NATIVE LAW

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E94
C36
1978
v.4
c.2

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Mark Yeoman, for appellant.

Charles Leger, Q.C., for respondent.

The judgment of the Court was delivered by

McNair C.J.N.B.:—The appellant, an Indian registered under the *Indian Act,* R.S.C. 1952, c. 149 as a member of the band of Micmacs residing on the Big Cove Reservation in Kent County, was convicted before the Magistrate for Kent County of a violation of the *New Brunswick Fishery Regulations* [P.C.1908 [1954] S.O.R. 2563] made under the *Fisheries Act,* R.S.C.1952, c.119. The offence consisted of setting a net in that portion of the Richibucto River above a line drawn across it from a point at or near its confluence with Bass River. An appeal to the Kent County Court, under Part XXIV of the *Criminal Code* relating to summary convictions, was dismissed. The accused now appeals to this Court claiming immunity on the ground of Treaty rights.

He relies on s. 87 of the *Indian Act:* "87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

As stated by Kellock J. in *Francis* v. *The Queen,* 3 D.L.R. (2d) 641 at p. 652, [1956] S.C.R. 618 at p. 631 "treaty", as used in s.87, extends to and embraces Treaties with Indians and has no reference to Treaties in the conventional sense, being international agreements.

The appellant rests his claim to immunity upon a Treaty found recorded in the minutes of a meeting of Council held at the Governor's House in Halifax on November 22, 1752 which had been negotiated by the Governor of Nova Scotia with a Tribe, so-called, of Micmac Indians. The minutes are on file in the Public Archives of the Province and a certified copy was put in evidence before the Magistrate. They show a "Treaty and Articles of Peace and Friendship Renewed" were entered into by His Excellency Peregrine

Robert Hopson, Esquire, Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia or Accadie – and His Majesty's Council, on behalf of His Majesty, with Major Jean Baptiste Cope, Chief Sachem of the Tribe of Indians inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah, members and delegates of the said Tribe, "for themselves and the said Tribe, their heirs and the heirs of their heirs forever;" and that an order was made that provisions issue according to the allowance of the troops, for 6 months for ninety of the said Indians "being the computed number of that Tribe".

Article 1 of the Treaty will be set out *in extenso* later. Article 2 provides all transactions during the late war "shall on both sides be buried in oblivion with the hatchet" and assures to the said Indians the favour, friendship and protection of His Majesty's Government. By art. 3 the said Tribe undertake to use their utmost endeavour to bring in "the other Indians to renew and ratify this peace", to make known any attempts or designs of other Indians or any enemy against His Majesty's subjects within the Province and to hinder and obstruct the same to their utmost power; and, on behalf of the Government, aid and assistance are assured to the said Tribe if war is made upon them by other Indians refusing to ratify the peace. Article 4 reads: "It is agreed that the said Tribe of Indians shall not be hindered from, but shall have free liberty of hunting and fishing as usual"; and provides for a truckhouse at the River Chibenaccadie or other place of resort to supply the said Indians with merchandise in exchange for what they shall have to dispose of, if such truckhouse is thought needful; and, in the meantime, the said Indians shall be at liberty to bring their products for sale at Halifax or any other settlement in the Province. Article 5 provides for certain provisions to be furnished half yearly "necessary for the family's and proportionable to the number of the said Indians" and to be furnished also to the other Tribes that might thereafter renew the peace upon the terms of the Treaty. Article 6 stipulates that there will be furnished yearly on October 1st presents of blankets, tobacco, powder and shot to the said

Indians so long as they shall continue in friendship, which they were to come by themselves or delegates each year to receive and renew their friendships and submissions. By art. 7 the said Indians undertook to lend their efforts to save the lives and goods of people shipwrecked "on this coast where they resort" and convey them to Halifax, for which they would receive reward.

The appellant contends the privileges accorded by the opening clause of art. 4 entitle him to fish with nets in the waters of the Richibucto River irrespective of any prohibitions contained in the *Fisheries Act* or the Regulations thereunder.

In *R.* v. *Syliboy,* 50 Can. C.C. 389, [1929] 1 D.L.R. 307 the accused, a Cape Breton Indian, had been charged with a violation of the provincial game laws in force in Nova Scotia. He claimed exemption by virtue of the 1752 Treaty. Having regard to the language of the Treaty, we are satisfied with the correctness of the view taken by Patterson, Acting County Court Judge, that the Treaty was not made with the Micmac Nation or Tribe as a whole but only with a small group of Micmac Indians inhabiting the eastern part of what is now the Province of Nova Scotia with their habitat in or about the Shubenacadie area. This view is confirmed by the terms of the Treaty proclamation approved at a meeting of Council held on November 24, 1752 which appears in a publication containing Nova Scotia Documents entitled "Nova Scotia Archives", to which our attention was drawn. The proclamation recites the Treaty as made "between this Government and Major Jean Baptiste Cope, Chief Sachem of the Chibenaccadie Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of this Province, and the Delegates of the said Tribe fully empowered for the purpose" and commanded His Majesty's subjects to forbear all acts of hostility against "the aforesaid Major Jean Baptiste Cope, or His Tribe of Chibenaccadie Mick Mack Indians".

The appellant made no effort to establish any connection, by descent or otherwise, with the original group of Indians with whom the 1752 Treaty was made.

Alternatively, before this Court, the appellant relied upon an earlier Treaty which is the subject of art. 1 of the 1752 Treaty: "1. It is agreed that the Articles of Submission and Agreement made at Boston in New England by the Delegates of the Penobscot Norridgwolk & St. Johns Indians in the year 1725 Ratified & Confirmed by all the Nova Scotia Tribes at Annapolis Royal in the month of June 1725 & lately renewed with Governor Cornwallis at Halifax & Ratified at St. Johns River, now read over, Explained and Interpreted shall be and are hereby from this time forward Renewed, Reiterated, and forever Confirmed by them and their Tribe; and the said Indians for themselves and their Tribe and their Heirs aforesaid to make & Renew the same Solemn Submissions and promises for the Strickt observance of all the Articles therein contained as at any time heretofore hath been done."

No copy of the Boston Treaty of 1725 was in evidence in the Courts below. However, since the argument before us there has been made available a photostatic copy of the Treaty which is on file in the Archives Division of the Office of the Secretary of the Commonwealth of Massachusetts at the State House in the City of Boston. It was entered into on December 15, 1725 by His Majesty's Governments of Massachusetts Bay, New Hampshire and Nova Scotia, on behalf of themselves and the British Subjects under them and as well the Governments and people of the Province of New York and the Colonies of Connecticut and Rhode Island, with Sauguaaram, alias Loron Arexus Francois Xavier, and Meganumbe as delegates of the several Tribes of Eastern Indians, *viz.*: the Penobscot, Narwgwalk, St. Johns, Cape Sables and other Tribes inhabiting His Majesty's Provinces aforesaid and their natural descendants respectively all their lands, liberties and properties not by them conveyed or sold to or possessed by any of the English subjects as aforesaid, as also the privilege of fishing, hunting and fowling as formerly.

There is nothing before us to indicate to what Nations the Indians concerned in the 1725 Treaty belonged nor to show that the Micmacs, or any particular tribe of them, were

involved or that the band of Micmacs on the Big Cove Reservation, of which the appellant is a member, are natural descendants of any of the Eastern Indians with whom the Treaty was made. Likewise the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and any of the Indian Tribes who, according to art. 1 of the 1752 Treaty, had lately at Halifax and the St. Johns River ratified the earlier Treaty.

On the evidence the appellant has failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s. 87 of the *Indian Act*. In consequence, it is unnecessary for us to attempt any definition of the privileges to which legislative countenance has been so given. The proviso found in the section invites elucidation. The task of determining its scope and effect is one which, in our respectful opinion, could fittingly be undertaken by the Executive Authority.

The appeal must be dismissed. There will be no order as to costs.

Appeal dismissed.

RE POPOFF

British Columbia Supreme Court, Ruttan J. May 4, 1959.

Certiorari I A – Commitment I –

Whether certiorari lies to review sufficiency of evidence on committal for trial – Where there is no dispute as to a Magistrate's initial jurisdiction, *certiorari* does not lie to quash a committal for trial on an indictable offence and a superior Court has no jurisdiction to review the sufficiency of the evidence before the committing Magistrate. [*R.* v. *Thompson*, 99 Can. C.C. 89, 1 W.W.R. (N.S.) 66; *R.* v. *Schellenberg*, 122 Can. C.C. 132, 29 C.R. 158, (1958) 26 W.W.R. 374; *R.* v. *Krueger*, 93 Can. C.C. 245, [1949], 2 D.L.R. 569, 1 W.W.R. 140; *R.* v. *Plouffe & Warren*, 122 Can. C.C. 291, 29 C.R. 279, [1959] O.W.N. 30 *sub nom. Ex. p. Plouffe*, not folld; *R.* v. *Irwin*, 80 Can. C.C. 314, [1944] 1 D.L.R. 618, [1943] O.W.N. 668; *R.* v. *Roscommon Justices*, [1894] 2 Ir.R. 158, apld; *R.* v. *Mishko*, 85 Can. C.C. 410, [1946], 3 D.L.R. 220, O.W.N. 131, 1 C.R. 7, distd; *R.* v. *Northumberland Compensation Appeal Tribunal*, [1952] 1 K.B. 338; *R.* v. *Bolton*, 1 Q.B. 66, 113 E.R. 1054, refd to]

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Saskatchewan Court of Appeal, Turgeon, Martin and Mackenzie, JJ.A. June 12, 1935.

Indians—Game Act, R.S.S. 1930, c. 208—Carrying firearms upon a game reservation—Natural Resources Agreement.

The words "on unoccupied Crown lands" as used in para. 12 of the Natural Resources Agreement between the Dominion and the Province of Saskatchewan must be given their plain and ordinary meaning and be taken to include lands required for the establishing of game reserves. And the words "on any other lands to which the said Indians may have a right of access" does not give Indians a right of access to a game reserve beyond that accorded to all other persons as they too are subject to the reserves of the Game Act.

APPEAL by way of stated case by an Indian from his conviction on a charge of carrying fire-arms on a game reserve. Affirmed.

J. G. Diefenbaker, K.C., for appellant.

H. E. Sampson, K.C., for Attorney-General.

TURGEON, J.A.:—This appeal comes before us by way of stated case arising out of the conviction by J. E. Lussier, Police Magistrate, of a treaty Indian named John Smith, Jr., charged with carrying fire-arms on Fort La Corne Game Preserve in this Province, contrary to the provisions of s. 69(1) of the Game Act, R.S.S. 1930, c. 208, and amendments thereto. The section in question is as follows:—

"69 (1) Notwithstanding anything in this Act contained, those areas of land set forth in schedule B and such other areas as are from time to time determined by the Lieutenant Governor in Council are hereby declared game preserves for the propagation and perpetuation of birds and animals, and shooting, hunting, trapping or carrying of firearms except as provided in subsection (2) within the said preserves is forbidden.

"(2) Within such preserves every constable, guardian or forestry official may carry firearms in the performance of his duties, which duties may under instructions from the minister necessitate the killing or taking of certain animals for the maintenance of proper control."

Although this case is of great interest and importance I do not think it will be necessary in disposing of it to examine minutely the state of the law existing prior to recent date, nor the Indian treaty or treaties referred to in the argument. If these treaties, or the various Dominion or Provincial Statutes referred to have any present bearing on the case it is only in so far as they may throw some light upon the interpretation of certain words in the instrument which, in my opinion, now

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governs the relations of these Indians with the game laws of Saskatchewan, and to which I am about to refer.

Subsection 24 of s. 91 of the B.N.A. Act confers upon the Parliament of Canada exclusive jurisdiction upon the subject of "Indians, and Lands reserved for the Indians," while, on the other hand, the Provinces have power to make laws concerning the hunting, fishing preservation, etc., of game in the Province. As a result controversies have arisen in the past as to the application of provincial game laws to Indians: *Rex* v. *Rodgers*, [1923] 3 D.L.R. 414, 40 Can. C.C. 51.

But in the years 1929 and 1930 something occurred which, in my opinion, had the effect of recasting the jurisdiction of the Province of Saskatchewan in respect to the operation of its game laws upon our Indian population. In December, 1929, an agreement was entered into between the Dominion and the Province having for its primary object the transfer from the one to the other of the natural resources within the Province. This transfer was accompanied by many terms, some of which had to do with matters pertaining to the Indians. Among these is para. 12 of the agreement, which reads as follows:—

"12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have the right of access."

It is admitted in this case that the accused was hunting for food.

This agreement between the Dominion and the Province was made "subject . . . . to approval by the Parliament of Canada and the Legislature of the Province . . . . and also to confirmation by the Parliament of the United Kingdom." Ratification by the Imperial Parliament was necessary insofar at least as the agreement purported to make any change in the constitutional powers of the Dominion or of the Province. In a recent decision of this Court, *Rex* v. *Zaslavsky*, [1935] 3 D.L.R. 788, 64 Can. C.C. 106, the learned Chief Justice quoted from the remarks of Lord Watson in the course of the argument in *C.P.R.* v. *Notre Dame de Bonsecours Parish*, [1899] A.C. 367. The statement quoted by the learned Chief Justice may fittingly be repeated here (p. 790 D.L.R., p. 108 Can. C.C.):—

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"'The Dominion cannot give jurisdiction or leave jurisdiction with the province. The provincial Parliament cannot give legislative jurisdiction to the Dominion Parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction.'"

Consequently no legislative jurisdiction can be taken from the Dominion Parliament and bestowed upon a provincial Legislature, or *vice versa*, without the intervention of the Parliament of the United Kingdom.

The Imperial statute confirming the agreement is c. 26, 1930, s. 1, of which enacts that the agreement shall have the force of law "notwithstanding anything in the British North America Act, 1867, or any Act amending the same" etc. It follows therefore that, whatever the situation may have been in earlier years, the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of para. 12, given force of law by this Imperial statute. This paragraph says that the Indians are to have the right to hunt, trap and fish for food in all seasons "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by individuals as to which some other question might arise) because this game preserve is Crown land. The question then is (1) is it unoccupied Crown lands or (2) is it occupied Crown lands to which the Indians have a right of access? If it is either of these no offence was committed by the accused.

Counsel for the accused, in proposing a test for the meaning which must be given to the words "occupied" and "unoccupied," referred to the treaty made between the Crown and certain tribes of Indians near Carlton, on August 23, 1876, whereby, on the one hand, these Indians consented to the surrender of their title of whatsoever nature in an area of which this game preserve forms part, and on the other hand, the Crown undertook certain obligations towards them and assured them certain rights and privileges. As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question. I would even say that we should endeavor, with the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain

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the rights accorded to the Indians by the treaty. The paragraph of the treaty to which counsel referred is as follows:—

"Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of Her Dominion of Canada, and 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."

Counsel submits that, having regard to this provision, the words "unoccupied Crown lands" in para. 12, should be defined as all Crown lands not required or taken up for settlement, mining, lumbering or for other purposes, and that the expression "other purposes" should be interpreted as not including the setting aside of areas for the preservation of game. This submission resolves itself into an argument that the Crown by specifying in the treaty the purposes of settlement, mining, and lumbering, excluded itself for all time from setting aside tracts of land as game preserves, the words "other purposes" not being sufficiently broad to include such setting aside. Counsel invokes the *ejusdem generis* rule. On the ground so chosen by counsel I find I must differ from him. Looking at the words "settlement," "mining" and "lumbering," I do not see how they can be grouped into any *genus* to which the *ejusdem generis* rule can be applied. I do not think the words "other purposes" were meant to be construed in such a manner.

When the treaty was made in 1867 the necessity for game preservation was probably not present in the minds of the parties. Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it. It is evident that the Parliament of Canada did not put any such narrow meaning on the words of the treaty, but had in mind that nothing in it prevented the due preservation of game, because the Indian Act, R.S.C. 1927, c. 98, s. 69, provides as follows:—

"The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba,

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Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient."

I am therefore of the opinion that nothing in the treaty referred to can assist the contention of counsel for the accused, because under its terms Parliament might have set up game preserves in the area surrendered, without violating any promise made by the Crown to the Indians.

We return therefore to the words "unoccupied Crown lands" in para. 12 of the aforesaid agreement without having found in the treaty anything to help the accused's case.

Looking now at the ordinary dictionary meaning of the word "unoccupied," I think that among its possible uses, the parties to the agreement and the Legislature intended in this case to express those which invoke the idea of "idle," "not put to use," "not appropriated," etc.

To refer again, by way of illustration, to the treaty of 1876 I think that tracts set aside for mining, lumbering, settlement or other purposes (and upon which the right to hunt was withheld from the Indians) might have been said to be "occupied." So I take it that when the Crown, in the right of the Province, appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be "unoccupied Crown lands" within the meaning of para. 12 of the agreement.

But it is also urged that the land of this game preserve is land to which the Indians have a right of access and that they are authorized to shoot on it because of that right. Any so called "right" of access which the Indians may enjoy in respect to this preserve is, so far as we were shown, merely the privilege accorded to all persons to enter the preserve *without carrying fire-arms*. We were not told of any special, peculiar right of access to this preserve conferred upon or enjoyed by the Indians. The Indians assuredly have a peculiar right of access to certain Crown lands, as, for instance, the reservations upon which they live and which are vested in the Crown, but it does not appear that they have any similar right of access to the land comprising this preserve.

For the above reasons I think that the conviction must be upheld and the appeal, by way of stated case, dismissed.

MARTIN, J.A.:—This is an appeal by way of a stated case from a conviction of a treaty Indian, John Smith, Jr., who was charged with carrying fire-arms, to wit a rifle, on the Fort La

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Corne Game Preserve, contrary to the provisions of s. 69(1) of the Game Act.

A number of questions are submitted in the stated case but I do not consider it necessary to refer to them in detail. The issue raised in the appeal is whether a treaty Indian is bound by the provisions of the Game Act, s. 69, and therefore prohibited under the generality of the words used in the section from shooting, hunting, trapping or carrying fire-arms within certain areas of land which are declared to be game preserved and which are particularly described in Sch. B to the Game Act. Among the areas so set aside is the Fort La Corne Reserve and it is admitted that John Smith, Jr., did on October 17, 1934 carry fire-arms on this preserve.

The issue must be determined upon the construction of para. 12 of the Natural Resources Agreement, made between the Government of the Dominion of Canada, and the Government of the Province of Saskatchewan, and which provided the terms upon which the natural resources within the boundaries of the Province were transferred by the Dominion to the Province. This agreement was affirmed by the Legislature of the Province by c. 87 of the Statutes of 1930, and by the Parliament of Canada by c. 41 of the Statutes of Canada, 1930. It was also affirmed by the Parliament of the United Kingdom of Great Britain and Northern Ireland, by the B.N.A. Act, 1930 (Imp.), c. 26. By the Act of the Imperial Parliament the agreement was declared to have the force of law notwithstanding anything in the B.N.A. Act of 1867, or any amending Act or any Act of Parliament of Canada or any Order in Council, or by any terms or conditions of union made or approved under any such Act. The Natural Resources Agreement, therefore, has been given the force of law by the Imperial statute and the law with respect to any subject dealt with therein must be determined by an interpretation of the terms of that agreement.

Paragraphs 10, 11 and 12 of the Natural Resources Agreement set out the terms with respect to the Indians and these paragraphs contain the law on the subject, notwithstanding anything in the B.N.A. Act, and notwithstanding anything in any Act of the Parliament of Canada. Paragraph 12 makes provision for the right of the Indians to hunt and fish and is as quoted *supra*.

It will be observed that Canada agreed that the provincial laws with respect to game in force from time to time should apply to the Indians, subject to the proviso at the end of the paragraph, and the reason stated for so doing is "In order to secure to the Indians of the Province the continuance of

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the supply of game and fish for their support and subsistence." The application of the game laws of the Province is, however, made subject to the proviso that the Indians are to have the right to hunt and fish for food at all seasons of the year "on all unoccupied Crown lands and on any other land to which the said Indians may have a right of access." The Fort La Corne Game Preserve consists of Crown lands and the right of the accused, John Smith, Jr., to carry fire-arms on the preserve depends upon whether the lands therein are "unoccupied" or are lands to which Indians "have a right of access."

The word "unoccupied" used in conjunction with the words "Crown lands" means, I think, lands which have not been appropriated or set aside by the Crown. Counsel for the accused for the purpose of defining the word, referred to the treaty made with the Indians in 1876, under the terms of which the Indians surrendered their title in the area of which the Fort La Corne Game Preserve forms a part and, on the other hand, the Crown agreed that the Indians should have certain rights. Among the rights extended to the Indians was one to the effect that they should have the right to hunt and fish throughout the tract surrendered but subject to such regulations as might from time to time be made by the Government of the Dominion of Canada and excepting tracts of land which might from time to time be required or taken "for a settlement, mining, lumbering or other purposes by the Government of the Dominion of Canada or by any of the subjects duly authorized by the said Government."

Counsel submitted that the meaning assigned to the word "unoccupied" should not go beyond the words of the treaty and that it should be limited to lands required for "settlement, mining, lumbering or other purposes." It was further submitted that the *ejusdem generis* rule applied and that the words "other purposes," could not be construed so as to include lands required or set apart as game preserves.

The *ejusdem generis* rule was laid down by Lord Campbell, C.J., in *Reg.* v. *Edmundson* (1859), 28 L.J.M.C. 213, at p. 215, as follows:—"Where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." The principle applies only where the special words are of the same nature and can be grouped together in the same *genus*: where there are different *genera* the meaning of the general words is unaffected by their collocation with the special words and must be given their full and ordinary meaning. *Reg.* v. *Payne* (1866), 35 L.J.M.C. 170. *Tillmanns & Co.* v. *SS. "Knutsford" Ltd.*,

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[1908] 2 K.B. 385. Craies on Statute Law, 3rd ed., pp. 154-5. Maxwell on the Interpretation of Statutes, 7th ed., pp. 284 and 290.

The words "settlement, mining, lumbering" are not of the same *genus*: they each describe a different use for which Crown lands may be required or taken up and therefore the words "or other purposes" must be given their plain and ordinary meaning and, when given such meaning, may very reasonably be taken to include lands required for the establishing of game preserves. Nothing therefore in the treaty of 1876 can help the accused because under it the Government of the Dominion of Canada might have set up game preserves in the land surrendered by the Indians without in any way breaking faith with them. In this connection it is interesting to note that the Parliament of Canada by s. 69, of R.S.C. 1927, c. 98, has provided that the Superintendent-General of Indian Affairs may from time to time by public notice declare game laws of Manitoba, Saskatchewan and Alberta applicable to the Indians in these Provinces, or in such part thereof as seems expedient. This provision was first enacted with respect to Manitoba and the North-West Territories in 1890, by 53 Vict., c. 29, s. 10, and Parliament at the time must have had in mind the preservation of game and did not consider that such an enactment was in any way in violation of the provisions of the treaty of 1876. Moreover when the Natural Resources Agreement was enacted in law in 1930 game preserves had already been created in the Province of Saskatchewan, as appears by the Game Act, R.S.S. 1930, c. 208, and had been in existence for many years. *Vide*, s. 33 of c. 128, R.S.S. 1909.

The Fort La Corne Game Preserve is not therefore "unoccupied Crown lands." It was argued however that the accused had a right of access to the game preserve. Indians undoubtedly have a right of access to certain reserves set apart for them and upon which they reside, but they have no right of access to game preserves beyond that accorded to all other persons and they are subject, as all persons are, to the provisions of s. 69 of the Game Act.

The appeal by way of stated case should be dismissed and the conviction affirmed.

MACKENZIE, J.A., concurs with TURGEON, J.A.

Appeal dismissed.

SASKATCHEWAN

COURT OF APPEAL

Before Martin, C.J.S., Gordon, Procter, McNiven and Culliton, JJ.A.

Regina v. Strongquill

Indians — Hunting Rights of Treaty Indians — Natural Resources Agreement, 1929, Par. 12 — Effect of Provincial Legislation — Whether S. 13 (2) Game Act, 1950 Valid — "Unoccupied Crown Land" — "Lands to Which Indians May Have a Right of Access" — "Taken Up" — "Grant" — "Given By."

The extent to which treaty Indians are exempted from the game laws of Saskatchewan must be determined by an interpretation of par. 12 of the Natural Resources Agreement of 1929 made between the province and Canada. The agreement was ratified by the legislature by ch. 87 of 1930 and by the Parliament of Canada by ch. 41 of 1930, and confirmed by Imperial statute, ch. 26 of 1930. See *Rex v. Smith* [1935] 2 WWR 433, 20 Can Abr 1157 (Sask. C.A.).

Per Gordon, J.A.: There are two different areas on which such Indians may hunt for game when required for food at all times of the year. They are, first, "unoccupied crown lands" and, second, "any other lands to which the Indians may have a right of access." The second class would include "occupied" crown lands, in which class Indian reservations would fall. Even accepting the rule laid down in *Rex v. Smith, supra,* as to the meaning of "unoccupied" it cannot be said that the Indians had no "right of access" to the Porcupine Provincial Forest Reserve.

Per McNiven, J.A.:

The limitations on such Indians' rights to hunt over the lands surrendered as set out in the treaty of 1874 are: " * * * upon such tracts as may be required or taken up for settlement, mining, or other purposes under grant, or other right given by Her Majesty's said government." The words "taken up," "grant," "given by," imply alienation, transfer of the crown's interest therein. These forest reserves are still crown lands—not required for settlement or mining—and the word "unoccupied" in said par. 12 should be so interpreted.

The right of treaty Indians to hunt for food is "on all unoccupied crown lands" and to effectuate the true intent and spirit of said par. 12 the word "all" should be interpreted as any. The whole is the summation of its parts. If the legislature by setting apart certain crown lands as forest reserves (over 8,000 square miles) can convert them into occupied lands then it could set apart all crown lands as a forest reserve and thus defeat the paramount object of par. 12. The legislature has no power to do indirectly what it cannot do directly.

Per Procter, J.A.:

The area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area No. 103 was open to any visiting hunters who had a licence and they were permitted to hunt over

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that area which is crown lands. Such being the case the accused had, apart from other legislation, the same "right of access" to the crown land in the said Reserve and Conservation Area as said other hunters had. Having such access to that crown land it was lawful for him to kill moose for food under the special right reserved to him by par. 12 of said agreement notwithstanding that the killing of moose in the province generally was prohibited.

Sec. 13 of *The Game Act, 1950*, ch. 76, is not a binding enactment as against Indians and is *ultra vires*.

Per Martin, C.J.S., Culliton, J.A. concurring, dissenting: Provincial forests and fur conservation areas having been set aside or appropriated by the crown in right of the province for special purposes cannot be deemed to be "unoccupied crown lands" within par. 12 of the Natural Resources Agreement. The legislature therefore in enacting in sec. 13 (2) of *The Game Act, 1950*, that provincial forests and fur conservation areas "shall be deemed not to be unoccupied crown lands" has enacted what is consistent with the interpretation of the words "unoccupied crown lands" in par. 12 of the Natural Resources Agreement.

The conviction of the accused, a treaty Indian, for hunting and killing a moose in the Porcupine Provincial Forest Reserve, being Fur Conservation Area No. 103, contrary to *The Game Act, 1950*, and regulations thereunder, set aside. *Rex v. Wesley* [1932] 2 WWR 337, 20 Can Abr 1156, applied. Martin, C.J.S. and Culliton, J.A. dissented.

[Note up with 1 CED (CS) *Constitutional Law*, sec. 52; 2 CED (CS) *Game Laws*, sec. 1; *Indians*, sec. 7; 3 CED (CS) *Words and Phrases* (1947-1952 Supps.).]

Appeal from a conviction under *The Game Act, 1950*, ch. 76. Appeal allowed and conviction quashed, Martin, C.J.S. and Culliton, J.A. dissenting.

L. McK. Robinson, Q.C., for accused, appellant.

R. M. Barr, Q.C., for the crown, respondent.

March 13, 1953.

MARTIN, C.J.S. (dissenting) — The accused was charged before C. P. B. Dundas, a justice of the peace, on December 17, 1952, that he "a treaty Indian on or about the 8th day of November, 1952, at or upon the Porcupine Provincial Forest Reserve, being Fur Conservation Area Number 103 * * * did hunt, take and kill a moose, being big game as defined by *The Game Act, 1950*, of the Province of Saskatchewan, contrary to the provisions of the said *Game Act* and the regulations thereunder."

Evidence was adduced on behalf of the prosecution and defence. The justice of the peace found the accused guilty and imposed a fine of $150 and $30, the costs of prosecution, and directed that in default of payment he serve three months

in jail. On December 23, 1952, the justice was requested to state a case for the opinion of the Court of Appeal setting forth the facts and the grounds upon which the proceeding is questioned. Pursuant to the request the justice has stated the case as follows:

"1. The accused, Thomas Strongquill, is a Treaty Indian, of the Keeseekoose Indian Reserve, in the Province of Saskatchewan, which Reserve is situated near Kamsack, in the Province of Saskatchewan.

"2. The hunting and killing of moose in and for the Province of Saskatchewan for the year 1952 was prohibited.

"3. The season for the hunting of other big game in the Province of Saskatchewan, opened on the 8th day of November, A.D. 1952.

"4. On the 8th day of November, 1952, the accused Thomas Strongquill, was hunting with one Arthur Barton for big game in the Porcupine Provincial Forest Reserve, which was also known as Fur Conservation Area No. 103, in the Province of Saskatchewan, which area is situated on the east side of the Province of Saskatchewan, containing township 38, range 30, in the said Province, the point in question being designated as near Camp 5 as shown on the map which was produced to me by an Officer of the Natural Resources Department, and which map, I am advised, can again be produced to the Court to show the exact location.

"5. On the 8th day of November, A.D. 1952, the accused while hunting as I have stated herein shot and killed a moose in the said Reservation above described at or near the said point indicated as Camp 5, in township 38, range 30, West of the First Meridian, in the Province of Saskatchewan.

"6. The area where the moose was shot was not inhabited; there was no one living near the point and for seven miles south of Camp 5 there is but one family and they do not farm or work the land; the country is new and there are patches of timber, some burned over, but no clearing or any agriculture or farming area; the area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area No. 103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands.

"7. The accused Thomas Strongquill is a member of the

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Keeseekoose Indian Reserve. He still follows the Indian way of life and does not speak English and makes his living by hunting, fishing and woodcraft and rough labour. He has a family of six adults and a number of grandchildren. When he went to the Porcupine Forest Reserve to hunt on the 8th day of November, 1952, he was trying to obtain food for his family.

"8. The lands in the area herein referred to where the moose was killed was a Provincial Park or Fur Conservation Area according to the evidence given and the map produced which is referred to in *The Game Act* as was pointed out to me, the reference being to section 13 of the said *Game Act*, and the lands referred to I found not to be unoccupied Crown lands as referred to in that section.

"9. I found that the accused actually killed a moose at the point in question and that it was big game within the meaning of *The Game Act*, section 11 thereof, and that he took the meat after the animal was dressed, a portion of it at least, to his home.

"10. On behalf of the accused there was produced from the custody of an Indian Chief a copy of the Treaty between Her Most Gracious Majesty Queen Victoria through her Commissioners and the Indian Chiefs of Western Canada, dated the 15th day of August, A.D. 1874, which was entered as an exhibit and it was contended on behalf of the accused that this Treaty gave the Indians and the accused himself, since he was an Indian, the right to hunt, trap and fish throughout the tract of land surrendered to Her Majesty under the said Treaty, which tract would apparently take in the area in question in this case and I am advised the said exhibit will be made available for the purpose of this appeal.

"11. I found the accused guilty and fined him the sum of $150.00 and in default of payment that he serve three months in gaol and that he pay the costs in the sum of $30.00.

"At the conclusion of the trial counsel for the accused questioned the conviction of the accused on the grounds that since he was a Treaty Indian he was entitled under the Treaty herein referred to, to hunt any place in the territory referred to in the said Treaty which apparently would cover the land referred to in this case.

"The grounds upon which I found the accused guilty were as follows:

"That the accused on the 8th day of November, A.D. 1952, at or upon the Porcupine Provincial Forest Reserve, known also as Fur Conservation Area No. 103, did hunt, kill and take a moose, which was big game as defined by *The Game Act, 1950,* of the Province of Saskatchewan and that the hunting of such big game, that is, moose, was prohibited in the Province of Saskatchewan for the year 1952 and that *The Game Act* applied and I did not consider that I should endeavour to interpret the effect of the Treaty that was referred to me and I thought it was my duty to follow the provisions of *The Game Act* and found the accused guilty and fined him accordingly. As to the point with reference to the Treaty this, I felt, was a matter for a higher court."

Counsel for the accused referred to the treaty which was made between the crown in right of Canada and certain tribes of Indians on September 15, 1874, under which the Indians agreed to surrender their title, whatever it was, in an area of land of which the Porcupine Forest now forms a part, and the crown undertook certain obligations and assured the Indians certain rights and privileges. The treaty was made between the Honourable Alexander Morris, Lieutenant-Governor of Manitoba and the Northwest Territories, and the Honourable David Laird, Minister of the Interior and the Cree, Salteaux and other Indian inhabitants of the territory described, represented by their chiefs and headsmen. The treaty contained the following provision:

"And further Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of Her Majesty and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes under grant or other right given by Her Majesty's said Government."

It will be observed that the right to hunt and fish on the tract surrendered is subject to "such regulations as may from time to time be made by the Government of the Country acting under the authority of Her Majesty." There is also the saving

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clause which excepts "such tracts as may be required or taken up from time to time for settlement, mining or other purposes * * *."

In *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, a decision of this court, the provisions of a treaty made on August 23, 1876, were considered. One of the paragraphs of the treaty was as follows:

> "Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of Her Dominion of Canada, and 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."

It was held by the court that the words "or other purposes" were not *ejusdem generis* as the words "settlement, mining and lumbering" could not be grouped in any genus to which the *ejusdem generis* rule could be applied. The court was therefore of the opinion that the words "or other purposes" were broad enough to include a game preserve on which the accused in the case was charged with carrying arms contrary to the provisions of sec. 69 of *The Game Act,* RSS, 1930, ch. 208. In his judgment Turgeon, J.A. referred to sec. 69 of the *Indian Act,* RSC, 1927, ch. 98 [now 1951, ch. 29] which provided that the Superintendent General of Indian Affairs might by public notices declare that the laws respecting game in the province of Manitoba, Saskatchewan or Alberta specified in the notice shall apply in the province or to Indians in such part thereof as to him seems expedient. The court was of the opinion that nothing in the treaty of August, 1876, could assist the accused because under its terms parliament might have set up game preserves in the area surrendered without violating any promises made to the Indians.

Applying the decision in *Rex v. Smith, supra,* to the treaty of September 15, 1874, the words "or other purposes" following the words "for settlement, mining" are not *ejusdem generis* because the words "settlement, mining" cannot be grouped in any genus to which the *ejusdem generis* rule can be applied. Moreover the right of the Indians to hunt and fish is subject

to "such regulations as may from time to time be made by the Government of the Country acting under the authority of her Majesty." Nothing therefore in the treaty of 1874 can assist the accused because under its terms parliament might have set up game preserves in the area surrendered, and in my opinion provincial forests and fur conservation areas, without violating any promises made to the Indians in the treaty.

The extent to which treaty Indians are exempted from the game laws of Saskatchewan must be determined by an interpretation of the provisions of par. 12 of the Natural Resources Agreement of 1929 made between the province and Canada. The agreement was ratified by the legislature by ch. 87 of the statutes of 1930 and by the Parliament of Canada by ch. 41 of the statutes of Canada, 1930. It was confirmed by Imperial statute, ch. 26 of 1930. The agreement therefore has the force of law and the law in respect of any subject dealt with therein must be determined by an interpretation of the relevant provisions. The right of the Indians to hunt, trap and fish is dealt with in par. 12 of the agreement which is as follows:

> "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Under this paragraph the intention is to assure the Indians a supply of game in the future for their subsistence by requiring them to comply with the game laws of the province, subject, however, to the express provision that they have the right to hunt, trap and fish for food at all seasons of the year on all "unoccupied Crown lands" and on any other lands to which they may have the right of access. Indians have a right of access to certain crown lands, for example, the reservations on which they live, and which are vested in the crown, but it does not appear that they have any similar right of access to the lands in the Porcupine Forest. In *Rex v. Wesley* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, it was admitted that the alleged offences took place on unoccupied crown lands and the Appellate Division of the Supreme Court of Alberta considered

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the effect of par. 12 of the Alberta Natural Resources Agreement, which is in the same language as par. 12 of the Saskatchewan agreement. The court held that, regardless of the provisions of the provincial *Game Act*, RSA, 1922, ch. 70, Indians may when hunting for food kill all kinds of wild animals at all seasons of the year wherever they may be found on unoccupied crown lands or other lands to which they have a right of access, and that they need no licence beyond the provisions of par. 12 to enable them to do so: Lunney, J.A., p. 338; McGillivray, J.A., p. 344.

The sole question for determination here is whether or not the Porcupine Forest is unoccupied crown land. The accused was hunting for food and if he shot the moose when on land where, under par. 12 of the agreement, he had a right to hunt for food he cannot be convicted.

The accused is here charged with hunting and killing a moose in the Porcupine Provincial Forest which is also a fur conservation area, No. 103. Under *The Forest Act*, RSS, 1940, ch. 39, the Lieutenant-Governor in Council may constitute any portion of the province a forest district and by sec. 43 [as amended by 1951, ch. 20, sec. 4] it is provided that the provincial lands within the boundaries of the provincial forests mentioned in the schedule to the Act "are hereby withdrawn from disposition, sale, settlement or occupancy * * *." Sec. 44 provides that the provincial forests are for the "maintenance, protection and reproduction of the timber thereon, for the conservation of the minerals and for the protection of the animals, birds and fish therein." Among the areas thus set aside is the Porcupine Provincial Forest in which the moose was shot by the accused.

Under sec. 5 of *The Fur Act, 1950*, ch. 77, the Lieutenant-Governor in Council may constitute any area of crown land a registered trap line or a fur conservation block and every such order must be published in *The Saskatchewan Gazette*. According to the stated case the Porcupine Provincial Forest has been constituted a fur conservation area, No. 103.

In *Rex v. Smith, supra*, the word "unoccupied" was interpreted as meaning "idle," "not put to use," "not appropriated," and it was held that when the crown in right of the province appropriates or sets aside certain areas for special purposes, as for game preserves, such areas can no longer be deemed to be "unoccupied Crown lands" within the meaning of par. 12 of the agreement. Following the decision in *Rex v. Smith, supra*, a

provincial forest created under the provisions of *The Forest Act* and a fur conservation area created under *The Fur Act, 1950*, cannot be deemed to be "unoccupied Crown lands" within par. 12 of the agreement.

The area on which the accused shot the moose was set aside by the crown in right of the province both as a forest reserve and as a fur conservation area and the accused had no right to hunt thereon.

Counsel for the accused argued that sec. 13 (2) of *The Game Act, 1950*, is *ultra vires* of the provincial legislature. Notice was served upon the Attorney-General pursuant to *The Constitutional Questions Act*, RSS, 1940, ch. 72. Sec. 13 of *The Game Act, 1950*, is as follows:

> "13.—(1) Notwithstanding the provisions of this Act, and in so far only as is necessary in order to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan ratified by chapter 87 of the statutes of 1930, it shall be lawful for the Indians within the province to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.
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> "(2) For the purpose of subsection (1) the lands designated by or pursuant to *The Provincial Lands Act* as school lands and the lands within game preserves, provincial forests, provincial parks, registered traplines, or fur conservation areas established pursuant to the regulations under *The Fur Act*, shall be deemed not to be unoccupied Crown lands or lands to which Indians have a right of access."

It will be observed that subsec. (1) states that in so far only as is necessary to implement the provisions of the agreement between the Government of Canada and the Government of Saskatchewan "it shall be lawful for the Indians to hunt for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." The words quoted are a repetition of the language contained in the last lines of par. 12 of the Natural Resources Agreement. Subsec. (2) of sec. 13 follows with a declaration that the lands within game preserves, provincial forests, registered trap lines or fur conservation areas shall be deemed not to be "unoccupied Crown lands" or lands to which Indians have a right of access. I am of the opinion, following the decision in *Rex v. Smith, supra*, that provincial forests and

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fur conservation areas having been set aside or appropriated by the crown in right of the province for special purposes cannot be deemed to be "unoccupied Crown lands" within par. 12 of the Natural Resources Agreement. The legislature therefore in enacting in sec. 13 (2) of *The Game Act, 1950,* that provincial forests and fur conservation areas "shall be deemed not to be unoccupied Crown lands" has enacted what is consistent with the interpretation of the words "unoccupied Crown lands" in par. 12 of the Natural Resources Agreement. No question therefore as to the constitutionality of sec. 13 (2) of *The Game Act, 1950,* here arises.

The appeal is dismissed.

GORDON, J.A. — In this appeal I have had the advantage of reading the judgment of my Lord the Chief Justice in which he has set out the material parts of the stated case so it is unnecessary for me to do so. As I have the misfortune to differ from him I need hardly say that I do so with great regret and respect.

When the matter first came before us Mr. Robinson, Q.C., appearing for the accused, stated that he wished to contend that subsec. (2) of sec. 13 of *The Game Act, 1950,* ch. 76, was *ultra vires.* The matter was accordingly adjourned to permit the necessary notice to be given to the Attorney-General of the province, which notice was duly given and the matter came before us, with Mr. R. M. Barr, Q.C. appearing for the Attorney-General of the province as well as crown prosecutor.

Par. 12 of ch. 87 of the statutes of Saskatchewan for 1930 reads as follows:

> "12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Sec. 13 of *The Game Act, supra,* reads as follows [see *ante,* p. 255].

So far as I can find this is the first effort on the part of the legislature of the province of Saskatchewan to define "unoccupied Crown lands."

The history of the dealings of the crown with the native tribes is set forth in an admirable way by the late Mr. Justice McGillivray in *Rex v. Wesley* [1932] 2 WWR 337, beginning at p. 342, 26 Alta LR 433, 58 CCC 269.

The contention of Mr. Robinson, appearing for the accused, is that the province cannot by unilateral legislation take away any rights that were assured to the Indians under sec. 12 of ch. 87 of the statutes of 1930.

The agreement entered into between the province and the Dominion was confirmed by the Parliament of Great Britain by an amendment to the *British North America Act, 1867,* by ch. 26 of 20 & 21 Geo. V. The operative section of this Act, being sec. 1, is as follows:

> "The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *British North America Act, 1867,* or any Act amending the same, or any Act of Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid."

Mr. Robinson contends that the Saskatchewan legislature had no more right to define terms used in this agreement so confirmed and made a part of the *British North America Act, 1867,* than they could define terms used in the original Act.

For the crown it was contended that the decision of this court in *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, was conclusive against the accused. With every deference I think there is a very material difference. In the *Smith* case the accused Indian was hunting on a game preserve on which all hunting was absolutely prohibited. Turgeon, J.A., writing the majority judgment of the court stated in part as follows at p. 437 of the report:

> "Nevertheless it was within reason that the time might come in this, as in all populated countries, when the establishment of game preserves would be beneficial to all interested in hunting and fishing, including the Indians themselves. But a game preserve would be one in name only if the Indians, or any other class of people, were entitled to

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> shoot in it. It is evident that the Parliament of Canada did not put any such narrow meaning on the words of the treaty but had in mind that nothing in it prevented the due preservation of game * * *."

Then again the opening words of the very section of the agreement assuring to the Indians the right to hunt are:

> "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence."

By creating the game preserves the province was endeavouring to secure to the Indians of the province an adequate supply of game.

With every respect I do not think the enactment of sec. 13 (1) of the provincial *Game Act, 1950,* added anything to the rights assured to the Indians of this province, nor do I think that subsec. (2) of the same section in any way curtailed them.

If instead of defining the words "unoccupied lands" the provincial legislature had defined the word "game," as it appears in said par. 12, as limited to jack rabbits no one would have had the temerity to suggest that such legislation was not *ultra vires* the province. The same could be said if the area in question had been reserved for hunting by white men alone.

With every deference I agree with my Lord the Chief Justice [then Martin, J.A.] when in the *Smith* case, *supra,* he stated on p. 439 as follows:

> "The issue must be determined upon the construction of par. 12 of the Natural Resources Agreement, made between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan, and which provided the terms upon which the natural resources within the boundaries of the province were transferred by the Dominion to the province. This agreement was affirmed by the Legislature of the province by ch. 87 of the statutes of 1930, and by the Parliament of Canada by ch. 41 of the statutes of 1930. It was also affirmed by the Parliament of the United Kingdom of Great Britain and Northern Ireland, by the *British North America Act,* 20 & 21 Geo. V, ch. 26. By the Act of the Imperial Parliament the agreement was declared to have the force of law notwithstanding anything in the *B.N.A. Act* of 1867, or any amending Act or any Act of Parliament of Canada or any order in council, or by any

terms or conditions of union made or approved under any such Act. The Natural Resources Agreement therefore has been given the force of law by the Imperial statute and the law with respect to any subject dealt with therein must be determined by an interpretation of the terms of that agreement."

Other parts of the Act certainly apply to Indians because par. 12 of the agreement above set out provides that:

"* * * Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof * * *."

There was however one important exemption reserved to the Indians, namely:

"* * * provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

It was admitted by the counsel for the crown that the accused would have the right to shoot even a moose on his own reserve or upon any unoccupied crown lands provided that his definition of "unoccupied" were accepted. It therefore seems clear that the absolute prohibition against killing moose at any time or anywhere in the province did not apply to Indians.

It is also clear from the stated case and from statements by counsel that the Porcupine Forest Reserve is not in the same class as a game preserve where hunting is absolutely prohibited because on November 8, 1952, the day in question in this appeal, the accused and one Barton were on the reserve to shoot big game and people other than Indians could lawfully hunt on this reserve for big game during the proper hunting season which opened on November 8, 1952. The stated case says:

"The area known as Porcupine Provincial Forest Reserve and also as Fur Conservation Area No. 103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands."

There are therefore two different areas on which the Indians may hunt for game when required for food at all times of the year. They are, first, "unoccupied Crown lands" and, second,

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"any other lands to which the Indians may have a right of access." This was stated by Turgeon, J.A. in the *Smith* case at p. 436, *supra*.

The second class would include "occupied" crown lands in which class Indian reservations would fall. Even accepting the rule laid down in *Rex v. Smith, supra,* as to the meaning of "unoccupied" I cannot see how it could be said the the Indians had no right of access to the Porcupine Provincial Forest Reserve. The word "access" is very simple and according to the *New Oxford Dictionary* its main meaning is "action of going or coming to or into." I cannot see how any Indian could have been excluded from this reserve. The public at large was permitted not only to go into the reserve but to hunt big game there. The accused entered the reserve to hunt for food. If he had shot a deer, there could not have been a single objection raised. In my opinion he undoubtedly had a right of access to this crown land and having that right he could kill moose for food, within its boundaries.

In the *Smith* case, *supra,* Turgeon, J.A. held that, although the accused in that case had the right of access to the game preserve, his rights were no greater than the right of any other member of the public and that therefore he could not hunt even for food within its area. However this statement cannot be divorced from his previous statement that the game preserves were set apart for the benefit of the Indians as well as the sporting public. The accused having the right of access to the forest reserve in question to hunt for big game, I think he had the right to shoot moose providing it was needed for food. As my brother Procter stated on the argument the Indians should be preserved before moose.

I would allow the appeal with costs here and in the court below, set aside the conviction and discharge the accused.

PROCTER, J.A. — The stated case has been set out in full in the judgment of the Honourable the Chief Justice of this court and I repeat only such of the facts as found by the justice of the peace as are necessary to establish the grounds on which I base my opinion.

The right of a treaty Indian such as Strongquill to shoot, hunt, trap and carry fire-arms within certain areas of crown lands in the province which have been declared to be game preserves was dealt with by this court in *Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, and in disposing of that case it was held

unnecessary to examine minutely the state of the law prior to the passing of the Imperial statute, ch. 26, Geo. V, cited as the *British North America Act, 1930*. That statute validated and confirmed the agreement entered into between the Dominion of Canada and the province of Saskatchewan, which had already been validated and confirmed by legislation passed in the parliament of the Dominion of Canada and the legislature of the province.

Par. 12 of that agreement reads as follows [see *ante*, p. 253].

In *Rex v. Smith, supra,* this court held that par. 12 now governs the relations of treaty Indians under the game laws of Saskatchewan rather than the old Indian treaties which have a bearing on the question only as they assist in an interpretation of par. 12, *supra.*

In view of the fact that the agreement in part recited above required legislation not only on the part of the Dominion of Canada and the province of Saskatchewan but also of the Imperial Parliament of the United Kingdom to render it operative it is clear that any amendment to the rights and powers set forth in the agreement can only be affective if made under the authority so granted by the validating legislation of the three governments. It is also I think clear that any attempt to limit the rights conferred on Indians to hunt, shoot, etc. by par. 12 cannot be altered or amended by the province of Saskatchewan alone under the guise of legislation in respect to game laws unless the provisions of such game laws fairly come within the authority provided for by par. 12, cited *supra.*

In *Rex v. Smith, supra,* Turgeon, J.A., who delivered the majority judgment of this court, said:

> "It follows therefore that, whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, *supra,* given force of law by this Imperial statute. This paragraph says that the Indians are to have the right to hunt, trap and fish for food in all seasons 'on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.'
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> "For the purposes of the present inquiry we can confine ourselves to Crown lands (excluding lands owned by indiv-

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iduals as to which some other question might arise) because this game preserve is Crown land. The question then is (1) is it unoccupied Crown land, or (2) is it occupied Crown land to which the Indians have a right of access? If it is either of these no offence was committed by the accused."

Thereafter Turgeon, J.A. held in effect that it was originally contemplated in the old Indian treaties and carried forward into par. 12, *supra,* that various areas might be established as game preserves in the province to conserve and propagate game, and that upon the establishment of such a game preserve the area became "occupied Crown land" within the meaning of par. 12 and the Indian for whose benefit the area had been occupied had no longer the right to hunt and shoot thereon.

Dealing, in the *Smith* case, *supra,* with the second question which Turgeon, J.A. had posed—"Is it occupied Crown land to which the Indians have a right of access?"—he disposed very shortly of this question in one paragraph holding that any right of access the Indians enjoyed was merely the privilege of all persons to enter the preserve *without carrying fire-arms,* italicizing the last four words. The charge in the *Smith* case was one of "carrying fire-arms" on the game preserve. No one, Indian or otherwise, was entitled to *access to the game preserve* whilst carrying fire-arms and it was therefore held that Smith was properly convicted of the offence charged.

Turning now to the provisions of *The Game Act, 1950,* ch. 76, sec. 13 reads as follows [see *ante,* p. 255].

It will be seen that by subsec. (2) it has been enacted that, amongst other crown lands, provincial forests and fur conservation areas shall be deemed not to be unoccupied crown lands or lands to which Indians have a right of access.

Before us counsel for the accused Strongquill argued that sec. 13 (2) was *ultra vires* of the provincial legislature in view of the provisions of par. 12 of the agreement with the Dominion validated as it was by the legislation of the Imperial and Dominion parliaments and the provincial legislature. There is a very full discussion of the rights granted to the Indians under the various treaties in *Rex v. Wesley* [1932] 2 WWR 337, 26 Alta LR 433, 58 CCC 269, and it is there pointed out that there is a difference in the rights of an Indian hunting for sport and one hunting for food necessary for his maintenance. In addition to what was pointed out in the *Wesley* case I would

call attention to the fact that, since the validation of par. 12 of the agreement, by the legislation enacted neither the government of the province, the government of the Dominion nor the Imperial Parliament itself can by legislation of one government alone alter or amend the rights conferred by the three governments jointly under par. 12 of the agreement on treaty Indians except as the right to do so is contained in that agreement and the validating legislation.

Sec. 13 of *The Game Act, 1950,* purports to affect Indians only. Doubtless within the ambit of provincial legislation under the civil rights sections of the *British North America Act, 1867,* the province has the right to pass game laws but it must be held not to have the right to alone vary or affect the rights of treaty Indians granted to them under par. 12 of the agreement nor can any legislation of the Dominion government alone now affect those rights in so far as treaty Indians in this province are concerned even though jurisdiction in respect to Indians was reserved to them by the *B.N.A. Act, 1867.* Game laws of the province passed to secure a continuance of game and fish in the province are within the purview of par. 12 and for that purpose reasonable and *bona-fide* areas may be set aside for game preserves in which hunting by treaty Indians may be prohibited under the reasoning applied in *Rex v. Smith, supra.* Attempts however to limit, exclude or prohibit the rights granted to treaty Indians to hunt, trap and fish for food on all unoccupied crown lands and on any other lands to which the Indians may have a right of access must be viewed in the light of the true intent of the words used in par. 12 by the parties.

See *Mullins v. Surrey Treasurer* (1880) 5 QBD 170, at 173; *Craies' Hardcastle's Statute Law,* 5th ed., p. 214, cited in *Rex v. Wesley, supra,* at p. 344.

I can add little to the very able judgment of McGillivray, J.A. in the *Wesley* case with which I wholly agree.

A careful study of the *Smith* case, *supra,* convinces me that the question of the right of a treaty Indian to shoot game for food on unoccupied crown lands or crown lands to which he has access is still open. There this court dealt only with the prohibition of carrying fire-arms on a game preserve which was held to be occupied crown land.

The justice of the peace has found the accused to be a treaty Indian belonging to an Indian reserve in this province and that

he was hunting for food when he killed the moose in question during a time when the hunting and killing of moose was prohibited, but the season for hunting of other big game was open. The moose was killed in the Porcupine Forest Reserve also known as fur conservation area, No. 103.

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Pars. 6, 7 and 8 of the stated case read as follows [see *ante*, p. 250].

The grounds on which the justice of the peace held the accused guilty were that provisions of *The Game Act, 1950,* applied and that his killing of the moose under the circumstances was prohibited thereby.

The licence referred to in par. 6 above is a licence to hunt game under *The Game Act, 1950,* and does not confer any special right of access to the forest reserve or fur conservation area.

On the date in question, November 8, 1952, the killing of moose generally in the province was prohibited but the area where this moose was killed was at the time of killing an area open to visiting hunters who had a licence and such hunters were permitted to hunt over the area in question which are crown lands. Such being the case it appears to me that hunters had access to these crown lands for the purpose of killing game and unless the provision of sec. 13 (2) of *The Game Act, 1950,* denying Indians access to this area is valid this Indian had a right of access to the crown land in this area and having such a right of access he could lawfully kill the moose in question since he required it for food for his family. His right to kill the moose should have been determined by the justice of the peace, not under *The Game Act, 1950,* but under par. 12 of the agreement referred to before. Sec. 13 of *The Game Act, 1950,* is not a binding enactment as against Indians and is *ultra vires* of the provincial legislature.

By sec. 91, par. 24, of the *British North America Act, 1867,* exclusive legislative authority to deal with Indians and lands reserved for Indians was reserved to the Parliament of Canada. The Parliament of Canada dealt with the rights and liabilities of Indians by ch. 29, statutes of Canada, 1951, the *Indian Act.* Sec. 87 of that Act reads as follows:

"LEGAL RIGHTS

"87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general applica-

> Parliament of the Dominion, does not declare that the defendant shall cease to be a denizen of the Province in which he may be, or that he shall, in other respects, be exempted from the jurisdiction of the provincial legislatures * * * It therefore appears * * * that any attempt by the legislature of Ontario to regulate by enactments his conduct *qua* Indian would be in excess of its powers. If, on the other hand, the enactment had no reference to the conduct of the defendant *qua* Indian, but provided generally that no one was to sell, etc., liquors, then the enactment would be * * * a piece of legislation competent to the legislature * * * —'
>
> "even though he—not in his status *qua* Indian, but under the general words—should come within the prohibition.
>
> "In other words, no statute of the Provincial Legislature dealing with Indians or their lands as such would be valid and effective; but there is no reason why general legislation may not affect them."

By secs. 9, 11 and 17 of ch. 35, *supra,* it is provided as follows:

> "9. Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.
>
> "11. Every person and every class of persons shall enjoy the right to obtain the accommodation or facilities of any standard or other hotel, victualling house, theatre or other place to which the public is customarily admitted, regardless of the race, creed, religion, colour or ethnic or national origin of such persons or class of persons.
>
> "17. The provisions of this Act shall bind the Crown and every servant and agent of the Crown and application for relief may be made without complying with the provisions of *The Petition of Right Act.*"

The justice of the peace in par. 6 of the stated case has found that "the area known as Porcupine Provincial Forest Reserve and also as fur conservation area No. 103 was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is crown lands." Such being the case

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tion from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

Sec. 13 (2) of *The Game Act, 1950,* purports to declare that lands designated by or pursuant to *The Provincial Lands Act,* RSS, 1940, ch. 37, as school land, lands within game preserves, provincial forests, provincial parks, registered trap lines or fur conservation areas established by the regulations under *The Fur Act, 1950,* ch. 77, shall be deemed not to be unoccupied crown lands or lands to which Indians have a right of access. That provision is clearly intended to apply only to Indians and it does not apply to the general public. It is not a "law of general application" within the meaning of sec. 87 of the *Indian Act* and is therefore not binding on Indians within the meaning of that section. Provision for the right of Indians to hunt for food on crown lands had already been made by "other Acts" referred to in sec. 87, these being the Acts validating the agreement of which par. 12, *supra,* was a part.

A further reason for holding sec. 13 to be ineffective for the purpose of excluding only Indians from access to forest reserves exists in the provisions of *The Saskatchewan Bill of Rights Act, 1947,* ch. 35. The latter Act is an Act of "general application" within the meaning of sec. 87 of the *Indian Act* and by its express provisions binds the crown in Saskatchewan. It has been the consensus of judicial opinion in Canada as expressed in many decisions of the courts that an Indian is a Canadian citizen and that, subject to the special privileges and restrictions provided in legislation such as the *Indian Act* and the Acts validating the agreement of which par. 12 is a part, he has the same rights, duties and obligations as any other Canadian citizen.

In *Rex v. Martin* (1917) 41 OLR 79, at 83-4, 39 DLR 635, at 639, Riddell, J. said:

"I think the language used by the Judicial Committee in *C.P.R. v. Notre Dame de Bonsecours Parish* [1899] AC 367, 372, 373, 68 LJPC 54, may well be applied here *mutatis mutandis*:—

" 'The *British North America Act,* whilst it gives the legislative control of the Indian defendant *qua* Indian to the

Strongquill apart from the other legislation to which I have referred had the same "right of access" to the crown land in the Porcupine Forest Reserve and fur conservation area, No. 103, as the other hunters referred to in par. 6 of the stated case. Having such access to that crown land it was lawful for him to kill the moose for food under the special right reserved to him by par. 12 of the agreement hereinbefore referred to notwithstanding that the killing of moose in the province generally was prohibited.

The appeal therefore will be allowed, the conviction will be quashed and the appellant will have his costs here and in the court below.

MCNIVEN, J.A. — This conviction comes before us on appeal by way of stated case which is set out in full in the judgment of the learned Chief Justice. However, the pertinent facts may be summarized:

The accused was a treaty Indian living on an Indian reservation where he followed the Indian way of life. On the day in question in company with a white man the accused was hunting for food, and shot the said moose as food for his family of six adults and a number of grandchildren. The area where the moose was shot was crown land, known as Porcupine Provincial Forest Reserve and also fur conservation area, No. 103, and was open to any visiting hunters in possession of a licence to hunt big game. The said area is uninhabited, covered with patches of timber, some burned over, but no part thereof was cleared or used for farming or agricultural purposes. The season for hunting big game opened on November 8, 1952 (the day the said moose was shot) but by regulation made pursuant to *The Game Act, 1950*, ch. 76, the killing of moose in 1952 was prohibited throughout the province.

In 1930 the natural resources of the province generally were transferred from Canada to the province by an agreement now known as the Natural Resources Agreement which was ratified and confirmed by the Saskatchewan legislature and by parliament and given the force and effect of law as an amendment to the *British North America Act* (ch. 26 of 20 & 21 Geo. V) by the Imperial Parliament. Pars. 10, 11 and 12 of the said agreement refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated. *Vide Rex v. Smith* [1935] 2 WWR 433, 64 CCC 131, where Turgeon, J.A. says at p. 436:

> "It follows therefore that whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game law of Saskatchewan is to be determined by an interpretation of par. 12, given force of law by this Imperial statute."

See also *Rex v. Wesley* [1932] 2 WWR 337, at 342, 26 Alta LR 433, 58 CCC 269.

Par. 12 of the said agreement is as follows [see *ante*, p. 253].

It is a cardinal rule that in interpreting a statute the proviso or exception is to be carved out of its enacting terms. As I read this section its dominant purpose and real intent was to preserve to the Indians the right of hunting, trapping and fishing for food at all seasons of the year, irrespective of the game laws but limited to the lands therein mentioned. This right is embedded in and guaranteed by the constitution of Canada coupled with the solemn assurance by the province that this right would be made effective. One cannot help but wonder what added strength such an assurance gives to the constitution unless it be that the ownership of all wild game is by law vested in the crown in the right of the province.

This right is limited to "all unoccupied Crown lands and to any other lands to which the Indians may have a right of access." As was succinctly stated by Turgeon, J.A. in *Rex v. Smith, supra:*

> "The question then is (1) is it unoccupied Crown land, or (2) is it occupied Crown land to which the Indians have a right of access? If it is either of these no offence was committed by the accused."

The Indians were the original settlers in the North West Territories now known as Alberta, Saskatchewan and the northern part of Manitoba. Apart from some fur traders and the odd settler the Indians were the only inhabitants of this vast territory in 1874. In that year, by treaty the Indians ceded whatever rights they had to Her Majesty and in consideration thereof *inter alia* Her Majesty agreed that:

> " • • • Her said Indians shall have the right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of Her Majesty

and saving and excepting such tracts as may be *required or taken up* from time to time for settlement, mining or other purposes under *grant* or other right *given* by Her Majesty's said Government."

The tract surrendered was practically "unoccupied" in the physical sense—it was idle land, empty—vacant—not put to any use.

It is common knowledge that wild life (game) instinctively seeks "unoccupied" places remote from human habitation for food, for breeding and nurturing its young, for concealment and protection from predatory wild life including human beings.

I have already said that whatever rights with respect to hunting granted to the Indians by the said treaty were merged in par. 12 of the Natural Resources Agreement, *supra*. I have only referred to the treaty for such assistance as its terms may give in interpreting the language used in par. 12 for we must attribute to parliament an intention to fulfil its terms. It is also a cardinal rule of interpretation that words used in a statute are to be given their common ordinary and generally accepted meaning. Statutes are to be given a liberal construction so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning. See *The Interpretation Act, 1943*, ch. 2, sec. 5. *Murray's Standard Dictionary* defines "unoccupied" with relation to ground as "not occupied by inhabitants or in-dwellers—not put to use in this way—not frequented or filled up—empty."

This offence was committed on the Porcupine Forest Reserve which approximates 181 square miles and that part thereof where the moose was shot measures up to the foregoing definition of "unoccupied." In the schedule to *The Forest Act*, RSS, 1940, ch. 39, reserves are described which in area exceed 8,000 square miles. Sec. 43 (1) of *The Forest Act* as amended by 1951, ch. 20, sec. 4, is as follows:

"43.—(1) In order to reserve certain areas in the province for a perpetual growth of timber, and to preserve the forest cover thereon, which regulates stream flow, and to provide for a reasonable use of all the resources which the forests contain, all provincial lands within the respective boundaries of the provincial forests mentioned in the schedule to this Act are hereby withdrawn from disposition, sale, settlement *or occupancy* except under the authority of this Part or of regulations made thereunder."

Under the said Act there is power to withdraw from these forest reserves such land as may be required for historical sites or residential purposes and the granting of leases within provincial forests for agricultural, business, or residential purposes not exceeding 33 years. This vast area is, subject to these exceptions, withdrawn from sale, disposition, settlement or occupancy. It is a natural hunting ground. Whether crown land is occupied or unoccupied is a question of fact to be determined by evidence and the facts as set out in the stated case compel the conclusion that the area where this moose was shot was unoccupied crown land. The right of the Indians to hunt for food is "on all unoccupied Crown lands" and to effectuate the true intent and spirit of par. 12 the word "all" should be interpreted as any. The whole is the summation of its parts. If the legislature by setting apart certain crown lands as forest reserves (over 8,000 square miles) can convert them into occupied lands then it could set apart all crown lands as a forest reserve and thus defeat the paramount object of par. 12. The legislature has no power to do indirectly what it cannot do directly. I am equally certain the legislature would not do anything to even qualify its solemn assurance as contained in par. 12.

The limitations on the Indians' right to hunt over the lands surrendered as set out in the treaty of 1874 are:

> " * * * upon such tracts as may be required or taken up for settlement, mining, or other purposes under grant, or other right given by Her Majesty's said Government."

The words "taken up," "grant," "given by," imply, connote alienation, transfer of the crown's interest therein. These forest reserves are still crown lands—not required for settlement or mining—and the word "unoccupied" in par. 12 should be so interpreted.

The offence charged in *Rex v. Smith, supra,* was carrying fire-arms on a game preserve against which there was an absolute prohibition. Such prohibition was of general application and as such comes within the meaning of *The Indian Act, 1951,* ch. 29, sec. 87. It can be readily distinguished upon the facts and the terms of the treaty of 1874 are substantially different from the terms of the treaty of 1876 before the court in the *Smith* case.

However should I be wrong in this conclusion I am of the opinion that the Indians have a right of access to these forest

reserves including the area where this moose was shot by the accused. Sec. 54 of *The Forest Act,* RSS, 1940, ch. 39, is as follows:

> "54. Persons using, or travelling in, a provincial forest shall, upon request, give the local field officers of the department, or other authorized officers of the Crown, information as to their names, addresses, routes to be followed and the location of their camps, and any other information pertaining to the protection of the forest from fire. Any person who refuses to give the required information shall be guilty of an offence, and for each such offence shall be liable on summary conviction to a fine of not less than $5 nor more than $50."

This section impliedly gives the right to use and travel in a provincial forest to "persons" and "any person" failing to give an authorized officer of the crown the information therein required commits an offence. The treaty of 1874 was made with "Her Majesty's Indian subjects" and as stated by my brother Procter in his judgment there is ample judicial authority for the statement that Indians born in Canada and/or living upon Indian reservations are British subjects and as such would be persons within the meaning of the foregoing section of *The Forest Act.* It is a right common to all persons and the "right of access" referred to in par. 12 is not a special or peculiar right limited or confined to Indians to be enjoyed by them alone. In addition in the stated case there is the fact that the area in question "was open to any visiting hunters who have a licence and they are permitted to hunt over that area which is Crown lands." In my opinion the accused, a treaty Indian, had a right of access to the said land, a right to hunt thereon for and kill the said moose for food irrespective of the provincial *Game Act, 1950.*

However, counsel for the crown relies upon sec. 13 of *The Game Act, 1950,* as follows [see *ante,* p. 255].

This section is not of general application but limited to the Indians and therefore does not come within the meaning of sec. 87 of *The Indian Act, supra.* By sec. 91, par. 24, of the *British North America Act, 1867,* the right to enact laws with regard to Indians and land reserved for the Indians is vested exclusively in parliament.

Sec. 13 (1), *supra,* merely restates a substantial part of par. 12 of the Natural Resources Agreement, *supra,* which was

approved by the legislature, 1930, ch. 87. It does not amplify, extend, or curtail any rights granted the Indians under the agreement. It is merely a basis for the enactment of subsec. (2), *supra*, which is limited in its application to the purposes of subsec. (1).

This subsection designates certain crown lands which shall be deemed not to be unoccupied crown lands or other lands to which the Indians have a right of access. Irrespective of the facts applicable to such lands and no matter what the common, ordinary and generally accepted meaning of the words and phrases used therein may be the legislature by the use of the word "deemed" has imposed its own meaning upon the language used. In effect this section declares the named lands to be occupied crown lands to which the Indians have no right of access.

In my opinion the legislature has no power by unilateral action to define the language used nor amplify, extend, modify or alter the terms of the said Natural Resources Agreement, nor to derogate from the rights granted to the Indians by the said agreement. These are constitutional rights which can only be amended or interpreted as provided for in the *B.N.A. Act, 1867*, and amendments thereto. *Vide C.P.R. v. Notre Dame de Bonsecours Parish* [1899] AC 367, 68 LJPC 54.

In my opinion sec. 13 (2) of *The Game Act, 1950*, is *ultra vires* and has no application to the accused.

The appeal will be allowed and the conviction quashed with costs both here and in the court below.

CULLITON, J.A. (dissenting) concurs with Martin, C.J.S.

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observed that Viscount Cave, taking part in *Hamilton* v. *Caldwell*, *supra*, did not express any doubt of the decision he had made in *Re Jones*, *supra*.

I am of opinion that the bankrupt cannot be made the slave of the trustee under the circumstances of this case, and that the appeal should be dismissed with costs.

Under no circumstances could the order made by the Assistant Master stand—it is an order to the bankrupt to go on working, or, at least, earning money, and, no matter how little he may earn, pay $2,000 a year to the trustee. The glaring injustice of such an order would condemn it in itself.

Appeal dismissed.

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REX v. SYLIBOY.

Inverness County Court, Nova Scotia, Patterson, Acting Co. Ct. J. September 10, 1928.

Criminal Law I A—Game and Fisheries—Indians—Cape Breton—Treaty of 1752—Scope and effect.

The Treaty of 1752 made between Governor Hopson and certain of the Mick Mack Indians of Nova Scotia, was not in reality a treaty, not being made between competent contracting parties and did not extend to Cape Breton Indians. The latter therefore acquired no rights to hunt under the treaty contrary to the general game laws of Nova Scotia.

APPEAL by the accused from his conviction by a Magistrate, on a charge of unlawful possession of furs. Affirmed.

D. McLennan, K.C., for Crown.

J. McDonald, K.C., and *C. MacKenzie*, K.C., for accused.

PATTERSON, (ACTING) CO. CT. J.:—The defendant, who is the grand chief of the Mick Macks of Nova Scotia was convicted under the Lands and Forests Act, 1926 (N.S.), c. 4, of having in his possession at Askilton in the County of Inverness on November 4, last fifteen green pelts, fourteen muskrat and one fox. He made no attempt to deny having the pelts, indeed frankly admits having them, but claims that as an Indian he is not bound by the provisions of the Act, but has by Treaty the right to hunt and trap at all times. Every now and then for a number of years one has heard that our Indians were making these claims but, so far as I know, the matter has never been before a Court.

The Treaty relied upon is that of 1752, made between Governor Hopson of the Province of Nova Scotia and His Majesty's

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Council on behalf of His Majesty, and "Major Jean Baptiste Cope, chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin & Francis Jeremiah, Members and Delegates of the said Tribe:" (1 Nova Scotia Archives, p. 683). Article 4 in part says:—"It is agreed that the said Tribe of Indians shall not be hindered from but have free liberty to hunt and fish as usual."

Observe the date 1752. Cape Breton between 1748 and 1763 was not part of Nova Scotia. It was owned and governed by the French, while Nova Scotia was a colony of Great Britain. It will be remembered that defendant is a Cape Breton Indian and that the offence alleged against him was committed in Cape Breton. Assuming for the time that the Treaty is still in force in Nova Scotia proper, can defendant claim protection under it? Unless there is something more than I have stated, clearly not. But, say his counsel, the Mick Mack Tribe throughout Nova Scotia, including Cape Breton, is one and indivisible, and the Treaty was made with the tribe, and a very bright and intelligent young Indian testifies that two of the signatories to it were Cape Breton Indians. The language of the Treaty not only lends no support to this contention, but shows that it is untenable, and I am satisfied that the young Indian is mistaken.

"The following Treaty of Peace," reads the minute of Council, "was Signed, Ratifyed and Exchanged with the Mick Mack Tribe of Indians, Inhabiting the Eastern Parts of this Province:" (1 Archives, pp. 682-3) computed to be ninety in number,—Cope himself claimed authority over only forty. (1 Archives, p. 671). Eight years before there had been three hundred Indians engaged in the attack on Canso (2 Nova Scotia Historical Society Collections, p. 15), all from "the Eastern Parts of this Province" which shows that Cope and the others who joined with him in the Treaty, really represented only a small portion even of these very Indians they claimed to represent. Notice further, how Cope is described as "chief Sachem of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province," (*i.e.*, Nova Scotia proper) and his fellow signatories as "Members and Delegates of the said Tribe." Article 3 seems conclusive on the point. There it is provided (p. 683):—"That the said Tribe" (*i.e.* the tribe inhabiting the eastern coast of Nova Scotia) "shall use their utmost endeavours to bring in the other Indians to Renew and Ratify this Peace." In the proclamation bringing the Treaty into force, Cope is described as "Chief Sachem of the Chibenacadie (Shubenacadie) Tribe of Mick Mack Indians, Inhabit-

the Eastern Coast of this Province," and his associates as "Delegates of the said Tribe:" (1 Archives, pp. 685-6).

If the communings leading up to the Treaty (Archives p. 671) be examined it will be seen that Cope calls himself "chief of that part of the Nation that lived in these parts of the province," (that is near Halifax) and had about forty men under him. He accepted the proposals made to him by the Governor in these words:—"I Major Jean Baptiste Cope do accept . . . . the conditions of this answer of His Excellency the Governour . . . . . for myself and my people . . . . and I promise . . . . to do my utmost Endeavours to bring here the other Tribes of Micmacks to make a peace:" (Archives, p. 674).

In the face of this evidence there can be no doubt, I think, that the Treaty relied upon was not made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

But there is much more than what I might not improperly call internal evidence to show that defendant's contention that the Treaty was a general and not a local one is untenable. Between 1752 and 1763 we find negotiations going on between the Governor and council and various tribes or local bodies of Indians for treaties:—for instance with the Fort Lawrence (Missiquash) Indians in 1753 and again in 1755; with the Cape Sable Indians in 1753; with Indians near Halifax in 1760; with Chibenaccadie Indians (the very Indians of our Treaty) in 1760 (2 Murdoch's History of Nova Scotia, pp. 219, 225, 257, 383 and 384). Between same dates we find treaties entered into with Lehéve (LaHave) Indians in 1753, 1760 and 1761; with the Chibenaccadie and Muscadoboit (Shubenacadie and Musquodoboit) Indians in 1760; with certain Indian chiefs in 1761; with the Missiquash Indians, and with the Pictouck and Malagonich (Pictou and Merigomishe) Indians in the same year, (2 Murdoch's History, pp. 219, 385, 403, 406-7). Why these negotiations—why these treaties if the Treaty of 1752 was general applying to all Nova Scotia?

In none of these treaties, or in the negotiations leading up to them is there any reference to the Treaty of 1752, while there are many to the Treaty of 1725. (1 Archives, pp. 572-3). Indeed the only reference to the Treaty of 1752 that I have been able to find is in that infamous proclamation by Governor Law-

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rence dated May 14, 1756, wherein he offers a reward of £30 for the capture of any Indian, or £25 for any Indian woman. There it is mentioned as a treaty made with a tribe of Mick Macks. (2 Murdoch's History, p. 308). We read too that in 1763 a chief of the Indians in the Island of Cape Breton repeatedly applied to the commanding officer at Louisbourg for provisions, which were refused, whereupon the chief said he would apply to the French and did so, (p. 437).

That the Governor in Council of Nova Scotia knew that these treaties were of a local character is evident. On February 29, 1760, that body resolved "to make peace with each chief who came in, and afterwards to have a general treaty signed at Chignecto:" (p. 385).

Counsel for the defendant suggest another way in which the benefits from the Treaty were or should be extended to their client and all other Cape Breton Indians. By Royal Proclamation after the Treaty of Paris, Cape Breton and St. John's (Prince Edward) Island were annexed to Nova Scotia and three years later the Parliament of Nova Scotia by statute declared that the laws of Nova Scotia extended to the Island of Cape Breton. But the expression, "the Laws of Nova Scotia" had reference only to the general laws of the Province and it would be misusing words to speak of the Treaty of 1752 as a law. At any rate the statute of 1766 (N.S.), c. 1, ceased to have any effect in 1784 when Cape Breton was disjoined from Nova Scotia and created a colony with authority to its Governor to convene the Assembly. Separate Cape Breton and Nova Scotia remained until 1820-21 (N.S.), c. 5. After their union in that year an Act was passed enacting that the administration of justice in the Island of Cape Breton should be conformable to the usage and practice of the Province of Nova Scotia. Nothing is said about general laws or treaties. Presumably no mention of general laws was necessary to make them effective, but surely that cannot be said of treaties.

I have referred to the proclamation after the Treaty of Paris. That is relied upon by the defendant for a reason other than that set out in the preceding paragraph. If that proclamation be examined it will be found that it deals only with those territories or countries, of which Nova Scotia was not one, that had been ceded to Great Britain by France. These territories or countries, exclusive of Cape Breton and St. John's Island which, as we have seen, were annexed to Nova Scotia, were divided into four distinct governments, namely: Quebec, East Florida, West Florida and Grenada. The references in it to the Indians are specifically limited to the Indians of the three

first named governments. One can understand an Indian in Quebec for example making a claim that he was guaranteed certain rights about hunting by the proclamation, but I confess I cannot understand a Cape Breton Indian making any such claim.

I might stop here. If the Treaty did not extend to Cape Breton and the Indians there could make no claim under it or derive any benefits from it, the prosecution must succeed and the conviction of the defendant be confirmed. I think, however, I should express my opinion on the other questions raised for I am in hopes that there will be an appeal from my decision and that upon so important a matter we may have the judgment of the Appeal Court.

Mr. McLennan for the prosecution, whose brief is a joy to read so complete and compact it is, contends that even if the Treaty relied upon by the defendant was made for the whole Micmack Tribe and did extend to Cape Breton and included the Indians there, it was almost at once put an end to by the breaking out of war. The ink was not much more than dry on the Treaty when Indians led by a son of Cope (let us hope not that son to whom the complacent Governor had sent a laced hat as a present) were carrying on in the characteristic Indian way a war against Britain. It was the very Indians who were parties to the Treaty that were responsible for the repeated raids upon Dartmouth, (2 Murdoch's History, p. 231), and it is a well-known and established fact that right down until the Treaty of Paris put an end to the war between England and France the Indians were on the side of France and were carrying on war in her behalf. Would that clause in the Treaty guaranteeing them the right to hunt be in consequence put an end to, or would it be merely suspended? Mr. McLennan as I have pointed out argues it would be put an end to, but I am inclined to hold it would only be suspended.

He quotes in support of his contention Woolsey on International Law, 5th ed., p. 272:—"Great Britain admits of no exception to the rule that treaties, as such, are put an end to by a subsequent war between contracting parties:" but this is not Woolsey's own language,—it is a quotation from Dr. Twiss' Law of Nations in Peace, 1884, pp. 440-1, para. 252, and it is clear that Woolsey himself does not hold that view, that he recognizes certain exceptions to the rule that treaties are abrogated by war between the contracting parties. Woolsey points out (p. 272) for example that war between the U.S. and England would not end but would merely suspend the stipulation in the Treaty of 1818, 1 Malloy's Treaties, p. 631, giving the

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U.S. liberty "forever to cure and dry fish" in certain places.

The treaty we are discussing was not made with the signatories alone but "with their heirs, and the heirs of their heirs forever," which seems to me to bring that portion of it giving to one of the contracting parties the right to hunt within Woolsey's exception. In other words it is my opinion and if it were necessary I would so hold that assuming the Treaty of 1752 to be a treaty the right referred to was only suspended during the war and would become operative again when peace came. Quite recently some Canadians in the U.S. Courts have invoked and successfully invoked the provisions of the Jay Treaty, 1794, 1 Malloy's Treaties, p. 590, though the war of 1812 has intervened.

A treaty such as that with which we are dealing if made today is one that would require to be ratified by Parliament before becoming effective, and would be invalid until such ratification: (6 Hals., pp. 440-1, para. 679). Though there was authority in Cornwallis' commission to summon a parliament for Nova Scotia, we all know that none was summoned for some years after the treaty was signed. It is a fair inference I think that after parliament had been assembled and began to legislate this treaty should have been ratified, or otherwise it would lose its validity. At any rate it was not very long after Parliament assumed its functions that a statute was passed which ignored the Treaty and treated it as non-existent.

In 1794 the first of our many Game Acts was passed, 1794 (N.S.), c. 4. It provided that no person within a certain period each year should kill partridge or black duck but Indians and poor settlers. It might be argued that the exception goes to show that the Indians had a special right by treaty, but if they had such a right why mention it in the statute? It would seem to me that the proper interpretation would be that they having no such right by treaty were given it by statute. However that may be the next statute on the subject makes the point clear.

By s. 1 of R.S.N.S. 1851, c. 92, it was enacted that:—

"No person shall take or kill any partridge . . . . between the first of March and the first of September in any year; but Indians and poor settlers may kill them for their own use at any season."

Section 3 of that Act provides that:—"The sessions may make orders respecting the setting of snares or traps for catching moose," and by s. 5, "may make orders for regulating the periods . . . . within which moose may be killed." If the Indians were excepted as to the taking or killing of partridge

because they had special right by treaty, why were they not so excepted as to setting snares or killing moose?

Then follows a series of statutes prohibiting everyone, Indians not excepted, from hunting during certain seasons until we come to that under which this prosecution was brought. Where a statute and treaty conflict a British Court must follow the statute, (*Re Carter Medicine Co.'s Trade-Mark*, [1892] 3 Ch. 472; *Walker* v. *Baird*, [1892] A.C. 491, at pp. 494-5). The result therefore is that even assuming the so called Treaty of 1752 is a treaty; assuming that it was valid as such without ratification by parliament, and that any rights under it could be claimed by the Indians of all Nova Scotia as that Province is now constituted, the prosecution would still succeed, because the statute not the treaty prevails.

At the trial there was no discussion as to whether the so called treaty was really a treaty or not. Counsel for the defendant, whose closely reasoned brief I cannot too highly commend, did not touch this point. Apparently they are content to accept the description in the document itself, "Treaty or Articles of Peace," but the prosecution raised the question and I must deal with it. Two considerations are involved. First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.

(1) "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return

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for good behaviour food, presents, and the right to hunt and fish as usual—an agreement that, as we have seen, was very shortly after broken.

(2) Did Governor Hopson have authority to make a treaty? I think not. "Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose." Clearly our treaty was not made with the constituted authorities of Great Britain. But was Governor Hopson specially deputed by them? Cornwallis' commission is the manual not only for himself but for his successors and you will search it in vain for any power to sign treaties.

Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities—representations which if there is nothing else in the way of the Indians could hardly fail to be successful.

On behalf of the defendant one witness testified that all his life he had fished as he would without regard to the Fisheries Law, and defendant himself swears he has started hunting muskrat for the last thirty-four years on Hallowe'en, October 31. Neither of them had ever been interfered with. The suggestion was that they had not been interfered with because they were within their rights in doing what they did by virtue of the treaty. I say nothing about fishing, but as to the hunting it was not until 1927 that the close season was extended to November 15. Until that year whenever there had been a close season on muskrat it had ended on November 1. If defendant did not start his hunting until October 31, the reason he was not proceeded against before seems obvious.

There is abundant evidence also that the Indians have been for many years receiving food, blankets, etc., from the government through the Indian agent because, says the defendant, of this treaty. I cannot agree. Rather I think they received these goods, and other benefits as well, not because of the treaty but by virtue of the successive statutes in that behalf: (1842 (N.S.). c. 16; 1844 (N.S.), c. 56; R.S.N.S. 1851, c. 58; and 1859 (N.S.), c. 14). The good work so begun and carried on when Nova Scotia was a separate Province was taken over by the federal government at Confederation and one is glad to learn is being so generously continued.

On no ground that has been advanced, and I am sure everything has been said or done that with any chance of success could have been said or done, can defendant in my opinion suc-

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eeed. Such sympathy as a Judge is permitted to have is with defendant. I would gladly allow the appeal if I could find any sound reason for doing so, but I cannot and must confirm the conviction. The very capable Magistrate who heard the case below has, I am pleased to see, fixed the penalty at the very lowest figure that the Act allows. Even so I venture to express the hope that the authorities will not enforce the conviction.

I have no doubt whatever that defendant honestly believed that the treaty was valid and that he was entitled under it to kill muskrat or have their pelts in his possession at any time, and as I pointed out, a year ago or rather in 1926 it was no offence on November 4 to have green muskrat pelts in one's possession. While everyone is presumed to know the law and to know the exact limits of the close season, it is more than likely—is it not a certainty—that the untutored mind of the defendant was not aware that in 1927 the close season had been lengthened to November 15? Of course, ignorance of the law excuses no one, but surely ignorance of the law under such circumstances can be urged as a plea for most lenient treatment—for in such a case as this waiving both penalty and costs.

Appeal dismissed.

UNTERMEYER v. A.-G. B.C.

Can.
S.C.
1928.

Supreme Court of Canada, Anglin, C.J.C., Mignault, Rinfret, Lamont and Smith, JJ. December 21, 1928.

Taxes V C—Succession duties—Shares—Situs—Value.

For succession duty purposes the *situs* of shares is where they may be transferred, and the market price is a safe guide to their fair market value.

[See annotation [1926] 3 D.L.R. 449, 1 Dom. L. Ann. 547.]

APPEAL by the executors of I. Untermeyer, deceased, from the judgment of the B.C. Court of Appeal, [1928] 3 D.L.R. 311, affirming the decision of the commissioner fixing the value of certain shares for succession duty. Affirmed.

J. W. de B. Farris, K.C., for appellant.

E. F. Newcombe, for respondent.

The judgment of the Court was delivered by

MIGNAULT, J.:—The late I. Untermeyer, among other property, was possessed at his death of 320,800 shares of Premier Gold Mining Co., a British Columbia corporation. Of these shares, of a nominal value each of $1, 2,000 were held by him in trust, and the controversy here is restricted to the balance,

YUKON TERRITORY MAGISTRATE'S COURT

O'Connor, Magistrate

R. v. Tom Tom

Game laws — Indian charged with abandoning meat and allowing meat to spoil — Legislation applicable to Indians and Eskimos — Negligence in not preserving meat constituting mens rea — The Game Ordinance, R.O.Y.T. 1975, c. G-1, s. 14(1)(a), (b) — The Yukon Act, R.S.C. 1970, c. Y-2, ss. 16(1)(q), 17(2), (3).

The accused was charged with two counts of abandoning the meat of moose which he had killed, and with two counts of allowing meat that was suitable for human food to spoil contrary to s. 14(1)(*a*), (*b*) of The Game Ordinance. The accused, an Indian, had packed out some of the meat and had not taken steps to preserve the remainder until such time as he could remove it as well. He argued that The Game Ordinance did not apply to him and that there was no proof of mens rea.

Held, the charge of abandoning meat was dismissed; the accused was convicted on the charge of allowing meat to spoil. The Game Ordinance did not interfere with the right of Indians and Eskimos to hunt on unoccupied Crown lands, but merely ensured that what was hunted was in fact used for food; s. 14 therefore applied to the accused. As it was not shown that the accused intended to abandon the meat, those charges were dismissed. His carelessness and negligence in not taking steps to preserve the meat were sufficient to constitute the mental element required on the charge of allowing meat to spoil.

Kullooar v. R. (1964), 50 W.W.R. 602 (N.W.T.); *R. v. Kogogolak* (1959), 28 W.W.R. 376, 31 C.R. 12 (N.W.T.); *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 referred to.

Sigeareak v. R., [1966] S.C.R. 645, 56 W.W.R. 478, 49 C.R. 271, [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536; *R. v. Royal Can. Legion*, [1971] 3 O.R. 552, 4 C.C.C. (2d) 196, 14 Cr. L.Q. 106, 21 D.L.R. (3d) (C.A.) 148 applied.

[Note up with 12 C.E.D. (West. 2nd) *Game Laws*, ss. 2, 3.]

P. J. McIntyre, for the Crown.

A. Lueck, for defendant.

(Whitehorse Nos. 99/6/0988; 99/6/0991)

4th August 1976. O'CONNOR, Magistrate:—This is the judgment in the case of *R. v. Tom Tom*. The accused stands charged with four separate counts in a single information. Each relates to an incident that occurred on 22nd February 1976. Count 1 charges that the accused:

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". . . having killed a cow moose, did abandon the flesh thereof that was suitable for human food, contrary to Section 14, subsection (1)(a), of the Game Ordinance".

Count 2 is identical except that it relates to a calf moose. Count 3 reads in part that the accused:

". . . having killed a cow moose, did allow a portion of the flesh thereof that was suitable for human food to be destroyed or spoiled, contrary to Section 14 subsection (1)(b), of the Game. . . ."

Count 4 is identical except that it relates to a calf moose.

The evidence established that the defendant, a registered member of the Whitehorse Indian Band, shot two moose, a cow and a calf, on unoccupied Crown land near mile 11 of the Carcross Road, in the Yukon Territory. Mr. Tom Tom is employed by the White Pass and Yukon Route, Railway Division, and as a result of travelling back and forth between Whitehorse and Robinson, some 22½ miles distance, he became aware that three moose were frequenting an area approximately 20 miles from Whitehorse at mile 91 on the railway.

On 22nd February 1976, a Sunday, he was not working, and arranged for a ride with another employee in order to locate and shoot the moose which he had seen. He was dropped off, and did in fact shoot a cow and a calf. He returned to Whitehorse and later that day, with two friends, returned to the scene in order to pack out some of the meat. They drove by car to a place within approximately one mile of where the moose had been shot, walked in and located the animals. The three removed part of the meat from each animal, but left much behind. The snow at the time was approximately two feet deep, and walking back to the road with the meat was a difficult matter. Each of the friends packed a portion of the meat which had been removed, while Mr. Tom Tom walked ahead breaking trail. He took no precautions which would have preserved the meat until his return. The animals were not skinned, nor were they propped to allow the cold to enter the cavity to freeze the meat. The temperature in the area at the time was cold; however, the animals, left as they were, retained much heat. Mr. Tom Tom did not return to the moose, and on 26th February they were located by the game branch officers and found to be in a spoiled condition. I will deal with the evidence relating to the spoilage in more detail at a later point.

The defendant advised the game officers that it was his intent to return with a skidoo in order to pick up the remainder of the meat.

The first submission made on behalf of the defendant is that s. 14 of The Game Ordinance, R.O.Y.T. 1975, c. G-1, is legislation which is not applicable to Indians in the Territory by virtue of the provisions of s. 17(3) of the Yukon Act, R.S.C. 1970, c. Y-2. The Game Ordinance was enacted by the Commissioner in Council pursuant to powers conferred by s. 16(1)(*q*) of the Yukon Act, which reads:

"16.(1) The Commissioner in Council may, subject to this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territory in relation to the following classes of subjects, namely: . . .

"(*q*) the preservation of game in the Territory. . . ."

It is useful to set out here as well the provisions of s. 17(2) and (3) of that Act.

"(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make ordinances for the government of the Territory, in relation to the preservation of game in the Territory, that are applicable to and in respect of Indians and Eskimos, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territory, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

"(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct."

Clearly moose have not been declared by the Governor in Council to be game in danger of becoming extinct. The contention is that s. 14 of The Game Ordinance, under which the defendant is charged, is legislation restricting Indians or Eskimos from hunting for food on unoccupied Crown land and, therefore, has no application to Mr. Tom Tom. *Sigeareak v. R.*, [1966] S.C.R. 645, 56 W.W.R. 478, 49 C.R. 271, [1966] 4 C.C.C. 393, 57 D.L.R. (2d) 536, provides a complete answer to that

submission. The Supreme Court was dealing with a charge against an Eskimo under s. 15(1)(*a*) of the Northwest Territories Game Ordinance, 1960 (N.W.T.) (2nd Sess.), c. 2 (now R.O.N.W.T. 1974, c. G-1, s. 16(1)(*a*)), that he did abandon three barren-ground caribou which he had shot. The magistrate found that the defendant had killed the three animals and that after removing some of the meat he had formed the intention to abandon the balance. He concluded, however, that The Game Ordinance did not apply to Eskimos and, following the decisions of the Northwest Territories Territorial Court in the cases of *Kallooar v. R.* (1964), 50 W.W.R. 602, and *R. v. Kogogolak* (1959), 28 W.W.R. 376, 31 C.R. 12, dismissed the charge. There were included in the Northwest Territories Act [R.S.C. 1952, c. 331], at that time, sections indentical to s. 17(2) and (3) of the Yukon Act. The Crown appealed by way of stated case, with the following question being posed:

"Was I right in holding that the Game Ordinance and particularly section 15(1)(a) thereof, does not apply to Eskimos?"

The appeal was dismissed by the Territorial Court. Subsequent appeal to the Court of Appeal for the Northwest Territories was allowed and a further appeal, by the defendant, to the Supreme Court of Canada was dismissed. Hall J., writing on behalf of the court, concluded, firstly, that the caribou shot were barren-ground caribou, an animal that had been declared in danger of becoming extinct by the Governor in Council pursuant to the provisions of the Northwest Territories Act and that, therefore, the exemption from The Game Ordinance contained in the section of that Act similar to s. 17(3) of the Yukon Act had no application. He went on to say at p. 485:

"In any event, the caribou he killed were game within the meaning of the *Game Ordinance* and the offence here was in abandoning parts thereof suitable for human consumption even if he had the legal right to hunt for them for food.

"I am of opinion that the question put by Parker, P.M. in the case stated by him must be answered in the negative, the conviction of the appellant by the court of appeal affirmed and the direction remitting the case to the summary conviction court upheld.

"I think it is desirable to say specifically that, in so far as *Kallooar v. R.* and *R. v. Kogogolak* hold that the *Game Ordinance* does not apply to Indians or Eskimos in the Northwest

Territories, they are not good law and must be taken as having been overruled."

Mr. Lueck, on behalf of the defendant, urges that the finding referred to above is obiter dicta in that the basis of Hall J.'s judgment is the conclusion that the caribou were barren-ground caribou and that his further statement concerning the applicability of The Game Ordinance to Indians and Eskimos was unnecessary surplusage. I am not able to agree with that view. The question in the stated case posed by the magistrate clearly involved a consideration of the applicability of the section to Eskimos.

The Supreme Court, in remitting the case for decision, expressed the clear opinion that the section did apply to Eskimos and that the two earlier decisions of the Territorial Court to the contrary were overruled. The decision in *Sigeareak* cannot be distinguished from the present case.

The Game Ordinance does not operate to prohibit or restrict Mr. Tom Tom's right to hunt. Implicit in the decision of the Supreme Court in *Sigeareak* is the interpretation that the expression "hunting for food" used in s. 17(3) does not include the care and preservation of meat after kill. Mr. Lueck suggests that the two, hunting and subsequent handling and treatment of the animal, are so closely linked that they ought not to be separated and that the Commissioner in Council, by enacting unreasonable or restrictive legislation concerning the care and treatment of meat after a kill, could thereby infringe upon the right to hunt. If the effect of the legislation was such it would fall within the exemption set out in s. 17(3). Section 14 as presently enacted does not interfere with the right to hunt for food. Quite to the contrary, it is complementary to that right, ensuring that what is hunted is in fact used for food.

Counts 1 and 2 charge the defendant with abandoning meat. Sissons J. in *Kallooar v. R.* applied the ordinary general meaning to the word "abandon," that being "to leave completely and finally; . . . to give up all concern in" [p. 605]. That, it seems to me, is a reasonable interpretation to attach to the word. There must be present an intention on the part of the defendant to relinquish any further interest in the meat and to make no further effort to return to it. I am not satisfied that Mr. Tom Tom had such an intention. It seems that he had plans to re-

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turn the following weekend if he was able to obtain the use of a skidoo. Counts 1 and 2 will, therefore, be dismissed.

The evidence relating to the condition of the remaining meat when it was located by the game officers is that a large portion had been eaten by birds or other animals. The skin had not been removed, and the meat was still unfrozen. There was a strong odour emanating from it. Some of the meat had turned green in colour. Both game officers were experienced in dealing with the hunting of animals and the cleaning of killed animals. They expressed the opinion that the meat had spoiled, and they did not feel it was fit for human consumption. Max Lasinger, a witness called by the Crown, expressed the same opinion. That was the only evidence before the court as to the condition of the meat at the time it was found. I am satisfied that the meat left at the scene by Mr. Tom Tom was suitable for human consumption, and that much of it was spoiled when found. During cross-examination, questions were directed to a number of witnesses concerning the customs of Indian people in preserving meat and in eating meat that might be considered spoiled by others. There was no evidence, however, either by way of response to those questions or introduced through other witnesses, to indicate that Indian customs in these matters are significantly different from those of the whites. Were there such evidence I would have no hesitation in finding that s. 14 of The Game Ordinance ought to be interpreted in light of the traditional hunting customs and habits of the Indian people. It can never be the case that white hunting practices are to be imposed upon the Indian people. The court, however, cannot speculate as to what Indian custom is, and it seems to me that a prima facie case is made out if it is shown that food suitable for human consumption is found in a spoiled condition.

The final matter to be determined is the mental element required in order to support a conviction under s. 14(1)(*b*). The defendant submits that it is an offence requiring proof of mens rea. The Crown, on the other hand, urges that this section is one of strict liability and refers to the case of *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591.

I have found the decision of the Ontario Court of Appeal in *R. v. Royal Can. Legion*, [1971] 3 O.R. 552, 4 C.C.C. (2d) 196, 14 Cr. L.Q. 106, 21 D.L.R. (3d) 148, to be of assistance. The court was there dealing with a charge under the Ontario Liquor

Licence Act, R.S.O. 1960, c. 218, prohibiting a licensee from *permitting or suffering* any person under or apparently under the age of 18 years to enter a licensed premises. The submissions to the court with respect to the requirement of mens rea were similar to those before this court. The court held that the section imposed a duty upon the licensee to ensure that persons under or apparently under the age of 18 were not on the premises. The court was concerned with the interpretation of the words "permit" and "suffer." Here the word "allow" has been used. The three are synonymous. Applying the *Royal Can. Legion* case to the present, there was a duty imposed that, upon Mr. Tom Tom once having killed the moose, he take sufficient steps to ensure that the meat of the animals would not spoil. This duty is not one of strict liability. It does, however, require him to act with a reasonable degree of care. Carelessness, recklessness or negligence in the exercise of the duty to which I have referred will expose the defendant to liability under s. 14(1)(*b*). That duty here was twofold. First, he was required to make reasonable efforts to preserve the meat when leaving the scene and, secondly, to take reasonable steps to return in sufficient time to obtain the meat before it spoiled. He did neither. He left the meat in such a state that spoilage within a short time was inevitable. His efforts to return and save the meat were half-hearted at best. He indicates that he did not have available time until the following weekend. By then much of the meat would be spoiled. His carelessness or negligence is sufficient to constitute the mental element required under s. 14(1)(*b*). The defendant will be found guilty of counts 3 and 4.

submissions be filed with the Court by April 1st. These were received within the time prescribed and have been fully considered by me.

The defendant claims to be exempt or immune from the provisions of ss. 41 and 42 of the *Game and Fish Act* pursuant to s. 88 of the *Indian Act* on the ground that the aboriginal rights from time immemorial of the Indians of the Ojibway Tribe to hunt and to fish in the area in question was and still is reserved to him under the Robinson Treaty of 1850 and/or the James Bay Treaty — Treaty No. 9, of 1905, except as otherwise therein provided.

With regard to such claim of exemption or immunity, s. 730(2) of the *Criminal Code*, which is made applicable to provincial statutory offences by s. 3 of the *Summary Convictions Act*, R.S.O. 1970, c. 450, provides that:

> 730(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

In *R. v. Park Hotel (Sudbury) Ltd.*, [1966] 2 O.R. 316, [1966] 4 C.C.C. 158, it was held that s. 730(2) of the *Criminal Code* is applicable to provincial statutory offences and that the burden of proving that an exception operates in favour of the defendant is on defendant and that the prosecutor is not required, except by way of rebuttal, to negative the exception. See, also, s. 89(*a*) of the *Game and Fish Act*, which places upon the person charged thereunder in respect of taking, killing, procuring or possessing game or fish, the "onus" of "proving" that it was lawfully taken, killed, procured or possessed by him.

Of this section His Honour Judge Little in *R. v. Moses*, [1970] 3 O.R. 314 at pp. 319-20, [1970] 5 C.C.C. 356 at p. 362, 13 D.L.R. (3d) 50 at pp. 55-6 (Ont.), said:

> The onus is therefore on the accused under said s. 81(*a*) and he seeks to meet that onus by claiming that the terms of the Robinson Treaty are still operative, and if so, he has not contravened the provisions of said s. 38(1) as charged.

Accordingly I hold that the onus of proving that the defendant is exempt from the relevant provisions of the *Game and Fish Act* is upon the defendant and that the prosecutor is not required, except by way of rebuttal, to negative the exemption.

Where the law imposes an onus upon an accused to estab-

M. M. deWeerdt, Q.C., for appellant.

O. J. Troy, for Crown, respondent.

July 31, 1970.

MADDISON, J. — This is an appeal by way of trial *de novo* against a conviction by Morrow, J., sitting as a Police Magistate (1970) 71 WWR 435, 9 CRNS 92.

The appellant is charged that on or about April 14, 1969, at or near Pasley Bay, Northwest Territories, he did "unlawfully hunt a female polar bear with young, contrary to Item 6 (b) of Schedule B of the *Game Ordinance*".

On or about April 14, 1969, the accused Eskimo and his Eskimo companion, Argvik Agvil, both of whom live at Spence Bay, N.W.T., proceeded by dog sled northwest of Spence Bay to a point several miles off the coast of the Boothia Peninsula on the sea-ice northwest of Pasley Bay, N.W.T., in search of polar bears to shoot for their hides. At about 97° west, 70° 45′ north, they sighted three polar bears together — two smaller bears, approximately the same size, and a larger bear. Argvik Agvil and the accused, knowing that Mathias Munga and his deaf-mute son, Oomeemungnak Munga, were following behind, waited for some time for Mathias Munga and Oomeemungnak Munga to arrive, as they wanted Oomeemungnak to have the opportunity to take the first shot, so that he would, if he were successful in killing a bear, gain the hide, which he could then trade with the local fur trader.

Oomeemungnak was, accordingly, afforded the opportunity of taking the first shot, which he did, killing one of the smaller bears and the larger bear with one shot. The other small bear ran away but was worried back to the area by the accused's dog. The accused then shot it. The evidence is clear that the largest bear was a female. The accused and his companions were holders of general hunting licences and were therefore entitled to hunt the bears permitted by item 6 (*b*) of Sched. B of the *Game Ordinance,* 1960 (2nd. sess.) (N.W.T.), ch. 2, and prohibited by the *Game Ordinance,* sec. 4 (1), from hunting any other polar bears.

The skins of all three bears, stretched and dried, were exhibits in court. The smallest of the three skins measured 65 inches in length from tip of nose to tip of tail.

Upon the joint motion of counsel, the evidence of Paul Kwaterowski, Superintendent of Game for the Northwest Territories, given by him at the previous trial (with the exception

(3d) 170, summarized the Indian title in Ontario as follows at p. 620 O.R., p. 180 D.L.R.:

> For the purposes of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the good will of the Sovereign". Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished.

It is also beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the prosecution and that intention must be clear and plain: *per* Hall, J.A., *supra*, at p. 404 S.C.R., p. 210 D.L.R.

It follows from this that the onus of proving that the Sovereign intended to limit or to restrict such title to certain Indians or to confine it to a certain territory or to terminate or to abrogate it on the happening of a certain event also lies on the prosecutor and such intention must also be clear and plain.

In any such treaty the provisions conferring a right or benefit upon the Indians are to be construed broadly in their favour and in the event of any ambiguity in any of the terms thereof any issue arising therefrom should be resolved against the Sovereign as the draughtsman of the document and in favour of the Indian.

Against this general background of the law I turn first to a consideration whether the Ojibway Indians ever enjoyed any aboriginal right to hunt and to fish and, if so, what the nature and the extent of that right was.

In addition to the facts admitted in evidence the defendant called one William E. Sault, a full-blooded Ojibway Indian from Nipigon, Ontario, to give evidence touching upon such rights and the nature and extent thereof.

Having researched the subject thoroughly and from information that has been passed down from one generation to another and from his personal knowledge Mr. Sault may aptly be described as a scholar of the history and the culture of his people and of the several treaties affecting them.

He touched upon the aboriginal rights from time immemorial of the members of the Ojibway Tribe to hunt and fish over all of the territories subsequently covered by the Robinson Treaty of 1850 with the Indians of Lake Huron, by the Robinson Treaty of 1850 with the Indians of Lake Superior, by the Northwest Angle Treaty (Treaty No. 3) with the Saulteau Indians and by the James Bay Treaty — Treaty

cannot come to the conclusion that the phrase "without young" in the Act means the same thing as "unaccompanied by cubs".

The first contention is appealing when considered with reference to the term "with child" which, in ordinary English, preceded by the word "woman" or preceded by the words "she is" refers to a pregnant woman. The *Shorter Oxford English Dictionary* gives the same definition for the phrase "with young" in relation to animals. The difficulty with the contention for the opposite meaning is that in ordinary English the phrase "without child" used in conjunction with the word "woman" does not mean a woman who is not pregnant. Nor does the expression "without young" in conjunction with "female polar bears" mean a polar bear who is not pregnant. There is even less logic in the suggestion that "female polar bear without young" means a female polar bear without suckling young.

Where does this leave us? If the Commissioner in Council had wished to make it clear that the permission to hunt female polar bears provided by sec. 6 (*b*) of Sched. B was limited to female polar bear unaccompanied by cubs, why did the drafters of the legislation not use the term which they saw fit to use in the regulations, namely, the term "unaccompanied by cubs"? I can only conclude that the legislators in their wisdom meant something different by the use of the expression "without young". But what did it mean?

The desire of the Commissioner in Council to protect young bears by prohibiting the killing of their mothers is apparent, especially in light of the fact that the Governor-General in Council has been sufficiently concerned to declare, in 1960, pursuant to subsec. (3) of sec. 14 of the *Northwest Territories Act*, RSC, 1952, ch. 331, the polar bear to be game in danger of becoming extinct, thereby enabling the Commissioner in Council to make Ordinances which restrict the rights of the Eskimo to hunt the polar bear even for food.

But do these bears come within this vague phrase in this Schedule? The answer must surely lie in whether or not these smaller bears would have been capable of surviving after the older female bear had been removed. The evidence of Kwaterowski is that the sow becomes pregnant when the last litter is at least one and three-quarter years of age. I quote from pp. 20 and 21 of Ex. 1:

> "Q. And did you not tell us that it was only after the 2nd summer that the cub bear left the mother? A. Yes, I mentioned when the female becomes pregnant and goes

of Madeline C. Nash, deceased, and directing the Registrar of Land Titles for the Saskatoon Land Registration District to cancel the existing certificate of title to said land and to issue title thereto to Joseph T. Nash as executor aforesaid.

The appellant is entitled to his costs of this appeal and of the application to the Chambers Judge, to be paid by the receiver from funds in its hands. The receiver shall have its costs from the fund.

The matter of costs of the other parties has given me concern. The Wells estate has not been a party to these proceedings and it is questionable if its distributive share on final winding-up should be decreased by any portion of these costs. I think, in fairness to all, it is best to direct, as I do, that no costs be awarded to each of the other appearing parties on this appeal and on the application below.

NORTHWEST TERRITORIES

TERRITORIAL COURT — MADDISON, J.

Regina v. Tootalik E4-321

Game Laws — Hunting Female Polar Bear with Cubs — Interpretation of Statute.

Appeal from a conviction for unlawfully hunting "a female polar bear with young, contrary to Item 6 (b) of Schedule B of the *Game Ordinance*", made by Morrow, J. sitting as a Magistrate (1970) 71 WWR 435, 9 CRNS 92. Appellant was a party to the shooting of a female polar bear and two younger bears in her company; the smallest of the three skins measured 65 inches overall. The case fell to be decided on the proper meaning to be given to the words in item 6 (*b*) of the *Game Ordinance*, 1960 (2nd sess.) (N.W.T.), ch. 2, " * * * female polar bear without young".

Maddison, J. considered the earlier legislation and the intent of the current legislation, having in mind the mischief aimed at, and concluded that the intent was to suppress the hunting of the mother bear when she was accompanied by cubs so young that they would be incapable of surviving without her; there was evidence that a female polar bear became pregnant when her last litter were about one and three-quarter years old at which time she became intolerant and chased them away, they being at that age well able to fend for themselves. If the mother did not conceive at that time the cubs often stayed with her and the continued association increased their ability to survive on their own. In the case at bar there was reasonable doubt that the cubs in question were of an age at which they could not survive without their mother and they were not therefore within the ambit of item 6 (*b*). The conviction must be quashed.

[Note up with 12 CED (2nd ed.) *Game Laws*, sec. 5; 22 CED (2nd ed.) *Words and Phrases*.]

In the case at hand, the mischief to be suppressed is the hunting of the mother bear when the young which are with her are at an age at which they would be incapable of surviving without her. As I have come to the conclusion that there is reasonable doubt that these young bears were of that age, they are outside the mischief to be suppressed and outside the objects of the enactment.

Accordingly the appeal is allowed and the accused acquitted. The hides forfeited will be returned.

In the conclusion which I have come to it is not necessary for me to consider other grounds of appeal advanced. It should be stated however that counsel for the defence abandoned his ground of appeal claiming an excess of jurisdiction in the trial Judge.

I am indebted to both counsel for the excellence of their presentations, which reflected a great deal of homework.

BRITISH COLUMBIA

SUPREME COURT CHAMBERS — HINKSON, J.

MacMillan Bloedel Industries Limited v. International Woodworkers of America, Local 1-357 et al

Trades and Trade Unions — Picketing Tugboat as Place of Operations of Employer — Designating as "Hot" Scows and Logs Handled by Tugboat — Resulting Shutdown of Plaintiff's Operations — Injunction.

The defendant Guild commenced a lawful strike against the members of the B.C. Towboat Owners Association; plaintiff used, under lease, a vessel called "Straddi IV", owned by a member of the association in its sawmill and associated booming grounds. There was no labour dispute between the plaintiff and the Guild or the International Woodworkers of America. The Guild claimed the right to picket in the vicinity of the leased vessel on the ground that it was a place of operations of its owner, and to picket near other vessels, scows and barges used by plaintiff and owned by other members of the association. Thereafter, the Guild declared that the "Straddi IV" was "hot" and that anything it hooked into would be considered "hot"; certain logs were spray-painted with the word "hot". In the result plaintiff's boom men, on the instructions of defendant I.W.A. refused to handle the logs and its plant suffered a substantial shutdown.

It was *held* that the plaintiff was entitled to the injunction sought; the plaintiff had made out a strong *prima facie* case that the boom men had struck, within the meaning of the *Labour Relations Act*, RSBC, 1960, ch. 205, and the *Mediation Commission Act*, 1968 (B.C.)

of that portion of the transcript of his evidence from line 15, p. 15 to the foot of p. 16) was permitted by me as evidence in this trial under the provision of sec. 727 (2) of the *Criminal Code,* 1953-54 (Can.), ch. 51. By further agreement between counsel certain publications which had been introduced in conjunction with Mr. Kwaterowski's evidence at the previous trial were introduced in this trial *de novo.* They were "Denning Habits of the Polar Bear", by C. Richard Harington, Canadian Wildlife Report Series, No. 5, published at Ottawa in 1968 and "Polar Bears and Their Present Status" by C. Richard Harington, published by the Canadian Wildlife Service in 1964.

If an offence was committed, there is no doubt on the facts that the accused was a party to it. The question for my determination is whether the hunting of this female polar bear, which was accompanied by smaller bears, comes within item 6 (*b*) of Sched. B of the *Game Ordinance.* By 1966 (2nd sess.), ch. 8, Sched. B was altered as to item 6 (*b*) to provide that the holder of a general hunting licence may: "hunt male polar bear and female polar bear without young". What interpretation am I to put upon the words "without young" as found in the amended Schedule under which the accused is charged? In interpreting these words I am entitled to look at the Ordinance as it was prior to the passing of the amendment. Item 6 (*b*) of Sched. B, prior to the 1966 amendment, provided that the holder of a general hunting licence might: "hunt female polar bear without young under one year of age and male polar bear". What am I to make of the deletion of the words "under one year of age"? If, as counsel for the defence contends, the deletion of those words has the effect of contracting the meaning of the words "without young" to something narrower than "without young under one year of age", to what does the deletion of the words "under one year of age" contract the phrase? Defence counsel suggests that I should find that the phrase "without young" means either: (1) A female polar bear who is not pregnant; or (2) A female polar bear who is not suckling cubs. Counsel refers in support of both contentions to sec. 7 of the Regulations respecting the conservation of game made pursuant to Commissioner's Order 90-67, dated April 28, 1967 (Ex. 3), made under the authority of the *Game Ordinance,* which, in providing for the quotas and bag limits of black bear and grizzly bear, uses the term "unaccompanied by cubs". Defence counsel says that I must look at the regulations as part of the whole Act to determine the meaning of the phrase and that, if I do so, I

"The informant says that he has reasonable and probable grounds to believe and does believe that Tootalik E4-321, of Spence Bay, Northwest Territories, on or about the 14th day of April, 1969, at or near Pasley Bay, Northwest Territories did unlawfully hunt a female polar bear with young, contrary to item 6 (b) of Schedule B of the Game Ordinance."

At this time I was proceeding through the area on my usual summer court circuit and, by prior arrangement with Magistrate Parker of Yellowknife, had agreed to take any magistrate's work that might result in "guilty" pleas, hoping to thereby save him the necessity of a trip.

There were no counsel available at this time, the Crown being represented by Constable H. K. Moorlag of the Royal Canadian Mounted Police and the accused in person. There were two similar charges involving two other accused, which charges arose out of the same circumstances. These charges were put over to abide the outcome of the present case.

The accused, through an interpreter, pleaded "guilty". Upon hearing representations as to the facts and with respect to the law applicable, it seemed to me that there were legal points that were better to be settled after argument of counsel. Accordingly I directed that the plea be changed to "not guilty" and proceeded to hear evidence put in by the Crown. The case was then adjourned to Yellowknife.

After counsel was appointed for the defence, he and the Crown attorney appeared on the continuation of the case at Yellowknife on 22nd October 1969. By agreement of both counsel, Paul Kwaterowski, Superintendent of Game for the Government of the Northwest Territories, was called by the Court. He gave evidence in great detail as to the life and habits of polar bear and was most helpful to the Court.

Following argument judgment was reserved to this date. Before discussing the issues raised by both counsel a review of the important facts is in order.

It is admitted by counsel that the accused is an Eskimo and that at the pertinent time held a general hunting licence.

From the evidence adduced it is pretty clear that the male polar bear when full grown is bigger than the female. Normally the female polar bear, when pregnant, will seek seclusion and hibernate some time from the end of October to the end of November. The time varies with the distance north or south

into hibernation she will become intolerant and chase the young ones out, chases the young ones away. At this particular time they will be at least 1 year and ¾.

"Q. Is there any particular reason why the cub bear would stay with the mother for a 3rd summer? A. For the 3rd summer?

"Q. For the 3rd summer, yes, besides the fact that she didn't get pregnant. A. It seems this is the social habits of quite a few game animals. As long as the mother has not conceived and didn't give birth for another spring, they will still associate. You will find it with quite a few animals.

"Q. When is a cub bear or a young bear with the mother able to leave and fend for itself, that is, its own feedings and protecting itself from other animals and that sort of thing? A. 1 and ¾ years, when they are chased away. At that time they are quite capable of taking care of themselves.

"Q. And would that be so even if they stay with their mother a third year? A. This would increase their survival opportunities and possibilities quite a bit. The longer the young animal is under the guidance of the mother the better it is for survival."

I have the gravest doubt upon the evidence before me that these smaller bears were under two years of age. It follows that had their mother become pregnant at the earliest of the normal times, she would have some time previously left them to fend for themselves. How then can it be said that these younger bears, which were at an age beyond that at which their mother might have left them in the course of nature, are young bears within the contemplation of the Schedule? I am of the opinion that it cannot.

It is true that every obscure enactment must be construed so as to "suppress the mischief, and advance the remedy", to use the words of Lord Coke when he reported the resolution of the Barons of the Exchequer in *Heydon's Case* (1584) 3 Co Rep 7a, at 7b, 76 ER 637, at 638. It is also true that sec. 10 of the *Interpretation Ordinance,* RONWT, 1956, ch. 52, requires that:

"Every enactment and every provision thereof shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects."

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The waters bounding this area are described as being frequently "icebound even in summer": Arctic Canada from the Air by Dunbar and Greenaway, p. 143. At p. 153 of the same publication an aerial photograph taken on 12th August 1949 shows the bay as completely icebound. It is interesting to note that Sergeant H. A. Larsen in the Royal Canadian Mounted Police Schooner *St. Roch* was icebound in Pasley Bay "from September 3, 1941 to August 4, 1942": Pilot of Arctic Canada, vol. III, 1st ed., p. 208.

On 14th April 1969 the accused, in the company of three other Eskimos, two to a sled, went hunting for polar bear to the Pasley Bay area. They came upon the polar bears, one larger than the other two. In concert all four hunters converged on the three bears. All three bears were shot and killed, the large one, a female, and one of the smaller ones surprisingly with one shot. The third bear ran away and then came back and was shot. The accused was not one of the ones who actually fired the shot. They were very close to the three bears at the time. The witness for the Crown described the two small bears as being about 29 inches high when standing on all fours. The same witness in describing the event of the first shot said "he got them both with one shot. The mother and the small one".

I am completely satisfied that the accused was engaged in concert with the other three in stalking and hunting the three polar bears in question. Remembering that I should give the benefit of every doubt or weakness in the evidence to the accused, I find on the evidence that the episode resulting in the death of the three bears took place on the sea-ice offshore from Pasley Bay. I am also satisfied that at the time of the episode it should have been apparent to the accused, as it was to at least one of the others in the hunting party, that they were engaged in hunting a female bear with her young, the two small bears having been born the spring previously.

It should be observed that it was admitted that the accused was an Eskimo and that he held a general hunting licence within the meaning of ss. 2(*b*) and 8(3)(*a*) of The Game Ordinance respectively.

The various legal defences put forward on behalf of the accused must now be considered. Briefly the defences as I understand them are:

embrace an included offence, a special plea of *autrefois acquit* was not available to the accused on the second indictment, and was properly disallowed by the learned trial judge.

The appeal will therefore be dismissed.

NORTHWEST TERRITORIES TERRITORIAL COURT

Morrow J.

Regina v. Tootalik E4-321

Indians and Eskimos — Hunting female polar bear with young — Whether Territorial Game Ordinance extending to sea-ice — Questions of Canadian sovereignty and statutory interpretation — The Game Ordinance (N.W.T.), 1960, (2nd sess.), c. 2, Schedule B, as amended 1966 (2nd sess.), c. 8, item 6(b) — The Northwest Territories Act, R.S.C. 1952, c. 331, ss. 2 (i), 13.

An Eskimo was charged with hunting a female polar bear with young, contrary to item 6(*b*) of Schedule B of The Game Ordinance. Two defences were put forward: (1) that the Court lacked jurisdiction; and (2) that the evidence was insufficient to support a conviction.

Held, the accused should be convicted.

(1) Although the offence took place on the sea-ice, Canadian politicians have on more than one occasion asserted that Canadian sovereignty extended to "the islands and the frozen sea north of the mainland". Royal Canadian Mounted Police patrols of these areas over the last 40 years constituted a day-by-day display of sovereign rights. The Territorial Court of the Northwest Territories had even sat in an aircraft resting on the sea-ice. An Eskimo was once tried for murder in the case of a crime allegedly committed on the sea-ice. Section 2(i) of the Northwest Territories Act defined "Territories" as including "all that part of Canada north of the sixtieth Parallel of North Latitude". Such definition did not restrict "Territories" to land. Upon a broad interpretation of the word "Territories", the Commissioner in Council had power, under s. 13 of the Act, to legislate in respect to game on the sea-ice.

(2) Upon the facts as found, the accused must be taken to have known that the shooting of the bears in question was prohibited by The Game Ordinance.

TRIAL upon a charge of hunting a female polar bear with young.

O. J. Troy, for the Crown.

Mark M. deWeerdt, Q.C., for accused.

17th November 1969. MORROW J.:—This case first came before me sitting as a Police Magistrate at Spence Bay, in the Northwest Territories, on 28th August 1969. The charge arose under The Game Ordinance. The information states:

about our active occupation and exercise our sovereignty in these lands right up to the pole", Debates, House of Commons, Canada, 1953-54, vol. 1, p. 700.

The Honourable Lester B. Pearson in 1946, while Canadian Ambassador to the United States, said:

"A large part of the world's total Arctic area is Canadian. One should know exactly what this part comprises. It includes not only Canada's northern mainland, but the islands and the frozen sea north of the mainland between the meridians of its east and west boundaries, extended to the pole." (Canada Looks Down North, (1945-46) 24 Foreign Affairs, p. 638.)

It is not declarations of sovereignty that count so much as the actual day-by-day display of sovereign rights: Van der Heydte, Discovery, Symbolic Annexation and Virtual Effectiveness in International Law, 1935. See also Hyde, International Law, 2nd ed., 1945, vol. 1; Jenness, D. Eskimo Administration: II Canada, Arctic Institute, 1964, p. 17. The recent article by Margaret W. Morris at p. 32 of The Musk-Ox, No. 6 on "Boundary Problems Relating to the Sovereignty of the Canadian Arctic" has been most helpful with her review of the various authorities.

One can go back at least 40 years to find Canada's Royal Canadian Mounted Police patrolling the Arctic areas including patrols over the sea-ice and attending to law and order and to the welfare of the inhabitants (mostly Eskimo).

Since 1955, when the Territorial Court of the Northwest Territories was set up under the Northwest Territories Act it has been notorious that this Court has administered the laws of Canada in all parts of the territory, including such of the Arctic Islands as have inhabitants and this by going on circuit several times a year and by holding court in the various places visited. It is to be observed that on at least one occasion court was actually held in a ski-equipped Otter sitting on the sea-ice off Tuktoyaktuk. Again, in early 1956, the late Sissons J. presided over a case involving an Eskimo named Allan Kaotok, who was charged with committing a murder on the sea-ice some 60 miles north-east of Perry River in Queen Maud Gulf. The Court did not hesitate to assume to itself jurisdiction to hear the case. It is interesting to note that the present alleged offence took place only some 200

and in the case of the Spence Bay area with which we are concerned it would be the earlier time. She will remain in hibernation and give birth to her young. The newly-born cubs are very small, about one pound at birth and blind and naked. They instinctively crawl to the mother and will nurse while she sleeps on. This will be the normal picture during the period December to January. Some time in March or the middle of April the mother and young ones will appear in the open and at that time the young will be 18 to 20 inches in height. The mother and young will then remain together roaming around the Arctic regions until some time during the next year. It would appear to be clear that by the second March or April the young bears would be 29 to under 36 inches in height. By height means measured with both feet or paws on the ground. Some time during the second year, if the mother bear mates again, the young will be driven away by her and the same cycle will then go on. The male bear or father bear does not see his offspring and has no part in their rearing or care. The polar bear is seen to be rather unsociable in general, although of course abnormal situations can and do show exceptions.

At the hearing before me, both counsel, by agreement, introduced through the witness Kwaterowski various publications relating to polar bear, published by such agencies as Canadian Wildlife Service, U.S. Department of the Interior and so on. To quote from one of these, *viz.* C. R. Harington on Polar Bears and their present status, reprinted from Canadian Audubon Magazine, Jan. - Feb. 1964:

"Understandably, polar bears have an ecological preference for areas that possess suitable combinations of pack ice (a hunting platform and protective cover), open water (where seals are able to reach the surface and are often abundant), and land (for denning, cover and auxiliary food supplies when seals are not available)." [P. 5].

"During April and May the young cubs follow their mothers closely while they prowl along leads and fractured ice margins in order to catch scent of snow-covered seal dens. The young seals, or 'whitecoats' constitute by far the greatest part of the polar bears' diet in spring." [P. 6].

Pasley Bay, the bay "at or near" which the offence is alleged to have been committed, is a fairly large bay on the west side of the Boothia Peninsula and faces onto Larsen Sound.

"13. The Commissioner in Council may, subject to the provisions of this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely,

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. . .

"(*q*) the preservation of game in the Territories."

The Administration of Justice sections are ss. 20 to 39 inclusive. Certain provincial courts are given concurrent jurisdiction with that of the Territorial Court by ss. 29 and 30. Aside from these there does not appear to be any attempt to permit the Commissioner in Council to exercise authority over the sea or sea-ice unless the definition contained in s. 2(*i*), quoted above, includes the sea or sea-ice.

Section 146 of the British North America Act, 1867 made provision for the admission of Rupert's Land and the North-western Territory to the Union.

On 23rd June 1870 Rupert's Land and the North-western Territory were united with the Dominion of Canada and the Parliament of Canada was given authority to legislate for their future welfare and good government. The Deed of Surrender covering the Hudson's Bay lands and which forms Schedule (C) to the Order-in-Council of 1870 (R.S.C. 1952, vol. VI, p. 6237) makes no reference to any islands commonly referred to as Arctic Islands except those areas that border on Hudson's Bay or Hudson's Straits and makes no reference to the west portion of Boothia Peninsula. There is considerable confusion in the detail shown on some of the official maps which antedate 1869. For example, a map produced during this trial, described as No. 542, House of Commons, 12th July 1850, does not show any detail for the west coast of Boothia Peninsula at all, and the general area is shown as British territory.

In 1880, when the remaining British possessions in North America were admitted to the Dominion of Canada, the language used is as follows:

"From and after the first day of September, 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any 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

(a) On the evidence before the Court there is no jurisdiction.

(b) In any event the evidence does not warrant a conviction.

I choose to deal with the defence (b) first.

Section 4(1) (*a*) of The Game Ordinance provides that:

"4. (1) No person shall (*a*) hunt any game" "except as authorized by this Ordinance or the regulations."

Section 23(1) of the Ordinance (re-en. 1961 [2nd sess.], c. 5) provides that a person mentioned in column 1 of Schedule B, subject to certain limitations therein described, may "carry on the activity set out in Column II of that Schedule in the area" and during the period set out in Column V of the same Schedule.

An examination of Schedule B provides that the holder of a general hunting licence may "hunt male polar bear and female polar bear without young" in the Franklin District. I would have thought that the person drafting the legislation could have perhaps used a more definitive phrase than "without young". What is a "young" polar bear? Is it a one-year old bear, a two-year old bear, or one that is not old or that has left its mother? It might have been better to have attempted to define the prohibition by age or height or length. However, I must deal with the present wording, I must avoid "a construction which would lead to anomalous or patently unreasonable results. . . . The function of the Court is interpretation, not legislation", Lord Greene in *Rex v. Mohindar Singh et al.*, [1950] A.C. 345, 10 C.R. 454, [1950] 2 W.W.R. 835 at 843.

In the view of the facts that I have taken here I am satisfied that the accused knew these were the very bear they were not to shoot. Accordingly, I find against the accused and in favour of the Crown in respect to this defence.

Defence (a) took the line that the offence took place offshore on the sea-ice and that therefore this Court has no jurisdiction to entertain the case. The question of situs of a crime in respect to jurisdiction is a question of law for the Court to decide with consideration of the evidence as needed: *Balcombe v. The Queen*, [1954] S.C.R. 303, 110 C.C.C. 146.

In a speech in the House of Commons in 1953, the then Prime Minister St. Laurent stated: "We must leave no doubt

went along with and was part of whatever title passed from the Queen to the Dominion of Canada in 1870 and 1880. If it should happen that the recognition of this jurisdiction over the sea-ice has only come in recent times as a result of the comity of nations, or as the result of the activities of the Government of Canada in its exercising of sovereignty in these areas, then it still remains that the Parliament of Canada in 1952 had to have intended to include the whole area in its definition of "Territories". In s. 2(*i*) the phrase "all that part of Canada north of the Sixtieth Parallel" must include the sea-ice off Pasley Bay, as Pasley Bay is in this area. I conclude therefore that the definition in no wise restricts "Territories" to land only as distinct from "land" in the larger sense. It may well be that the change in wording here to the more general description was deliberate with the above result as the object.

In the result, therefore, it follows that I find this Court has jurisdiction and accordingly the accused is found guilty as charged.

I do not propose sentencing until I have heard counsel. In this respect I make the observation that I regret having to find an Eskimo guilty of a game offence such as this. Apparently the Game Department, through no negligence on their part, have found it difficult, if not almost impossible, to give adequate education and instruction to the native people in such remote areas as Spence Bay. To me game enforcement of this kind is a matter of education rather than policing. We all know the polar bear should be protected but the Eskimo living in the limited horizon of his harsh world knows only that the polar bear is to be hunted for food and for the money the hide will produce.

I wish to thank both counsel for their assistance in this case.

MANITOBA COURT OF APPEAL

Smith C.J.M., Freedman and Dickson JJ.A.

Regina v. Vogelle and Reid

Stolen goods — Having in possession property known to have been obtained by commission in Canada of an offence — Owner of property unknown — Necessity for direct evidence of theft — No evidence that theft took place "in Canada" — Doctrine of

miles from the situs of the Kaotok offence and 200 miles is of no real consequence in this large territory.

Reference should be made to s. 10 of the Territorial Sea and Fishing Zones Act (Can.), 1964-65, c. 22, wherein s. 420 of the Criminal Code was amended to give the Court jurisdiction to try offences committed on the territorial sea. Sections 2, 3, 4, 5 and 6 of the same statute are of interest in this respect as well.

If this was all there was to it I would have no hesitation in holding that the Court had jurisdiction even where, as here, the offence was committed on the sea-ice. Counsel for the defence, however, insists that even if the situs of the offence is within Canada and the Court has jurisdiction to hear the case, none the less, because The Game Ordinance is not a statute passed by the Canadian Government but rather one passed by the Commissioner in Council of the Northwest Territories, the Court is without jurisdiction. The final submission here is that in the absence of legislative authority in the Northwest Territories Act or some such federal statute, The Game Ordinance has no application below the low-water mark or, to put it another way, cannot apply to an act committed on the sea-ice or anywhere offshore. The recent decision of the Supreme Court of Canada, *Re Offshore Mineral Rights of British Columbia,* [1967] S.C.R. 792, 62 W.W.R. 21, 65 D.L.R. (2d) 353, is of interest here to the extent it is applicable to the facts of the present case. It becomes necessary now to examine the extra-territorial effect, if any, of The Game Ordinance.

Section 3 of The Game Ordinance provides that the Ordinance "applies to all the Territories except Wood Buffalo National Park".

Section 2(*i*) of the Northwest Territories Act contains the definition of "Territories":

"2. (*i*) 'Territories' means the Northwest Territories which comprise

"(i) all that part of Canada north of the Sixtieth Parallel of North Latitude, except the portions thereof that are within the Yukon Territory, the Province of Quebec, or the Province of Newfoundland."

Section 13 of the same Act outlines the authority to legislate:

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APPEAL by way of stated case from the judgment of Sanders, P.M., acquitting the accused, a Stoney Indian of two charges and convicting him of another charge under the Game Act of Alberta. Affirmed as to acquittals. Reversed as to conviction.

H. J. Wilson, for the Crown; *M. B. Peacock*, for accused.

CLARKE and MITCHELL, JJ.A., concur with MCGILLIVRAY, J.A.

LUNNEY, J.A.:—This appeal is by way of stated case from the judgment of Col. G. E. Sanders, P.M., in connection with a number of charges against a Stoney Indian, relating to alleged infraction of the Game Act, R.S.A. 1922, c. 70. The Indian, Wm. Wesley, was charged:—

(1) That he did on December 10, hunt and kill one male deer having horns or antlers less than 4" in length. On this charge he was convicted.

(2) That he did hunt the said deer without having a licence. On this charge he was acquitted.

(3) That he did hunt the said deer with dogs. On this charge he was acquitted, all of these alleged offences being in contravention of the provisions of the Game Act.

Admissions were made that the alleged offences took place on unoccupied Crown land, that the accused was an Indian and a member of the Stoney Band, whose reserve is at Morley, Alta., that he did not have a big game licence and that the carcase of the deer killed was used for food.

The general issue raised by this appeal is the question whether or not a treaty Indian is bound by the provisions of the Game Act of Alberta.

Special provisions have been made from time to time in regard to Indians, by way of direct treaty and by way of legislation. The most recent legislation on the matter is found in the Alberta Natural Resources Act, 1930 (Alta.), c. 21, respecting the transfer of the natural resources of Alberta from the Dominion of Canada to the Province. Section 12 of the Memorandum of Agreement between the two Governments provides:—

"12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that

being in force in the said Dominion, in so far as such laws may be applicable thereto." (R.S.C. 1952, vol. VI, p. 6281).

In the first Northwest Territories Act, R.S.C. 1906, c. 62, which followed the transfer of the above lands, the definition is:

"2 (*a*) 'Territories' means the Northwest Territories which comprise the Territories formerly known as Rupert's Land and the Northwestern Territory, except such portions thereof as form the provinces of Manitoba, Saskatchewan and Alberta and the Yukon Territory, together with all British territories and possessions in North America and all islands adjacent thereto, not included within any province, except the colony of Newfoundland and its dependencies."

This definition uses almost the same language as is found in the two Orders-in-Council discussed above.

Finally, on 1st January 1920, the Northwest Territories was, by Order-in-Council P.C. No. 655, dated 16th March 1918, divided into three "Provisional Districts, namely, Mackenzie, Keewatin and Franklin, according to the description and map annexed hereto".

Counsel for the defence takes the position that land, and land only was passed on to and became part of the Dominion of Canada by the chain of transfers recited above.

A great deal therefore depends on the meaning to be put to the definition of "Territories" contained in s. 2(*i*) of the present Northwest Territories Act. When it defines "Territories" to include "all that part of Canada north of the Sixtieth Parallel of North Latitude" does it purport to include the waters and where appropriate the sea-ice in between the islands, or the continent and the islands, or does it only embrace the land area itself?

If the first interpretation governs, then it follows that the Commissioner in Council, by virtue of the powers given to him by s. 13, has the power to legislate in respect to game on the sea-ice or on the waters, frozen or otherwise, in between. If the second interpretation applies, then The Game Ordinance can have no effect off the land itself.

I have already found that the sea-ice, extending off from the land, is within the jurisdiction of the Government of Canada. If I am right in my reasoning here then it must surely follow that this attribute of land, if it can be so described,

in Correspondence Reports of the Minister of Justice and Orders in Council upon Dominion and provincial legislation, p. 1254. A portion of the report reads:—

"Prior to the acquisition of the North-West Territories by the Dominion of Canada the whole country with the exception of a small area, had never been surrendered by the Indians inhabiting the same. At the present time, however, almost all the territory south of the 52nd parallel of north latitude, has been divested of the Indian title by the operation of treaties known as Nos. 2, 4, 6 and 7. Each of these treaties, with the exception of No. 2, contains a provision guaranteeing to the Indians certain rights of fishing and hunting over the surrendered territory.

"Treaties Nos. 4 and 7 contain the following covenant:—

"And further Her Majesty agrees that her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, or other purposes, under grant or other right given by Her Majesty's said government.

"Treaties Nos. 5 and 6 contain the following covenant:—

"Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her government of the Dominion of Canada, and saving and excepting such treaties 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.

"It will be observed that in the treaties Nos. 4 and 7, the right of regulating the hunting and fishing is vested in 'the government of the country, acting under the authority of Her Majesty, whereas in Treaties Nos. 5 and 6 such regulations are to be made by the government of the Dominion of Canada.

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to carry out such contracts and arrangements in accordance with the terms thereof. I cannot think that this interpretation can conceivably involve the yielding up of legislative power which the Province enjoyed before the making of the agreement.

It follows from what I have said that in my opinion the Act in question does not alter the terms of the lease, contrary to s. 2 of the agreement and that subject to what I have said as to ss. 20, 21 and 22, must be held to be within the legislative competency of the provincial Legislature and applicable to the lands of the appellants within the conservation area.

In the result the judgment is varied so as to declare that ss. 20, 21 and 22 of the Act are *ultra vires* of the provincial Legislature; in all other respects the judgment is affirmed.

The appellants are to have one third of the costs of the action and of the appeal, exclusive of the cost of preparation of the appeal books.

The respondents are to have two thirds of the costs of the action and of the appeal.

The one set of costs is to be set off against the other.

Appeal allowed in part.

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Alberta Supreme Court, Appellate Division, Clarke, Mitchell, Lunney and McGillivray, JJ.A. June 6, 1932.

Indians—Hunting game in unoccupied Crown lands in Alberta—Application of provincial Game Act—Whether right restricted by.

By virtue of s. 12 of the Statutory Agreement between the Dominion and the Province of Alberta confirmed by the B.N.A. Act, 1930, and dealing with the transfer of the Public Domain to the Province Indians in the Province hunting for food may kill all kinds of wild animals regardless of age or size wherever found on unoccupied Crown lands or other lands to which they have a right of access at all seasons and may hunt such animals with dogs or otherwise as they see fit without having a provincial license. Assuming that such a construction involves an inconsistency between the first part of that section whereby provincial game laws are to apply to the Indians and the proviso thereto as to Indians hunting for food regardless of the restrictions in the provincial Game Act, R.S.A. 1922, c. 70, a consideration of the history and documents relative to the rights of Indians with respect to hunting the purpose of the proviso was to assure to the Indians covered by the section an unrestricted right to hunt for food in the places described in the section and that the apparent ambiguity should be determined accordingly.

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By s. 69 of the Indian Act, R.S.C. 1927, c. 98, provision is made that:—

"The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient." The Superintendent General is the Minister of the Interior.

In the result I would dismiss the appeals from the dismissals of the charges before the Magistrate, allow the appeal from the conviction by the Magistrate and quash the conviction. I would allow costs to the respondent, Wm. Wesley, in the two cases in which he was acquitted by the Magistrate and to the applicant, Wm. Wesley, in the case in which he was convicted by the Magistrate.

McGILLIVRAY, J.A.:—The accused Wm. Wesley was charged before Sanders, P.M., with having committed three offences. First that he hunted and killed a deer without having a provincial license so to do, contrary to s. 17 of the Game Act; second that he used dogs to hunt big game contrary to s. 16 of the Game Act; and third that he hunted and killed one male deer having horns or antlers less than 4" in length, contrary to s. 4(*e*) of the Game Act.

As to the first charge the Magistrate held that the accused was hunting for food when he killed this deer and so was not required to have a license. As to the second charge the Magistrate held that the accused was not hunting with dogs as alleged. On the third charge the Magistrate yielded to the argument of Crown counsel that "animals whose destruction is prohibited (by the provincial Game Act) cannot be classed as game, and are, therefore, immune from Indians as well as whites."

In the result on the two charges first mentioned the accused was acquitted. On the last mentioned charge he was convicted and a fine of $10 and costs was imposed, or in default of payment, 6 weeks' imprisonment.

These three cases come before this division on cases stated by the Police Magistrate.

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the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

It is argued by counsel for the applicant that this Memorandum of Agreement does not alter the law applicable to Indians, and expressly provides that the game laws shall apply to Indians within the Province. I am of opinion that the Memorandum did not, nor was there any intention that it should, alter the law applicable to Indians. It did emphasize the right of Indians, and provided for the continuance of that right "of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians have a right of access."

Somewhat similar provision is made for residents of certain portions of the Province under the provisions of the Game Act. Section 37 of the Game Act, is:—

"Any person who is resident of that portion of the Province lying to the north of the fifty-fifth parallel of north latitude and who is exempt from the requirements of section 20 hereof, may, when necessary so to do to provide food for himself and family, hunt and kill big game (other than buffalo and elk) and scoters (commonly called 'black duck') in such portion of the Province.

"Provided, however, that any game so taken or killed shall not be sold or trafficked in."

Section 20 is:—"No person, a resident of the Province, shall hunt, trap, take, shoot at, wound or kill any game bird without having in his possession a licence duly issued to him so to do, which shall be known as a resident's bird game licence:

"Provided, however, that the provisions of this section shall not apply to any farmer or member of his family residing with him upon his farm, nor to those residents of the Province residing to the north of the fifty-fifth parallel of north latitude."

The question came up squarely in 1890 in reference to a proposed Game Ordinance of the North-West Territories. The report of Sir John Thompson, then Minister of Justice, recommending that the Ordinance in question be disallowed is found

he is hunting for food, on unoccupied Crown lands or other lands to which he has a right of access.

In applying the rule of construction that Acts of Parliament are to be construed according to the intent of the Parliament which passed the Act, one experiences little difficulty if the words of the statute under consideration are precise and unambiguous because the expounding of the words in their ordinary sense gives the intention of Parliament.

It seems to me that the language of s. 12 is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the game laws of the Province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word "game" in its broadest sense, at all seasons on unoccupied Crown lands or other land to which they may have a right of access.

With respect it seems to me that Crown counsel gives a fantastic meaning to the word "game" and that he over emphasizes the words "all seasons" and underestimates the value of the words "for food."

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

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"The undersigned is inclined to the opinion that the authority referred to in both cases is the Dominion government or parliament, but whatever doubts there may be as to the meaning of the phrase 'the government of the country acting under the authority of Her Majesty' there can be none as to the meaning of the phrase 'Her government of the Dominion of Canada,' and that the treaties contained in these words, purport to secure to the Indians the right to pursue their avocations of hunting and fishing, subject to any regulations made by your Excellency in Council.

"The Ordinance now under review purports to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to.

"The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of your Excellency's government, to see that none of the treaty rights of the Indians are infringed without their concurrence."

Counsel for the applicant argues that if the provisoes in the Memorandum of Agreement between the Dominion and the Province is given the wide construction that Indians are entitled to hunt any animal at any season of the year, it renders nugatory the provision that they shall be subject to the game laws of the Province. As I have pointed out, the Legislature, in making special provisions for residents north of the fifty-fifth parallel, realized that there was a difference in hunting from the viewpoint of a sportsman and from the viewpoint of a man seeking food which is necessary to his maintenance.

The treaties with the Indians and the subsequent legislation treat with the rights of Indians to hunt, and until definite legislation is passed by a competent body, the Indian is, in my opinion, entitled to hunt on "all unoccupied Crown lands and on any other lands" to which he may have a right of access.

If it should be necessary or desirable to curtail the hunting rights of the Indian, provision has been made to that effect.

kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no license beyond the language of s. 12 to entitle them so to do.

In the view I take of the case nothing more need be said to justify accepting the submissions of counsel for the accused before referred to in their entirety. But counsel for the Crown contends that to give to s. 12 the construction which I have done is to hold in effect that there is an inconsistency between the first part of the section and the proviso at the end, and in support of this view he urges that it cannot be said that the game laws of the Province apply to Indians if they may hunt for food regardless of the prohibitions and restrictions provided in the provincial Game Act.

From this premise he argues that the Court should accept his construction of the section because it is the duty of the Court so far as possible to construe every part of an enactment so as to be consistent with every other part which it does not in express terms modify or repeal.

This submission may be simply answered by saying that an exception out of an enactment does not necessarily provide inconsistency nor repugnancy. Assuming however that there is an apparent inconsistency and that the language of the section as a whole is capable of two meanings then it may be of something more than historical interest to consider what have been the rights of Indians with respect to hunting in this Dominion prior to the statutory confirmation of the agreement in question of which this s. 12 is a part. *The Queen* v. *Bishop of London* (1889), 24 Q.B.D. 213; *Philipps* v. *Rees* (1889), 24 Q.B.D. 17; *A.-G.* v. *Metropolitan Electric Supply Co. Ltd.*, [1905] 1 Ch. 24, at p. 31; *Wear River Com'rs* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, at pp. 365, 369; *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98, at p. 105.

As a starting point it is interesting to notice that Art. 40 of the Articles of Capitulation signed at Montreal in 1760, reads as follows:—

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All of these alleged violations of the Game Act relate to the killing of the one deer on December 10, 1931.

It is not in dispute that the accused killed the animal in question at the time and place mentioned in the charges.

It is common ground that the accused is a Stoney Indian entitled to the benefits of the Articles of Treaty made between the Queen and the Black Feet, Stoney and other Indians on September 22, 1877.

This treaty and the proclamation and Order in Council with exhibits thereto to which I shall refer, were by consent made part of the case.

It is admitted that the land on which the accused was hunting when he killed the deer is unoccupied Crown land; that this land is a part of the lands granted to the Hudson's Bay Co. in the year 1670, and part of the lands covered by the Indian Treaty mentioned.

In my view this case falls to be decided upon the construction to be given to s. 12 of the Statutory Agreement set forth in the Alberta Natural Resources Act, 1930 (Alta.), c. 21.

This Agreement was approved by the Parliament of Canada and the provincial Legislature and confirmed by an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland, *viz.*, the B.N.A. Act, 1930, in which last-mentioned Act this Agreement is declared to have the force of law notwithstanding anything in the B.N.A. Act, 1867, or any amending Act or any Act of the Parliament of Canada or any Order in Council or any terms or conditions of union made or approved under any such Act.

Section 12 reads as quoted *supra*.

Counsel for the Crown repeats the argument made before the Magistrate to which I have alluded and further contends that the Court should interpret this section so as to give to it the meaning that while Indians are not bound by seasonal restrictions when hunting for food, with this exception, they are subject to all the prohibitions, restrictions and regulations which the Game Act provides. Counsel for the accused contends that having regard to the proviso at the end of this section an Indian is entitled to hunt any wild animal of any age at any season of the year in any manner that he sees fit provided always that

of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convineed of our Justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but if at any time any of the said Indians should be inelined to dispose of the said lands, the same shall be purehased only for us, in our name, in some publie meeting or assembly of the said Indians to be held for that purpose by the Governor or Commander-in-Chief of our eolony respeetively within which they shall lie; and in case they shall lie within the limits of any proprietaries conformable to such directions and instruetions as we or they think proper to give for that purpose."

This proclamation insofar as it deals with Indian rights was the subjeet of eonsideration in the case *St. Catherine's Milling & Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46. I quote from Lord Watson's judgment in this ease:—

"The tenure of the Indians was a personal and usufruetuary right, depending upon the good will of the Sovereign . . . ." (p. 54).

"There was a great deal of learned discussion at the Bar with respeet to the preeise quality of the Indian right, but their Lordships do not eonsider it necessary to express any opinion upon the point. It appears to them to be suffieient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished. . . ." (p. 55).

"The Crown has all along had a present proprietary estate in the land, upon whieh the Indian title was a mere burden . . ." (p. 58).

"The faet that the power of legislating for Indians, and for lands whieh are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree incon-

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In *Mullins* v. *Treasurer of Surrey* (1880), 5 Q.B.D. 170, at p. 173, Lush, J., said:—"When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso."

In Craies' Hardcastle's Statute Law, 3rd ed., at pp. 194-5, the author says:—"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

It seems to me that the enacting part of the section subjecting Indians to the game laws of the Province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the Province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access.

With reference to the argument that "animals whose destruction is prohibited cannot be classed as game," I need only say that there appears to be no authority for such a proposition and in my judgment there is no justification for assuming that the word game as used in s. 12 is intended to be read in any other than its ordinary and natural meaning. I cannot think that a deer with antlers of a certain length should be considered game while a deer with antlers of lesser length should be deemed not to be game. I cannot think that wild animals are to be considered game in one Province and not in another or game in one year and not another. At any rate in the absence of clear statutory direction I think that a Court should not so hold. Neither s. 12 nor the Game Act provide support for such a contention.

In Murray's New English Dictionary "Game" is defined as follows:—"Wild animals or birds such as are pursued, caught or killed in the chase."

In the result I hold that in turning over to Alberta the Public Domain of the Province the Dominion has sought and the Province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may

address is Schedule A to the Order in Council mentioned) with respect to the Hudson's Bay Company's deed of surrender, 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."

In Schedule B the following resolution is to be found:—"That 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 interest and well being are involved in the transfer."

Whatever the rights of the Stoney and other Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the Treaty to which I shall next allude, the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the *St. Catherine's Milling* case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title.

The Treaty made with the once powerful nation of the Assiniboines or Stonies on September 22, 1877, reads in part as follows:—

"And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say . . . ."

(b) while Mr. Sault stated that the Ojibwa were known to travel and to hunt and fish over all of the territories occupied by them, Jenness concluded that each band had its own hunting and fishing grounds and that members of other Ojibwa bands might use them temporarily with the consent of the owner band, and

(c) while Mr. Sault appeared to state that it was the aboriginal right of any Indian to fish anywhere in Canada, Jenness concludes that a local band opposed the invasion upon their hunting and fishing grounds by natives living outside the tribe.

Because of the significance of these differences as they relate to the theory of the prosecutor and of the defendant, I reiterate my acceptance of Jenness' statements.

The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada — in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands: *per* Johnson, J.A., in *R. v. Sikyea*, [1964] 2 C.C.C. 325 at pp. 327-8, 43 D.L.R. (2d) 150 at p. 152, 43 C.R. 83, and affirmed by the Supreme Court of Canada in [1964] S.C.R. 642 at p. 646, [1965] 2 C.C.C. 129 at p. 132, 50 D.L.R. (2d) 80 at p. 84, and by Hall, J., in *Calder et al. v. A.-G. B.C., supra*, at pp. 397-8 S.C.R., pp. 205-6 D.L.R.

This right was affirmed and reserved unto them by the Royal Proclamation of 1763 which has been carried forward into s. 91(24) of the *British North America Act, 1867*, and later affirmed, assured and regulated by s. 88 of the *Indian Act*. See, generally, *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), and more particularly the judgment of Norris, J.A., starting at p. 625 *et seq.*

Section 88 of the *Indian Act* provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Of this section Martland, J., speaking for the majority of the Court in *R. v. George*, [1966] S.C.R. 267 at p. 280, [1966] 3 C.C.C. 137 at p. 150, 55 D.L.R. (2d) 386 at pp. 397-8 (S.C.C.), said:

> I understand the object and intent of that section is to make

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Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that Act, do not apply.

In considering the right of an Indian as defined in s. 2(1) of the *Indian Act* to exercise his aboriginal right to hunt and to fish in any particular part of Canada, regard must be had to the particular tribe or band and to the particular territory over which such right was reserved, affirmed, allowed or granted and to any conditions or restrictions that may have been imposed by the treaty in question: *R. v. Syliboy* (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 124 C.C.C. 110, 43 M.P.R. 101 (N.B.C.A.); *R. v. White and Bob, supra*, affirmed by the Supreme Court of Canada, [1965] S.C.R. vi, 52 D.L.R. 481*n*; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485 (B.C.C.A.); *R. v. Moses, supra*; *R. v. Francis*, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249 (N.B.C.A.); *Calder v. A.-G. B.C., supra*; *R. v. Kruger and Manuel, supra* (B.C. Co.Ct.); *R. v. Derriksan* (1974), 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56 (B.C.S.C.) [affirmed 24 C.C.C. (2d) 101, [1975] 4 W.W.R. 761]; *R. v. Dennis and Dennis* (1974), 22 C.C.C. (2d) 152, 56 D.L.R. (3d) 379, 28 C.R.N.S. 268 (B.C. Prov.Ct.); *The Pas Merchants Ltd. v. The Queen* (1975), 50 D.L.R. (3d) 154, [1974] 2 F.C. 376 (Fed.Ct.).

In *R. v. Syliboy*, the defendant, who was the Grand Chief of the Mick Macks of Nova Scotia and an inhabitant of Cape Breton Island, was convicted under the *Lands and Forests Act* of Nova Scotia of a hunting offence committed on Cape Breton Island. He claimed that as an Indian he was not bound by the provisions of that Act as he had by treaty the right to hunt and trap at all times.

The treaty in question was made with the Chief "of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province" (*i.e.*, Nova Scotia proper) and thereafter reference was made to "the said Tribe of Indians" (*i.e.*, the tribe inhabiting the eastern coast of Nova Scotia) who "shall not be hindered from but have free liberty to hunt and fish as usual" and it was made not only with the signatories thereto but "with their heirs, and the heirs of their heirs forever".

For the defendant it was submitted that the Mick Mack Tribe throughout Nova Scotia, including Cape Breton Island, was one and indivisible; that the treaty was made with the tribe and that it was of general and not of local application.

Of this submission Patterson, Acting Co.Ct.J., in upholding the conviction, said at p. 391 C.C.C., p. 309 D.L.R.:

> In the face of this evidence there can be no doubt, I think, that the Treaty relied upon was not made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie, and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

The Court there held that the treaty did not extend to Cape Breton Indians and that by reason thereof they did not acquire any rights to hunt under the treaty contrary to the game laws of Nova Scotia.

This decision was referred to, approved and followed in *R. v. Simon* in relation to another treaty.

Of it the Court said, at pp. 114-5:

> There is nothing before us to indicate to what Nations the Indians concerned in the 1725 Treaty belonged nor to show that the Micmacs, or any particular tribe of them, were involved or that the band of Micmacs on the Big Cove Reservation, of which the appellant is a member, are natural descendants of any of the Eastern Indians with whom the Treaty was made. Likewise the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and any of the Indian Tribes who, according to art. 1 of the 1752 Treaty, had lately at Halifax and the St. Johns River ratified the earlier Treaty.
>
> On the evidence the appellant has failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s. 87 of the *Indian Act*. In consequence, it is unnecessary for us to attempt any definition of the privileges to which legislative countenance has been so given. The proviso found in the section invites elucidation. The task of determining its scope and effect is one which, in our respectful opinion, could fittingly be undertaken by the Executive Authority.

In *R. v. White and Bob* the Court held that the Royal Proclamation of 1763 was a treaty within the meaning of s. 88 of the *Indian Act*; that it applied to Vancouver Island thereby confirming the aboriginal rights of the Indian to hunt and to fish on the Island and that such right could only be extinguished before Confederation by surrender to the British Crown and after Confederation by surrender to the Dominion Government, which the Indians in question had not

done and that by reason thereof the Indians on Vancouver Island could exercise their aboriginal rights.

In *Calder v. A.-G. B.C.*, the Supreme Court of Canada, because of a split decision, affirmed the decision of the British Columbia Court of Appeal in 13 D.L.R. (2d) 64, 74 W.W.R. 481, which held that the Royal Proclamation of 1763 did not apply to the lands historically occupied by the tribe in question in the absence of any subsequent treaty or federal legislation extending the benefits of the Proclamation to such tribe.

R. v. Discon and Baker involved two members of the Band of the Squamish Indian Reserve situated in North Vancouver, B.C., who were found hunting on unoccupied, reforested bush land outside of an Indian reservation.

It was there held that the Royal Proclamation of 1763 preserved the hunting rights of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection" and because the Squamish Indians did not come within this category at the date of the Proclamation and there was no reservation of aboriginal hunting rights in favour of the Squamish Indians in either a written treaty or a statute the two Indian hunters were bound by the gaming laws of the Province by virtue of s. 88 of the *Indian Act*.

In concluding his judgment Schultz, Co.Ct.J., said at p. 629 D.L.R., p. 496 W.W.R.:

> This judgment relates only to the appellants, who are Squamish Indians, and is not to be interpreted as declaratory of the legal status of members of other tribes of Indians in the province of British Columbia.

In *R. v. Moses* the Court held that in the absence of federal legislation abrogating the hunting rights granted thereby, a registered member of a band covered by the Robinson Treaty of 1850 with the Lake Huron Ojibwa who was entitled to occupy the reserve established thereby for his band had the right to hunt on unoccupied Crown lands in territory covered by the treaty notwithstanding that he lived on another reserve established by the treaty.

Little, D.C.J., said at p. 317 O.R., pp. 359-60 C.C.C., p. 53 D.L.R.:

> Furthermore, it matters not that Moses lives on another reserve. A member of one band may live on the reserve of another band provided he has permission from those governing the reserve on which he lives. The word "occupied" in the first paragraph of the treaty has been treated as meaning "set aside for their use and benefit" and not necessarily physically occupied.

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to carry out such contracts and arrangements in accordance with the terms thereof. I cannot think that this interpretation can conceivably involve the yielding up of legislative power which the Province enjoyed before the making of the agreement.

It follows from what I have said that in my opinion the Act in question does not alter the terms of the lease, contrary to s. 2 of the agreement and that subject to what I have said as to ss. 20, 21 and 22, must be held to be within the legislative competency of the provincial Legislature and applicable to the lands of the appellants within the conservation area.

In the result the judgment is varied so as to declare that ss. 20, 21 and 22 of the Act are *ultra vires* of the provincial Legislature; in all other respects the judgment is affirmed.

The appellants are to have one third of the costs of the action and of the appeal, exclusive of the cost of preparation of the appeal books.

The respondents are to have two thirds of the costs of the action and of the appeal.

The one set of costs is to be set off against the other.

Appeal allowed in part.

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Alberta Supreme Court, Appellate Division, Clarke, Mitchell, Lunney and McGillivray, JJ.A. June 6, 1932.

Indians—Hunting game in unoccupied Crown lands in Alberta—Application of provincial Game Act—Whether right restricted by.

By virtue of s. 12 of the Statutory Agreement between the Dominion and the Province of Alberta confirmed by the B.N.A. Act, 1930, and dealing with the transfer of the Public Domain to the Province Indians in the Province hunting for food may kill all kinds of wild animals regardless of age or size wherever found on unoccupied Crown lands or other lands to which they have a right of access at all seasons and may hunt such animals with dogs or otherwise as they see fit without having a provincial license. Assuming that such a construction involves an inconsistency between the first part of that section whereby provincial game laws are to apply to the Indians and the proviso thereto as to Indians hunting for food regardless of the restrictions in the provincial Game Act, R.S.A. 1922, c. 70, a consideration of the history and documents relative to the rights of Indians with respect to hunting the purpose of the proviso was to assure to the Indians covered by the section an unrestricted right to hunt for food in the places described in the section and that the apparent ambiguity should be determined accordingly.

By s. 69 of the Indian Act, R.S.C. 1927, c. 98, provision is made that:—

"The Superintendent General may, from time to time, by public notice, declare that, on and after a day therein named, the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient." The Superintendent General is the Minister of the Interior.

In the result I would dismiss the appeals from the dismissals of the charges before the Magistrate, allow the appeal from the conviction by the Magistrate and quash the conviction. I would allow costs to the respondent, Wm. Wesley, in the two cases in which he was acquitted by the Magistrate and to the applicant, Wm. Wesley, in the case in which he was convicted by the Magistrate.

McGILLIVRAY, J.A.:—The accused Wm. Wesley was charged before Sanders, P.M., with having committed three offences. First that he hunted and killed a deer without having a provincial license so to do, contrary to s. 17 of the Game Act; second that he used dogs to hunt big game contrary to s. 16 of the Game Act; and third that he hunted and killed one male deer having horns or antlers less than 4" in length, contrary to s. 4(*e*) of the Game Act.

As to the first charge the Magistrate held that the accused was hunting for food when he killed this deer and so was not required to have a license. As to the second charge the Magistrate held that the accused was not hunting with dogs as alleged. On the third charge the Magistrate yielded to the argument of Crown counsel that "animals whose destruction is prohibited (by the provincial Game Act) cannot be classed as game, and are, therefore, immune from Indians as well as whites."

In the result on the two charges first mentioned the accused was acquitted. On the last mentioned charge he was convicted and a fine of $10 and costs was imposed, or in default of payment, 6 weeks' imprisonment.

These three cases come before this division on cases stated by the Police Magistrate.

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the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

It is argued by counsel for the applicant that this Memorandum of Agreement does not alter the law applicable to Indians, and expressly provides that the game laws shall apply to Indians within the Province. I am of opinion that the Memorandum did not, nor was there any intention that it should, alter the law applicable to Indians. It did emphasize the right of Indians, and provided for the continuance of that right "of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians have a right of access."

Somewhat similar provision is made for residents of certain portions of the Province under the provisions of the Game Act. Section 37 of the Game Act, is:—

"Any person who is resident of that portion of the Province lying to the north of the fifty-fifth parallel of north latitude and who is exempt from the requirements of section 20 hereof, may, when necessary so to do to provide food for himself and family, hunt and kill big game (other than buffalo and elk) and scoters (commonly called 'black duck') in such portion of the Province.

"Provided, however, that any game so taken or killed shall not be sold or trafficked in."

Section 20 is:—"No person, a resident of the Province, shall hunt, trap, take, shoot at, wound or kill any game bird without having in his possession a licence duly issued to him so to do, which shall be known as a resident's bird game licence:

"Provided, however, that the provisions of this section shall not apply to any farmer or member of his family residing with him upon his farm, nor to those residents of the Province residing to the north of the fifty-fifth parallel of north latitude."

The question came up squarely in 1890 in reference to a proposed Game Ordinance of the North-West Territories. The report of Sir John Thompson, then Minister of Justice, recommending that the Ordinance in question be disallowed is found

he is hunting for food, on unoccupied Crown lands or other lands to which he has a right of access.

In applying the rule of construction that Acts of Parliament are to be construed according to the intent of the Parliament which passed the Act, one experiences little difficulty if the words of the statute under consideration are precise and unambiguous because the expounding of the words in their ordinary sense gives the intention of Parliament.

It seems to me that the language of s. 12 is unambiguous and the intention of Parliament to be gathered therefrom clearly is to assure to the Indians a supply of game in the future for their support and subsistence by requiring them to comply with the game laws of the Province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game, using the word "game" in its broadest sense, at all seasons on unoccupied Crown lands or other land to which they may have a right of access.

With respect it seems to me that Crown counsel gives a fantastic meaning to the word "game" and that he over emphasizes the words "all seasons" and underestimates the value of the words "for food."

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food "out of season" and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial.

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"The undersigned is inclined to the opinion that the authority referred to in both cases is the Dominion government or parliament, but whatever doubts there may be as to the meaning of the phrase 'the government of the country acting under the authority of Her Majesty' there can be none as to the meaning of the phrase 'Her government of the Dominion of Canada,' and that the treaties contained in these words, purport to secure to the Indians the right to pursue their avocations of hunting and fishing, subject to any regulations made by your Excellency in Council.

"The Ordinance now under review purports to regulate and control the avocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treaties referred to.

"The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of your Excellency's government, to see that none of the treaty rights of the Indians are infringed without their concurrence."

Counsel for the applicant argues that if the provisoes in the Memorandum of Agreement between the Dominion and the Province is given the wide construction that Indians are entitled to hunt any animal at any season of the year, it renders nugatory the provision that they shall be subject to the game laws of the Province. As I have pointed out, the Legislature, in making special provisions for residents north of the fifty-fifth parallel, realized that there was a difference in hunting from the viewpoint of a sportsman and from the viewpoint of a man seeking food which is necessary to his maintenance.

The treaties with the Indians and the subsequent legislation treat with the rights of Indians to hunt, and until definite legislation is passed by a competent body, the Indian is, in my opinion, entitled to hunt on "all unoccupied Crown lands and on any other lands" to which he may have a right of access.

If it should be necessary or desirable to curtail the hunting rights of the Indian, provision has been made to that effect.

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kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access, at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no license beyond the language of s. 12 to entitle them so to do.

In the view I take of the case nothing more need be said to justify accepting the submissions of counsel for the accused before referred to in their entirety. But counsel for the Crown contends that to give to s. 12 the construction which I have done is to hold in effect that there is an inconsistency between the first part of the section and the proviso at the end, and in support of this view he urges that it cannot be said that the game laws of the Province apply to Indians if they may hunt for food regardless of the prohibitions and restrictions provided in the provincial Game Act.

From this premise he argues that the Court should accept his construction of the section because it is the duty of the Court so far as possible to construe every part of an enactment so as to be consistent with every other part which it does not in express terms modify or repeal.

This submission may be simply answered by saying that an exception out of an enactment does not necessarily provide inconsistency nor repugnancy. Assuming however that there is an apparent inconsistency and that the language of the section as a whole is capable of two meanings then it may be of something more than historical interest to consider what have been the rights of Indians with respect to hunting in this Dominion prior to the statutory confirmation of the agreement in question of which this s. 12 is a part. *The Queen* v. *Bishop of London* (1889), 24 Q.B.D. 213; *Philipps* v. *Rees* (1889), 24 Q.B.D. 17; *A.-G.* v. *Metropolitan Electric Supply Co. Ltd.*, [1905] 1 Ch. 24, at p. 31; *Wear River Com'rs* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, at pp. 365, 369; *Re Section 24 of the B.N.A. Act*, [1930] 1 D.L.R. 98, at p. 105.

As a starting point it is interesting to notice that Art. 40 of the Articles of Capitulation signed at Montreal in 1760, reads as follows:—

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All of these alleged violations of the Game Act relate to the killing of the one deer on December 10, 1931.

It is not in dispute that the accused killed the animal in question at the time and place mentioned in the charges.

It is common ground that the accused is a Stoney Indian entitled to the benefits of the Articles of Treaty made between the Queen and the Black Feet, Stoney and other Indians on September 22, 1877.

This treaty and the proclamation and Order in Council with exhibits thereto to which I shall refer, were by consent made part of the case.

It is admitted that the land on which the accused was hunting when he killed the deer is unoccupied Crown land; that this land is a part of the lands granted to the Hudson's Bay Co. in the year 1670, and part of the lands covered by the Indian Treaty mentioned.

In my view this case falls to be decided upon the construction to be given to s. 12 of the Statutory Agreement set forth in the Alberta Natural Resources Act, 1930 (Alta.), c. 21.

This Agreement was approved by the Parliament of Canada and the provincial Legislature and confirmed by an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland, *viz.*, the B.N.A. Act, 1930, in which last-mentioned Act this Agreement is declared to have the force of law notwithstanding anything in the B.N.A. Act, 1867, or any amending Act or any Act of the Parliament of Canada or any Order in Council or any terms or conditions of union made or approved under any such Act.

Section 12 reads as quoted *supra*.

Counsel for the Crown repeats the argument made before the Magistrate to which I have alluded and further contends that the Court should interpret this section so as to give to it the meaning that while Indians are not bound by seasonal restrictions when hunting for food, with this exception, they are subject to all the prohibitions, restrictions and regulations which the Game Act provides. Counsel for the accused contends that having regard to the proviso at the end of this section an Indian is entitled to hunt any wild animal of any age at any season of the year in any manner that he sees fit provided always that

of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name, in some public meeting or assembly of the said Indians to be held for that purpose by the Governor or Commander-in-Chief of our colony respectively within which they shall lie; and in case they shall lie within the limits of any proprietaries conformable to such directions and instructions as we or they think proper to give for that purpose."

This proclamation insofar as it deals with Indian rights was the subject of consideration in the case *St. Catherine's Milling & Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46. I quote from Lord Watson's judgment in this case:—

"The tenure of the Indians was a personal and usufructuary right, depending upon the good will of the Sovereign . . . ." (p. 54).

"There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished. . . ." (p. 55).

"The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden . . ." (p. 58).

"The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree incon-

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In *Mullins* v. *Treasurer of Surrey* (1880), 5 Q.B.D. 170, at p. 173, Lush, J., said:—"When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso."

In Craies' Hardcastle's Statute Law, 3rd ed., at pp. 194-5, the author says:—"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

It seems to me that the enacting part of the section subjecting Indians to the game laws of the Province in general terms is subject to a clear excepting and qualifying proviso in favour of Indians who are hunting for food to whom the game laws of the Province are not intended to apply when so engaged on unoccupied Crown lands or other lands to which they have a right of access.

With reference to the argument that "animals whose destruction is prohibited cannot be classed as game," I need only say that there appears to be no authority for such a proposition and in my judgment there is no justification for assuming that the word game as used in s. 12 is intended to be read in any other than its ordinary and natural meaning. I cannot think that a deer with antlers of a certain length should be considered game while a deer with antlers of lesser length should be deemed not to be game. I cannot think that wild animals are to be considered game in one Province and not in another or game in one year and not another. At any rate in the absence of clear statutory direction I think that a Court should not so hold. Neither s. 12 nor the Game Act provide support for such a contention.

In Murray's New English Dictionary "Game" is defined as follows:—"Wild animals or birds such as are pursued, caught or killed in the chase."

In the result I hold that in turning over to Alberta the Public Domain of the Province the Dominion has sought and the Province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may

address is Schedule A to the Order in Council mentioned) with respect to the Hudson's Bay Company's deed of surrender, 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."

In Schedule B the following resolution is to be found:—"That 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 interest and well being are involved in the transfer."

Whatever the rights of the Stoney and other Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the Treaty to which I shall next allude, the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the *St. Catherine's Milling* case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title.

The Treaty made with the once powerful nation of the Assiniboines or Stonies on September 22, 1877, reads in part as follows:—

"And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say . . . ."

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"The savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatsoever, for having carried arms and served His Most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries."

We next come to the Treaty of Paris in 1763, under which Canada was ceded to Great Britain. In the same year a royal proclamation was issued dividing the British possessions in America into separate Governments and defining the powers of each. Under this proclamation which has been spoken of as the Charter of Indian Rights the hunting rights of the Indians are strictly conserved, as the following extracts therefrom will serve to show.

"And whereas it is Just and Reasonable and Essential to our Interests and the Security of our Colonies that the several Nations or Tribes of Indians with whom we are connected and who live under Our protection should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds."

Here follows a declaration that no Governor shall grant warrants of survey or patents to such lands and then we have the following:—

"And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our Sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company; as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatsoever, or taking possession of any of the lands above reserved, without our especial leave or license for that purpose first obtained . . . ."

"And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice

to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.

In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:—

"I expect to listen to what you have to say to-day, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:—"The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up."

It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

In the case *A.-G.* v. *Metropolitan Electric Supply Co.*, 74 L.J. Ch. 145, at p. 150, Farwell, J., said:—

"I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co.* v. *Comptroller General of Patents, Designs, and Trade Marks*, [1898] [A.C. 571] referring to *Heydon's Case* (1584), [3 Co. Rep. 7*a*] 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the

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sistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title." (p. 59).

In the case of *Canada* v. *Ontario* (Indian Annuities), [1910] A.C. 637, Lord Loreburn, L.C., giving the judgment of the Judicial Committee, in speaking of the effect of the surrender of lands by the Indians by the treaty there in question, said that the lands "are released from the overlying Indian interest."

It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest.

But it is to be noticed in a consideration of the Indian title under this proclamation of 1763 that excluded from the lands reserved for the use of Indians, is the territory granted to the Hudson's Bay Co. in 1670, which as before stated includes the land with which we are concerned in this case.

There is no material before the Court upon which we can base a judicial opinion as to the position of the Indians inhabiting that great section of country granted to the Hudson's Bay Co. in consideration of the company yielding and paying two elk, and two black beavers as often as the Sovereign, his heirs or successors happened to enter into the territory granted; but this we do find in the Order in Council of June 23, 1870, admitting Rupert's Land and the North-Western Territory into the union (which followed upon the Rupert's Land Act, 1868 (Can.), c. 3) amongst the terms and conditions remaining to be performed by the Parliament of Canada in consideration of the company's deed of surrender, there is the following:—

"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."

We also find in the first address to Her Majesty from the Senate and the House of Commons of the Dominion, (which

forestall points that may depend upon entirely different circumstances when they come up for decision, is, in my opinion, unwise.

Appeal dismissed as to acquittals.

Allowed as to conviction.

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Re MOFFATT & CITY OF HAMILTON.

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Wentworth County Court, Ontario, Thomson, Co.Ct.J. November 14, 1932.

Taxes VI—Income tax — Exemption as "householder" — Right to, of married woman owning property and paying for upkeep—Assessment Act, R.S.O. 1927, c. 238, s. 4(22).

A married woman owning property and paying the taxes and general upkeep out of her own money may be considered a "householder" within the meaning of s. 4(22) of the Assessment Act so as to claim the exemption of $3,000.

APPEAL by the City of Hamilton from the judgment of the Court of Revision for Hamilton, allowing the claim of Mrs. A. Moffatt for an income exemption of $3,000 as a householder within the meaning of s. 4(22) of the Assessment Act, R.S.O. 1927, c. 238.

A. J. Polson, for appellant; *W. H. Fraser*, for respondent.

Mrs. Moffatt was originally assessed by the Assessment Commissioner of the City of Hamilton as the owner of 141 George St., and her husband, Ormond Moffatt, who resides with his wife on the premises, was assessed as tenant. Mrs. Moffatt was also assessed on an income of $2,880. Mrs. Moffatt owned and occupied the house 141 George St., both prior to her marriage in June, 1930, and since, and out of her own money she pays the taxes, municipal rates, insurance and general upkeep of the premises. The Court of Revision allowed her claim for income exemption as a "householder." Mrs. Moffatt also appealed on

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"To have and to hold the same to her Majesty the Queen and her successors forever:—And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her Government of Canada, or by any of Her Majesty's subjects duly authorized therefor by the said Government.

"It is also agreed between Her Majesty and her said Indians that reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families and that said reserves shall be located as follows, that is to say:—The next consideration which arises is as to the exact quality of the right of those Indians with whom a treaty was made."

Until the year 1871 the United States conceded to the Indian tribes the right to treat upon terms of national equality and numbers of treaties were entered into which were deemed to have the same dignity and effect as a treaty with a foreign nation. In the year 1871 this was changed by statute. In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can.* v. *A.-G. Ont.* (Indian Annuities case), [1897] A.C. 199, at p. 213.

Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines.

At the time of the making of this Indian Treaty it was of first class importance to Canada that the Indians who had become restless after the sway of the Hudson's Bay Co. had come

to an end, should become content and that such title or interest in land as they had should be peacefully surrendered to permit of settlement without hindrance of any kind. On the other hand it goes without saying that the Indians were greatly concerned with "their vocations of hunting" upon which they depended for their living.

In this connection it is of historical interest although of no assistance in the interpretation of the treaty, that Governor Laird who with Colonel Macleod negotiated this treaty, said to the Chiefs of the Indian tribes:—

"I expect to listen to what you have to say to-day, but first, I would explain that it is your privilege to hunt all over the prairies, and that should you desire to sell any portion of your land, or any coal or timber from off your reserves, the Government will see that you receive just and fair prices, and that you can rely on all the Queen's promises being fulfilled."

And again he said:—"The reserve will be given to you without depriving you of the privilege to hunt over the plains until the land be taken up."

It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.

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Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at."

If as Crown counsel contends, s. 12 taken as a whole gives rise to apparent inconsistency and is capable of two meanings then I still have no hesitation in saying in the light of all the external circumstances relative to Indian rights in this Dominion to which I have alluded, that the law makers in 1930 were in the making of this proviso, aiming at assuring to the Indians covered by the section, an unrestricted right to hunt for food in those unsettled places where game may be found, described in s. 12.

This does not in any wise imply that the Game Act of this Province is *ultra vires*. I merely hold that it has no application to Indians hunting for food in the places mentioned in this section.

It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our justice and determined resolution to remove all reasonable cause of discontent."

The two acquittals by the Magistrate are confirmed and the conviction by the Magistrate is set aside. The accused will have the costs of the appeals.

In the course of argument other questions were mooted as to the rights of Indians on the Indian Reserves. I decline the invitation of counsel for the accused to write a treatise upon this subject. This judgment must be treated as deciding nothing more than the points involved in the consideration of the three cases with which we are now concerned. In taking this attitude I have the comfort of knowing that the legal rights of the Stoney Indians will be watched with great zeal and advanced with great enthusiasm so long as Mr. Peacock, one of His Majesty's counsel learned in the law, continues to be a chief of that tribe, bearing the proud name of Chief Walking Bear. Whilst it might convenience him to have the Court at this time decide all questions affecting Indians, to attempt to

forestall points that may depend upon entirely different circumstances when they come up for decision, is, in my opinion, unwise.

Appeal dismissed as to acquittals.

Allowed as to conviction.

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accordingly allow the appeal of the Crown and restore the conviction and sentence of the learned Provincial Judge.

Appeal dismissed.

REGINA v. WESLEY

District Court of Algoma, Ontario, Vannini, D.C.J. April 29, 1975.

Indians — Aboriginal rights — Hunting on unoccupied Crown land — Accused Ojibway Indian hunting on territory covered by Robinson Treaty — Accused a James Bay Treaty Indian — Both treaties entered into by Ojibway Indians preserving right to hunt on unoccupied Crown land within area covered by treaty — Whether accused may be convicted of unlawful hunting contrary to provincial statute — Game and Fish Act (Ont.), ss. 41, 42 — Indian Act (Can.), s. 88 — British North America Act, 1867, s. 91(24).

Defences — Double jeopardy — Interpretation Act providing that where act constitutes offence under two or more Acts, accused "not liable to be punished twice for the same act or omission" — Whether section applicable where act constitutes two offences under same Act — Interpretation Act (Ont.), s. 25 — Game and Fish Act (Ont.), ss. 41, 42.

The accused was charged with unlawfully hunting deer and possession of game contrary to ss. 42(1) and s. 41 of the *Game and Fish Act*, R.S.O. 1970, c. 186. The accused, an Indian within the meaning of s. 2 of the *Indian Act*, R.S.C. 1970, c. I-6, was hunting on unoccupied Crown land in the territory covered by the Robinson Treaty of 1850. The accused, however, was a James Bay Treaty, Treaty No. 9 Indian. Both treaties were signed by the Ojibway Tribe of which he was a member, although the Robinson Treaty was not signed by the particular "band" of Ojibway to which the accused belonged. The accused led evidence that historically the Ojibway Tribe hunted throughout the area embracing, *inter alia*, the territory covered by both treaties. On appeal by the accused by way of trial *de novo* from two convictions for unlawful hunting of deer and possession of game, *held*, the appeal should be allowed in part and the conviction for possession of the game and one of the counts of unlawful hunting quashed.

Section 88 of the *Indian Act* provides that the application of provincial laws to Indians is subject to the terms of any treaty. The aboriginal right of Indians to hunt on unoccupied Crown land, which right was preserved by the Royal Proclamation of 1763 and s. 91(24) of the *British North America Act, 1867*, was surrendered by them when they entered into the treaties with the Crown. However, the treaties did preserve their right to hunt on unoccupied Crown land within the territory covered by the treaty. Accordingly, s. 88 of the *Indian Act* will prevent prosecution of a treaty Indian for violation of provincial game legislation when the accused is hunting on unoccupied Crown land within the territory covered by a treaty under which he has rights.

Although the accused was an Ojibway Indian and both treaties were entered into by Ojibway Indians, the rights of both treaties did not enure to his benefit considering the historical evidence that the Ojibway

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"tribe" was in fact a large group of individual "bands" each occupying and protecting their own hunting grounds, and, further, that the treaties were intended to be mutually exclusive with respect to the Indians covered thereby. The accused could claim a treaty right to hunt only under his own band's treaty, covering his own band's traditional hunting territory, and not the Robinson Treaty. Therefore, the accused was rightly convicted of hunting deer out of season on the territory covered by the Robinson Treaty of 1850. However, s. 84 of the *Game and Fish Act* provides that only one conviction for the same kind of offence on the same day shall be imposed and s. 25 of the *Interpretation Act*, R.S.O. 1970, c. 225, provides that where an act constitutes an offence under two or more Acts the accused is "not liable to be punished twice for the same act or omission" and therefore only the one conviction contrary to s. 42(1) of the *Game and Fish Act* should be entered.

[*R. v. Moses*, [1970] 3 O.R. 314, [1970] 5 C.C.C. 356, 13 D.L.R. (3d) 50; *R. v. Dennis and Dennis* (1974), 22 C.C.C. (2d) 152, 56 D.L.R. (3d) 379, 28 C.R.N.S. 268, [1975] 2 W.W.R. 630, distd; *R. v. Syliboy* (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 124 C.C.C. 110, 43 M.P.R. 101, consd; *Calder et al. v. A.-G. B.C.*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; *R. v. Kruger and Manuel* (1974), 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206 [revd on other grounds 24 C.C.C. (2d) 120, [1975] 5 W.W.R. 167]; *Isaac et al. v. Davey et al.* (1974), 5 O.R. 610, 51 D.L.R. (3d) 170; *R. v. Sikyea*, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, 43 C.R. 83, 46 W.W.R. 65; affd [1964] S.C.R. 642, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80, 44 C.R. 266, 49 W.W.R. 306; *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193; affd [1965] S.C.R. vi, 52 D.L.R. 481*n*; *R. v. George*, [1966] S.C.R. 267, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485; *R. v. Francis*, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249, 2 N.B.R. (2d) 14; *R. v. Derriksan* (1974), 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56 [affd 24 C.C.C. (2d) 101, [1975] 4 W.W.R. 761]; *The Pas Merchants Ltd. v. The Queen* (1975), 50 D.L.R. (3d) 154, [1974] 2 F.C. 376; *R. v. Smith* (1935), 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433; *R. v. Mirasty*, [1942] 1 W.W.R. 343, refd to]

Indians — Exemption from seizure — Rifle and motor vehicle seized from accused on reserve in respect of violation of provincial game legislation outside reserve — Indian Act providing that Indian property situated on reserve not subject to seizure — Provincial legislation providing for seizure inconsistent with Indian Act provision — Provincial legislation ineffective to permit seizure — Goods returned — Game and Fish Act (Ont.), ss. 16, 42(1) — Indian Act (Can.), ss. 88, 89.

[*Campbell v. Sandy*, [1956] O.W.N. 441, 4 D.L.R. (2d) 754; *Diabo v. Rice*, [1942] Que. S.C. 418; *Beaulieu v. Petitpas*, [1959] Que. P.R. 86; *Geoffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323; *R. v. Jim* (1915), 26 C.C.C. 236, 22 B.C.R. 106; *R. v. Rodgers* (1923), 40 C.C.C. 51, [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353, Man. L.R. 139; *R. v. Morley* (1931), 58 C.C.C. 166, [1932] 4 D.L.R. 483, [1932] W.W.R. 193, 46 B.C.R. 28, refd to]

Sentence — Mitigation — Mistake of law — Belief by accused Indian

that entitled to hunt on certain lands — Action by accused apparently to test application of provincial law — Accused intending to give meat to needy Indian family — $750 fine varied on appeal to suspended sentence — Game and Fish Act (Ont.), ss. 42(1), 90 — Summary Convictions Act, R.S.O. 1970, c. 450, s. 11(1).

Indians — Aboriginal rights — Charge of unlawful hunting contrary to provincial game legislation — Claim by accused Indian that exempt from legislation based on aboriginal right — Burden of proof on accused to prove exemption on balance of probabilities — Aboriginal right once proved presumed to continue until contrary proved — Crown relying on treaty as extinguishing right — Burden on Crown as author of treaty to prove that treaty extinguished Indian title to land — Treaty provisions to be construed against Sovereign as draughtsman in event of ambiguity — Game and Fish Act (Ont.), ss. 41, 42, 89(a) — Indian Act (Can.), ss. 33, 89(1) — Summary Convictions Act, R.S.O. 1970, c. 50, s. 3 — Cr. Code, s. 730(2).

[*R. v. Park Hotel (Sudbury) Ltd.*, [1966] 2 O.R. 316, [1966] 4 C.C.C. 158; *Calder et al. v. A.-G. B.C.*, [1973] 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1; affg 13 D.L.R. (3d) 64, 74 W.W.R. 481; *Isaac et al. v. Davey et al.* (1974), 5 O.R. 610, 51 D.L.R. (3d) 170, apld; *R. v. Moses*, [1970] 3 O.R. 314, [1970] 5 C.C.C. 356, 13 D.L.R. (3d) 50; *R. v. Appleby*, [1972] S.C.R. 303, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601; *R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196; affd 14 App. Cas. 46, refd to]

Evidence — Judicial notice — Court entitled to take judicial notice of facts of history past or contemporaneous — Court entitled to rely on own historical knowledge and researches — Court may take judicial notice of treaties with Indians — Game and Fish Act (Ont.), ss. 41, 42 — Indian Act (Can.), ss. 88, 89(1).

[*Calder et al. v. A.-G. B.C.*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, folld; *R. v. Kruger and Manuel* (1974), 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435, [1974] 6 W.W.R. 206 [revd on other grounds 24 C.C.C. (2d) 120, [1975] 5 W.W.R. 167, refd to]

APPEAL by the accused by way of *trial de novo* from convictions and sentences on two charges of unlawfully hunting deer contrary to s. 42(1) of the *Game and Fish Act* and one charge of possessing such game contrary to s. 41 of the *Game and Fish Act* (Ont.).

T. G. Watkinson, for accused, appellant.
D. R. Orazietti, for the Crown, respondent.

VANNINI, D.C.J.:—This is an appeal by the defendant by way of a trial *de novo* from two convictions for unlawfully hunting deer contrary to s. 42(1) and from a conviction of knowingly possessing such game contrary to s. 41 of the *Game and Fish Act*, R.S.O. 1970, c. 186, and from the sentences imposed as well as the seizures made in respect thereof.

With the consent of counsel the appeal was heard upon the following agreed and admitted statement of facts, namely:

(1) The accused Henry Wesley, on March 29, 1974, in the Township of Sheddon in the District of Algoma, hunted deer.
(2) That March 29, 1974, was during the closed season for deer hunting in the Township of Sheddon pursuant to the *Game and Fish Act*.
(3) That the hunting took place on private property, not used "for settlement, mining, lumbering, trading or other purposes" and, secondly, hunting took place on a public highway, Highway 17 East and adjacent to Crown land.
(4) That Henry Wesley is an Indian as defined by the *Indian Act*, R.S.C. 1970, c. I-6, and in particular that Henry Wesley is a member of the Ojibway Indian Tribe and is a registered James Bay Treaty No. 9 Indian, from the Lake Constance Band.
(5) That seizure of the vehicle and rifle of Henry Wesley was made on an Indian reserve as defined in the *Indian Act*.
(6) That copies of both the Robinson Treaty (1850) and James Bay Treaty be filed.

Counsel for the defendant further admitted each of the following as facts in evidence against the defendant:

(1) That the Lake Constance Band Reserve is situated within that portion or tract of land in the Province of Ontario described in, and to which the James Bay Treaty — Treaty No. 9, in part, relates and said therein to contain 90,000 square miles, more or less.
(2) That the said Township of Sheddon is situate within the lands described in and to which the Robinson Treaty of 1850 relates.

The Lake Constance Band Reserve is situated some 20 miles east of Hearst, Ontario, and Hearst is said to be some 200 to 300 miles "as the crow flies" north of the Township of Sheddon.

At the conclusion of the oral submissions of counsel on the initial hearing of the appeal counsel requested that they be permitted to file supplementary submissions in writing and that I postpone the determination of the appeals until they were received and considered by me as submissions on the hearing of the appeals.

The Court acceded to this request and directed that such

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Indian by languages and cultural areas, Jenness concludes, at p. 12:

> This is the classification we shall adopt in this book, a classification based primarily on culture areas, which were themselves largely determined by the physiography of the country. But in discussing each culture area in turn, we shall find it most convenient to subdivide according to cleavages of tribe and language, so that in the end we shall be adopting all three bases of classification.

i.e., political, linguistic and cultural.

Jenness then determined that there were four such cultural areas or groups, one of which he describes as the Migratory Tribes of the Eastern Woodlands which comprised, *inter alia*, the Algonkins between the Ottawa River and the St. Maurice and the Ojibwa of Northern Ontario.

Of what he writes of the Ojibwa at pp. 277-83 that may be relevant to the determination of the said issue on this appeal may be summarized as follows:

(1) They were the strongest nation in Canada and controlled all the northern shores of Lakes Huron and Superior from Georgian Bay to the edge of the prairies and at the Height of Land north of Lake Superior where the rivers begin to flow towards Hudson Bay they united with their near kinsmen, the Cree;

(2) so numerous were they and so large a territory did they cover that they could be separated into four distinct groups or tribes, namely, the Ojibwa of the Lake Superior region, the Mississauga of Manitoulin Island and of the mainland around the Mississagi River, the Ottawa of the Georgian Bay region, and the Potawatomi on the west side of Lake Huron within the State of Michigan, some of whom moved across into Ontario in the 18th and 19th centuries;

(3) each tribe was subdivided into numerous bands that possessed their own hunting territories and were politically independent of one another, though closely connected by intermarriage;

(4) the band was the real political unit with its own leader;

(5) there was no chief for a whole tribe;

(6) while they were not so completely dependent on game and fish as other Canadian tribes they were, nevertheless, as keen hunters and as keen fishermen as other Indians, thereby causing them to be migratory, and,

(7) by the beginning of the 18th century the main body of the Ojibwa suddenly entered on a career of expansion provoked by the diminution of the beaver within their

domains as a result of which many Mississauga moved into the old territory of the Hurons between Lakes Huron and Erie; some of the Lake Superior Ojibwa occupied parts of Manitoba and some spread eastward along the north shore of Lake Huron into Georgian Bay where they still remain on the numerous reserves that the Government has set aside for their use.

Of the term "tribe" Jenness states, at p. 121:

> We may admit at the outset that the term tribe, strictly speaking, is hardly applicable to the eastern and northern peoples of Canada; for the word implies a body of people who occupy a continuous territory, who possess the same customs, speak the same language, and act as a unit in matters of offence and defence. It implies, further, a clear political separation from neighbouring peoples, usually associated in turn with differences in customs and in language.

and at p. 122:

> It is true that neighbouring bands differed little except in the possession of different hunting-grounds, and that they frequently joined together for mutual support, but the compositions of these united groups varied continually as a band coalesced with its kindred, now in one direction, now in another.

Of "ownership" of the land they occupied and over which they hunted and fished, Jenness writes, at p. 124:

> "Real" property he had none, for the hunting territory and the fishing places belonged to the entire band, and were as much the right of every member as the surrounding atmosphere. Members of other bands might use them temporarily, with the consent of the owner band, or they might seize them by force; but land could not be sold or alienated in any way.

and at p. 125:

> Natives living outside the tribe were enemies, real or potential, to be carefully avoided unless they encroached on the hunting territories. Then it was the local band only that opposed the invasion, unless the menace became so serious that other bands voluntarily rallied to its aid.

Having regard to the reputation of Diamond Jenness as an internationally known ethnologist and consequently as an authority on the Indians of Canada, I accept the statements he makes in his text, as above quoted and summarized, as facts of history.

These findings do not differ materially from the evidence of Mr. Sault as it relates thereto except as follows:

(a) While Mr. Sault could not definitely state what the westerly limits were of the lands occupied by the Ojibwa, Jenness states that they extended to the edge of the prairies;

(b) while Mr. Sault stated that the Ojibwa were known to travel and to hunt and fish over all of the territories occupied by them, Jenness concluded that each band had its own hunting and fishing grounds and that members of other Ojibwa bands might use them temporarily with the consent of the owner band, and

(c) while Mr. Sault appeared to state that it was the aboriginal right of any Indian to fish anywhere in Canada, Jenness concludes that a local band opposed the invasion upon their hunting and fishing grounds by natives living outside the tribe.

Because of the significance of these differences as they relate to the theory of the prosecutor and of the defendant, I reiterate my acceptance of Jenness' statements.

The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada — in the early days as an incident of their "ownership" of the land, and later by the treaties by which the Indians gave up their ownership right in these lands: *per* Johnson, J.A., in *R. v. Sikyea*, [1964] 2 C.C.C. 325 at pp. 327-8, 43 D.L.R. (2d) 150 at p. 152, 43 C.R. 83, and affirmed by the Supreme Court of Canada in [1964] S.C.R. 642 at p. 646, [1965] 2 C.C.C. 129 at p. 132, 50 D.L.R. (2d) 80 at p. 84, and by Hall, J., in *Calder et al. v. A.-G. B.C.*, *supra*, at pp. 397-8 S.C.R., pp. 205-6 D.L.R.

This right was affirmed and reserved unto them by the Royal Proclamation of 1763 which has been carried forward into s. 91(24) of the *British North America Act, 1867*, and later affirmed, assured and regulated by s. 88 of the *Indian Act*. See, generally, *R. v. White and Bob* (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), and more particularly the judgment of Norris, J.A., starting at p. 625 *et seq.*

Section 88 of the *Indian Act* provides:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

Of this section Martland, J., speaking for the majority of the Court in *R. v. George*, [1966] S.C.R. 267 at p. 280, [1966] 3 C.C.C. 137 at p. 150, 55 D.L.R. (2d) 386 at pp. 397-8 (S.C.C.), said:

> I understand the object and intent of that section is to make

Indians, who are under the exclusive legislative jurisdiction of the Parliament of Canada, by virtue of s. 91(24) of the *British North America Act, 1867*, subject to provincial laws of general application.

The application of provincial laws to Indians was, however, made subject to "the terms of any treaty *and any other Act of the Parliament of Canada*" (the italics are mine). In addition, provincial laws inconsistent with the *Indian Act*, or any order, rule, regulation or by-law made thereunder, or making provision for any matter for which provision is made under that Act, do not apply.

In considering the right of an Indian as defined in s. 2(1) of the *Indian Act* to exercise his aboriginal right to hunt and to fish in any particular part of Canada, regard must be had to the particular tribe or band and to the particular territory over which such right was reserved, affirmed, allowed or granted and to any conditions or restrictions that may have been imposed by the treaty in question: *R. v. Syliboy* (1928), 50 C.C.C. 389, [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 124 C.C.C. 110, 43 M.P.R. 101 (N.B.C.A.); *R. v. White and Bob, supra*, affirmed by the Supreme Court of Canada, [1965] S.C.R. vi, 52 D.L.R. 481*n*; *R. v. Discon and Baker* (1968), 67 D.L.R. (2d) 619, 63 W.W.R. 485 (B.C.C.A.); *R. v. Moses, supra*; *R. v. Francis*, [1970] 3 C.C.C. 165, 10 D.L.R. (3d) 189, 9 C.R.N.S. 249 (N.B.C.A.); *Calder v. A.-G. B.C., supra*; *R. v. Kruger and Manuel, supra* (B.C. Co.Ct.); *R. v. Derriksan* (1974), 20 C.C.C. (2d) 157, 52 D.L.R. (3d) 744, [1975] 1 W.W.R. 56 (B.C.S.C.) [affirmed 24 C.C.C. (2d) 101, [1975] 4 W.W.R. 761]; *R. v. Dennis and Dennis* (1974), 22 C.C.C. (2d) 152, 56 D.L.R. (3d) 379, 28 C.R.N.S. 268 (B.C. Prov.Ct.); *The Pas Merchants Ltd. v. The Queen* (1975), 50 D.L.R. (3d) 154, [1974] 2 F.C. 376 (Fed.Ct.).

In *R. v. Syliboy*, the defendant, who was the Grand Chief of the Mick Macks of Nova Scotia and an inhabitant of Cape Breton Island, was convicted under the *Lands and Forests Act* of Nova Scotia of a hunting offence committed on Cape Breton Island. He claimed that as an Indian he was not bound by the provisions of that Act as he had by treaty the right to hunt and trap at all times.

The treaty in question was made with the Chief "of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province" (*i.e.*, Nova Scotia proper) and thereafter reference was made to "the said Tribe of Indians" (*i.e.*, the tribe inhabiting the eastern coast of Nova Scotia) who "shall not be hindered from but have free liberty to hunt and fish as usual" and it was made not only with the signatories thereto but "with their heirs, and the heirs of their heirs forever".

For the defendant it was submitted that the Mick Mack Tribe throughout Nova Scotia, including Cape Breton Island, was one and indivisible; that the treaty was made with the tribe and that it was of general and not of local application.

Of this submission Patterson, Acting Co.Ct.J., in upholding the conviction, said at p. 391 C.C.C., p. 309 D.L.R.:

> In the face of this evidence there can be no doubt, I think, that the Treaty relied upon was not made with the Mick Mack Tribe as a whole but with a small body of that tribe living in the eastern part of Nova Scotia proper, with headquarters in and about Shubenacadie, and that any benefits under it accrued only to that body and their heirs. The defendant being unable to show any connection, by descent or otherwise, with that body cannot claim any protection from it or any rights under it.

The Court there held that the treaty did not extend to Cape Breton Indians and that by reason thereof they did not acquire any rights to hunt under the treaty contrary to the game laws of Nova Scotia.

This decision was referred to, approved and followed in *R. v. Simon* in relation to another treaty.

Of it the Court said, at pp. 114-5:

> There is nothing before us to indicate to what Nations the Indians concerned in the 1725 Treaty belonged nor to show that the Micmacs, or any particular tribe of them, were involved or that the band of Micmacs on the Big Cove Reservation, of which the appellant is a member, are natural descendants of any of the Eastern Indians with whom the Treaty was made. Likewise the record is completely devoid of evidence to show any connection, by blood or otherwise, between the appellant and his band and any of the Indian Tribes who, according to art. 1 of the 1752 Treaty, had lately at Halifax and the St. Johns River ratified the earlier Treaty.
>
> On the evidence the appellant has failed to show vested in himself any right to any immunity that may have been contemplated by the Parliament of Canada when enacting s. 87 of the *Indian Act*. In consequence, it is unnecessary for us to attempt any definition of the privileges to which legislative countenance has been so given. The proviso found in the section invites elucidation. The task of determining its scope and effect is one which, in our respectful opinion, could fittingly be undertaken by the Executive Authority.

In *R. v. White and Bob* the Court held that the Royal Proclamation of 1763 was a treaty within the meaning of s. 88 of the *Indian Act*; that it applied to Vancouver Island thereby confirming the aboriginal rights of the Indian to hunt and to fish on the Island and that such right could only be extinguished before Confederation by surrender to the British Crown and after Confederation by surrender to the Dominion Government, which the Indians in question had not

done and that by reason thereof the Indians on Vancouver Island could exercise their aboriginal rights.

In *Calder v. A.-G. B.C.*, the Supreme Court of Canada, because of a split decision, affirmed the decision of the British Columbia Court of Appeal in 13 D.L.R. (2d) 64, 74 W.W.R. 481, which held that the Royal Proclamation of 1763 did not apply to the lands historically occupied by the tribe in question in the absence of any subsequent treaty or federal legislation extending the benefits of the Proclamation to such tribe.

R. v. Discon and Baker involved two members of the Band of the Squamish Indian Reserve situated in North Vancouver, B.C., who were found hunting on unoccupied, reforested bush land outside of an Indian reservation.

It was there held that the Royal Proclamation of 1763 preserved the hunting rights of "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection" and because the Squamish Indians did not come within this category at the date of the Proclamation and there was no reservation of aboriginal hunting rights in favour of the Squamish Indians in either a written treaty or a statute the two Indian hunters were bound by the gaming laws of the Province by virtue of s. 88 of the *Indian Act*.

In concluding his judgment Schultz, Co.Ct.J., said at p. 629 D.L.R., p. 496 W.W.R.:

> This judgment relates only to the appellants, who are Squamish Indians, and is not to be interpreted as declaratory of the legal status of members of other tribes of Indians in the province of British Columbia.

In *R. v. Moses* the Court held that in the absence of federal legislation abrogating the hunting rights granted thereby, a registered member of a band covered by the Robinson Treaty of 1850 with the Lake Huron Ojibwa who was entitled to occupy the reserve established thereby for his band had the right to hunt on unoccupied Crown lands in territory covered by the treaty notwithstanding that he lived on another reserve established by the treaty.

Little, D.C.J., said at p. 317 O.R., pp. 359-60 C.C.C., p. 53 D.L.R.:

> Furthermore, it matters not that Moses lives on another reserve. A member of one band may live on the reserve of another band provided he has permission from those governing the reserve on which he lives. The word "occupied" in the first paragraph of the treaty has been treated as meaning "set aside for their use and benefit" and not necessarily physically occupied.

> It is therefore clear from this evidence, and I so find, that Moses is a member of the Henvey Inlet Band; that he is one of the successors of the band headed by Chief Wagemake who signed the treaty; that the lands comprising the Henvey Inlet Reserve are those shown on ex. 6; that these are the lands "occupied" by this band as referred to in the treaty; and even though he does not live on the said reserve, Moses is one of those entitled to "occupy" it and he not only annually receives money under the provisions of the said treaty, but is also entitled to any other rights or benefits conferred on the members of his band by it.

and at p. 322 O.R., p. 364 C.C.C., p. 58 D.L.R.:

> . . . I am satisfied from the authorities that it is only the Parliament of Canada which has power to abrogate the privilege to hunt which the Indians retained under the Robinson Treaty.

and further, at pp. 323-4 O.R., pp. 365-6 C.C.C., pp. 59-60 D.L.R.:

> In the case at bar no derogating legislation has been enacted by the Parliament of Canada to restrict in any way the right of Indians entitled to the benefits under the Robinson Treaty from hunting moose at any time on unoccupied Crown lands. As a member of the Henvey Inlet Band, Moses still has his rights under the said treaty and has therefore satisfied the onus cast on him by said s. 81(*a*). He therefore did not commit an infraction of s. 38(1) of the *Game and Fish Act, 1961-62.*

In *R. v. Kruger and Manuel* the defendants hunted food for sustenance on unoccupied Crown land which had been and still was the traditional hunting ground of the Penticton Indian Band in British Columbia, of which the defendants were members.

The Court there held that the Royal Proclamation of 1763 was applicable throughout British Columbia and because there never was a treaty between the Crown and the Penticton Indian Band nor, except for the Royal Proclamation of 1763, any statutory reservation of any aboriginal right and, of even more importance, no statutory extinguishment by federal enactment taking away the aboriginal right of Indians to hunt for sustenance on unoccupied Crown land, the right could not be affected by mere provincial legislation and that by virtue of s. 88 of the *Indian Act* the Royal Proclamation of 1763 was still in full force and effect in so far as the particular band was concerned.

In *R. v. Derriksan* the Court found that the Royal Proclamation of 1763 has no application to the Indians therein involved or to the territory they occupy and that if they had aboriginal rights to hunt and fish for food in the territory occupied by them such rights had been wholly extinguished in the absence of any treaty affecting such Indians or their

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territory and by reason thereof they were subject to the *Fisheries Act* of British Columbia.

In *R. v. Dennis and Dennis* the Court had to first determine whether or not the treaty in question applied to the defendants who were Indians under the *Indian Act,* for if it did it afforded a complete defence to them "as it reserves hunting rights to the Indians within the treaty area": see p. 155 C.C.C., p. 382 D.L.R., p. 271 C.R.N.S.

The Court found that the treaty in question legally affected only the signatories to the treaty and those whom they represented and that it did not inure to the benefit of the defendants who were members of a band that was not a party to the treaty although they hunted within the treaty area.

Of this, O'Connor, Prov.Co.J., said at p. 155 C.C.C., p. 382 D.L.R., pp. 271-2 C.R.N.S.:

> A reading of the treaty makes it clear that only the signatories and those whom they represented are legally affected by its provisions. The treaty is similar to an agreement or contract. Neither the Tahltan Indian Band from Telegraph Creek nor its chief were parties to that treaty. The treaty is not a surrender of Indian rights by Indians not parties to it, and conversely does not purport to confer on such Indians the hunting rights set out in the treaty. The fact that the incident giving rise to the charge occurred within the treaty area does not afford the defendants with an answer to the charge.
>
> The second question to be decided is whether or not the defendants have an aboriginal or native interest or title to hunt for food on the lands in question.

The Court then proceeded to consider whether or not the defendants had an aboriginal or native interest or title to hunt for food on the lands in question and after having found that they did and that such rights had not been extinguished by a federal enactment, the Court held that the Province could not extinguish or restrict native hunting rights and that s. 88 of the *Indian Act* did not operate to make provincial legislation in that regard applicable to the defendants.

Of this the Court said, at pp. 155-6 C.C.C., p. 382 D.L.R., p. 272 C.R.N.S:

> In recent years there has been a great deal of judicial and academic writing with respect to the question of the existence of aboriginal rights in the native people of Canada. I have carefully reviewed the authorities dealing with the question and am in agreement with, and adopt the reasoning of those Judges and authors who conclude that aboriginal rights do exist in the native people of Canada until they have either been surrendered or extinguished by Act of Parliament.

See authorities and texts there referred to.

Of what such rights encompass, the Court said, at pp. 158-9 C.C.C., pp. 385-6 D.L.R., p. 275 C.R.N.S.:

> In the many judgments and articles dealing with the question of aboriginal rights, there has been surprisingly little written on what these rights encompass. However, it does appear certain that at the very least there is included the right of Indians to hunt for food for themselves and their dependants on unoccupied Crown lands. I, therefore, am able to conclude that in the present case that at the time the two defendants shot the moose, they were doing so in exercise of their aboriginal or native rights.

This case appears to be an authority for the proposition that unless such aboriginal rights are extinguished or restricted by treaty or by federal enactment they may be enjoyed by any Indian as defined by s. 2(1) of the *Indian Act* over the treaty area in which he resides notwithstanding that such Indian is not a member of the band that was a party to the treaty.

In *The Pas Merchants Ltd. v. the Queen*, Bastin, J., said, at p. 155 D.L.R., p. 378 F.C.:

> With respect to Treaty No. 5, this was an agreement between the Canadian Government and the Indian tribes in question. On the principle of privity such an agreement confers no rights and imposes no obligations arising under it on any person not a party to it. It follows that its interpretation and performance concern only the parties to it and the plaintiff has no status to enforce its provisions.

The Robinson Treaty was made and entered in Sault Ste. Marie on September 9, 1850, with certain named Chiefs and certain named individuals who were described as

> . . . principal men of the Ojibewa Indians, inhabiting and claiming the Eastern and Northern Shores of Lake Huron, from Penetanguishine to Sault Ste. Marie, and thence to Batchewanaung Bay, on the Northern Shore of Lake Superior; together with the Islands in the said Lakes, opposite to the Shores thereof, and inland to the Height of Land which separates the Territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada West to which they have any just claim . . .

On their part

> . . . they the said Chiefs and Principal men, on behalf of their respective Tribes or Bands, do hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest to, and in the whole of, the territory above described, save and except the reservations set forth in the schedule hereunto annexed; which reservations shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit.

In return for this concession, "the said Chiefs, and their

Tribes" were allowed "the full and free privilege to hunt over the Territory now ceded by them, and to fish in the waters thereof, as they have heretofore been in the habit of doing; saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government", *i.e.*, the then Province of Canada.

The following is to be particularly noted of the right that was allowed to such Indians to hunt and fish, namely:

(1) that it is confined to "the said Chiefs and their Tribes", and

(2) that it is restricted to the territory ceded by them and to the waters thereof "save and except such portions thereof as may be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the Provincial Government".

The James Bay Treaty — Treaty No. 9, of 1905 was made between His Majesty the King and the Province of Ontario, of the one part, and "the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their chiefs, and headmen hereunto subscribed" of the other part.

By it:

> . . . the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: That portion or tract of land lying and being in the province of Ontario, bounded on the south by the Height of Land and the northern boundaries of the territory ceded by the Robinson-Superior Treaty of 1850, and the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the North-west Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less.
>
> And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.
>
> To have and to hold the same to His Majesty the King and His successors for ever.

In return for such surrender:

> His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to

> time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band . . . the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario.

The following is to be particularly noted of the right to hunt, trap and fish that was agreed to:

(1) that it was so agreed with "the said Indians", *i.e.*, with "the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described";
(2) that the right so granted to such Indians extended "throughout the tract surrendered as heretofore described", *i.e.*, over the whole of the territories surrendered thereby;
(3) that the tract surrendered thereby included an area of 90,000 square miles more or less, as well as all other lands of the said Indians wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada;
(4) that no reference is made therein to the Robinson-Superior Treaty of 1850 and the Robinson Huron Treaty of 1850 and the Northwest Angle Treaty of 1873 (Treaty No. 3) or to the lands surrendered thereby;
(5) that the right so granted did not extend to "such tracts" of the tract so surrenderd thereby "as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

Did the James Bay Treaty — Treaty No. 9 cover any lands previously surrendered by the Robinson Treaties of 1850 or by the Northwest Angle Treaty of 1873 as counsel for the defendant contends they did?

Whatever other lands in Ontario or elsewhere in Canada the Indians of the James Bay Treaty — Treaty No. 9 laid claim to, which were also by them surrendered thereby, could only relate to such lands, wherever situated in Canada, as such Indians had not hitherto surrendered and their inclusion in the treaty was obviously intended to embrace all of the lands to which such Indians lay claim as may have been excluded by previous treaties involving the Ojibwa, the Cree and other Indians who were parties to the James Bay Treaty — Treaty No. 9 with whom the Sovereign may have hitherto entered in a treaty of cessation.

That this is so is confirmed by the report of the Commissioners dated November 6, 1905, to the Superintendent General of Indian Affairs when transmitting the James Bay Treaty to him in which they set out the need for the treaty which they negotiated on behalf of the Government of Canada. This report forms part of ex. 2.

The reasons for the treaty are set out at the very beginning of the report, as follows:

> Since the treaties known as the Robinson Treaties were signed in the autumn of the year 1850, no cession of the Indian title to lands lying within the defined limits of the province of Ontario had been obtained. By these treaties the Ojibeway Indians gave up their right and title to a large tract of country lying between the Height of Land and Lakes Huron and Superior. In 1873, by the Northwest Angle Treaty (Treaty No. 3), the Saulteaux Indians ceded a large tract east of Manitoba, part of which now falls within the boundaries of the province of Ontario. The first-mentioned treaty was made by the old province of Canada, the second by the Dominion.
>
> Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario north of the Height of Land and south of the Albany River rendered it advisable to extinguish the Indian title. The undersigned were, therefore, appointed by Order of His Excellency in Council on June 29, 1905, as commissioners to negotiate a treaty with the Indians inhabiting the unceded tract. This comprised about 90,000 square miles of the provincial lands drained by the Albany and Moose river systems. When the question first came to be discussed, it was seen that it would be difficult to separate the Indians who came from their hunting grounds on both sides of the Albany river to trade at the posts of the Hudson's Bay Company, and to treat only with that portion which came from the southern or Ontario side. As the cession of the Indian title in that portion of the Northwest Territories which lies to the north of the Albany river would have to be consummated at no very distant date, it was thought advisable to make the negotiations with Indians whose hunting grounds were in Ontario serve as the occasion for dealing upon the same terms with all the Indians trading at Albany River posts, and to add to the community of interest which for trade purposes exists amongst these Indians a like responsibility for treaty obligations. We were, therefore, given power by Order of His Excellency in Council of July 6, 1905, to admit to treaty any Indian whose hunting grounds cover portions of the Northwest Territories lying between the Albany river, the district of Keewatin and Hudson bay, and to set aside reserves in that territory.

It must be also remembered, as Jenness points out, that the Ojibway was the largest nation in Canada and so numerous were they that they could be separated into four groups or tribes and that they occupied all of that part of Ontario lying between the Height of Land and Lakes Huron and Superior which were ceded by the Robinson Treaties of 1850 and a large tract east of Manitoba, part of which now falls within

the boundaries of Ontario, which was surrendered by the Saulteaux Indians in 1873 by the Northwest Angle Treaty (Treaty No. 3).

So general were the descriptions of the lands surrendered by these treaties as to make it inevitable that tracts or pockets of lands that were occupied by other Ojibway might easily have been excluded therefrom.

Then, too, at the Height of Land the Ojibway united with their near kinsmen, the Cree, who occupied all of Northern Ontario and Northern Quebec from the Height of Land to James Bay and Hudson Bay as well as large parts of Manitoba and Saskatchewan (see map of aboriginal population in Jenness, *supra*).

Even Mr. Sault expressed some doubt as to the exact territory that is covered by one or two of the earlier treaties with the Ojibway around Sault Ste. Marie and he was unable to say what were the westerly territorial limits in Canada of the Ojibway Nation.

And of the number of treaties entered into by the Ojibway he testified that, in addition to the four major ones, there were others with "countless number of bands and land surrenders which are overlapping".

Whatever land in Canada the Indians of the James Bay Treaty — Treaty No. 9 may have occupied at the time which had not previously been surrendered by them were by them by that treaty surrendered and in respect of such lands they still enjoy such hunting and fishing rights as by that treaty were granted to them.

Accordingly, I hold that as an Indian covered by the James Bay Treaty — Treaty No. 9, the defendant was not granted a right thereby to hunt in the Township of Sheddon in the District of Algoma, or elsewhere in the territory covered by the Robinson Treaty of 1850 for the reason that by each of the said treaties the Indians thereto surrendered their aboriginal right to hunt and to fish over the lands respectively covered thereby and agreed to accept in return the right to hunt and to fish as by such treaties respectively granted to them in respect of the lands respectively covered thereby.

The facts of this case and the law applicable thereto differ from the factual situation and the law applicable thereto in *R. v. Moses*, *supra*, and in *R. v. Dennis and Dennis*, *supra*.

The defendant before me has failed to prove a right to hunt or to be in possession of game in the Township of Sheddon in the District of Algoma either as an aboriginal right or under the rights reserved or conferred in this re-

gard by the Robinson Treaty of 1850 or by the James Bay Treaty — Treaty No. 9 of 1905, or otherwise.

The defendant hunted and killed two deer in the Township of Sheddon and was later found in possession of their carcasses and was charged, convicted and fined $250 in respect of each.

In this regard s. 84 of the *Game and Fish Act* provides:

> 84. Where in a prosecution under this Act it appears in evidence that more than one offence of the same kind was committed at the same time or on the same day, the court shall in one conviction impose all the penalties at the same time.

Further, it is by s. 25 of the *Interpretation Act*, R.S.O. 1970, c. 225, provided:

> 25. Where an act or omission constitutes an offence under two or more Acts, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of those Acts, but is not liable to be punished twice for the same act or omission.

Having regard to the facts of this case and to the provisions of s. 84 of the *Game and Fish Act* and giving the defendant the benefit of the doubt as to whether in law the provisions of s. 25 of the *Interpretation Act* apply to the facts herein, I do find the accused guilty only of one offence under s. 42(1) of the *Game and Fish Act* and I dismiss the other information thereunder as well as the information under s. 41 of that Act.

Having found the defendant guilty on the grounds that I did there is no need to consider the issue raised on the appeal whether or not the hunting that took place on "private" property which was not used "for settlement, mining, lumbering, trading or other purposes" and the hunting that took place on the public highway adjacent to Crown lands constituted hunting within or in contravention of the rights to hunt granted by the James Bay Treaty — Treaty No. 9.

Suffice it only to make reference in this regard to *R. v. Smith* (1935), 64 C.C.C. 131, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433, in which it was held that the words "settlement", "mining" and "lumbering" could not be grouped into any genus to which the *ejusdem generis* rule applies; that the words are not of the same genus as they describe a different use for which Crown lands may be required or taken up and therefore the words "or other purposes" must be given their plain and ordinary meaning and, when given such meaning, may very reasonably be taken to include lands required for the establishing of game preserves. See, also, *R. v. Mirasty*, [1942] 1 W.W.R. 343, to the same effect.

It only remains to determine the legality of the seizure effected pursuant to s. 16 of the *Game and Fish Act* on a reserve of the rifle and the motor vehicle used by the defendant in the commission of the offence contrary to s. 2(1) of the Act.

The defendant claims exemption from such seizure by virtue of s. 89(1) of the *Indian Act*, which provides:

> 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.

This section has to be read subject to the provisions of s. 88 of the *Indian Act* which makes Indians subject to all provincial laws of general application except in so far as they are inconsistent with the Act.

By virtue of the combined effect of ss. 88 and 89 of the *Indian Act* it was held that an Indian judgment debtor is exempt from execution under the law of Ontario if he has no property or interests outside the reserve: *Campbell v. Sandy*, [1956] O.W.N. 441, 4 D.L.R. (2d) 754 (Kinnear, Co.Ct.J.). Nor is his immovable property on a reserve subject to seizure in satisfaction of a judgment: *Diabo v. Rice*, [1942] Que. S.C. 418, and a Court cannot order an Indian judgment debtor to pay a sizable part of the wages he earned on a reserve to satisfy the judgment: *Beaulieu v. Petitpas*, [1959] Que. P.R. 86, although the wages he earns outside the reserve are liable to attachment by garnishment: *Geoffries v. Williams (alias Well)* (1958), 16 D.L.R. (2d) 157, 26 W.W.R. 323 (B.C.).

The regulation of Indian reserves being under the exclusive jurisdiction of Dominion Parliament, a provincial game protection law is not effective, as regards such Indian reserve, to prohibit an Indian there resident from hunting, trapping and fishing on his own reserve: *R. v. Jim* (1915), 26 C.C.C. 236, 22 B.C.R. 106 (B.C.S.C.); *R. v. Rodgers* (1923), 40 C.C.C. 51, [1923] 3 D.L.R. 414, [1923] 2 W.W.R. 353 (Man. C.A.). See, also, *R. v. Morley* (1931), 58 C.C.C. 166, [1932] 4 D.L.R. 483, [1932] W.W.R. 193 (B.C.C.A.), where the Court upheld the conviction of a white man for killing a pheasant on a reserve during a closed season contrary to the *Game Act* of the Province.

Because s. 16 of the *Game and Fish Act* is inconsistent with s. 89(1) of the *Indian Act* it is inapplicable and unenforceable in respect of any personal property "of an Indian or a band situated on a reserve".

While in the circumstances of this case the rifle and the motor vehicle used by the defendant were liable to seizure pursuant to s. 16 of the *Game and Fish Act* when situated outside of a reserve, they were immune from seizure while situated on a reserve by virtue of s. 89(1) of the *Indian Act*, notwithstanding that they were used in the commission outside of a reserve of an offence under the provincial Act. The seizure in these circumstances was illegal.

In respect of the one conviction under s. 42(1) of the Act the defendant is by s. 90 thereof liable to a fine of not more than $1,000 and in the determination thereof the Court is required by s. 84 of the Act to impose a penalty for the commission by the defendant on the same day of the other offence under s. 42(1) of the Act.

It is by s. 11(1) of the *Summary Convictions Act*, R.S.O. 1970, c. 450, provided that where a person is convicted of an offence for which a minimum punishment is not provided and he has not been previously convicted of any offence, the Court may, if it "thinks it expedient having regard to the age, character and antecedents of the offender and to the nature of the offence and to any extenuating circumstances, direct that he be released upon suspended sentence".

This defendant is 34 years of age and although married is living separate from his wife and it appears he is not contributing to her maintenance. He is presently employed by International Nickel in Sudbury where he lives and was living at the time of the commission of the offences in question.

He intends to leave his present employment to join the police force of the Indian band on Walpole Island. It will be part of his duty as a member of that police force to enforce the game laws.

The prosecutor not having made any reference to any previous conviction of any offence I can only conclude that this defendant has no previous conviction for any offence either criminal or under any provincial enactment.

He hunted and killed two deer, one of which carried one fawn and the other carried two, who were also killed as a result.

The evidence given by this defendant at his trial before the summary conviction Court seems to indicate that he was aware of wrongdoing at the time of the hunting and shooting, but before this Court he maintains that he believed he had a right to hunt as a Treaty Indian notwithstanding the game laws of the Province.

I am going to give the defendant the benefit of the doubt

in this regard and consider the sentence in the light of his belief that he had a right to hunt. I accept, also, his statement that he was not aware before shooting the deer that they were with fawn. If I could be satisfied that this was a deliberate infraction by this defendant of the game laws of the Province, deliberate in the sense that he knew that he did not have a right as a treaty Indian to hunt and that it was against the game laws of the Province to do so, I would take a more serious view of the matter in so far as sentence is concerned than I propose to.

To his credit is his decision to join the police force in question and to become a law enforcement officer and it was his right to test what he believed to be his right to hunt in the area in question, albeit he was mistaken, and to test it as he did on his appeal to this Court.

In all of these circumstances the Court thinks it expedient, having regard to the age, character and antecedents of the defendant, to the nature of the offence and to the extenuating circumstances, namely, his mistaken belief as to his right to hunt and to his statement in the evidence read by the Crown from the evidence on the trial that he was killing to give the meat to a needy Indian family, I direct that the defendant be released upon suspended sentence for a period of two years as provided for by s. 11(1) of the *Summary Convictions Act*.

Appeal allowed in part.

REGINA v. CKOY LTD.

Ontario High Court of Justice, Reid, J. May 5, 1975.

Statutes — Subordinate legislation — Validity of Regulation — Canadian Radio-Television Commission empowered to make Regulations necessary "for furtherance of its objects" — Objects of Commission including implementation of policy enunciated in Broadcasting Act — Question of whether Regulation implements policy proper for Court to decide and not exclusively for Commission — Regulation respecting conduct of telephone interviews by station only with person's consent unrelated to policy as stated in Act — Regulation invalid — Broadcasting Act, R.S.C. 1970, c. B-11, ss. 16, 15, 3 — Radio (A.M.) Broadcasting Regulations, SOR/64-49, s. 5(1)(k).

Broadcasting — Validity of Regulation respecting conduct of telephone interviews by station only with person's consent — Canadian Radio-Television Commission empowered to make Regulations necessary "for furtherance of its objects" — "Objects" including implementation of policy enunciated in Broadcasting Act — Question of whether Regulation implements policy proper for Court to decide and not exclusively for

exists as law. The significant quality is that of capacity or incapacity, and for this there is no boundary.

So the jurisdiction of the Court which entertained this lady's application for a decree of nullity on April 28th, was confined to citing "a declaration as to what the state of affairs has been and is". The Court had no jurisdiction to attach any further disability or prohibition to that state of affairs. Therefore when this lady went through the marriage ceremony with Rowbottom, she was restricted by neither incapacity or prohibition from contracting a valid marriage and that marriage is still in full force and effect. Her action for decree of nullity must therefore be dismissed.

Petition dismissed.

REGINA v. WHITE AND BOB

[50 D.L.R. (2d) 613]

NOTE: An appeal from the above decision to the Supreme Court of Canada (Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Hall, JJ.) was dismissed with costs on November 10, 1965.

Mr. Justice Cartwright delivered the following oral judgment:

"Mr. Berger, Mr. Sanders and Mr. Christie. We do not find it necessary to hear you. We are all of the opinion that the majority in the Court of Appeal were right in their conclusion that the document, Exhibit 8, was a 'treaty' within the meaning of that term as used in s. 87 of the *Indian Act* [R.S.C. 1952, c. 149]. We therefore think that in the circumstances of the case, the operation of s. 25 of the *Game Act* [R.S.B.C. 1960, c. 160] was excluded by reason of the existence of that treaty.

"The appeal is accordingly dismissed with costs throughout."

T. G. Bowen-Colthurst, Q.C., and *A. W. Hobbs*, for appellant.

T. R. Berger and *D. E. Sanders*, for respondent.

D. H. Christie, Q.C., for Attorney-General of Canada.

REGINA v. WHITE AND BOB*

British Columbia Court of Appeal, Davey, Sheppard, Norris, Lord and Sullivan, JJ.A. December 15, 1964.

Indians — Alleged violation of provincial game laws — Right to assert "Treaty" hunting rights under Indian Act (Can.) — Hunting on unoccupied land outside a reserve on Vancouver Island.

Game and fisheries — Treaty hunting rights of Indians on Vancouver Island — Preservation under Indian Act (Can.).

The prohibitions of the *Game Act*, R.S.B.C. 1960, c. 160, against the hunting of game, *e.g.* deer, during the closed season (unless under permit) do not apply to native Indians, descendants of certain Nanaimo tribes, who hunt on unoccupied lands in an organized district, such lands not being within a reserve but being lands conveyed to the Hudson's Bay Co. by ancestors in the tribes. The conveyance of surrender of the lands in 1854 is a "Treaty" within the meaning of that term in the context of the *Indian Act*, R.S.C. 1952, c. 149; and s. 87 of this Act, in making applicable to Indians in a Province all provincial laws of general application subject, *inter alia*. to "the terms of any treaty and any other Act of the Parliament of Canada", qualifies the application of provincial legislation not only by Indian Treaties that create hunting rights but also any that confirm or except pre-existing rights already in being.

Per Davey, J.A., Sullivan, J.A., concurring: Legislation that abrogates or abridges hunting rights reserved to Indians under the Treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Co. for white settlement is legislation in relation to Indians because it deals with rights peculiar to them. Such rights cannot be abrogated or abridged by provincial legislation alone which is of such general application as to include Indians. Only Parliament can derogate from those rights, and it has, on the contrary, preserved them by s. 87.

Per Norris, J.A.: Aboriginal rights existed in favour of Indians from time immemorial and they became personal and usufructuary under the British Crown when it acquired a proprietary estate, by virtue of its sovereignty, over Vancouver Island. The right to hunt and fish on unoccupied lands was an aboriginal right confirmed by the *Royal Proclamation of 1763* which applied to territories claimed by the British with the exception mentioned therein, and it applied to Vancouver Island by virtue of the claim of Sir Francis Drake in 1579 and subsequent British claims thereto. Vancouver Island was not within the exceptions in the Proclamation since it was not Hudson's Bay Co. land in 1763. This right to hunt and fish, recognized by British and colonial governments before Confederation, could only be extinguished before Confederation by surrender to the British Crown and after Confederation by surrender to the Dominion Government. Dominion and Provincial Governments had recognized this right after Confederation and it had never been surrendered or extinguished.

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*Leave to appeal to the Supreme Court of Canada granted April 5, 1965.

Per Sheppard, J.A., Lord, J.A., concurring, dissenting: The *Game Act* is valid provincial legislation in so far as it applies to Indians not on a reserve and it is not ousted by s. 87 of the *Indian Act* since the conveyance or document of 1854 is not a "Treaty" within s. 87, either in form or in substance. In form, the parties were the Indians and the Hudson's Bay Co. to which the Crown had granted its interests in Vancouver Island in 1849. In substance, the document was a deed of surrender by the Indians to the Hudson's Bay Co., not creating any rights of hunting and fishing and not containing any grant of such rights or promise thereof from the Crown. The assertion therein of such rights by the Indians as excepted from the surrender meant the exclusion thereof from the operative part of the document. A Treaty would include such rights within its operative part either by grant or by acknowledgment of their existence. No reliance could be placed on the *Proclamation of 1763* since it did not apply to Vancouver Island which was unknown then to the Crown.

[*Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618; *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, 58 L.J.P.C. 54, apld; *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543 (U.S.); *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403; *Ontario Mining Co. v. Seybold* (1900), 31 O.R. 386; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637; *A.-G. Can. v. George*, 45 D.L.R. (2d) 709, [1965] 2 C.C.C. 148, [1964] 2 O.R. 429; *Secretary of State for India v. K. B. Sahaba* (1859), 13 Moo. P.C. 22, 15 E.R. 9; *A.-G. Can. v. Cain, A.-G. Can. v. Gilhula*, [1906] A.C. 542; *R. v. Robertson* (1886), 3 Man. R. 613; *R. v. Hill* (1907), 15 O.L.R. 406, refd to]

Statutes — Interpretation — Judicial notice of facts of history — Right of Court to rely on own historical knowledge and research.

Per Norris, J.A.: The Court is entitled in interpreting the meaning of a term in a statute to take judicial notice of the facts of history whether past or contemporaneous and is entitled to rely on its own historical knowledge and researches.

[*Monarch Steamship Co. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196; *Read v. Bishop of Lincoln*, [1892] A.C. 644, refd to]

APPEAL by the Crown from an acquittal of certain Indians by Swencisky, Co.Ct.J., allowing an appeal from a conviction by L. Beevor-Potts, Esq., P.M., on a charge under the *Game Act* (B.C.).

T. G. Bowen-Colthurst, Q.C., and *A. W. Hobbs*, for appellant.

T. R. Berger, for respondents.

DAVEY, J.A.:—The Crown appeals from the respondents' acquittal by Swencisky, Co.Ct.J., on their appeal to him from their summary conviction by L. Beevor-Potts, Esq., P.M., of having game, namely, the carcasses of six deer, in their possession during the closed season without having a valid and subsisting permit under the *Game Act*, contrary to the pro-

visions of that Act. The *Game Act* is an Act of the Provincial Legislature, R.S.B.C. 1960, c. 160.

The Crown concedes that if the respondents, who are native Indians, had a legal right to hunt for food for themselves and their families over the lands in question, they were lawfully in possession of the carcasses, no permit was required, and they were not guilty of the offence.

Section 18 of the *Game Act* forbids any person to kill deer except in the open season, subject to certain specified exceptions within which the respondents do not fall. They contend that an agreement (ex. 8) between their ancestors, members of the Saalequun tribe, and Governor Douglas, dated December 23, 1854, for the sale of the land to the Hudson's Bay Company, gave them the right to hunt for food over the land in question and, alternatively, that as native Indians they possess the aboriginal right to hunt for food over unoccupied land lying within their ancient tribal hunting grounds.

For the purposes of this appeal it must be taken that the respondents are native Indians, members of the Saalequun tribe, and descendants of the members who signed ex. 8; that they killed the deer on unoccupied land comprised in the sale to the Hudson's Bay Co., and forming part of the ancient hunting grounds of the tribe, for the purpose of providing food for themselves and their families.

It is common ground that ex. 8 must be taken to include the following clause appearing in all other transfers of Vancouver Island Indian land, which, for reasons that need not be mentioned, does not appear in this instrument:

> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

The Crown does not deny that the respondents are entitled to exercise and enjoy whatever rights or privileges there may be under ex. 8 until they have been effectively extinguished. It does contend that ex. 8 conferred no hunting rights, and if it did, that these rights have been extinguished by s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, first enacted in 1951, which the Crown says extends in effect the general provisions of the *Game Act* to Indians.

Section 87 reads as follows:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

The Crown submits that ex. 8 does not fall within the prefatory saving clause of s. 87 because:

(1) Exhibit 8 did not create any hunting rights but merely recognized pre-existing privileges; that the alleged hunting rights were mere liberties which formed part of the aboriginal rights of the Indians over the soil, and that they existed when Vancouver Island became British territory, and continued until extinguished or abolished by valid legislation; that the saving clause refers only to rights created by Treaties.

(2) That even if ex. 8 did create or recognize rights that could be the subject of a Treaty within the meaning of the saving clause, the document is not such a Treaty.

The force of the first argument seems to depend upon the assumption that s. 87 should be read as if it were subject only to rights created by a Treaty; that would remove from the saving clause rights already in being and excepted from or confirmed by a Treaty. That argument fails to accord full meaning to the words, "subject to the *terms* of any treaty . . ." In my opinion an exception, reservation, or confirmation is as much a term of a Treaty as a grant, (I observe parenthetically that a reservation may be a grant), and the operative words of the section will not extend general laws in force in any Province to Indians in derogation of rights so excepted, reserved or confirmed.

Counsel for the Crown next submits that ex. 8 is not a Treaty. He contends that a Treaty within s. 87 is:

(1) A document that on its face is so described or one that uses that word in the text, and,

(2) deals with fundamental differences between the parties (quaere, political differences?) and not merely with private rights, such as in this case the sale of land, and,

(3) a formal document in which the terms are set out with some degree of formality, and,

(4) an agreement to which the Crown is a party, or which it has authorized one of the parties to make on its behalf.

Counsel submits that ex. 8 meets none of these requirements.

It is unnecessary to venture any extended definition of the word "Treaty" in this context, but it can be safely said that it does not mean an "executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities . . .", *per* Rand, J., in *Francis v. The Queen*, 3 D.L.R. (2d) 641 at p. 647, [1956] S.C.R. 618. It is also clear in my opinion that the word is not used in its widest sense as including agreements between individuals dealing with their private and personal affairs. Its meaning lies between those extremes. Counsel for the Crown submits on the authority of Kellock, J., in *Francis v. The Queen, supra*, at p. 652 D.L.R., that the word means only those Treaties referred to in other sections of the Act, *i.e.*, ss. 11(*b*), 15(1)(*b*), 18(1), 71, 89(1)(*b*), and 112(4) [repealed 1960-61, c. 9, s. 1]. Taking the learned Judge's remarks in their context, I do not understand him to mean that s. 87 refers only to those Treaties, but that it means Treaties of that type, as opposed to solemn conventions between states, such as the *Jay Treaty*, which was relied upon by Francis in that case.

In considering whether ex. 8 is a Treaty within the meaning of s. 87, regard ought to be paid to the history of our country: its original occupation and settlement; the fact that the Hudson's Bay Co. was the proprietor, and to use a feudal term contained in its charters, the Lord of the lands in the Northwest Territories and Vancouver Island; and, the part that company played in the settlement and development of this country. In the Charter granting Vancouver Island to the Hudson's Bay Co., it was charged with the settlement and colonization of that Island. That was clearly part of the Imperial policy to head off American settlement of and claims to the territory. In that sense the Hudson's Bay Co. was an instrument of Imperial policy. It was also the long standing policy of the Imperial government and of the Hudson's Bay Co. that the Crown or the company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the Crown and the Hudson's Bay Co. in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard ex. 8 as a

mere agreement for the sale of land made between a private vendor and a private purchaser. In view of the notoriety of these facts, I entertain no doubt that Parliament intended the word "Treaty" in s. 87 to include all such agreements, and to except their provisions from the operative part of the section. That being so, s. 87 does not extend the general provisions of the *Game Act* to the respondents in the exercise of their hunting rights under ex. 8 over the lands in question.

We have been referred to no other Act of Parliament or the Colonial Legislature that would have the effect of abrogating or curtailing the respondents' rights under ex. 8, and the only provincial legislation that might do so is the *Game Act* itself.

Sections 8 [rep. & sub. 1961, c. 21, s. 3] and 15 [rep. & sub. 1961, c. 21, s. 6] of the *Game Act* specifically exempt Indians from the operation of certain provisions of the Act, and from that I think it clear that the other provisions are intended to be of general application and to include Indians. If these general sections are sufficiently clear to show an intention to abrogate or qualify the contractual rights of hunting notoriously reserved to Indians by agreements such as ex 8, they would, in my opinion, fail in that purpose because that would be legislation in relation to Indians that falls within Parliament's exclusive legislative authority under s. 91(24) of the *B.N.A. Act*, and also because that would conflict with s. 87 of the *Indian Act* passed under that authority. Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them. Lord Watson's judgment in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 58 L.J.P.C. 54, if any authority is needed, makes that clear. At p. 60 he observed that the plain policy of the *B.N.A. Act* is to vest legislative control over Indian affairs generally in one central authority. On the same page he spoke of Parliament's exclusive power to regulate the Indians' privilege of hunting and fishing. In my opinion, their peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which Parliament has exclusive legislative authority, and only Parliament can derogate from those rights.

In the result, the right of the respondents to hunt over the lands in question reserved to them by ex. 8 are preserved by s. 87, and remain unimpaired by the *Game Act*, and it follows that the respondents were rightfully in possession of the carcasses. It becomes unnecessary to consider other aspects of a far-reaching argument addressed to us by the respondents' counsel.

I would dismiss the appeal.

SHEPPARD, J.A. (dissenting) :—This appeal is by the Crown from the acquittal of Swencisky, Ct.Ct.J., from the charge that the accused on July 7, 1963, by Old Nanaimo Lake Road, B.C., did have possession of six deer more than nine days after the close of the open season, contrary to the *Game Act*, R.S.B.C. 1960, c. 160, s. 25 as re-enacted by 1961, c. 21, s. 10.

The accused, who are native Indians, admitted that they had shot the deer on the western slope of Mount Benson near Nanaimo, which was found not to be on a reserve but in an organized district. The facts are not in dispute. The sole defence is that the accused Indians have a right to hunt paramount to the prohibitions of the provincial *Game Act*.

The accused were tried before L. Beevor-Potts, Esq., Magistrate, Nanaimo, were convicted and fined. They thereupon appealed to Swencisky, Co.Ct.J., who, after trial, held:

> Briefly, to summarize the effect of my judgment, I hold that the document filed as ex. 8, though not signed by Governor Douglas in his capacity as Governor, is, nevertheless, a Treaty and, as a result, the two accused are entitled to the benefit of the exception contained in s. 87, of the *Indian Act*.
>
> I also hold that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the Proclamation of 1763, has never been abrogated or extinguished and is still in full force and effect.

and acquitted the accused. From that acquittal the Crown has appealed. Under the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, the Crown is limited to a point of law and therefore accepts the finding of the learned Judge that the accused Indians are descendants of the band who were parties to the alleged "Treaty" (ex. 8) but contends that the accused Indians not then hunting on the reserve are within the prohibition contained in s. 25 of the *Game Act*. On the other hand, the accused contend that their rights of hunting are created or at least confirmed by the *Royal Proclamation of 1763* (found in R.S.C. 1952, vol. 6, p. 6127) in the following part thereof [p. 6130]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies. that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads of Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

and that the Proclamation has the effect of legislation and creates a right superior to the *Game Act*.

The Proclamation of 1763 does not apply to Vancouver Island. In that Proclamation the Crown states that it is concerned with the "Tribes of Indians with whom We are connected, and who live under our Protection", and with the lands which are "reserved to the said Indians, or any of them". The bands of Indians on Vancouver Island in 1763 were not "Tribes of Indians with whom We are connected, and who live under our Protection", and therefore the Proclamation of 1763 did not apply to the accused Indians for the following reasons:

First, in 1763 Vancouver Island and the bands of Indians thereon were unknown to the Crown. In 1778 Captain Cook landed at Nootka, which was a separate island. In 1792 Captain Vancouver circumnavigated Vancouver Island and formed the settlement at Friendly Cove, Vancouver Island, so that in 1763, the date of the Proclamation, Vancouver Island had not been discovered by any subject of the Crown and until such discovery the Crown could not have been aware that there was such an island or that it was inhabited by Indians.

Secondly, the Proclamation refers to lands to the west used by "said Indians", and therefore to lands used by Indians with whom the Crown was then connected or who lived under the Crown's protection. In 1763 that would not relate to Vancouver Island or the Indian bands thereon.

Thirdly, in 1763, the date of the Proclamation, the Crown had no lands in Vancouver Island to which the Proclamation could apply as lands "reserved to the said Indians, or any of them".

The Proclamation dealing with Indian rights was considered in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, where Lord Watson said at pp. 54 and 58:

> . . . the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. . . . The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.

As the Proclamation deals with Crown lands on which such Indian rights are a burden, it could not have application to the lands of Vancouver Island in respect of which the Crown in 1763 asserted no "present proprietary estate".

The accused Indians also contend that the document (ex. 8) is a treaty within s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, and that therefore all the laws of the Province, including the *Game Act*, are subject to the provisions of such treaty by reason that s. 87 comes within one of the enumerated classes of subjects in s. 91 of the *B.N.A. Act, viz.*, s. 91 (24), and the Provincial Legislature is "thereby overborne": *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136, Lord Watson at p. 149. It is therefore necessary to consider whether, as the accused contend, the document (ex. 8) is a Treaty within s. 87 of the *Indian Act*; that is, whether it is a Treaty at all and if so, whether a Treaty within s. 87.

On January 13, 1849, the Crown did grant to the Hudson's Bay Co. the lands of Vancouver Island and provide for the government thereof by Governor and Legislative Council, and later on July 16, 1849, appointed Blanshard and on May 16, 1851, appointed Douglas as successive Governors. During the time material, Douglas was the Factor of the Hudson's Bay Co. and Governor of Vancouver Island. The learned trial Judge has found: " . . . that a number of documents were signed by the members of various Tribes of Indians on Vancouver Island surrendering the lands occupied by them as follows . . ." then follow a recital of 14 agreements —ten from August 29, 1850 to February 8, 1851, when Blanshard

was Governor and four from February 6, 1852 to (December 23rd) 1854, when Douglas was Governor. The learned trial Judge further held:

> Blanshard was Governor when the first 10 agreements were signed between the Hudson's Bay Co., and various Indian Tribes on Vancouver Island, but he did not sign any of them so far as any documents filed in Court, as exhibits disclose.

and that Douglas " . . . was never specifically deputized . . . to enter into a treaty with the Indians of Vancouver Island . . ." The practice was to pay the Indians the purchase price against their signature by mark on blank paper to be filled in later as a deed. In 1854 the Saalequun tribe so surrendered their lands on Commercial Inlet, 12 miles up the Nanaimo River. For that surrender no deed was made up but the signatures or marks were obtained on blank paper against payment (ex. 8). Had the deed been completed it would have been substantially in the following form (ex. 8):

> Know All men that we the Chiefs and people of the . . . Tribe who have signed our names and made our marks to this deed, on the . . . day of . . . do consent to surrender entirely and forever, to James Douglas the Agent of the Hudsons Bay Company, in Vancouver Island that is to say for the Governor, Deputy Governor and Committee of the same, the whole of the lands situate and lying between . . .
>
> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be proper[illegible] surveyed hereafter; it is understood however, that the land its[illegible] with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. We have received as payment . . .

The accused contend that this arrangement was acted on throughout and therefore is binding, although the deed has not been drawn, and that the agreement so read is a Treaty between the band and Governor Douglas as the Governor of Vancouver Island and representing the Crown, whereby the Crown granted to the Indians the right "to hunt over the unoccupied lands, and to carry on our fisheries as formerly". That contention is not sound. Exhibit 8 is neither in form nor in substance a Treaty.

The parties to a Treaty would necessarily be the Crown or an authorized official and the Indians, but the parties to this transaction are the Hudson's Bay Co. and the Indians; the parties thereto are named as follows: for the Indians, the Chiefs and people; and for the other party, James Doug-

las, the Agent of the Hudson's Bay Co. on Vancouver Island. Further, the signatures and witnesses are officials of the Hudson's Bay Co. — Charles Edward Stuart, Richard Gollidge and George Robson, Manager at the Nanaimo office. It is also signed "James Douglas, Governor, Vancouver Island", although he was then the Factor and is described in the document as the Agent of the Hudson's Bay Co.

The Hudson's Bay Co. had the essential interest of entering into the document (ex. 8) with the Indians. Any rights of the Indians would be a cloud on the title of the Hudson's Bay Co. as the Crown had previously conveyed its title to the lands of Vancouver Island.

On January 13, 1849 (ex. 6) the Crown had granted to the Hudson's Bay Co. the lands of Vancouver Island, and the interest of the Crown in those lands had therefore ceased until the time of the subsequent conveyance by the Hudson's Bay Co. On April 3, 1867, the Hudson's Bay Co. did reconvey to the Crown (ex. 7). Hence the acquisition of these lands from the Indians originated in the policy of the Hudson's Bay Co., not in any instructions from the Crown. It was afterwards that the Hudson's Bay Co. asked to be reimbursed for obtaining such surrender (Petition of March 25, 1861, ex. 11), and while the company held the grant of land it was to their interest to obtain these settlements for their trading posts.

If the document (ex. 8) were a Treaty it would include a grant of rights or a promise of such rights from the Crown but in substance the document is a deed of surrender being granted by the Indians to the Hudson's Bay Co. The rights of hunting and fishing are not created by the document (ex. 8) nor granted by the Crown as in the case of a Treaty, but are asserted by the Indians as rights which they retain and are therefore excepted from the surrender which they are then making to the Hudson's Bay Co. In short, the document (ex. 8) excludes such alleged rights from the operative part; a Treaty as contended would include such rights within the operative part, either by grant or acknowledgment of their existence.

It therefore follows that the document (ex. 8) is not a Treaty and is therefore not within s. 87 of the *Indian Act* and does not contain rights created by the Parliament of Canada by s. 87. As the Indians have not a Treaty within s. 87 of the *Indian Act*, there remains the question whether or not the *Game Act* is within the legislative jurisdiction of the Province and applicable to Indians not on their reserve.

In *St. Catherine's Milling & Lumber Co. v. The Queen*, *supra*, Lord Watson, in describing such rights under the Proclamation of 1763, said [p. 54] that the aboriginal rights of hunting were "personal and usufructuary . . . dependent upon the good will of the Sovereign", and Sir William Blackstone in his *Commentaries on the Laws of England*, vol. 2, c. 26, p. 403 said:

> 4. With regard likewise to animals *ferae naturae*, all mankind had by the original grant of the creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own . . .

Such rights would therefore appear to come within the *B.N.A. Act*, s. 92(13), Property and Civil Rights in the Province, and head (16), Generally all Matters of a merely local or private Nature in the Province, and therefore within the legislative jurisdiction of the Province.

In *R. v. Robertson* (1886), 3 Man. R. 613, the provincial enactment prohibiting any person having deer in his possession during the closed season, was held *intra vires* of the Manitoba Legislature as coming within the *B.N.A. Act*, s. 92(13) and (16), and applicable to the accused Indian not on his reserve. *R. v. Paling*, [1946] 3 D.L.R. 54, 85 C.C.C. 289, 54 Man. R. 43, [1946] 2 W.W.R. 49, applied *R. v. Robertson*, *supra*, and held that the provincial enactment prohibiting an Indian hunting not on the reserve wild ducks from sunset Saturday to sunrise Monday was valid.

In *R. v. Hill* (1907), 15 O.L.R. 406, the accused was held properly convicted under a provincial enactment for practising not on the reserve medicine for hire. Osler, J.A., at p. 410 said:

> I am, however, of opinion that the question submitted by the magistrate should be answered in the affirmative, and that the defendant was rightly convicted.
>
> The Indian Act does not profess to deal with all the rights and obligations of an Indian. Nothing forbids him to acquire real and personal property outside of a reserve or special reserve, or to dispose of it, *inter vivos* at all events, as freely as persons who are not Indians.

In conclusion, the section of the *Game Act* here in question is within the legislative jurisdiction of the Province and is here applicable to the accused Indians not on their reserve; therefore the appeal should be allowed and the conviction of the Magistrate affirmed.

NORRIS, J.A.:—This is an appeal by the Crown from a judgment of Swencisky, Co.Ct.J., allowing an appeal by the accused, respondents on this appeal, from a conviction by L. Beevor-Potts, a Magistrate, upon a charge of having in their possession game, to wit, the carcasses of 6 deer during the closed season without being authorized to do so by a valid and subsisting permit under the *Game Act* contrary to the provisions of that Act.

The facts on which the charge was founded are not in dispute. The accused were found on the Old Nanaimo Lake Road on Vancouver Island, British Columbia, in possession of the carcasses shot on the west slope of Mount Benson near Nanaimo, as food for the accused and their families. It is common ground that the place where the deer were killed and where the accused were found in possession of the carcasses is not in an unorganized district as defined in the regulations under the *Game Act*, but that the west side of Mount Benson falls within the definition of "unoccupied lands" referred to in the condition contained in a conveyance (ex. 8) of the land to the Hudson's Bay Co. from the predecessors of the two accused in the tribe or band to which the accused belong and from whom they are descended and that these lands formed part of the ancient hunting grounds of the tribe or band. This conveyance (ex. 8) and its condition are of great importance in this appeal.

The foregoing facts being accepted, the Crown concedes that if the respondents who are native Indians are not within the prohibition contained in the *Game Act* of British Columbia they were lawfully in possession of the carcasses and were not guilty of the offence.

It is agreed by the parties that a number of conveyances of land from Indians on Vancouver Island to the Hudson's Bay Co. executed within a year or so of the execution of ex. 8 contained the following condition:

> The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

and that such condition is, on the evidence, to be taken as contained in ex. 8. Exhibit 8 was executed by some 159 Indian Chiefs and heads of families of the bands comprising the Nanaimo tribe of Indians, each of whom executed the docu-

ments by affixing his mark. The attestation clause is as follows:

or

Done at Fort Nanaimo/ Colvile Town
December
this 23rd day of September in the
year of our Lord 1854 in presence of us
who in the presence of each other,
have hereunder affixed our names.

Charles Edward Stuart Hudson's Bay Compy. i charge of Fort Nanaimo

Richard Golledge Hudson's Bay Compys Service
George Robinson — Manager of the Nanaimo ....
James Douglas Governor Vancouver Island

(corrections and abbreviations as contained in the original document)

The consideration for the conveyance was 636 white blankets, 12 blue blankets, 20 inferior blankets. From the exhibit and the evidence it appears that the blankets were not divided equally among those who executed ex. 8, but that the Chiefs and a few other Indians received "enhanced" consideration in the way of extra blankets. Apart from this, the consideration was roughly 3 blankets to each Indian.

The evidence is that at the time ex. 8 was executed the tribal territory of these tribes included what is now the Old Nanaimo Lakes Road referred to in the information and the west slope of Mount Benson which is in the same general area.

The learned County Court Judge delivered an exhaustive judgment allowing the appeals by the accused and quashing the convictions. He summarized his findings as follows:

> Briefly, to summarize the effect of my judgment, I hold that the document filed as ex. 8, though not signed by Governor Douglas in his capacity as Governor, is, nevertheless, a Treaty and, as a result, the two accused are entitled to the benefit of the exception contained in s. 87, of the *Indian Act*.
>
> I also hold that the aboriginal right of the Nanaimo Indian tribes to hunt on unoccupied land, which was confirmed to them by the *Proclamation of 1763*, has never been abrogated or extinguished and is still in full force and effect.

The argument of counsel for the Crown appellant was made under the following heads:

1. That ex. 8 is not a treaty within the meaning of s. 87 of the *Indian Act* and therefore the provisions of that section make the provisions of the *Game Act* of British Columbia applicable to the respondents because:

(a) it is reasonable to suggest that any document which is a Treaty within s. 87 would show on its face that it is a treaty within the section;

(b) a Treaty involves something more fundamental than a sale and purchase, *viz.*, a basic difference between the parties;

(c) a treaty is a formal document in which the terms are set out with a considerable degree of formality;

(d) the word "treaty" in s. 87 refers to a political agreement to which the Crown must be a party or at the very least it must be an agreement made pursuant to authority conferred by the Crown on one party to the agreement.

2. In any event, ex. 8 did not confer hunting rights — the rights being rights reserved and not conferred — s. 87 does not refer to rights acknowledged and only to rights conferred by a treaty.

3. That as to the effect of the *Royal Proclamation of 1763*:

(a) This *Proclamation* has never had any application whatsoever to the Indians on Vancouver Island.

(b) If this *Proclamation* did ever apply to Vancouver Island, such application was excluded in 1849 by the Crown grant of Vancouver Island to the Hudson's Bay Company (ex. 6).

(c) In any event, any hunting rights conferred on any Indians on Vancouver Island had on July 7, 1963, the date of the alleged offence, been extinguished by legislation, such legislation being colonial and provincial legislation relating to game and the combined effect of s. 87 of the *Indian Act* and the B.C. *Game Act*.

4. As to aboriginal hunting rights these had been by July 7, 1963, the date of the alleged offence, extinguished by colonial and provincial legislation and the combined effect of s. 87 of the *Indian Act* and the British Columbia *Game Act*.

The submission of counsel for the respondents was as follows:

A. The Game Act, properly construed, does not apply to the Respondents because they are entitled to hunt by virtue of a treaty made in 1854 between the Governor of Vancouver Island and the Indian tribes at Nanaimo (being the said Exhibit 8) and

1. The Treaty reserved to the Indians the right to hunt over unoccupied lands.

2. The Respondents, being descendants of the Indians who signed the Treaty, are entitled to claim the benefits it conferred on the Indians.
3. The Crown was a party to the Treaty and in any event, having taken the benefit of the treaty, is bound by it.
4. The "unoccupied lands" over which the Indians were given the right to hunt encompassed the whole of their ancient tribal territories.
5. The Treaty referred to is a Treaty within the meaning of the Indian Act, Section 87, and therefore the Game Act does not apply to the Respondents.
6. In any event the Legislature did not intend to take away the right to hunt conferred on the Indians by the said Treaty of 1854.

B. 1. The Game Act, properly construed, does not apply to the Respondents because their aboriginal title to their hunting grounds and their right to hunt thereon have never been extinguished, the aboriginal title being recognized under International law.

2. The Crown grant of Vancouver Island to the Hudson's Bay Company in 1849 did not extinguish the aboriginal rights of the Indians because:
   (a) The Crown could not, by the exercise of its executive power to make a grant of land in 1849 extinguish the aboriginal title of the Indians.
   (b) The Crown did not convey the 'hunting grounds' of the Indians in the grant.
   (c) Crown grants to proprietary companies were always subject to Indian title.
   (d) The evidence shows that it was never contemplated by the Colonial Office, the government of the Colony, the Hudson's Bay Company, or the Indians, that the grant should extinguish the Indian title.

C. 1. As to the Royal Proclamation of 1763, that Proclamation guaranteed the aboriginal rights of the Indians.

2. That Proclamation applied — and applies — to Vancouver Island.

D. If the Game Act, properly construed, applies to the Respondents, it is ultra vires the Province as being legislation in relation to Indians and lands reserved for the Indians because:
   (a) Prior to British Columbia entering confederation in 1871, no legislation had been passed extinguishing the aboriginal right of the Indians to hunt.
   (b) After British Columbia entered confederation in 1871, it had no power to pass legislation in relation to 'Indians and lands reserved for the Indians'.

E. The Indian Act, Section 87 does not operate so as to make the Game Act applicable to the Respondents.

Notices under the provisions of the *Constitutional Questions Determination Act* of British Columbia [R.S.B.C. 1960,

c. 72] were duly given by the respondents to the Attorneys-General of Canada and of British Columbia to the effect that the constitutional validity of s. 25 of the *Game Act* of British Columbia would be called into question in the hearing of this appeal in so far as that section purports to take away the respondents' right as Indians to hunt on unoccupied lands lying within the ancient tribal territories of the Nanaimo Indians pursuant to the treaty made at Nanaimo, B.C., in 1854 between Governor Douglas and the Nanaimo Indians, the *Royal Proclamation* of King George III of October 7, 1763, and the aboriginal title of the Indians and the respondents' right to be in possession of game as a result of such hunting. The Attorney-General of Canada was not represented on the hearing of the appeal.

Substantially for the reasons given by my brother Davey, which I have had the privilege of reading, I am of the opinion that ex. 8 is a "Treaty" within the meaning of s. 87 of the *Indian Act*. However, in view of the argument of counsel for the Crown, I think it is proper to add something further on that matter and to deal specifically with the matter of aboriginal rights and the applicability of the *Royal Proclamation of 1763*.

On all of these three matters it is proper to consider the history of the position of the Indians on this continent and in particular on Vancouver Island from the earliest times, the recognition of that position by the nations which sought or obtained dominion over the Indians and over the lands which they occupied and therefore the international treaties by which that dominion became effective and the legislation Imperial, Canadian, and Provincial affecting these rights of Indians. It is most important also to consider the position and authority of the Hudson's Bay Co. and the position and authority of James Douglas as Chief Factor of the Hudson's Bay Co. and Governor of Vancouver's Island as it was then called.

The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read v. Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

In order that my references on these matters may be understood from the beginning, I now state in general terms the conclusions to which I have arrived as follows:

(1) The fact of aboriginal rights on conquest or "discovery" so called of "new" lands has been recognized throughout the centuries by all the European nations which contended for power on this continent.

(2) The *Proclamation of 1763* was declaratory and confirmatory of such aboriginal rights and applies to Vancouver Island.

(3) The document ex. 8 including the condition or understanding hereinbefore quoted was a "Treaty" within the understanding of the Hudson's Bay Co. and Governor Douglas and the Colonial Government and the Indians and was therefore a "Treaty" within the contemplation of s. 87 of the *Indian Act*. It confirmed the Indians in their aboriginal rights of hunting and fishing, these being the rights essential to the survival of the Indians. These rights have never been surrendered or extinguished.

(4) As a result, the relevant restrictive provisions of the British Columbia *Game Act* under consideration on this appeal do not apply to the respondents. Any regulation of these rights would be a matter for the Parliament of Canada under s. 91(24) of the *B.N.A. Act, 1867*.

As to aboriginal rights:

Clearly, if only as a matter of expediency, the original explorers and their governments, with limited forces at their command and little or no knowledge of the country in which they were required to have dealings with the Indians, were bound to give recognition to "rights" of the native inhabitants. Motives, of course, varied from regard for fair dealing, through enlightened self-interest, to fear of death and destruction at the hands of savage tribes. The position of the conqueror in relation to the Indians has been well stated by Chief Justice Marshall in delivering the judgment of the Supreme Court of the United States in *Johnson and Graham's Lessee v. M'Intosh* (1823), 8 Wheaton 543, 5 Law Ed. 681 (at pp. 589-90 Wheaton):

> Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.
>
> The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become

> subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.
>
> When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.
>
> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.
>
> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

The controversy which has arisen from time to time has been generally as to the nature and extent of those rights and as to whether or not they have been extinguished.

The judgment of the learned Chief Justice is entirely consistent with the opinion of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen*, 14 App. Cas. 46, which will be referred to later. The judgment in *Johnson v. M'Intosh*, *supra*, was delivered at an early stage of exploration of this continent and when controversy as to those rights was first becoming of importance. Further, on the consideration of the subject-matter of this appeal, it is to be remembered that it was delivered only 5 years after the Convention of 1818 between Great Britain and the United States (erroneously referred to by counsel as the *Jay Treaty*) providing that the northwest coast of America should be free and open for the term of 10 years to the vessels, citizens, and subjects of both powers in order to avoid disputes between the powers. The rights of Indians were naturally an incident of the implementation of a common policy which was perforce effective as applying to what is now Vancouver Island and the territory

of Washington and Oregon, all of which were then Hudson's Bay territories. For these reasons and because the judgment in *Johnson v. M'Intosh, supra,* was written at a time of active exploration and exploitation of the West by the Americans, it is of particular importance.

In the same judgment the learned Chief Justice dealt with the nature of aboriginal rights at pp. 572-4, as follows:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishments of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

> The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Referring to the British position and the *Royal Proclamation of 1763* he said at p. 596:

> So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

In *St. Catherine's Milling & Lumber Co. v. The Queen*, 14 App. Cas. 46, Lord Watson in delivering the opinion of the Judicial Committee of the Privy Council dealt with the nature of the Indian rights as follows:

At p. 54:

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.

Page 55:

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

Pages 58-9:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

Page 59:

> . . . counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to

> designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91(24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Section 109 of the *B.N.A. Act, 1867*, which became applicable to include in its terms British Columbia when the Province entered Confederation in 1871, reads as follows:

> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

In the present case the aboriginal rights of the Indians confirmed by the reservation or condition in ex. 8 did not pass to the Province of British Columbia as they were an "interest other than that of the Province in the same". See also *A.-G. Que. v. A.-G. Can.*, 56 D.L.R. 373 at pp. 374, 377 and 378, [1921] 1 A.C. 401.

In the judgment of the Supreme Court of Canada in *Prince and Myron v. The Queen*, [1964] 3 C.C.C. 2, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, Hall, J. (*per curiam*), recognizes the aboriginal right, and treats the provisions of the *Game and Fisheries Act* and the *Manitoba Natural Resources Act* as recognizing an existing right, and in effect excluding Indians hunting for food on unoccupied land from the restrictive provisions of the provincial legislation as to hunting and fishing. The learned Judge of the Supreme Court of Canada states [p. 5 C.C.C.] that he agrees with the reasons of Freedman, J.A., in his dissenting judgment in this case in the Manitoba Court of Appeal, [1963] 1 C.C.C. 129 at p. 138, 40 W.W.R. (N.S.) 234, 39 C.R. 43, who speaking of the suggestion that there might be unsportsmanlike methods of hunting and fishing and the possibility of prejudice to the supply of game and fish if the Indians were not prevented from exercising their aboriginal rights of hunting said:

> The answer, however, lies in the education of the Indian so he will appreciate that what is in the best interests of the citizenry of Manitoba is also in his own best interests. The answer does not

consist in construing the section contrary to what appears to me to be its plain and dominant purpose.

Hall, J., also stated [p. 5 C.C.C.] that he agreed with the statement of McGillivray, J.A., in *R. v. Wesley*, [1932] 4 D.L.R. 774 at p. 781, 58 C.C.C. 269 at p. 276, [1932] 2 W.W.R. 337, 24 A.L.R. 433, who said:

> "If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food 'out of season' and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

It is to be noted that McGillivray, J.A., refers to the proviso in the Manitoba legislation as a matter of reassurance — "the Indian . . . was by the proviso to s. 12 *reassured* of the continued enjoyment of a right which he has enjoyed *from time immemorial*".

The aboriginal right is a very real right and is to be recognized although not in accordance with the ordinary conception of such under British law. In *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at p. 403, Viscount Haldane speaking of native rights said:

> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. See 14 App. Cas. 46 and [1920] 1 A.C. 401.

The last two citations undoubtedly refer to *St. Catherine's Milling & Lumber Co. v. The Queen* and *A.-G. Que. v. A.-G. Can.*, both *supra*.

As to the Royal Proclamation of 1763:

The *Royal Proclamation of 1763* was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island.

For the British, the *Proclamation of 1763* dealt with a new situation arising from the war with the French, in North America in which Indians to a greater or less degree took an active part on both sides, and incidentally from the *Treaty of Paris of 1763* which concluded that war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and the western reaches must be pacified, trade promoted, sovereignty exercised and justice administered, even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of the continent until almost the close of the 19th century. In the circumstances it was vital that aboriginal rights be declared and the policy pertaining thereto defined. This was the purpose and the substance of the *Royal Proclamation of 1763*. The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time — recognized in the various Treaties with the United States in which Indian rights were involved and in the succesive land Treaties made between the Crown and the Hudson's Bay Co. with the Indians.

The effect of the judgment of Lord Chief Justice Mansfield in *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 is that the *Royal Proclamation of 1763* is declared to have been the *Imperial Constitution* of Canada during the years 1763-1774 and had the effect of a statute. See *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72 *per* Maclean, J.: "The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed."

In his *A History of the Canadian West to 1870-71* (1939) A. S. Morton has discussed the foregoing matters at pp. 257-9 as follows:

> The cession of Canada by France to Great Britain, formally sealed by the Treaty of Paris, 1763, was necessarily followed by the organization of the territory involved. Only such phases of this

readjustment as may bear more or less directly upon the history of Rupert's Land call for attention here. The first decisions were registered in the Proclamation of October 7, 1763, after careful inquiries and many reports received from America. One of the Governments erected was that of Quebec. Its northern boundary was made to run from the head of the River St. John through Lake St. John to the south end of Lake Nipissing. Thus the claims of La Nouvelle France to all the territory to the north up to a narrow fringe on Hudson Bay occupied by the English Company were definitely set aside. Yet the southern boundary of Rupert's Land was in no way fixed. Indeed, it was not even mentioned. As the Company claimed to the height of land, and the northern boundary of Quebec was placed well to the south, the Proclamation left a strip of no-man's-land between. This was reserved as hunting-ground for the Red Men within which the White Men were not to settle. The western boundary of Quebec was drawn to run southward from Lake Nipissing, "crossing the River St. Lawrence and the Lake Champlain in 45 Degrees of North Latitude." West of this was again Indian Territory into which Europeans were not to migrate, but the Indians, and by implication the fur trade, were to be supreme. Any claim which Canada had to the North-West in virtue of La Verendrye's chain of forts ended when the western boundary of Quebec was thus fixed by law. On the other hand, the boundary of Rupert's Land is not so much as mentioned. The very silence of the Proclamation indicates that the rights of the Chartered Company were unaltered.

To discuss the many reasons for creating the great Indian Reservation would take us too far afield. The friendship of the Iroquois had, in certain phases, been a decisive factor in the late war on the side of the British, though their former treatment by the English colonists had all but thrown them into the arms of the French. It was due to the genius of Sir William Johnson, Superintendent of Indian affairs on behalf of the Imperial Government, that their hostility was allayed, so that the British could carry on campaigns through their territory and even gain battles with their help. The promise which won over the warlike Five Nations was that they would enjoy their territory undisturbed, and that no lands were to be taken from them but by formal purchase by His Majesty the King. Thus they would be protected from the dreaded encroachment of colonists. To us who have experienced the peaceful working out of such a policy, from the purchases by the Hudson's Bay Company of the rights to build their forts down to the long succession of Indian treaties which preceded the settlement of the North-West, this policy appears as doing no more than justice to the Indians, quite apart from the treaties which promised it to them — no mere scraps of paper, surely. So far from precluding the manifest destiny of the White Race on this continent, it really provided for an orderly and peaceful expansion.

. . . . .

The colonists, however, had habitually ignored the Red Man, and now persuaded themselves that, with the French driven out, the West had become theirs. Real estate speculators and eager migrants, ignoring the treaties and the right of the Crown to create such an Indian Reservation, and dominated by an overmastering will to possess, poured across the Alleghanies and even beyond the Ohio.

The inception and continued application of the principles of the *Royal Proclamation of 1763* are summarized by Idington, J., in *Province of Ontario v. Dominion of Canada* (1908), 42 S.C.R. 1 at pp. 103-4 [affd [1910] A.C. 637]:

> A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.
>
> That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.
>
> In these surrendering treaties there generally were reserves provided for Indians making such surrenders to enter into or be confined to for purposes of residence.
>
> The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of *The Queen* v. *The St. Catharines Milling Co.*, 10 O.R. 196.

See also the judgment of Chancellor Boyd last referred to at pp. 206 and 210-12.

In *Ontario Mining Co. v. Seybold* (1900), 31 O.R. 386, Chancellor Boyd emphasizes the importance of uniformity of administration of Indian affairs and points out that the *Proclamation of 1763* has been carried forward into s. 91(24) of the *B.N.A. Act, 1867*, and that the provisions in favour of the Indians are to be construed broadly in their favour. At p. 395 he said (referring to *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46):

> As to the power of the Dominion in the case of Indians and lands reserved for Indians (section 91(24)), it is decided that this was a bestowment of the exclusive power of legislation in order to ensure uniformity of administration as to all such lands and Indian affairs generally by one central authority, but that this was not inconsistent with the right of the Province to a beneficial interest in these lands available to them as a source of revenue whenever the estate of the Crown is relieved of the Indian title (p. 59).
>
> And as to the scope of "lands reserved for Indians," it is laid down that the phrase is sufficient to include all lands reserved upon any terms or conditions for Indian occupation (p. 59). That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy even in the most fugitive manner. But no doubt the phrase does include a treaty reserve such as "38 B." (See *Spalding v. Chandler* (1896), 160 U.S.R. at p. 403.)

The *Proclamation* while referring principally to Indians who were at the time known to the British, brought within its purview all Indians on lands over which Great Britain *claimed* dominion, that land being the unlimited west — the territory which was then and for over a century after the Treaty known generally as Indian Territory. This land was known to exist, although a great part of it had not been explored. The *Proclamation* is to be construed in accordance with the common understanding of the British expansionists of those days, who claimed the extension of dominion *not* in the terms of precise definition or of survey or of British settlement. In considering the applicability to Vancouver Island of the *Proclamation*, we are not concerned with the validity of such claim, but merely that the territory *was claimed* and that in its very terms the *Proclamation* covered all this territory. It reads in its relevant parts as follows [see vol. 6, R.S.C. 1952, pp. 6130-1]:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds — We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved,

without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And We do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And We do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the Use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was

committed of which they stand accused, in order to take their Trial for the same.

Given at our Court at
St. James's the 7th Day
of October 1763, in the
Third Year of our Reign.

GOD SAVE THE KING

If the conception of the British *claim* and continual extension of exploration be kept in mind, the use of the present tense in the expression "with whom We are connected, and who live under our Protection" is easily understood as referring to all the Indians on all territory claimed. The use of the term "for the present" presages the *anticipated* extension.

The declaration in the *Proclamation* in the following words:

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall *into the Sea from the West and North West as aforesaid*;

makes clear the inclusion of the western territories and the Indians thereon.

The *Hudson's Bay Charter* of 1670 did not include a grant to the company of the territory which included Vancouver Island and the Island was not granted to the company until the document of January 13, 1849 (ex. 6 hereinafter referred to). The exclusion from the reservation of lands for Indians in the *Royal Proclamation of 1763* of Hudson's Bay lands therefore did not apply to Vancouver Island. The aboriginal rights always existed on Vancouver Island and the *Proclamation of 1763* also applied to the Island from the date of the British claim hereinafter referred to.

In 1763 the full extent of the continent was not known, but the territories comprising it had been claimed by the British at least from the time of the Charter of Virginia in 1606 (C. M. Andrews, *Colonial Period of American History*, 1943, pp. 82-8). Such claims were subject to the recognition of the settlement and possession of territory by other European powers; but since 1496 when Henry VII granted to John Cabot, in defiance of the Papal Bull of 1493, a patent to discover and claim for England all lands not actually occupied by other European powers (Thomas Rymer-Foedera etc. London 1711, vol. XII, pp. 595-6) England, and later Britain, had adopted the policy of claiming all land not actually rec-

ognized by it as in occupation by another European power. Sir Francis Drake's claim in 1579 to New Albion (as he called it) was of this order and comprised the coast of northwest America. The words of the plaque which he placed in the San Francisco area on the coast of California are as follows:

> BEE IT KNOWNE VNTO ALL MEN BY THESE PRESENTS
> IVNE 17 1579
>
> BY THE GRACE OF GOD AND IN THE NAME OF HERR MAIESTY QVEEN ELIZABETH OF ENGLAND AND HERR SVCCESSORS FOREVER I TAKE POSSESSION OF THIS KINGDOME WHOSE KING AND PEOPLE FREELY RESIGNE THEIR RIGHT AND TITLE IN THE WHOLE LAND VNTO HERR MAIESTIES KEEPEING NOW NAMED BY ME AND TO BEE KNOWNE VNTO ALL MEN AS NOVA ALBION.
>
> FRANCIS DRAKE

Drake was seeking the Northwest Passage between the Atlantic and Pacific Oceans and turned back because of the cold. Records indicate that he reached at least the vicinity of the 48th parallel of north latitude which would be the west coast of Vancouver Island, the land "running on continually northwest as if it went directly to meet with Asia" (which corresponds to the bearing of the west coast of Vancouver Island): Sir Francis Drake, *The World Encompassed* quoted by R. P. Bishop, *Drake's Course in the North Pacific, B.C. Historical Quarterly*, vol. 3, 1939, in which is published a chart of that course plotted from records, and his claim for the British Crown was for all the "Kingdome". The claim may be taken to have included Vancouver Island in view of the fact that it was made on Drake's return south after his exploration of the north part of the west coast. That claim was the foundation of later claims reinforced by explorations between 1778 and 1789 and the occupation of Nootka on the west coast of Vancouver Island (A.F.N. Poole, *The Boundaries of Canada*, 42 *Can. Bar Rev.* 100 at p. 116 (1964)). Various maps in the 18th century, notably that of Samuel Dunn of 1774, portrayed the claim of England to the west coast as part of the general claim of England to all North America north and west of the Great Lakes. Dunn's map is of importance as it was prepared at a time when the coast began to appear on maps, before the voyages to Vancouver Island of Captains Cook and Vancouver. It may be taken as relating to a date before 1763 as there were no English explorations on the coast between 1763 and 1774, the date of the map. As such knowledge as there was of the coast including the west coast of Vancouver Island did not include knowledge of the existence of the Gulf of Georgia which separates

Vancouver Island from the mainland, the fact that Vancouver Island was not specifically shown on the map is not of importance and does not detract from the fact of the *claim* of the British to the north west part of North America.

Captain Cook in his journal for the year 1778 refers to "New Albion" as covering the north west coast of North America. In that year he followed the coast line north to Alaska calling at Nootka on the coast of Vancouver Island en route. Bering, for the Russians, had established a claim to Alaska half a century before.

The English and British claim, although vague and general was a claim asserted strenuously nevertheless, and as such covered part of the "lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north west", which included Vancouver Island.

There is some evidence that the Chinese endeavoured to establish a settlement on the west coast of Vancouver Island about the 5th century but Drake's claim of 1579 is the basis for the British claim to the Island and to British Columbia before 1763 (John Murray Gibbon, *The Romantic History of the Canadian Pacific*, 1937).

The *Proclamation of 1763* falls into five parts as affecting what is now Canada:

(1) A recital of the need to protect the Indians in territory not having been ceded to or purchased by the British Crown.

(2) A prohibition for the present and subject to further direction, against the grant by any Governor or Commander in Chief of any lands
   (a) beyond (*i.e.* to the West of) the heads or sources of any of the rivers which fall into the Atlantic Ocean from the West and North West (this being the unlimited West) and
   (b) any lands whatever which not having been ceded to or purchased by the British Crown were by the Proclamation reserved to Indians.

(3) The Reservation for the use of the Indians of all the lands and territories not included within the limits of the Government of Quebec and of the authority of the Hudson's Bay Co., the territories of which, but not their extent, were known in a general way at the time and were then under regulation. The declaration goes on to a further inclusion for the benefit of the Indians:

> "as also the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."

(4) Prohibitory and regulatory provisions for the benefit of the Indians.

(5) Administration of justice. Provisions for the apprehension and trial in the Colony of Quebec of fugitives from justice who might be in the Indian Territory.

The facts of actual surveys or settlement on the west coast are not of importance. The *Proclamation* was made on the basis of a *claim* to dominion and its protective provisions became applicable in fact to Indians as their lands (the Indian Territory) came under the *de facto* dominion of representatives of the British Crown.

It is to be noted that the *Proclamation* in its terms contemplates the direction and government by proprietaries such as the Hudson's Bay Co. This will be of importance later in the consideration of the position and authority of the Hudson's Bay Co. and of James Douglas in respect of the reservation to the Indians in ex. 8 of hunting and fishing rights.

The *Proclamation of 1763* had the effect of a statute and the following statutes show that Vancouver Island was formally brought within the terms of the *Royal Proclamation of 1763* for the purposes of the administration of justice by the statutory application of the provisions of the last paragraph thereof to that Island as part of the Indian Territory.

On August 11, 1803, *Imperial Statute*, 43 Geo. III, c. 138, provided:

> . . . That, from and after the passing of this Act, all Offences committed within any of the *Indian* Territories, or Parts of *America* not within the Limits of either of the said Provinces of *Lower* or *Upper Canada*, or of any Civil Government of the United States of *America*, shall be and be deemed to be Offences of the same Nature, and shall be tried in the same Manner and subject to the same Punishment, as if the same had been committed within the Provinces of *Lower* or *Upper* Canada.

and that the Governor or Lieutenant-Governor of Lower Canada might appoint persons wheresoever resident:

> . . . to act as Civil Magistrates and Justices of the Peace for any of the *Indian* Territories or Parts of *America* not within the Limits of either of the said Provinces, or of any Civil Government of the United States of *America*, as well as within the Limits of either of the said Provinces . . . for the Purpose only of hearing Crimes and Offences, and committing any Person or Persons guilty of any Crime or Offence to safe Custody, in order to his or their being conveyed to the said Province of *Lower Canada*, to be dealt with according to Law.

By *Imperial Statute*, 1 & 2 Geo. IV, c. 66 of July 2, 1821, to remove doubt, it was made clear that the last statute applied to the territories granted to the Hudson's Bay Company. The recital stated:

> And Whereas Doubts have been entertained, whether the Provisions of an Act passed in the Forty third Year of the Reign of His late Majesty King *George* the Third, intituled *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*, extended to the Territories granted by Charter to the said Governor and Company . . .
>
> . . . . .
>
> V. And be it declared and enacted, That the said Act passed in the Forty third Year of the Reign of His late Majesty, intituled *An Act for extending the Jurisdiction of the Courts of Justices 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*, and all the Clauses and Provisoes therein contained, shall be deemed and construed, and it is and are 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;* any thing in any Act or Acts of Parliament, or this Act, or in any Grant or Charter to the Company, to the contrary notwithstanding.

Throughout this statute successive references were made to "Indian territories" and other 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.

By *Imperial Statute*, 12 & 13 Vict. 1849, c. 48, provision was made for the administration of justice on Vancouver Island.

This statute, after reciting the Statutes of 1803 and 1821 and using the same words "Indian territories" and "other parts of America" etc. already referred to, went on to provide:

> And whereas, for the Purpose of the Colonization of that Part of the said *Indian* Territories called *Vancouver's Island*, it is expedient that further Provision should be made for the Administration of Justice therein: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Proclamation of this Act in *Vancouver's Island* the said Act of the Forty-third Year of King *George* the Third, and the said recited Provisions of the Second Year of King *George* the Fourth, and the Provisions contained in such Act for giving Force, Authority, and Effect within the said *Indian* Territories and other Parts of *America* to the Process and Acts of the said Courts of *Upper Canada*, shall

> cease to have Force in and to be applicable to *Vancouver's Island* aforesaid.

Thus not only was the policy set out in the last paragraph of the *Proclamation of 1763* carried through the three statutes as affecting the Indian Territories, but *Vancouver's Island* was stated in exact words in the Statute of 1849 to be part of the Indian Territories — the territories referred to in the *Proclamation*. In my opinion the conclusion is irresistible that before and at the time of the execution of ex. 8 in 1854 and on and after April 1867 when Vancouver Island was reconveyed to the Crown the *Proclamation* applied to Vancouver Island and so far as the Indian hunting rights are concerned, it has never been repealed: See *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *The King v. Lady McMaster*, [1926] Ex. C.R. 68 at p. 72 and there is no suggestion that they have ever been surrendered, the rights being in their "nature inalienable except by surrender to the Crown," in the words of Duff, J., in *A.-G. Que. v. A.-G. Can.*, 56 D.L.R. 373 at p. 377, [1921] A.C. 401. Such surrender would of necessity be to the Dominion Government or arranged with its concurrence: See *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, Lord Loreburn, L.C., at p. 646:

> The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, but in so doing they were not under any special duty to the province. And in regard to the proprietary rights in the land (apart from the Indian interest) which through the Crown enured to the benefit of the province, the Dominion Government had no share in it at all.

and *A.-G. Que. v. A.-G. Can.*, *supra*, Duff, J., at p. 380 D.L.R.:

> The Dominion Government had, of course full authority to accept the surrender on behalf of the Crown from the Indians . . .

See *Indian Act*, R.S.C. 1952, c. 149, the provisions of which in ss. 28, 37, 38 and 39 thereof carry out the policy of the *Royal Proclamation of 1763* as interpreted in the *St. Catherine's Milling & Lumber Co.* case, 14 App. Cas. at p. 59. On the effect of the *Royal Proclamation of 1763* see also *Johnson v. M'Intosh*, *supra*, Marshall, C.J., at p. 694 of 5 Law Ed.; *Mitchel v. United States* (1835), 9 Law Ed. 89; *The King v. Lady McMaster*, *supra*, Maclean, J., at p. 72; *A.-G. Can. v. George*, 45 D.L.R. (2d) 709, [1965] 2 C.C.C. 148, [1964] 2 O.R. 429. The appeal to the Supreme Court of Canada from the judgment in the last-named case has not been proceeded with, presumably because of the contrary conclusion reached by

that Court in *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642. However, that decision does not affect the applicability to this case of the dicta of Roach, J.A., at pp. 712 and 713 D.L.R. as follows:

> It is clear that what was thus reserved to them [under the *Royal Proclamation*] was not mere possession but also the use of the lands. All our Indian lore tells us of the use to which the Indians had been accustomed to put those lands. They used them primarily — to adopt the language in the recital — "as their Hunting Grounds". They lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food supplemented only by what, in accordance with their primitive knowledge they were able to grow on the land. These were the essentials that were secured to them, not alone for their security but also as being essential to the "Interest" of the Crown. This use was not peculiar to the Indians in this part of Canada. It was common among the Indians throughout the whole Dominion.

and referring to the 1930 agreement by which the Dominion ceded certain natural resources to the Prairie Provinces:

> I cite it merely for the purpose of indicating the recognition of the Federal Government of the rights of Indians which was exercised by them since time immemorial to hunt game for food in all seasons in those Provinces which rights have been similarly exercised by Indians wherever they have lived throughout the Dominion.

I am in complete agreement with the statement of Sissons, J., to the extent that it applies to the respondent Indians on this appeal in *R. v. Koonungnak* (1963), 45 W.W.R. 282 at p. 302, 42 C.R. 143:

> This proclamation has been spoken of as the "Charter of Indian Rights." Like so many great charters in English history, it does create rights but rather affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights.

The aboriginal rights as to hunting and fishing affirmed by the *Proclamation of 1763* and recognized by the Treaty (ex. 8) still exist. The principle of their existence has been recognized specifically in the legislation of many Provinces of Canada or by non-enforcement of provincial game laws affecting the rest of the population against Indians hunting game for food on unoccupied land.

To the extent that the exercise of the rights needs regulation they come under the provisions of Head 24 of Section 91 of the *British North America Act, 1867*, "Indians and lands reserved for Indians". The policy of Canada is that its regulatory laws should be applied uniformly throughout Canada. *See St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 *per* Lord Watson at p. 59:

> It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

referred to by Boyd, C., in *Ontario Mining Co. v. Seybold*, 31 O.R. at p. 395. This is particularly important in the case of Indians, who are inclined to rove, a fact which has been accepted by the United States and Canada with reference to the movements of Indians to and fro across the International Boundary. A provision to this effect was included in the *Jay Treaty* of 1794 between Great Britan and the United States and confirmed by the *Treaty of Ghent* in 1814.

The exclusive power of the Dominion Government to regulate the Indian hunting and fishing rights is accepted by Lord Watson in the *St. Catherine's* case, *supra*, at p. 60, as follows:

> The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario.

The Crown took benefits under the Treaty (ex. 8) and the hunting and fishing rights have been respected in British Columbia as in other Provinces ever since. It is now too late for this Province alone to attempt to take away rights which the Indians have had from time immemorial: See *Buron v. Denman* (1848), 2 Ex. 167 at p. 187, 154 E.R. 450, referred to in *Secretary of State for India v. K. B. Sahaba* (1859), 13 Moo. P.C. 22 at p. 86, 15 E.R. 9 (*post*) *per* Lord Kingsdown.

It is well that what is now attempted by the enforcement of the game laws against the Indians in this case be understood. This is not a case merely of making the law applicable to native Indians as well as to white persons so that there may be equality of treatment under the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had, *viz.*, the right to hunt out of season on unoccupied land for food for themselves and their families.

As to whether or not the document Exhibit 8 is a Treaty within Section 87 of the Indian Act:

On this branch of this appeal as has been stated, I agree with the conclusions of my brother Davey and substantially with his reasons. What I have to say following is by way of detail and in extension of those reasons. The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circum-

stances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 of the *Indian Act*, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied. In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. The transaction in question here was a transaction between, on the one hand, the strong representative of a proprietary company under the Crown and representing the Crown, who had gained the respect of the Indians by his integrity and the strength of his personality and was thus able to bring about the completion of the agreement, and, on the other hand, uneducated savages. The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded. The transaction in itself was a primitive one — a surrender of land in exchange for blankets to be divided between the Indian signatories according to arrangements between them — with a reservation of aboriginal rights, the document being executed by the Indians by the affixing of their marks. The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a "Treaty".

Exhibit 4 being a letter of instructions to James Douglas dated December, 1849, which was his authority in his dealing

with the Indians and the disposition of land, makes it quite clear that the document (ex. 8) completed in pursuance of that authority was to be a treaty. It also affirms the existence and the nature of the aboriginal rights as subsequently stated in the judgment of Lord Watson in the *St. Catherine's Milling Co.* case. This letter of instructions reads in part as follows:

> With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on, at the time when the Island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purposes of colonization. Where any annual tribute has been paid by the natives to the chiefs, a fair compensation for such payment is to be allowed.
>
> In other Colonies the scale of compensation adopted has not been uniform, as there are circumstances peculiar to each which prevented them all from being placed on the same footing, but the average rate may be stated at £1 pr head of the tribe for the interest of the Chiefs, paid on signing the Treaty.
>
> . . . . .
>
> The principle here laid down is that which the Governor and Committee authorize you to adopt in treating with the natives of Vancouver's Island, but the extent to which it is to be acted upon must be left to your own discretion, and will depend upon the character of the tribe and other circumstances. The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of fishing and hunting will be continued to them, and when their lands are registered, and they conform to the same conditions with which other settlers are required to comply, they will enjoy the same rights and privileges.

The language of the latter part of ex. 4 is particularly to be noted as containing "Treaty" language, *viz.*, the reference to the compensation to be "paid on signing the Treaty", the statement of the principle which Douglas is to adopt in "treating" with the natives of Vancouver's Island and that "the right of fishing and hunting will be continued to them".

The reply of Douglas to the Colonial Secretary on May 16, 1850 (ex. 5), confirms the policy that was followed in connection with all the Treaties including ex. 8 and the aboriginal rights of hunting and fishing and makes clear how the document was eventually completed. That reply contains the following words:

> I have the honour to acknowledge your communication of December 1849, stating in a more detailed form the views of the

> Governor and Committee respecting the colonization of this Island, the rights of the Natives, and their instructions as to the extent to which these rights are to be respected.
>
> . . . . .
>
> I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country.
>
> I attached the signatures of the native Chief's and others who subscribed the deed of purchase to a blank sheet on which will be copied the contract or Deed of conveyance, as soon as we receive a proper form, which I beg may be sent out by return Post. The other matters referred to in your letter will be duly attended to.

In determining the question as to whether ex. 8 is a "Treaty" within the meaning of s. 87 of the *Indian Act* of Canada the golden rule of construction is to be applied, *viz.*, that the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity, repugnance and inconsistency, but no further: *Becke v. Smith* (1836), 2 M. & W. 191 at p. 195, 150 E.R. 724; *Miller v. Salomons* (1852), 7 Ex. 475 at p. 546, 155 E.R. 1036. The Shorter Oxford dictionary, p. 2238, gives as a meaning of "treat", "To deal or carry on negotiations (*with* another) with a view to settling terms; to bargain, negotiate", and of "treaty", "A settlement arrived at by treating or negotiation; an agreement, covenant, compact, contract". In ex. 4, the instructions to Douglas under which ex. 8 was completed, words in the sense of the dictionary meaning quoted were used. The application of that meaning does not lead to any absurdity, repugnance or inconsistency, and indeed, in the light of the history and circumstances it is difficult to conceive of a term which would be more appropriate to describe the engagement entered into.

In *Francis v. The Queen*, 3 D.L.R. (2d) 641, [1956] S.C.R. 618, Kellock, J., at p. 652 D.L.R. excluded the more formal meaning of the word "Treaty" as it is used in respect of international treaties. My brother Davey has, in my respectful opinion, effectively disposed of the argument that Kellock, J., meant that s. 87 applied only to those Treaties referred to in other sections of the *Indian Act* and I would merely add that in my opinion the word as used in the section should, for the reasons already stated herein, be given its widest meaning in favour of the Indians. See also s. 15 of the *In-*

terpretation Act, R.S.C. 1952, c. 158 and *Worcester v. State of Georgia* (1832), 8 Law Ed. 512 at p. 579: "The language used in treaties with the Indians should never be construed to their prejudice."

The learned Judge below made a finding that "there is consequently no reason to conclude that he (Douglas) was signing in any other capacity other than as Chief Factor of the Hudson's Bay Co. when the document dealing with the lands of the Nanaimo Tribes was signed in 1854 even though in the latter document he wrote the words 'Governor Vancouver Island' after his signature. Such words, I hold to be merely descriptive of the man and not descriptive of the capacity in which he was signing the document". Because of the fact that the Hudson's Bay Co. like other proprietary companies of the day, was an instrument of Imperial Policy as indicated by my brother Davey and for other reasons following, with respect, I think that any question as to the capacity in which Douglas signed the document, whether as Governor or as Chief Factor or Agent of the company, is of little importance. He was at the same time both Governor and Chief Factor and Agent of the Hudson's Bay Co.

I propose now to deal with the position and authority of the Hudson's Bay Co.

The original Royal Charter incorporating the Hudson's Bay Co. was granted by King Charles the Second in 1670. The original members of the corporation thus established were all persons who history indicates were persons very much in the Royal favour. The first Governor, Prince Rupert of Bavaria, had been a great leader for the Stuarts in the Civil War. The second Governor was James, Duke of York, afterwards James II of England, and the third was John Churchill, afterwards Duke of Marlborough. As the power of the Monarch was without effective Parliamentary restriction it is understandable therefore, that the corporation formed by the persons, should have "of our especial grace, certain knowledge and mere motion", not only the great trading monopoly granted to it in British North America, well protected by the clauses of the Charter, but also the "absolute" lordship and proprietorship granted of the territory saving "the faith allegiance and sovereign dominion" due to the Crown, its heirs and successors to be held "in free and common soccage" with the right to pass "reasonable laws, constitutions, orders and ordinances . . . for the good government of the said Company, and of all governors of colonies, forts and plantations, factors, masters, mariners

and other officers employed or to be employed in any of the territories and lands aforesaid, and in any of their voyages . . . so always as the said laws, constitutions, orders and ordinances, fines and amerciaments, be reasonable, and not contrary or repugnant, but as near as may be agreeable to the laws, statutes or customs of this our realm." The tenure by "full and common soccage" — a tenure by service to be given by a corporation composed of persons in the Royal favour indicates the close, almost personal, relationship of the Grantee to the Sovereign who maintained his sovereignty in respect of the subject of the grant the company which was in this case responsible directly to the Crown and was to act as the instrument of *Royal,* and in more democratic days, of *Imperial* Policy.

The extent of the territory over which the company was to have trading jurisdiction is set out in the following words:

> WE HAVE granted, and by these presents, for us our heirs and successors, DO grant unto the said Governor and Company, and their successors, that they and their successors, and their factors, servants and agents, for them and on their behalf, and not otherwise, shall for ever hereafter have, use and enjoy, not only the whole, entire and only trade and traffic, and the whole, entire and only liberty, use and privilege of trading and trafficking to and from the territory, limits and places aforesaid; but also the whole and entire trade and traffic to and from all havens, bays, creeks, rivers, lakes and seas, into which they shall find entrance or passage by water or land out of the territories, limits or places aforesaid; and to and with all the natives and people inhabiting, or which shall inhabit within the territories, limits and places aforesaid; and to and with all other nations inhabiting any the coast adjacent to the said territories, limits and places which are not already possessed as aforesaid, or whereof the sole liberty or privilege of trade and traffic is not granted to any other of our subjects.

The fact of the Charter as a monopoly is expressed in the strongest terms with provision for forfeitures against those infringing on the exclusive rights of the company "the one half of all the said forfeitures to be to us, our heirs and successors, and the other half thereof WE DO by these presents clearly and wholly, for us, our heirs and successors, give and grant unto the said Governor and Company, and their successors". Under this Charter there was not a grant to the company of the territory which was afterwards known as Vancouver Island and therefore the *Proclamation of 1763* applied to the Island.

The power of the company, its Governors and Chief Factors and other officials to make laws and to enforce the laws is of the widest kind:

> . . . AND FURTHER, of our especial grace, certain knowledge and mere motion, WE DO, for us, our heirs and successors, grant to and with the said Governor and Company of Adventurers of England trading into Hudson's Bay, that all lands, islands, territories, plantations, forts, fortifications, factories or colonies, where the said Company's factories and trade are or shall be, within any the ports and places afore limited, shall be immediately and from henceforth under the power and command of the said Governor and Company, their successors and assigns; SAVING the faith and allegiance due to be performed to us, our heirs and successors as aforesaid; and that the said Governor and Company shall have liberty, full power and authority to appoint and establish Governors and all other officers to govern them, and that the Governor and his Council of the several and respective places where the said Company shall have plantations, forts, factories, colonies or places of trade within any the countries, lands or territories hereby granted may have power to judge all persons belonging to the said Governor and Company, *or that shall live under them*, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute justice accordingly; and in case any crime or misdemeanor shall be committed in any of the said Company's plantations, forts, factories or places of trade within the limits aforesaid, where judicature cannot be executed for want of a Governor and Council there, then in such case it shall and may be lawful for the chief Factor of that place and his Council to transmit the party, together with the offence, to such other plantation, factory or fort where there shall be a Governor and Council, where justice may be executed, or into this kingdom of England, as shall be thought most convenient, there to receive such punishment as the nature of his offence shall deserve.

The Charter gave power to the company "to make peace or war with any prince or people whatsoever that are not Christians" and in every way to protect the rights of the company.

The provisions of the Grant to the company of January 13, 1849 conveying Vancouver's Island to the company were definitive and confirmatory of the Charter of 1670 and specifically dealt with the matter of colonization of the Island. It did not destroy the aboriginal rights which the *Royal Proclamation of 1763* speaking prospectively in so far as Vancouver Island was concerned, affirmed. As was the case in the *Proclamation* the protection and welfare of the Indians was stressed and the lordship and proprietorship of the company (subject to the sovereign dominion of the British Crown) confirmed. The following paragraphs are noteworthy:

> And whereas it would conduce greatly to the maintenance of peace, justice and good order, and the advancement of colonization and the promotion and encouragement of trade and commerce in, and also to the protection and welfare of the native Indians residing within that portion of Our territories in North America called Vancouver's Island, if such island were colonized by settlers from the British dominions, and if the property in the land of such island

were vested for the purpose of such colonization in the said Governor and Company of Adventurers of England trading into Hudson's Bay; but nevertheless, upon condition that the said Governor and Company should form on the said island a settlement or settlements, as hereinafter mentioned, for the purpose of colonizing the said island, and also should defray the entire expense of any civil and military establishments which may be required for the protection and government of such settlement or settlements (except, nevertheless, during the time of hostilities between Great Britain and any foreign European or American power):

Now know ye, that We, being moved by the reasons before mentioned, do by these presents, for us, Our heirs and successors, give, grant and confirm unto the said Governor and Company of Adventurers of England trading into Hudson's Bay, and their successors, all that the said island called Vancouver's Island, together with all royalties of the seas upon the coasts within the limits aforesaid, and all mines royal thereto belonging:

And further We do, by these presents, for Us, Our heirs and successors, make, create and constitute the said Governor and Company for the time being, and their successors, the true and absolute lords and proprietors of the same territories, limits and places, and of all other the premises (saving always the faith, allegiance and sovereign dominion due to Us, Our heirs and successors for the same); to have, hold, possess and enjoy the said territory, limits and places, and all and singular other the premises hereby granted as aforesaid, with their and every of their rights, members, royalties and appurtenances whatsoever to them, the said Governor and Company, and their successors for ever, to be holden of Us, Our heirs and successors, in free and common soccage, at the yearly rent of Seven shillings, payable to Us and Our successors for ever, on the First day of January in every year.

The wording of the Hudson's Bay Co.'s *Royal Charter* of 1670 and the *Royal Grant* of 1849 leaves no room for doubt that it was contemplated that the Governor, Factors and other officials of the company should exercise on behalf of the company all the powers necessary to make such Treaties (in the broad sense as including accommodations) with the Indians and others which were considered necessary for the attainment of the objects of the Charter and the Grant, but as an arm of the Crown. Notwithstanding the informality of the transaction on the part of the Hudson's Bay Co., it was just as much an act of state as if it had been entered into by the Sovereign herself.

In the Tudor and Stuart days a number of proprietary companies were formed by charter direct from the Sovereign in person. Of these the East India Co. and the Hudson's Bay Co. were the most powerful. Both were emanations of the Crown in a very close sense of the terms — creatures of the Royal prerogative — and in this respect at least there was great similarity between them. It is therefore useful in con-

sidering the position of the Hudson's Bay Co. as representing the Crown to refer to the opinion of the Judicial Committee of the Privy Council in *Secretary of State for India v. K.B. Sahaba*, 13 Moo. P.C. 22 at pp. 75-7, 15 E.R. 9, Lord Kingsdown said:

> The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.
>
> But it was contended on the part of the Respondent, that this case did not fall within the principle, for the following reasons:—
>
> First. Because, as it was said, the East India Company did not stand in the position of an independent Sovereign; that such powers of Sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. . . .
>
> On the first point their Lordships are unable to discover any room for doubt. The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law, as it stood in the year 1839, is accurately stated in the following passage in the judgment of Chief Justice Tindal in case of *Gibson* v. *The East India Company* (5 Bingh. N.C. 273), in which, after referring to various legislative enactments, he observes that from these — "It is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India."

At p. 86:

> If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which according to the principle of the decision in *Buron v. Denman*, is equivalent to a previous authority.
>
> The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction.

It is abundantly clear, from the *Charter* of 1670 and the *Grant* of January 13, 1849, that the authority of the Hudson's Bay Co. as a delegate of the Crown and the authority of Douglas as the Agent and Chief Factor of the company and Gover-

nor of the Colony extended to the exercise of the powers of the Sovereign. See *A.-G. Can. v. Cain, A.-G. Can. v. Gilhula*, [1906] A.C. 542, Lord Atkinson at pp. 545-6:

> In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain: *St. Catherine's Milling and Lumber Co. v. Reg.* (1888) 14 App. Cas. 46, at p. 53. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. . . . The Imperial Government might delegate those powers to the governor of the Government of one of the Colonies, either by royal proclamation which has the force of a statute — *Campbell v. Hall* (1774) 1 Cowper, 204 — or by a state of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depository or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (1837) 1 Moo. P.C. 460, at pp. 472-6; *Donegani v. Donegani* (1835) 3 Knapp, 63, at p. 88; *Cameron v. Kyte* (1835) 3 Knapp, 332, at p. 343; *Jephson v. Ricra* (1835) 3 Knapp, 130.

I have no doubt that in enacting s. 87 of the *Indian Act*, Parliament recognized the fact that Indian Treaties would have been completed in degrees of formality varying with the circumstances of each case — some with Government representatives, some with military commanders and others with frontier representatives of the great trading companies. It was necessary that those on the frontier be given wide powers and a wide discretion. So it was with Douglas.

I have also no doubt that in enacting the section, Parliament recognized the fact that it was at the time of Douglas particularly important for the maintenance of law and order that Indian rights be respected and interpreted broadly in favour of the Indians, not merely for the due administration of law, but also for the safety of the settlers who constituted a minority of, at the most, 1,000 persons, there being 30,000 Indians on Vancouver Island alone, apart from the warlike tribes to the north, who always constituted a raiding threat and against whom the maintenance of friendship with the local Indians afforded a measure of security. The history of Indian troubles on the coast proved how important this consideration was. These being facts of history and notorious, it is reasonable to infer that Parliament had them in mind.

In considering the authority of Douglas in relation to the question as to whether or not the document (ex. 8) was a

Treaty, Parliament would doubtless have also in mind that he governed either as the Chief Factor or Agent of the Hudson's Bay Co. or as Governor, by the force of his personality and the respect which the Indians had for his word, and not by legislation or formal documents. He was almost isolated from the British Colonial Office and the head office of the company, as it took two months for his despatches to reach England and the same time for a reply to be received. These facts precluded him from obtaining specific authority when situations of emergency arose and changed from day to day. The Colonial Office was aware of this fact as is evidenced by a despatch of July 31, 1858, from Sir E. B. Lytton, Colonial Secretary, to Douglas. That despatch reads in part as follows:

> I have to enjoin upon you to consider the best and most humane means of dealing with the native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance and with the imperfect means of knowledge which I possess, I am reluctant to offer as yet, any suggestion as to the prevention of affray between the Indians and the immigrants.
>
> This question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you in the full persuasion that you will pay every regard to the interests of the natives which an enlightened humanity can suggest.
>
> Let me not omit to observe that it should be an invariable condition in all bargains for treaties with the natives for the cession of lands possessed by them.
>
> That subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's government that your early attention should be given to the best means of diffusing the blessings of the Christian religion and of civilization among the natives.

Similarly, Lord Carnarvon, Acting Colonial Secretary, in a despatch dated April 11, 1859, instructed Douglas in part as follows:

> I have to acknowledge the receipt of your despatch of 9th February, Number 4, transmitting copies of communications which have passed between you and the House of Assembly of Vancouver Island between the 23rd of August and the 5th of February, last.
>
> I am glad to perceive that you have directed the attention of the House to that interesting and most important subject, the relations of Her Majesty's government and of the Colony to the Indian race.
>
> Proofs are unhappily still too frequent of the neglect which Indians experience when the white man obtains possession of their country, and their claims for consideration are forgotten at the moment when equity most demands the hands of the Protector should be extended to help them.

> In the case of the Indians of Vancouver Island, and of British Columbia, Her Majesty's government earnestly wish that when the advancing requirements of colonization press upon the lands occupied by members of that race, measures of liberality and justice may be adopted for compensating them for the territory which they have been taught to regard as their own.
>
> Especially, I would enjoin upon you, and all in authority in both colonies, the importance of establishing schools of an industrial as well as an educational character for the Indians, whereby they may acquire the arts of civilized life which will enable them to support themselves and not degenerate into the mere recipients of emolumentary relief. If it is to be hoped that by such other means which your experience will enable you to devise, the Indians may in these, the most recent of the British settlements, be treated in a manner worthy of the beneficent rule of our gracious Sovereign.

These instructions as to the dealings with the Indians are in terms similar to those which Douglas received in December, 1849, from the Hudson's Bay Co. (ex. 4).

The wide power which Douglas had and the authority which he exercised is exemplified by his *Proclamation* of November, 1858, when he was made Governor of the Colony of British Columbia. By that *Proclamation* he indemnified himself and others in respect of illegal acts previously done and after referring to the fact that by his Commission he had been authorized by *Proclamation* under Seal of the Colony to make laws for the peace, order and good government of the same, he went on to proclaim:

> Be it therefore known to all whom it may concern, that I, the said James Douglas, Governor of British Columbia, do hereby, in virtue of the authority aforesaid, enact and proclaim that every act, matter or thing bona fide done and performed for any of the purposes aforesaid, before the date of this proclamation, by me, the said James Douglas, or any other person or persons acting under my authority or direction, shall be deemed to be and to have been valid in Law, and that I, the said James Douglas, and the said other persons, shall be and hereby are severally and jointly indemnified, freed and discharged from and against all actions, suits, prosecutions and penalties whatever, in respect of any such act, matter or thing, and that the same shall not be questioned in any of Her Majesty's Court of Civil or Criminal jurisdiction in this Colony.
>
> And I do further enact and proclaim, that any declaration in writing, under the hand of the Governor, or officer administering the Government of British Columbia, to the effect that any act, matter or thing specified therein, was done or performed for any of such purposes, or under any such direction or authority as aforesaid, shall, for the purposes of this proclamation, be conclusive evidence of the matters stated therein, and shall be a sufficient discharge and indemnity to all persons mentioned in the said declaration in respect of the act, matter or thing specified therein.

It is true that this *Proclamation* had reference to British Columbia, but it indicates that his authority was of the broad

nature referred to. Although on March 9, 1849, Governor Blanshard arrived as Governor, the authority continued to be exercised in fact by Douglas. The situation with which Blanshard was faced and the extent of his real power are referred to in *British Columbia: A History* by Margaret A. Ormsby, as follows (p. 99):

> There, without salary, without headquarters, without law officers, without an army, without police and without a gaol, Queen Victoria's representative was expected to introduce the pattern of government existing in all British colonies.
>
> Lacking a private residence, Blanshard remained on board the *Driver* for almost the first month of his term; on her departure, he was given a room in the Fort where he remained until autumn. During those months he learned that the authority of the Honourable Company ranked high above his and that the officers of the Company had methods of disciplining Company servants and Indians which were very different from his own.
>
> In the Colony of Vancouver Island, all the real power was concentrated in the hands of James Douglas. In addition to his position as Chief Factor and as senior officer of the Board of Management, Douglas acted as the Company's Agent for the sale of lands, minerals and timber, and as Agent of the Puget's Sound Agricultural Company. With the exception of twenty-six-year-old Captain Walter Colquhoun Grant, as yet the only colonist, and Grant's eight men, everyone on Vancouver Island was an employee of a great monopolistic trading company. By habit and by custom, everyone respected the decisions of the Chief Factor. To superimpose the institutions of self-government on a society organized as a hierarchy would be a mighty task.

Blanshard requested in November, 1850, that he be recalled and left the Colony in September, 1851. The Council was appointed by the Governor, the first Council being appointed by Blanshard as he was preparing to leave the Island and thereafter by Douglas. In 1850 Douglas was appointed the Senior member of the Council.

Douglas was appointed Governor of the Island on September 1, 1851. At that time the settlement on Vancouver Island amounted to a fort at Victoria and residential and farming lands adjoining thereto. In 1853 on Douglas' recommendation, his Council appointed Douglas' brother-in-law David Cameron as Chief Justice of Vancouver Island. The same historical authority (Ormsby) refers to this matter as follows (p. 120):

> Cameron had newly arrived in the Colony, and although the Governor had faith in his firmness and integrity, his past record was not too promising. After an unsuccessful career in business as a cloth merchant in Scotland and as manager of a sugar plantation in Demerara, he had obtained through Colvile a position as a clerk at the Company's Nanaimo coal-fields.

> Cameron's appointment, following by a few months the addition of John Work, an old Hudson's Bay Company man, to the Council, was all that Staines, Langford and Skinner needed to convince them that Douglas drew no distinction between his duty as Governor and his position as Chief Factor of the Hudson's Bay Company. At the meeting of the Legislative Council, Cooper had approved the selection of Cameron; now he threw in his lot with the parson and the squire. Early in February, 1854, Staines drafted a petition to be laid at the foot of the Throne, and prepared a protest to be placed before the Duke of Newcastle, the Colonial Secretary, claiming that Cameron had an "improperly close family connexion with the Governor", that he was not a lawyer by profession and that he had "exhibited notorious and gross partiality, acrimony, malice and indecorum" in his official capacity.

The protests referred to in the above quotation were not successful in obtaining any result from the British Government. Douglas' actions as the supreme power on the Island, either as the Agent and Chief Factor of the Hudson's Bay Co., or as Governor, were consistently upheld. He himself referred to the fact that he was "without legal advice, or intelligent assistance of any kind" (Ormsby, p. 122). The first lawyer did not arrive on Vancouver Island until 1858. The potential difficulties with Indians and the need that accommodations be made with them without delay is indicated by the following passage from Miss Ormsby's work (p. 127):

> The need for defence against hostile Indians constituted a great binding force for the communities of Nanaimo, Victoria and Sooke. White settlers on Vancouver Island, numbering with their children no more than 1,000 persons, were surrounded by an Indian population of nearly 30,000. The Hudson's Bay Company maintained its reputation for excellent relations with the native tribes by speedy punishment of any outrage. To hunt a Cowichan murderer in 1853, Douglas organized among Company servants the Victoria Voltigeurs, a small group of volunteer militiamen, enlisted the services of the Royal Navy, and for the trial, empanelled a jury on Board the *Beaver*. The same year he had the bastion built at Nanaimo, and in 1856, when the arrival of northern Indians in great numbers caused consternation at Fort Victoria, he advised the Council to use public funds to organize a company of thirty Voltigeurs.

The mere statement of the foregoing circumstances not only supports the authority of Douglas to complete the document (ex. 8) but also indicates the necessity for the same. In my opinion, these matters of history are to be taken as within the knowledge of Parliament when s. 87 of the *Indian Act* was passed.

Prior to British Columbia entering into *Confederation* in 1871, no provincial legislation had been passed extinguishing the aboriginal rights of the Indians to hunt. By Ordin-

ances of the Colony of Vancouver in 1859 and 1862, statutes dealing with the preservation of game were passed and in 1870 the United Colony of British Columbia passed a further Act for the protection of game [see C.S.B.C. 1877, cc. 79 and 80]. In none of these statutes was there any prohibition applying specifically to Indians. It would have required specific legislation to extinguish the aboriginal rights, and it is doubtful whether Colonial legislation, even of a specific kind, could extinguish these rights in view of the fact that such rights had been confirmed by the *Royal Proclamation of 1763*. That aboriginal rights were recognized by the provincial authority is clear from the petition sent by the House of Assembly of Vancouver Island to the Colonial Secretary in 1861 (ex. 11). This reads in part as follows:

> 1. THAT many colonists have purchased land, at the rate of One Pound Sterling per acre, in districts to which the Indian title has not yet been extinguished.
>
> . . . . .
>
> 4. THAT, within the last three years, this Island has been visited by many intending settlers, from various parts of the world. Comparatively few of these have remained, the others having, as we believe, been in a great measure, deterred from buying land as they could not rely on having peaceable possession; seeing that the Indian Title was still unextinguished to several of the most elegible agricultural districts of the Island.
>
> 5. . . . THAT the House of Assembly, bearing in mind, that from the dawn of modern colonization until the present day, wars with aborigines, have mainly arisen from disputes about land, which by timely and moderate concession on the part of the more powerful and enlightened of the disputants concerned, might have been peaceably and economically adjusted; now earnestly pray, that Her Majesty's Government would direct such steps to be taken, as may seem best, for the speedy settlement of the matter at issue, and the removal of a most serious obstacle to the well being of this Colony.
>
> I. S. Helmcken
> Speaker
>
> February 6th
> 1861

The fact that Indian rights had been recognized by the Colonial Government is supported by the terms of Union under which British Columbia entered into *Confederation* in 1871. The terms are to be found in the Order in Council of May 16, 1871, the Schedule to which contains addresses of the Senate of Canada and the House of Commons of Canada to Her Majesty, R.S.B.C. 1952, vol. 6, pp. 135-43. Those addresses contain the following provision as to Indians:

> 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.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

After British Columbia entered into *Confederation* it had no power to pass any such legislation in view of the provisions of head 24 of s. 91 of the *B.N.A. Act*, 1867. The scope of the *Indian Act* as applying to the regulation of hunting and fishing is very wide: see *R. v. Jim* (1915), 26 C.C.C. 236 at p. 237, 22 B.C.R. 106.

In my opinion, therefore, the document (ex. 8) is a Treaty within the meaning of s. 87 of the *Indian Act*. As has already been indicated, the right could only be extinguished by Federal legislation as was done with respect to the shooting of migratory birds by the *Migratory Birds Convention Act* referred to in *Sikyea v. The Queen*, 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, 49 W.W.R. 306, [1964] S.C.R. 642. That judgment upheld the judgment of the Manitoba Court of Appeal (Johnson, J.A., *per curiam*), 43 D.L.R. (2d) 150, [1964] 2 C.C.C. 325, 46 W.W.R. 65. With respect I agree with what the last-mentioned learned Judge said at p. 158 D.L.R. as follows:

> I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked — a case of the left hand having forgotten what the right hand had done. The subsequent history of the Government's dealing with the Indians would seem to bear this out.

To summarize, it is my opinion:

(1) That aboriginal rights existed in favour of Indians from time immemorial.

(2) That upon the British attaining sovereignty over British Columbia and in particular Vancouver Island, the British Crown held a substantial and paramount estate — a proprietary estate in the territory, the tenure of the Indians being a personal and usufructuary right (the aboriginal right) dependent on the goodwill of the Sovereign.

(3) That the right of the Indian respondents to hunt and fish on unoccupied lands was such a right.

(4) That the *Royal Proclamation of 1763* confirming such Indian rights applied to the territories claimed by the British with the exception mentioned in the *Proclamation* and applied in particular to Vancouver Island by virtue of the claim of Sir Francis Drake in 1579 and subsequent British claims to the Island.

(5) That Vancouver Island was not within the exceptions mentioned in the *Proclamation* as it was not Hudson's Bay Co.'s land in 1763 and therefore the Indians' right of hunting and fishing on unoccupied land applied to Vancouver Island.

(6) That before *Confederation* these rights had been recognized by British and Colonial Governments.

(7) That before *Confederation* these rights could only be extinguished by surrender to the British Crown and after *Confederation* by surrender to the Dominion Government which alone has the power to regulate the exercise of these rights.

(8) That after *Confederation* these rights had been recognized by the Dominion and Provincial Governments.

(9) That the said rights have never been surrendered or extinguished.

(10) That the document ex. 8 is a Treaty within the meaning of s. 87 of the *Indian Act* by virtue of the *Royal Proclamation of 1763* as confirming aboriginal rights or *per se* because of its very nature and the circumstances of its completion by the Hudson's Bay Co. as a delegate of the British Crown and James Douglas having the power to execute it either as the authorized representative of the delegate of the Crown — the Hudson's Bay Co. — or as Governor of Vancouver Island.

(11) That the sections of the *Game Act* of British Columbia under which the prosecution has been launched do not apply to the two respondents as native Indians hunting for food on unoccupied land.

Such is my opinion on the main issues. I have given the reasons therefor in detail. These will indicate my views on incidental matters arising. For the reasons stated the appeal of the Crown should be dismissed.

LORD, J.A. (dissenting):—I would allow the appeal for the reasons given by my brother Sheppard. I would, however, add these further observations:

In *Francis v. The Queen*, 3 D.L.R. (2d) 641 at p. 652, [1956] S.C.R. 618, Kellock, J., said in reference to s. 87:

> I think it is quite clear that "treaty" in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute.

When the statute is examined I think it is made quite clear that it has a restricted meaning in that it draws a distinction between a Treaty and an Agreement or an undertaking. Section 112(4) [of the *Indian Act*, R.S.C. 1952, c. 149] read as follows:

> 112(4) An Indian or members of a band shall not be enfranchised under this section contrary to the terms of any *treaty*, agreement *or undertaking* between a band and Her Majesty that is applicable.

Section 89(1)(*b*) reads:

> 89(1) For the purposes of sections 86 and 88, personal property that was
>
> (*b*) given to Indians or to a band under a *treaty or agreement* between a band and Her Majesty,
>
> shall be deemed always to be situated on a reserve.

The *Indian Act* was revised and re-enacted in 1951, at which time Parliament evidently had knowledge of agreements or undertakings with Indians which could not be classed as Treaties, and where it was necessary to show that Parliament intended to include such agreements it did so. I think it to be a reasonable conclusion that if it was intended to include such agreements in the exclusion clause of s. 87 it would have been so provided. In my opinion ex. 8 is simply an agreement for the sale of land between Indians and the Hudson's Bay Co. to provide for the acquisition of lands required by that company for the purposes of its own business. Several similar agreements with other Indian tribes had been executed in 1850 when Blanshard was Governor and the learned trial Judge has held that "he (Blanshard) did not sign any of them so far as any documents filed in Court as Exhibits disclose". He also held that Governor Douglas was never deputized to enter into a Treaty with the Indians on behalf of Her Majesty's Imperial Government, and further, that when Douglas signed as "Governor Vancouver Island" such words were merely descriptive of the man and not descriptive of the capacity in which he was signing the document.

The Crown Grant to the company (ex. 6) makes it clear that the paramount interest that the Crown had in conveying Vancouver Island was for the colonization of that area and for the promotion of trade and commerce. The only reference to Indians is to be found in a recital which indicates

that the vesting of title to Vancouver Island in the company "would conduce greatly to . . . and also to the protection and welfare of the native Indians residing" on Vancouver Island. Nowhere in this Grant does the Crown make any reservation for the rights of Indians to fish and hunt. This might be explained by the fact that the *Royal Proclamation of 1763* specifically excluded the Indians occupying the territory which had been granted to the Hudson's Bay Co. from participation in the benefits under the proclamation, including the use of the lands as hunting grounds. It would seem to have been the policy of the Imperial Government to leave the protection and welfare of such Indians to the Hudson's Bay Co.

SULLIVAN, J.A.:—I agree in dismissing the appeal for the reasons given by my brother Davey in which I concur.

Appeal dismissed.

REGINA v. LYKKEMARK

Alberta District Court, Tavender, D.C.J. March 1, 1965.

Constitutional law — Validity of legislation — Provincial offence of careless driving — Subsequently created Dominion offence of dangerous driving — Inadvertent and advertent negligence — Whether provincial enactment rendered inoperative.

Section 135 of the *Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356, dealing with the offence of careless driving is not rendered inoperative by *Cr. Code*, s. 221(4), subsequently enacted, which deals with the offence of dangerous driving. The word "dangerous" imports a greater degree of negligence than does "careless". It involves advertent negligence as against inadvertent and hence there is no conflict in the two provisions.

[*O'Grady v. Sparling*, 25 D.L.R. (2d) 145, 128 C.C.C. 1, 33 C.R. 293, 33 W.W.R. 360, [1960] S.C.R. 804, apld; *Stephens v. The Queen*, 25 D.L.R. (2d) 296, 128 C.C.C. 21, 33 C.R. 312, 33 W.W.R. 379, [1960] S.C.R. 823, refd to]

PRELIMINARY objection to constitutionality of s. 135 of the *Vehicles and Highway Traffic Act* (Alta.).

D. F. McLeod, for accused, appellant.
D. M. Sallenback, for the Crown, respondent.

TAVENDER, D.C.J.:—This is an appeal by way of trial *de novo* from a conviction by Magistrate C. Batch at Calgary that the appellant

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c) Annuities

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a) Legal Nature of

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REGINA v. JOHNSTON

Saskatchewan Court of Appeal, Culliton, C.J.S., Woods, Brownridge, Maguire and Hall, JJ.A. March 17, 1966.

Indians — Treaty rights — Entitlement to "medicine chest" and relief from "pestilence" or "general famine" — Whether thereby entitled to "general hospital services" — Whether exempt from hospital tax — Saskatchewan Hospitalization Act — Indian Act (Can.), s. 87.

Evidence — Judicial notice — Interpretation of treaty — Meaning of language — Judicial notice of facts of history — Reference to treatise.

A treaty between the Crown and certain Indian tribes concluded in 1876 provided "That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent" and "That in the event . . . of the Indians . . . being overtaken by any pestilence, or by a general famine, the Queen . . . will grant . . . assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity . . ." Such provisions do not entitle an Indian "to receive general hospital services from the Government of Canada" so as to exempt the Indian from payment of hospitalization tax under s. 23(1)(iv) of the Regulations issued under the *Saskatchewan Hospitalization Act*, R.S.S. 1953, c. 232 [now R.S.S. 1965, c. 253]. Nor, therefore, could he be protected by s. 87 of the *Indian Act*, R.S.C. 1952, c. 149, which makes provincial laws applicable to Indians "except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made under this Act".

The Court must give the words of the treaty the ordinary meaning that would have been attributed to them at the time the treaty was made and in so doing may take judicial notice of the facts of history by reference to authoritative treatises.

[*R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], apld]

APPEAL by way of stated case from an acquittal by a Magistrate on a charge under the *Saskatchewan Hospitalization Act* for failing to pay hospital tax.

Ronald L. Barclay, for the Crown.
D. S. Newsham, for respondent.

The judgment of the Court was delivered by

CULLITON, C.J.S.:—This is an appeal by the Attorney-General for Saskatchewan by way of stated case.

The respondent was charged on an information dated March 22, 1965, that he, being a resident of Saskatchewan, did unlawfully fail to pay 1963 tax on or before August 31, 1963, as required by the *Saskatchewan Hospitalization Act*,

R.S.S. 1953, c. 232 [now R.S.S. 1965, c. 253], and amendments and Regulations thereto. On being arraigned before Judge Policha of North Battleford, a plea of not guilty was entered.

Pursuant to s. 708(5) of the *Criminal Code*, certain facts were admitted by the respondent, namely: that he, Walter Johnston, was a resident of Saskatchewan and that he had not paid the tax as alleged in the information. It was agreed by counsel for the Crown that the respondent was an Indian within the meaning of the *Indian Act*, R.S.C. 1952, c. 149. There was filed by the prosecution a copy of the Regulations issued under the *Saskatchewan Hospitalization Act*. The two pertinent sections of these Regulations [O.C. 1400/62, 58 Sask. Gaz., p. 861] are as follows:

> 21. Where the tax is to be paid by the Government of Canada in accordance with an arrangement to that effect between that Government and the Government of Saskatchewan on behalf of a resident who is an Indian within the meaning of The Indian Act (Canada) and is residing on an Indian reserve or has been residing outside an Indian reserve for less than twelve months, the other provisions of these regulations shall apply to such resident and to the tax payments made on his behalf.
>
> 23(1) Subject to the provisions of section 24 the following classes of persons shall be exempt from taxation:
>
> (iv) every other person who is entitled to receive general hospital services from the Government of Canada at the beginning of the tax year, to the extent that he continues to be entitled to such general hospital services during the tax year.

Counsel for the prosecution stated that while there was no written agreement, there was an undertaking between the Government of Canada and the Government of Saskatchewan that the Government of Canada would pay the hospitalization tax for Indians residing on a reserve or who had been residing outside a reserve for less than 12 months. The evidence established that Johnston had permanent employment in the City of North Battleford and had been residing outside an Indian reserve for more than 12 months.

No evidence was called in defence. There was filed by counsel for the respondent a certified copy of Treaty Number 6 made between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions and concluded in 1876 [Indian Treaties and Surrenders (1891), vol. 2, No. 157A, p. 35], with special reference to the following clauses in that Treaty:

> That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

In disposition of the charge, the learned Judge of the Magistrate's Court, in a written judgment, said in part:

> Referring to the "medicine chest" clause of Treaty No. 6, it is common knowledge that the provisions for caring for the sick and injured in the areas inhabited by the Indians in 1876 were somewhat primitive compared to present day standards. It can be safely assumed that the Indians had limited knowledge of what provisions were available and it is obvious that they were concerned that their people be adequately cared for. With that in view, and possibly carrying the opinion of Angers, J., a step farther, I can only conclude that the "medicine chest" clause and the "pestilence" clause in Treaty No. 6 should properly be interpreted to mean that the Indians are entitled to receive all medical services, including medicines, drugs, medical supplies and hospital care free of charge. Lacking proper statutory provisions to the contrary, this entitlement would embrace all Indians within the meaning of the *Indian Act*, without exception. In my opinion, the accused falls within the exemption from taxation set forth in s. 23(1)(iv) of the Regulations and is not required to pay the tax.
>
> I find the accused not guilty as charged.

In stating the case for the Court, the learned Judge found the facts as I have outlined them, and submitted the following questions:

(1) Was I right in holding that Treaty No. 6 applied to the defendant, Walter Johnston?

(2) Was I right in holding that the clause which reads as follows:

"That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent"

in Treaty No. 6, covered premiums payable under the Saskatchewan Hospitalization Act by the said defendant, Walter Johnston?

(3) Was I right in holding that the said defendant, Walter Johnston, is exempt from taxes by virtue of Regulation 23(1)(iv) of the Regulations made pursuant to The Saskatchewan Hospitalization Act, O.C. 1400/62, Saskatchewan Gazette, September 14, 1962, Volume 58, No. 37, and thereby not required to pay the said tax?

It was agreed and so found by the trial Judge that the respondent was an Indian as defined in the *Indian Act* and that he was a descendant of the Indians on behalf of whom Treaty Number 6 was made. Treaty Number 6 is, in my opinion, a treaty of the type referred to in s. 87 of the *Indian*

Act. He is, therefore, in my opinion, entitled to any rights or immunities under the said Treaty that may have been contemplated by Parliament in enacting s. 87 of the *Indian Act*, unless the claim to such vested rights and immunities is limited to Indians residing on a reserve. Section 87 reads:

> 87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

I want to make it perfectly clear that the issue before this Court is not one relating to the general responsibility of the Government of Canada to Indians, but simply whether the learned trial Judge was right in his interpretation of the "medicine chest" and "pestilence" clauses of the Treaty. If I conclude that the learned trial Judge was right in his interpretation, only then would it become necessary to determine whether the respondent, as a non-resident of a reserve, is entitled to the benefits of the terms of the Treaty.

In the interpretation of the clauses of a treaty, one must first look to the words used and give to those words the ordinary meaning that would be attributed to them at the time the treaty was made. To do so, too, it is both proper and advisable to have recourse to whatever authoritative record may be available of the discussions surrounding the execution of the treaty. I agree with the opinion expressed by Norris, J.A., in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 [affd 52 D.L.R. (2d) 481*n*, [1965] S.C.R. vi], when, at p. 629, he said:

> The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co., Ld. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read v. Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

I have perused the treatise entitled *Treaties of Canada with the Indians of Manitoba, North-West Territories, and Kee-Wa-Tin*, by the Honourable Alexander Morris, P.C. The learned author, in this work, presents an authoritative record of the negotiations which resulted in the conclusion of a number of treaties, including Treaty Number 6. It is apparent that in the negotiation of Treaty Number 6 the Indians

greatly feared both pestilence and starvation. The learned author, at p. 178, says:

> They desired to be fed. Small-pox had destroyed them by hundreds a few years before, and they dreaded pestilence and famine,

and then he went on to say:

> The food question, was disposed of by a promise, that in the event of a *National* famine or *pestilence* such aid as the Crown saw fit would be extended to them, and that for three years after they settled on their reserves, provisions to the extent of $1,000.00 per annum would be granted them during seed-time.

The undertaking so given was incorporated in the "pestilence" clause of the Treaty. Thus both historically, and on the plain language of the clause, it means no more than it plainly states: the obligation of the Crown in the event of pestilence or general famine, to provide such assistance as the Chief Superintendent of Indians should deem necessary and sufficient to meet the calamity. With every deference to the contrary opinion of the learned Judge of the Magistrate's Court, I do not think this clause of the Treaty has any relevancy in the determination of the question with which he was faced.

There is nothing in Morris' treatise to suggest that any meaning should be given to the words "medicine chest" other than that conveyed by the words themselves in the context in which they are used. The only reference I can find in the treatise is at p. 218, where the author states: " 'A medicine chest will be kept at the house of each Indian agent, in case of sickness amongst you.' " The "medicine chest" clause in the Treaty incorporates this undertaking.

Again, on the plain reading of the "medicine chest" clause, it means no more than the words clearly convey: an undertaking by the Crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians *at the direction of the agent.* (The italics are mine.) The clause itself does not give to the Indian an unrestricted right to the use and benefit of the "medicine chest" but such rights as are given are subject to the direction of the Indian agent. Such limitation would indicate that the obligation was to have physically on the reservations, for the use and benefit of the Indians, a supply of medicine under the supervision of the agent. I can find nothing historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the Crown's obligation to provide a "medicine chest" had in contemplation provision of all medical services, including hospital care.

Mr. Justice Angers, of the Exchequer Court of Canada, in an unreported judgment in *Dreaver v. The King*, gave an extended interpretation to the "medicine chest" clause of the Treaty when, at p. 20, he said:

> The clause might unquestionably be more explicit but, as I have said, I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians of the Mistawasis Band were to be supplied to them free of charge.

In reaching the foregoing conclusion, the learned Justice appears to have relied on the evidence of the suppliant Dreaver, who testified he was present during the negotiation of the Treaty and that it was understood that all medicines were to be supplied free to the Indian. There appears to be nothing in his evidence to support any wider interpretation of the clause than that given to it by Mr. Justice Angers. While I express no opinion as to the correctness of the interpretation of the clause as made by Mr. Justice Angers, I do not think, with respect, that the interpretation so given justifies the extended meaning attributed thereto by the learned Judge of the Magistrate's Court.

In light of the conclusion which I have already stated, it is not necessary for me to answer Q. 1 of the stated case, but I must answer "No" to Qq. 2 and 3. I direct that the matter be remitted back to the learned Judge of the Magistrate's Court for disposition.

Appeal allowed; case remitted.

RE HALLIWELL AND WELFARE INSTITUTIONS BOARD (B.C.)

British Columbia Supreme Court, Munroe, J. December 9, 1965.

Administrative law — Boards and tribunals — Welfare Institutions Board cancelling licence for rest home — Whether acting judicially or administratively — Requirements of natural justice — Welfare Institutions Licensing Act (B.C.).

When the Welfare Institutions Board of British Columbia cancels a licence required for the operation of a private rest home in the Province under the terms of the *Welfare Institutions Licensing Act*, R.S.B.C. 1960, c. 406, as amended and Regulations pursuant thereto, it decides an issue affecting the rights of the licensee and must therefore act judicially and give the licensee an opportunity to know in what respect it is alleged to have violated any provisions of the Act or Regulations and to make answer to such allegations.

A failure by the Board to observe such procedure constitutes a denial of natural justice and its order will be quashed on *certiorari* proceedings.

SASKATCHEWAN COURT OF APPEAL

Culliton C.J.S., Woods, Brownridge, Maguire and Hall JJ.A.

Regina v. Swimmer

Indians — Whether Indian resident off reserve for more than one year liable to hospitalization tax and medical insurance premiums.

Appeal by way of stated case from the acquittal of the respondent on a charge of failing to pay joint hospitalization tax and medical care premium. Respondent was an Indian within the meaning of the Indian Act, R.S.C. 1952, c. 149, and had lived on a reserve since his birth until 1958, since when he had lived outside a reserve. The Indian Act provided that the Canadian Government should pay the hospitalization tax and provide medical care for Indians living on reserves and for those who had lived off a reserve for less than a year, and this arrangement was recognized in both The Saskatchewan Hospitalization Act, R.S.S. 1965, c. 253, and The Saskatchewan Medical Care Insurance Act, R.S.S. 1965, c. 255. The trial Judge found that the respondent was exempt from tax and premium by virtue of the "medicine chest" clause in Treaty No. 6 of 1876 which applied to him.

It was *held*, per curiam, that the appeal must be allowed and the matter remitted to the Magistrate for the imposition of the appropriate penalty; the "medicine chest" clause had been judicially interpreted in a way which made it clear that there was no obligation on the Government of Canada to provide, without cost, medical and hospital services for all Indians; nor did any other statute purport to do so. By s. 87 of the Indian Act the respondent was subject to the provisions of both The Saskatchewan Hospitalization Act and The Saskatchewan Medical Care Insurance Act: *Regina v. Johnston* (1966), 56 W.W.R. 565, 49 C.R. 203, 56 D.L.R. (2d) 749 followed.

[Note up with 13 C.E.D. (2nd ed.) *Indians*, s. 22.]

S. Kujawa, Q.C., for the Crown.

J. M. Koskie, for respondent.

4th December 1970. The judgment of the Court was delivered by

CULLITON C.J.S.:—This is an appeal by the Attorney General for Saskatchewan by way of stated case.

The respondent was charged in an information that he, on 13th May 1968, being a resident of Saskatchewan, did unlawfully fail to pay the 1966 joint tax, consisting of the following: the Saskatchewan Hospitalization Act tax, $48; the Saskatchewan Medical Care Insurance Act premium, $24; total $72.

After a trial before Policha P.M. of the Magistrate's Court, the respondent was found not guilty. The case stated by the learned Judge of the Magistrate's Court may be summarized as follows:

The respondent Andrew Swimmer is a resident of the Province of Saskatchewan and is an Indian within the meaning of the Indian Act. He lived on a reserve from his birth until

1958, and since that time has resided outside a reserve. It is admitted that he did not pay the tax.

Section 72(1)(*g*) of the Indian Act provides that the Governor in Council may make regulations to provide medical treatment and health services for Indians. The Government of Canada pays the hospitalization tax and provides medical care for an Indian who is a resident of the Province of Saskatchewan and resides on a reserve, or who has been residing outside a reserve for less than 12 months. This arrangement is recognized by s. 21 of the regulations issued under The Saskatchewan Hospitalization Act, which reads:

"21. Where the tax is to be paid by the Government of Canada in accordance with an arrangement to that effect between that Government and the Government of Saskatchewan on behalf of a resident who is an Indian within the meaning of the Indian Act (Canada) and is residing on an Indian reserve or has been residing outside an Indian reserve for less than twelve months, the other provisions of these regulations shall apply to such resident and to the tax payments made on his behalf."

This arrangement is also recognized by s. 21(1)(v) of the regulations issued under The Saskatchewan Medical Care Insurance Act, which is as follows:

"21.—(1) Subject to section 22, the following classes of persons shall be exempt from the premium levy: . . .

"(v) every person who at the beginning of the premium year is an Indian within the meaning of the Indian Act (Canada) and is residing on an Indian reserve or has been residing outside an Indian reserve for less than twelve months;"

The learned trial Judge found that the respondent was entitled to the benefit accorded to Indians under Treaty No. 6, made between Her Majesty the Queen and the Plain and Wood Cree Indians and other tribes of Indians at Fort Carlton, Fort Pitt and Battle River with adhesions, and concluded in 1876. This Treaty includes the "medicine chest" clause, which reads:

"That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent."

The learned trial Judge held that this clause should be interpreted to mean that all Indians to whom the said Treaty applies are entitled to receive all medical services, including medicine, drugs, medical supplies and hospital care free of charge. Because of this, the learned trial Judge said the respondent was exempt from payment of the taxes imposed by

The Saskatchewan Hospitalization Act and The Saskatchewan Medical Care Insurance Act, and that he came within the following regulations:

(Under The Saskatchewan Hospitalization Act)

"23.—(1) Subject to section 24, the following classes of persons shall be exempt from taxation: . . .

"(iv) every other person who at the beginning of the tax year is, without payment being made by him of a fee, premium or other sum of money, entitled to have payment made at the entire expense of the Government of Canada in respect of any hospital services he receives. . . . "

(Under The Saskatchewan Medical Care Insurance Act)

"21.—(1) Subject to section 22, the following classes of persons shall be exempt from the premium levy: . . .

"(vi) every other person who at the beginning of the premium year is, without payment being made by him of a fee, premium or other sum of money, entitled to have payment made at the entire expense of the Government of Canada in respect of any medical services he receives. . . . "

He further held that, because of the interpretation he placed upon the "medicine-chest" clause, only the Parliament of Canada could legislate in respect of Indians and consequently s. 21 of The Saskatchewan Hospitalization Act regulations, and s. 21(1)(v) of The Saskatchewan Medical Care Insurance Act regulations, were ultra vires.

The questions posed in the said case are as follows:

"1. Did I err in law in holding that the clause in Treaty No. 6, which reads as follows:

" 'That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such Agent'

"should be interpreted to mean that the Government of Canada should pay the joint tax payable under *The Saskatchewan Hospitalization Act* and the regulations thereto, and *The Saskatchewan Medical Care Insurance Act* and the regulations thereto, on behalf of the defendant Andrew Swimmer?

"2. Did I err in law in holding that the clause in Treaty No. 6 which reads as follows:

" 'That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such Agent'

"should be interpreted to mean that the Indians are entitled to receive all medical services including medicines, drugs, medical supplies and hospital care, free of charge?

"3. Did I err in law in holding that section 21 of the regulations made pursuant to *The Saskatchewan Hospitalization Act*, o/c 1479/64, Saskatchewan Gazette, September 18, 1964, is ultra vires the Province of Saskatchewan?

"4. Did I err in law in holding that section 21(1)(v) of the regulations made pursuant to *The Saskatchewan Medical Care Insurance Act*, o/c 1418/64, Saskatchewan Gazette, September 18, 1964, is ultra vires the Province of Saskatchewan?

"5. Did I err in law in holding that the defendant Andrew Swimmer, being an Indian within the meaning of the *Indian Act*, R.S.C. 1952, Cap. 149, and entitled to the benefits of Treaty No. 6 is entitled to have payment made at the entire expense of the Government of Canada in respect to any medical services he received as set forth in section 23(1) paragraph (vi) of the regulations made pursuant to *The Saskatchewan Medical Care Insurance Act,* o/c 1418/64, Saskatchewan Gazette, September 18, 1964?

"6. Did I err in law in holding that the defendant Andrew Swimmer, being an Indian within the meaning of the *Indian Act*, R.S.C. 1952, Cap. 149, and entitled to the benefits of Treaty No. 6, is entitled to have payment made at the entire expense of the Government of Canada in respect of any hospital services he received as set forth in section 21(1) paragraph (iv) of the regulations made pursuant to *The Saskatchewan Hospitalization Act,* o/c 1479/64, Saskatchewan Gazette, September 18, 1964?"

The interpretation and application to be given to the "medicine chest" clause in Treaty No. 6 was considered by this Court in *Regina v. Johnston* (1966), 56 W.W.R. 565, 49 C.R. 203, 56 D.L.R. (2d) 749. Speaking for the Court I said at p. 570:

"Again, on the plain reading of the 'medicine chest' clause, it means no more than the words clearly convey: An undertaking by the crown to keep at the house of the Indian agent a medicine chest for the use and benefit of the Indians *at the direction of the agent.* [The italics are mine]. The clause itself does not give to the Indian an unrestricted right to the use and benefits of the 'medicine chest' but such rights as are given are subject to the direction of the Indian agent. Such limitation would indicate that the obligation was to have physically on the reservations, for the use and benefit of the Indians, a supply of medicine under the supervision of the

agent. I can find nothing historically, or in any dictionary definition, or in any legal pronouncement, that would justify the conclusion that the Indians, in seeking and accepting the crown's obligation to provide a 'medicine chest' had in contemplation provision of all medical services, including hospital care."

I have no reason to depart from this opinion. There was, in my view, nothing in the present case that justified the rejection of this view by the learned Judge of the Magistrate's Court.

It was because of the interpretation the learned Judge of the Magistrate's Court gave to the "medicine chest" clause that he held s. 21 of the regulations under The Saskatchewan Hospitalization Act and s. 21(1)(v) of the regulations under The Saskatchewan Medical Care Insurance Act to be ultra vires.

Section 87 of the Indian Act reads:

"87. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

As I have already stated, the terms of Treaty No. 6 do not impose upon the Government of Canada the obligation of providing, without cost, medical and hospital services to all Indians. Moreover, I know of no Act of Parliament that purports to do so. Under these circumstances, the respondent was subject to the provisions of The Saskatchewan Hospitalization Act and The Saskatchewan Medical Care Insurance Act, being laws of general application, and liable for the tax thereunder.

In view of the conclusion I have reached I must answer all questions in the stated case, "Yes". The verdict of acquittal will be set aside, and there will be entered a verdict of guilty. The matter will be referred back to the learned trial Judge for the imposition of the appropriate penalty.

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[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO RESPONDENT.

AND

ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

ATTORNEY-GENERAL FOR ONTARIO RESPONDENT.

J. C.*
1896
Nov. 11, 12;
Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Indian Reserves—Liability to pay Annuities in respect thereof —British North America Act, 1867, *ss.* 109, 111, 112.

By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—

Held that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under s. 109 in that province.

The perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111 and 112; in the same manner as the original annuities.

THESE two appeals were heard together from a judgment of the Supreme Court (Dec. 9, 1895), reversing an award made in an arbitration for settlement of all questions relating or incident to the accounts between the Dominion and the provinces of

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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Ontario and Quebec, and between the two provinces, pursuant to 54 & 55 Vict. c. 6 (Canada), 54 Vict. c. 2 (Ontario), and 54 Vict. c. 4 (Quebec).

The questions decided turn upon the construction of two Indian treaties in 1850, the effect of which is stated in the judgment of their Lordships, and of ss. 109, 111, and 112 of the British North America Act of 1867, which are as follows:—

"Sect. 109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

"111. Canada shall be liable for the debts and liabilities of each province existing at the Union."

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two millions five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

An award was made in 1870 under s. 142 of the Act the 13th section of which provided "that all the lands in either of the provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late Province of Canada, shall be the absolute property of the province in which the lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

Then came the arbitration under the three statutes of 1891 mentioned above, under which a claim was put forward by the Dominion Government on behalf of the Ojibeway Indians, based on the treaties: (*a*) against the Province of Canada for $325,440.00 arrears of augmented annuities from 1851 to 1867; (*b*) against the Province of Ontario for $95,200.00, being

unpaid arrears of augmented annuities from 1867 to 1873; (*c*) against the Province of Ontario for $389,106.80, being the amount of increased annuities actually paid by the Dominion Government to the Indians from 1874 to 1892.

No question arose in this appeal under (*a*), or in reference to the amounts of the annuities originally specified in the treaties. These latter were capitalised at the date of confederation and added to the debt of the old province which was assumed by the Dominion.

The claims (*b*) and (*c*) were based on this, that the Province of Ontario, having succeeded to the lands surrendered, was liable for such increased annuities and payments under the treaties and s. 109.

The Province of Quebec supported that view.

The Province of Ontario, on the contrary, contended

(*a*) That the liability, if any, was of the Province of Canada, in respect of which Ontario, as a separate province, has no liability in any case, except, if at all, conjointly with Quebec.

(*b*) By s. 13 of the award of September 3, 1870, Ontario was expressly freed from any liability separately from Quebec.

(*c*) That no trust exists in respect of the said lands; that the Indian title was extinguished in order that the lands might be opened up for settlement, and that patents from the Crown might issue therefor to purchasers; and that the annuities or augmentations are not liens on the lands.

(*d*) That the Dominion, at the Union, or at or before the passing of the Act 36 Vict. c. 30, included, or is deemed to have included, the liability in the amount of the debt of the Province of Canada assumed by the Dominion, and of which Ontario and Quebec were thereby relieved.

The arbitrators on the question of liability, apart from the amount, awarded as follows:—

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of

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making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario, and that this burden has not been in any way affected or discharged."

"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the Union, any payments properly made are to be charged against the Province of Ontario in the Province of Ontario Account, as of the date of payment to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

The Province of Ontario appealed from the above findings, and a majority of the Supreme Court (Strong C.J., Taschereau and Sedgewick JJ.) allowed the appeal, Gwynne and King JJ. holding that it should be dismissed.

Accordingly the award was varied by striking out the 9th paragraph, and by substituting for the 6th paragraph the following:—

"The ceded territory mentioned became the property of Ontario under British North America Act, 1867, s. 109, absolutely, and free from any trust, charge, or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities, upon the condition in the treaties mentioned."

From this judgment the Dominion of Canada and the Province of Quebec appealed.

Cohen, Q.C., and *Loehnis*, for the Dominion of Canada, contended that the award of the arbitrators should be restored and the judgment of the Supreme Court reversed. Upon the construction of the treaties they contended that the covenant to pay the increased annuities was in effect and by necessary implication a covenant to pay out of the lands surrendered, being in terms a covenant to pay should the surrendered lands produce such an amount as would enable the Government to pay without incurring loss. Assuming this to be the right construction of the covenant, it was contended that at the time of the confederation a trust existed in respect of the lands surrendered, and an interest of the Indians therein, within the

meaning of s. 109 of the Act of 1867, when properly construed. That section is not so limited in its application as to include only a direct charge or lien upon or an interest in lands enforceable by legal process. It applies to a trust or interest created by the Crown to be recognised and carried out by the Crown. Accordingly, the lands having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians should be observed and carried out by that province. The province got the benefit of the increased value and profits of the land, and it was equitable that it should bear the burden of any increased annuities resulting from those increased profits under the terms of the treaties. Reference was made to *Attorney-General of Ontario* v. *Mercer* (1); *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2); *Kinloch* v. *Secretary of State for India in Council* (3); *Rustomjee* v. *Reg.* (4) With regard to the 13th clause of the earlier award of 1870, Ontario was not intended to be thereby freed from any liability to the Dominion for annuities to Indians in consideration of the lands surrendered. It merely meant that, as between the respective provinces, lands of this kind held by one province should be freed from claims of all other provinces. If it was intended to exclude a claim in respect of the Indians, or based upon a trust within s. 109, it was ultra vires the arbitrators.

Angers, Q.C., and *J. S. Hall, Q.C.*, for the Province of Quebec, contended to the same effect.

Blake, Q.C., *Haldane, Q.C.*, and *Irving, Q.C.*, for the respondent, the Province of Ontario, contended that the award had been rightly amended or reversed by the Supreme Court. According to the award, the liability for the increased annuities, so far as it had become by the happening of the prescribed event a present liability before the Union, was part of the debt of the late Province of Canada to be borne by Ontario and Quebec jointly. Then the award drew the distinction, that so far as that liability had not come into existence as a present liability before the Union, it was not a debt of the late Province of Canada, but a charge on the surrendered lands to which

(1) (1883) 8 App. Cas. 767.
(2) (1888) 14 App. Cas. 46.
(3) (1882) 7 App. Cas. 619.
(4) (1876) 2 Q. B. D. 69.

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Ontario became liable as the beneficial owner thereof. Reference was made to s. 111 of the Act of 1867, and it was contended that the liability to pay augmentations of the annuities was included in the "debts and liabilities" for which the Dominion became answerable under that section. The award admits that principle as regards such of the liabilities as had matured into debts before the Union. But the rest of the liabilities were created before the Union, and it was immaterial at what particular date they matured into debts. No distinction under s. 111 can be drawn between the two sets of liabilities. Recourse for all such liabilities must be had by the Dominion against the two provinces jointly. Then, as regards a charge or trust affecting the lands, it was not the intention of the authorities who concluded the treaties of 1850 to create charges or trusts in favour of the Indians affecting the surrendered lands or their proceeds to answer the annuities. Nor does the language of the treaties bear out that contention. The intention was to create liability on the part of the Province of Canada, party to the treaties, to pay out of its general revenue. Even if there were a trust or interest established in the lands it would exist solely for the benefit of the Indians, and would not affect the liabilities either of the old Province of Canada and the Dominion or of the various governments as between themselves in the ultimate adjustment of their accounts. The Supreme Court, moreover, were right in holding that this question had already been decided in favour of Ontario by the award of 1870 under s. 142 of the Act of 1867.

Cohen, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. In the year 1850 the Ojibeway Indians inhabiting the Lake Huron District, and the Indians of the same tribe inhabiting the Lake Superior District, entered into separate treaties with the Governor of the Province of Canada, acting on behalf of Her Majesty and the Government of the Province, for the cession of certain tracts of land, which had until that time been occupied as Indian reserves. As consideration for these surrenders, a sum of money was immediately

paid under each treaty; and a promise and agreement were given by the Governor, as representing the Crown and the provincial Government, to pay a perpetual annuity, in the one case of 600*l.*, and in the other of 500*l.* Both treaties contained the further promise and agreement that, in case the territory ceded should at any future period produce an amount which would enable the Government of the Province, without incurring loss, to increase these annuities, then and in that case the same should be increased from time to time, provided that the amount paid to each individual should not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order. Provision was also made for a proportional abatement of the annuities, in the event, which has not yet occurred, of the Indian population of either district becoming diminished in number below a specified limit.

The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased. In 1867, under the Act of Union, the Province of Canada ceased to exist, having been divided by that statute into two separate and independent provinces, Ontario and Quebec. Until the time when that division became operative, the Indian annuities payable under the treaties of 1850 were debts or liabilities of the old province, either present, future or contingent.

There are four sections in the Act of 1867 (ss. 109, 111, 112 and 142) which relate to the incidence, after Union, of the debts and liabilities of the old province. Those clauses contain the whole provisions of the Act upon that subject; and it is upon their construction that the decision of this appeal must ultimately depend. They distribute these debts and liabilities into two classes, the one being payable in the first instance by the Dominion, with a right of indemnity against Ontario and

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Quebec, and the other being directly chargeable either to Ontario or to Quebec.

Sect. 111 enacts, in general terms, that the Dominion of Canada "shall be liable for the debts and liabilities of each province existing at the Union." Sect. 112 enacts that Ontario and Quebec conjointly shall be liable to the Dominion for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of 5 per cent. per annum thereon. Then, by s. 142, provision is made for the apportionment of the excess of these conjoint liabilities over the sum specified between Ontario and Quebec.

The enactments of s. 109 relate to the lands, mines, minerals, and royalties from which the territorial revenues of the old province were derived. It assigns to Ontario and Quebec, respectively, such of these sources of revenue as are locally situated within the limits of each of these new provinces, together with all proceeds thereof which at the date of Union had become due and payable to the Province of Canada. But it is made an express condition of the transfer that the property transferred shall be "subject to any trusts existing in respect thereof, and to any interest other than that of the province (i.e. of Canada) in the same."

The beneficial interest in the territories ceded by the Indians under the treaties of 1850 became vested, by virtue of s. 109, in the Province of Ontario. So far as appears, the perpetual annuities of 600*l.* and 400*l.* were duly paid by the old province; and it was matter of admission, in the course of the argument upon this appeal, that, some time after the Union, the value of these annuities was capitalised, and, with consent of all the parties interested, added to the debts and liabilities which were assumed by the Dominion under the provisions of s. 111. The Indians do not seem to have become aware of the full extent of the rights secured to them by treaty, until the year 1873, when they for the first time preferred against the Dominion a claim for an annual increase of their respective annuities from and after the date of the treaties, upon the ground that, during the whole period which followed, the proceeds of the surrendered

lands had been so large as to enable the stipulated increase to be paid without involving loss. The Dominion Government, who maintained then, as they do now, that the Province of Ontario is directly liable to the Indians for any such increase, under the provisions of s. 109, intimated the claim to that province, when its Government admitted that the condition had been satisfied upon which the increased amounts became due and payable, but disputed liability, upon the ground that the claim was one which fell in the first instance upon the Dominion, with recourse against Ontario and Quebec jointly. It was ultimately arranged that the Government of the Dominion should from and after that date and in the meantime continue to pay these increased allowances as they became due to the Indians, until the question of liability was determined.

It appears that many questions have arisen from time to time since that arrangement was made with regard to the debts and liabilities of the Province of Canada at the time of the Union; and these had the effect of delaying the final adjustment of the account contemplated by s. 112, the object of which is to ascertain and fix the precise balance of which Ontario and Quebec are made conjointly liable to relieve the Dominion. With the view of accelerating that adjustment, three statutes, in terms identical, were in the years 1890 and 1891 passed by the respective Legislatures of Canada, of Ontario, and of Quebec, sanctioning the appointment of three judges as arbitrators for the purpose of finally determining various matters which are therein specified—including all questions which had arisen or might thereafter arise "in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec," concerning which no agreement had previously been arrived at.

In terms of, and under the authority of, these statutes a deed of submission was entered into between the Governments of Canada, Ontario, and Quebec, and arbitrators were duly appointed. The Dominion submitted to them a claim against Ontario, (1.) for the increase of Indian annuities (which had not been paid) from the date of Union until 1874, and (2.) for

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the increased amounts which had been paid to the Indians between 1874 and 1892, with interest from the several dates of disbursement. The claim was urged, mainly upon the ground that the treaty stipulations giving the Indians a right to an increase of annuity either constituted a trust burdening the surrendered lands and their proceeds, within the meaning of s. 109, or created an interest in the same, other than that of the old province, within the meaning of the same section. Quebec, having an obvious interest in the success of the claim, which would exclude any demand against its revenues under s. 112, maintained before the arbitrators the same view which was put forward by the Dominion.

The learned arbitrators, in February, 1895, issued an award, by the 6th article of which they found "that the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the Union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the Province of Ontario; and that this burden has not been in any way affected or discharged." By a clause in the statutes of 1890 and 1891 it is enacted that when the arbitrators proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either party, "and the award shall be subject to appeal so far as it relates to such decision to the Supreme Court, and thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal." The concluding part of that enactment ignores the constitutional rule that an appeal lies to Her Majesty, and not to this Board; and that no such jurisdiction can be conferred upon their Lordships, who are merely the advisers of the Queen, by any legislation either of the Dominion or of the provinces of Canada. By another clause in these Acts it is provided that, in case of an appeal on a question of law being successful, the matter shall go back to the arbitrators, for making such changes on the award as may be necessary, or an Appellate

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Court may make any other direction as to the necessary changes.

The learned arbitrators, by a supplementary order dated March 26, 1895, certified and declared that, in respect of the question as to the liability of the Province of Ontario for the increased annuities paid by the Dominion to the Indians since the Union, they proceeded upon their view of a disputed question of law. Their decision upon that point was accordingly brought under the review of the Supreme Court of Canada by an appeal at the instance of Ontario in which the Dominion and Quebec appeared as respondents. The Supreme Court was divided in opinion. Two of the learned judges, Gwynne and King JJ., held that the award ought to be maintained and the appeal dismissed; but the majority, consisting of Strong C.J., with Taschereau and Sedgewick JJ., ordered and adjudged that "the award should be varied by substituting for paragraph 6 thereof the following:—

"The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely and free from any trust, charge or lien in respect of any of the annuities, as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned." The Supreme Court, by the same majority, ordered the award to be further varied by striking out paragraphs 7 and 9; and directed that the respondents should pay his costs to the appellant. Against that judgment, both the Dominion and Quebec have presented appeals which have been admitted by Her Majesty in Council.

The findings which have been substituted, by the order of the Supreme Court for those contained in the 6th paragraph of the award raise the only substantial question which has been presented for their Lordships' decision. The directions to delete paragraphs 7 and 9 of the award are amendments merely consequential upon the previous findings being sustained, and must stand or fall with these findings. In other words, the main and only question between the parties is, whether liability for the increased amount of the Indian annuities

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stipulated by the treaties of 18.0 is so connected with or attached to the surrendered territory and its proceeds, in the sense of the concluding enactments of s. 109, as to follow the beneficial interest, and form a charge upon it in the hands of the province.

The enactments of s. 109, upon which the appellants rely, are to the effect that the beneficial interest in the property held by the Crown of which that section disposes shall belong to the province in which the property is situated, subject always "to any trusts existing in respect thereof, and to any interest other than that of the province in the same." The transfer of beneficial interest which the clause operates is not confined to lands, but extends to all proceeds thereof which had become due and payable to the old province before Union. There is nothing in the Record of these appeals to shew whether any, and, if so, what amount of proceeds were at the time of Union due and payable, and therefore came into the possession of the new Province of Ontario. The claim made by the Dominion, and sustained by the arbitrators, is therefore in substance, that the Indian annuities form a charge upon the lands, and their proceeds arising after Union, with which s. 109 does not deal, except in so far as they are implied or included in the word "lands."

The expressions "subject to any trusts existing in respect thereof," and "subject to any interest other than that of the province," appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word "trust" was meant by the Legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, "an interest other than that of the province in the same" appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the

beneficial interest of the old province. Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly if not wholly based upon the provisions of s. 109 with respect to trusts.

Two of the learned arbitrators explained at some length the reasons by which they were influenced in arriving at the conclusion which they embodied in the 6th paragraph of their award. They start from the proposition that the treaties of 1850, being in the nature of international compacts, ought to be liberally construed. That rule when rightly applied, in circumstances which admit of its application, is useful and salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity. Starting from the proposition already stated, Mr. Chancellor Boyd arrives, upon equitable and benignant principles, at the conclusion that the treaties of 1850 contain "an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario." Burbidge J., by a similar process of reasoning, arrived at substantially the same result, which was concurred in by Sir Louis Napoleon Casault.

Their Lordships are of opinion that the language of the treaties in question does not warrant the conclusion that payment of the original annuities and of their augmentations was to be derived from different sources, as the learned arbitrators appear to have held. The promise and agreement upon which the obligation for their payment rests is, in both cases, expressed in precisely the same terms. Their Lordships

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entirely agree with the following observations made by King J., one of the minority in the Supreme Court: "Practically it does not now, and it never did, make any difference to the Indians, whether they were declared to have an interest in the proceeds of the land or not. Their assurance would be equal in either case." Even at the present time, and in view of the change of circumstances introduced by the Act of 1867, their Lordships think it must still be matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the Province of Ontario. But it is clear that, for the purposes of the present question, the construction of the treaties must be dealt with on the same footing as if it had arisen between the Indians and the old Province of Canada; and it must be kept in view that, whilst the Indians had no interest in making such a stipulation, an agreement by the province to make a particular debt a charge upon a particular portion of its annual revenues, or an agreement to hold such portion of its revenue in trust for the future payment of that debt, might have occasioned considerable inconvenience to the Government of the province. Why, in these circumstances, a liberal construction should be resorted to for the purpose of raising an equitable right in the Indians which is of no pecuniary advantage to them, and to which the province did not, according to the ordinary and natural construction of the instruments, consent, and cannot with any degree of probability be presumed to have consented, their Lordships are at a loss to understand. The so-called equity appears to have been conjured up for the doubtful purpose of construing the provisions of s. 109 with an amount of liberality which the ordinary canons of construction do not admit of.

It may not be out of place, in this connection, to refer to the general arrangements made by the Government of the Province of Canada for the application of part of its revenues in payment of annuities to the Indian tribes. Before 1850 there had been many cessions of reserved territory by its Indian occupants, in respect of which consideration was due

by the province in the shape of annual payments. These annuities, then amounting to 6666*l.* currency, were by the Provincial Act, 9 Vict. c. 114, charged upon the Civil List of the province; and an annual sum of 39,245*l.* 16*s.* currency was granted to the Crown, which was at that time the administrator of Indians and Indian affairs, out of "the Consolidated Revenue Fund of this province," for the purpose of paying these annuities, and other charges included in Sched. B. of the Act. And there is no evidence to shew that, during the existence of the Province of Canada, the annuities which became payable under the two treaties of 1850 were dealt with on any other footing, or paid out of any other fund than the general revenues of the province.

Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities. They will, accordingly, humbly advise Her Majesty that the judgment of the Supreme Court of Canada ought to be affirmed, and both appeals dismissed. Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here. The appellants must, therefore, pay to the respondent his costs of these appeals.

Solicitors for both appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondent: *Freshfields & Williams.*

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*May 15,16.
*Dec. 9.

THE PROVINCE OF ONTARIO.....APPELLANT;

AND

THE DOMINION OF CANADA AND THE PROVINCE OF QUEBEC.....RESPONDENTS.

In re INDIAN CLAIMS.

ON APPEAL FROM AN AWARD IN AN ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Constitutional law—Province of Canada—Treaties by, with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands—B.N.A. Act s. 109.

In 1850 the late province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the Government of the province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory thereby ceded by the Indians at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time."

By the B.N.A. Act the Dominion of Canada assumed the debts and liabilities of the province of Canada, and sec. 109 of that Act provided that all lands, &c., belonged to the several provinces in which the same were situate "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

The lands so surrendered are situate in the province of Ontario and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874 at the increased amount) and claims to be reimbursed therefor.

Held, reversing the said award, Gwynne and King JJ. dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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"an interest other than that of the province in the same," within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly with Quebec as representing the province of Canada.

APPEAL from an award of the arbitrators appointed to adjust the accounts between the Dominion of Canada and the provinces of Ontario and Quebec respectively.

The circumstances under which this appeal came before the court were the following:

Prior to and in the year 1850 the Ojibeway Indians inhabited large tracts of land on the eastern and northern shores of Lake Huron, and on the northern shore of Lake Superior, which tracts of land were at that time within the boundaries of the then province of Canada, but since the year 1867 are within the province of Ontario. At the date first above mentioned, 1850, the administration of Indian affairs within the province of Canada was in the hands of Her Majesty the Queen, and the management of the business with the said Indians was conducted by officers and agents appointed by the Government of Great Britain.

In the said year 1850 the Honourable William Benjamin Robinson was duly authorized by Her Majesty, represented by the Government of the province of Canada, to negotiate and enter into agreements with the above named Indians for the extinguishment of their title to, and to obtain cessions of, portions of the tracts of land occupied and inhabited by them, for the purpose of opening up the said lands for settlement, and developing the mineral resources of the same, and on the 9th day of September, 1850, an agreement was entered into between the said Hon. W. B. Robinson on behalf of the Queen and the Ojibeway Indians of the Lake Huron district, which agreement is in the words and figures following:

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"This agreement made and entered into this ninth day of September, in the year of Our Lord one thousand eight hundred and fifty, at Sault Ste. Marie, in the province of Canada, between the Honourable William Benjamin Robinson of the one part, on behalf of Her Majesty the Queen, and (naming them) principal men of the Ojibeway Indians, inhabiting and claiming the eastern and northern shores of lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Batchewanaung Bay, on the northern shore of Lake Superior, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honourable Hudson Bay Company from Canada; as well as all unconceded lands within the limits of Canada west to which they have any just claim on the other part, witnesseth:"

"That for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada, to them in hand paid, and for the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice will be given at such places as may be appointed for that purpose, they, the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors forever, all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in the schedule hereunto annexed, which reservations shall be held and occupied by the said chiefs and their tribes in common, for their own use and benefit; and should the said chiefs and their respective tribes at any time desire to dispose of any part of such reserva-

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tions, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole interest and to the best advantage; and the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this province, hereby promises and agrees to make, or cause to be made, the payments as above mentioned; and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the provincial Government."

"The parties of the second part further promise and agree that they will not sell, lease or otherwise dispose of any portion of their reservations without the consent of the Superintendent-General of Indian Affairs, or other officer of like authority, being first had and obtained. Nor will they at any time hinder or prevent persons from exploring or searching for minerals or other valuable productions in any part of the territory hereby ceded to Her Majesty as before mentioned. The parties of the second part also agree, that in case the government of this province should before the date of this agreement have sold, or bargained to sell, any mining locations or other property on the portions of the territory hereby reserved for their use, then and in that case such sale, or promise of sale, shall be perfected by the government if the parties claiming it shall have fulfilled all the conditions upon which such locations were made, and the amount accruing therefrom shall be paid to the tribe to whom the reservation belongs."

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"The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order; and provided further, that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (which is twelve hundred and forty) to entitle them to claim the full benefit thereof, and should their numbers at any future period not amount to two-thirds of twelve hundred and forty the annuity shall be diminished in proportion to their actual numbers."

A similar treaty was entered into with the Lake Superior Indians in which the annuity to be paid was £600 and the number in the tribe was stated to be fourteen hundred and twenty-two.

On the union of the provinces in 1867 the Dominion became liable for the debts of the several provinces as provided in sections 111. 112 and 142 of the British North America Act, which are as follows:

"111. Canada shall be liable for the debts and liabilities of each province existing at the union.

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

"142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and the selection of the arbitrators shall not be made until the parliament of Canada and the legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec."

In accordance with the last named section arbitrators were chosen, and on the third day of September, 1870, two of them, namely, Hon. John Hamilton Gray and Hon. D. L. MacPherson, gave their award, paragraphs 1 and 13 of which are as follows:

"I. That the amount by which the debt of the late province of Canada exceeded on the thirtieth day of June, one thousand eight hundred and sixty-seven, sixty-two millions five hundred thousand dollars, shall be and is hereby divided between and apportioned to, and shall be borne by, the said provinces of Ontario and Quebec respectively, in the following proportions, that is to say—the said province of Ontario shall assume and pay such a proportion of the said amount as the sum of nine millions eight hundred and eight thousand seven hundred and twenty-eight dollars and two cents bears to the sum of eighteen millions five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents; and the said province of Quebec shall assume and pay such a proportion of the said amount as the sum of eight millions seven hundred and seventy-eight thousand and seven hundred and ninety-two dollars and fifty-five cents bears to the sum of eighteen millions

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five hundred and eighty-seven thousand five hundred and twenty dollars and fifty-seven cents."

"XIII. That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate by the other of the said provinces."

In 1891 the Parliament of Canada passed the Act 54 & 55 Vic. ch. 6, which contained the following provisions:

"An Act respecting the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, and between the said provinces."

[Assented to July 10th, 1891.]

"Whereas certain accounts have arisen or may hereafter arise in the settlement of the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec both jointly and severally, and between the two provinces, concerning which no agreement has hitherto been arrived at; and whereas it is advisable that all such questions of account should be referred to arbitration: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

"1. For the final and conclusive determination of such accounts, the Governor General in Council may unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, to whom shall be referred such questions as the Governor General and the Lieutenant-Governors of the said provinces shall agree to submit."

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"2. The arbitrators shall consist of three judges, one to be appointed by the Governor General in Council and one by each of the said Provincial Governments, and all three shall be approved of by each Government."

"3. The arbitrators shall not assume to decide any disputed constitutional question, but if any are raised they will note and report them with their award but without delaying the proceedings."

"4. Any two of the arbitrators shall have power to make an award."

"5. The arbitrators, or any two of them, shall have power to make one or more awards, and to do so from time to time."

"6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal."

"7. In case of an appeal on a question of law being successful the matter shall go back to the arbitrators for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes."

"8. The appointment of the said arbitrators by Order in Council and their award in writing shall be binding on Canada, save in case of appeal on questions of law, in which case the final decision thereon shall be binding on Canada."

"9. In case of a vacancy by death or otherwise among the arbitrators, the same shall be filled in the same

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manner as the appointment was first made, any such appointment to be approved of by the other two Governments."

In the same year the legislature of Ontario passed an Act 54 Vic. ch. 2, and the legislature of Quebec passed 54 Vic. ch. 4, each of which was identical in terms with the above Dominion statute.

In accordance with the provisions of the said statutes the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of Quebec; and the Hon. George W. Burbidge, Judge of the Exchequer Court of Canada, were appointed arbitrators and the counsel for the three governments entered into an agreement of submission which provided that certain matters should be referred to said arbitrators including:

"1. All questions relating to or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec, and to accounts between the two Provinces of Ontario and Quebec."

"2. The accounts are understood to include the following particulars":

"(*d*) The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference."

"(*e*) The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said Government."

The arbitrators made and published an award in respect of the claim of the Dominion for re-payment of the sums paid to the Indians under the above mentioned treaties, which award with the reasons given by the several arbitrators for the conclusion reached therein is as follows:

AWARD ON INDIAN ROBINSON TREATIES, HURON AND SUPERIOR.

13th February, 1895.

"*To all to whom these presents shall come:*

"The Honourable John Alexander Boyd, of the city of Toronto, and province of Ontario, Chancellor of the said province; the Honourable Sir Louis Napoleon Casault, of the city of Quebec, in the province of Quebec, Chief Justice of the Superior Court of the said province of Quebec; and the Honourable George Wheelock Burbidge, of the city of Ottawa, in the said province (of Ontario), Judge of the Exchequer Court of Canada,—Send greeting."

"Whereas it was in and by the Act of the Parliament of Canada, 54 & 55 Victoria, chapter 6, and in and by an Act of the Legislative Assembly of Ontario, 54 Victoria, chapter 2, and in and by an Act of the Legislature of Quebec, 54 Victoria, chapter 4, among other things provided that for the final and conclusive determination of certain questions and accounts which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the Governments of the provinces of Ontario and Quebec in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor General and Lieutenant-Governors of the provinces should agree to submit;"

"And whereas we, the undersigned John Alexander Boyd, Sir Louis Napoleon Casault, and George Wheelock Burbidge, have been duly appointed under the said Acts and have taken upon ourselves the burdens thereof;"

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"And whereas it was provided in and by the said Acts that such arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time;"

"And whereas certain questions respecting a claim made by the Dominion of Canada against the provinces of Ontario and Quebec in respect of Indian claims arising out of the Robinson treaties, and respecting a certain other claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure, and a certain other claim made by the province of Ontario against the Dominion of Canada in the first instance, and by notice to the province of Quebec against that province, for the recovery of a balance of the Upper Canada Municipalities' Fund, have been submitted to such arbitrators, and they have heard the parties thereto;"

"Now, therefore, the said arbitrators exercising their authority to make a separate award at this time respecting the said matters, do award, order and adjudge in and upon the premises as follows, that is to say:"

"I. In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson treaties:"

"1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual."

"2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the

treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled."

"3 That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year."

"4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873, 36 Vic. c. 30."

"5. That interest is not recoverable upon any arrears of such annuities."

"6. That the ceded territory mentioned became the property of Ontario under the 109th section of The British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario: and that

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this burden has not been in any way affected or discharged."

"7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled."

"8. That in respect to the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law."

"9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account."

"That Mr. Chancellor Boyd dissents from so much of the proposition contained in this paragraph as relates to the date at which such payment should be charged."

"II. With respect to the claim made by the Dominion of Canada against the province of Ontario for certain immigration expenditure :"

"1. That the Government of Canada recover against the province of Ontario the amount claimed for the year 1878, but that in reference to the claim made in respect of the years 1879 and 1880 the province of Ontario be discharged, and that this award is without prejudice to any question as to whether or not the province has paid more than was actually due in any year."

"III. With respect to the claim made by the province of Ontario against the Dominion of Canada, and by notice against the province of Quebec, for the recovery of a balance on the Upper Canada Municipalities' Fund :"

"1. That the province do recover against the Dominion $15,732.76, parcel of the sum of $21,488.74 claimed, which said sum of $15,732.76 is to be credited to the province of Ontario in the province of Ontario account as of the date of the 1st of July, 1872; and, that as to the balance of the said claim, amounting to $5,755.98, the Dominion be discharged, and that the province of Quebec be discharged in respect of the whole claim."

"In witness whereof we, the said John Alexander Boyd, Sir Louis Napoleon Casault and George Wheelock Burbidge, have hereunto set our hands and seals this thirteenth day of February, A.D. 1895."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Witness: L. A. AUDETTE."

(The award was published and decision given on 14th February, 1895.)

"In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to Statute of Canada, 54 & 55 V. c. 6, Statute of Ontario, 54 V. c. 2, and Statute of Quebec, 54 V. c. 4."

"On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the Union, as in such award is mentioned, the arbi-

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trators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law."

J. A. BOYD,
L. N. CASAULT,
GEO. W. BURBIDGE.

"Dated at Quebec,
this 26th day of March, 1895."

THE HONOURABLE MR. CHANCELLOR BOYD'S REASONS FOR AWARD OF FEBRUARY 13TH, 1895, DELIVERED 14th FEBRUARY, 1895.

"I. This broad question as to the obligation of Ontario with respect to the Indians of the "Robinson treaties" may fairly and properly be dealt with as if the provisions of the Treaty and the sections of The British North America Act relating to lands were placed in juxtaposition.

"Then arises the inquiry: Does any interest in respect of these Indians attach to the lands belonging to Ontario under the 109th section of British North America Act?"

"The course of construction applicable both to constitutional Act and Indian treaty is not that a literal and strict meaning be given to the words, but that they shall be construed liberally and comprehensively so as to further the reasonable scope of the provisions. This benignant construction obtains with added force in the construction of a treaty wherein the rules of international rather than of municipal law are to be regarded."

"Now in these transactions with the aborigines from the earliest colonial times in North America the Government has assumed the status of the Indian tribes to be that of distinct political communities. When the dealing has been by the Crown for the cession of territory over which some legal possessory right by the tribes in actual occupation has always been recognized, then the form of the transactions has been that of a treaty. Superadded to this, it is to be taken into account that the Indians relatively to the whites are in a state of dependency or pupilage, and that the nearest legal analogy as to the relationship between their tribes and the Government is that of guardian and ward."

"Hence arises the doctrines well established in American jurisprudence, and dating from the era of British colonization, that treaty stipulations are to be carried out with the utmost plentitude of good faith and with even generous interpretation in favour of these public wards of the nation."

"I cite the language of Mr. Justice McLean, in *Worcester* v. *State of Georgia* (1): 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"This language is quoted and approved of by Mr. Justice Mathews, giving the opinion of the court in *Choctaw Nation* v. *United States* (2), and he continues thus: 'The recognized relation between the parties to this controversy is that between a superior and an

(1) 6 Peters 582.

(2) 119 U. S. R. at p. 27.

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inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interest may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisdiction formulating the rights and obligations of private persons equally subject to the same laws.'"

"'The rules to be applied are those which govern public treaties, which even in the case of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger sense which constitutes the spirit of the Law of Nations.'"

"On the face of the treaty of 1850 are found indicia of generous intentions contemplated and liberal dealings promised. Fixed annuities are given, as to which no question now arises. Then comes the provision for the augmentation of the annuities, 'should the territory ceded at any future period produce such an amount as will enable the government, without incurring loss, to increase the annuity.' That is to say, if the rents, issues and profits (whether from sales, leases, mining royalties, timber licenses or other sources of revenue derived from the surrendered land) shall yield a surplus after payment of all outlay in connection with the development and improvement of the territory, then that surplus shall go to augment the annuities from time to time. True, the mere words

used do not say that the increased annuity is to be paid out of the proceeds of the land, but that is the plain and reasonable implication. In a dealing between guardian and ward, if the guardian took all the ward's property and undertook to maintain him, besides the general remedy equity would affix a trust to that effect upon the property so taken. Here the Indians would seem to have a right to an accounting even on the words of the treaty, so as to ascertain whether the event had arisen upon which the annuities were to be augmented. If upon such accounting a proper surplus appeared natural equity would impose a charge upon that surplus for the benefit of the Indians. That surplus would be in truth in the eye of equity the primary fund for the payment of the augmentations. The legislature (that includes the government) appears to treat even the fixed annuities as charges on the properties surrendered, and this though the payments are to be punctually made before any of the lands may have been realized. This no doubt is a proper fiscal arrangement (12 Vic. c. 200, s. 3). Even as to the fixed annuities, it would seem more obviously right where the annuities, as in the case of the augmentation, were only to be paid when a surplus arises out of the administration of the lands."

"In this latter case it would be not only a matter of finance and ordinary book-keeping, but also a conclusion of proper administration, that the revenue for the payment of the augmented annuities should be derived from the surplus outcome of the lands, and should be regarded as a charge upon that revenue, and so earmarked as applicable under the 'Robinson Treaties.'"

"This charge upon the proceeds of the lands which between individuals would have been looked for (especially where the weaker party was granting his property to the stronger) is here not expressed, because

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the undertaking of the Crown to make the payments afforded ample security, but nevertheless the real nature of the transaction involves the existence of an interest in the Indians in and upon the proceeds of the territory surrendered."

"The term 'interest' used in the statute is of large enough import to include this latent charge, as put by Mr Justice Kay *In re Thomas* (1), an interest in the proceeds of land sold is 'an interest in land in contradistinction to an estate in land.'"

"The making of a treaty usually implies that the nation will by its municipal laws do all that is necessary to carry the provisions of the treaty into effect. (Per Anderson, B., in *Reg.* v. *Serva* (2). If the parts of this treaty were thus extended, one proper term would be to charge the augmentations of the annuities upon the surplus revenues of the territory after the deduction of all proper outlays."

"By analogy to the equitable doctrine laid down in *Waring* v. *Ward* (3), it appears to me that there is an implied obligation to pay the increased annuities out of the proceeds of the lands which passes with the lands as a burden to be borne by Ontario."

"II. I think the treaty provides for an increase in the number of Indians who shall share in the augmented annuities as individuals, and that the increase is not to go to the Indians as a tribe but to the several members *per capita* at the time of payment. This is applying the liberal construction to the language used, so as to give the greatest possible benefit to the party least able to protect their own interests. The provision as to diminution of the annuity has reference only to the fixed sums, and does not impair the meaning given to the language used as to the augmentations. It is

(1) 34 Ch. D. 172.
(2) 2 C. & K. 86.
(3) 7 Ves. 336-7.

likely that the treaty was shaped with reference to the then prevalent idea that the tribes were dying out, but the intent of the treaty was to assist the Indians to change their state in bringing them a step nearer to civilization. If, however, the tribes increase in number the only limit of future payment is when they become entirely civilized so as to cease to be Indians."

"III. It is not desirable to define with minuteness who are Indians entitled to share, in advance of any particular case which arises for decision. It would appear from the despatch (a letter of Mr. Robinson, the Commissioner), which accompanies the treaty that half-breeds were then embraced in and numbered with the tribe in the approximate totals given. The recognition of these half-breeds as members of Indian tribes by the government appears to be manifested in contemporaneous and subsequent statutes."

"When the statute of Canada (13 & 14 Vic. ch. 74, passed 10th August, 1850), permitted none but Indians and those who may be intermarried with Indians to reside upon Indian lands (unless under special license from the government officer), and the act altogether seems to contemplate as Indians those of pure or mixed blood and those intermarried with and living among Indians (no distinction being made to sex). Then coming down to 1857, the statute of that year (20 Vic. ch. 26), gives a definition of Indians as meaning persons of Indian blood or intermarried with Indians, who shall be acknowledged as members of Indian bands, residing upon unsurrendered lands, or upon lands specially reserved for tribal use in common, and who shall themselves reside upon such lands; that is, one of other blood married to one of Indian blood, acknowledged as a member of the tribe and living on the tribal land with the tribe (whether man or woman) is accounted a member of that tribe. And the descendants of such marriage would

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be Indians as long as the tribal relation and residence lasted."

"This appears to be a more comprehensive category than would be the case if the matter rested on common law or on international law, for in such case, the maxim *partus sequitur patrem*, governs cases as to Indians. (See judgment of Parker J., in *Ex parte Reynolds* (3).

"There is the observation also to be made that the government of Canada, before 1867, had always power to regulate the inhabitancy of Indian lands by excluding all whites therefrom, and their marriage and residency on the part of white people must have been with the sanction of the government."

"I would therefore favour generally the application of the rule so as to include among Indians those of other blood, who are not only married to Indians, but were adopted and acknowledged by the tribe as members, and as such lived in tribal relation with the other members at their common place of residence. If all these conditions did not exist (as to the males anyway) I should say the person of other blood and his descendants was and were not included in those entitled under the treaties."

"IV. A similar difficulty arises as to the definition of what outlay should be taken into account before the right to increased annuities arises. All expenses connected with the survey and administration of the lands and the keeping of the accounts and all outlays going to develop and advantage the territory so as to induce settlement and sale would appear to be properly charged against the income from their lands, but it is better to deal with disputed items as they arise specifically than now to attempt to exhaust all details by way of anticipation."

(3) 5 Dillon 394.

"V. In case it appears that surplus revenues existed sufficient to pay increased annuities and that there has been paid by the Dominion Government pursuant to the suggestion of Attorney-General Mowat made in 1873, these payments should be recouped to the Dominion as of this date and without interest."

"The nature of annuities is such as not to carry interest and the offer of the Attorney-General then to submit the matter in dispute as to liability to judicial tribunal should preclude the Dominion from getting interest during the period of delay from then till now."

The Honourable SIR LOUIS NAPOLEON CASAULT:

"I would like to say one word about the interest, and about the responsibility of the provinces for the annuities subsequent to confederation. I have had occasion to consider the question before now, a good many years ago, and was firmly of the opinion that for all annuities, and even the capitalization subsequent to confederation, that it should be borne by the province of Ontario. I have had no occasion to change my mind—far from it—and I am glad to say that my two brother arbitrators are to-day of the same opinion. But there is a distinction to be drawn between the annuities payable after confederation, and those which became due before confederation. Of course, those which became due before confederation were due by the province of Canada to the Indians, and formed the debt of the province of Canada, and for those, if any there be, they should be paid both by Quebec and Ontario, in the proportion held by the first arbitration."

"As to interest, we have come to the conclusion, which was not adopted by the learned Chancellor, that the interest should be paid upon a balance of about $900,000 and $500,000, say $1,500,000 by Ontario, and by Quebec upon $625,000, if the balance against each province amounted to these amounts, and if by the final

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settlement of the accounts the balance was made less the interest should be for the less amount. I think this is nothing but a sequence of what we have decided. Of course, it should go with interest if the final settlement of the accounts diminishes the amount for which we have said that the Dominion was entitled to interest as against the province of Ontario, and if not, of course there would be no interest."

THE HONOURABLE MR. JUSTICE BURBIDGE:

"The case was presented to us by counsel with such completeness and lucidity of argument, and the learned Chancellor has, in the opinion that he has just delivered, and to which we have all listened with so great interest, dealt so fully with the principal issues involved, that I shall content myself with stating, as briefly and with as little discussion as possible, the conclusions to which I have come."

"I am of opinion, and as to that I do not know that there is any controversy between the parties, that if in any year since the two treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government of the province of Canada, or its successor, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase, not exceeding four dollars for each individual. So much they were entitled to as a matter of law and right. Any increase beyond that would have been a matter of grace."

"I am further of opinion that the total amount of annuity to be paid under each treaty is in such a case to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaty; that is, that in case of an increase in the number of Indians beyond the number of 1,240 named in one treaty, and 1,422 in the other,

the annuity, if the funds permitted, was to be equal to a sum that would provide four dollars for each Indian of the tribes entitled. The only difficulty I have had on this point arises from the provision for the diminution of the annuity in case the number of those entitled fell below two-thirds of the numbers mentioned. In that case they were not to have 'the full benefit' of the treaty, and the annuity should be diminished in proportion to the actual members. If this provision, however, be taken to have reference only to the fixed annuities, which at the moment were for all parties the more important matter, the difficulty disappears. That clause probably was intended to operate in reduction in the case provided for of the perpetual and fixed annuities that were payable quite apart from any consideration of the amount of the revenues to be derived from the ceded territory, leaving the other provision as to increase to depend upon the excess of such revenues over the charges referable to the opening up and administration of such territory. That, on the whole, it seems to me, must have been the intention of the parties."

"Then as to 'the individuals' who in case the increase can be made without loss are to be reckoned in ascertaining the amount of the annuity, it is clear of course that they are to be Indians belonging to the tribes or bands entitled, and no one should be counted who was not by law or well-established custom a *bonâ fide* Indian of the tribe or band."

"I agree with what was said by Mr. Robinson of the danger of attempting at present an abstract definition of the word "Indian." With reference to the period before the union I do not see that there can be any difficulty. Whatever government is now liable to pay or make good any amounts that were payable but not paid before the union, is so liable as the successor or successors of

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the old province of Canada, the government of which appears to have kept a record or list of the names of the Indians entitled to share in the fixed annuities. Generally speaking the 'individuals' whose names appear on such lists would be those to be taken into account in computing any increased annuity that should have been paid. The onus of showing that the names of any individuals entitled to be reckoned were improperly omitted from such lists should now be on the Indians, or those who act for them, and in like manner no names should, I think, be struck off, except for good reason shown by those whose interest it is to keep the numbers down."

"With reference to the period after confederation, neither Ontario nor Quebec would be in any way affected or precluded by the action of the Parliament or Government of Canada, or of any of its officers, either in prescribing a definition of who are Indians or in adding to the lists the name of any 'individual' as an Indian of a tribe or band entitled to the benefit of either treaty. The burden of showing that the names of any Indians so added since the union to such lists were rightly added, would be, it seems to me, on the Government of Canada."

"I should be equally unwilling to attempt a definition of the expenses and charges for the opening up, settlement and administration of the ceded territory that should be taken into account in determining whether or not the annuities could be increased 'without incurring loss.' In a general way they must, I think, be fairly referable to the administration of the particular territory and not of the class of expenditures that are incurred by governments for the general advantage of the whole country. During the argument certain expenditures by the Government of Canada since the union were mentioned; but on the whole they did

not appear to me to be such as should be taken account of. If, however, there should happen to be any expenditure directly made or incurred by the Government of the Dominion for the purpose of the opening up of, and enhancing the value of, the particular territory in question, I am not at present prepared to say that it should not be taken into account."

"Then as to the question raised by Mr. Robinson as to whether or not any excess of revenue in any year might not be used to give the increased annuity in a former year in which an increased annuity could not have been paid without loss, I see no reason to change the view I expressed at the hearing, that that could not be done. If in any year the condition prescribed by the treaties did not happen the Indians have in respect of that year no claim. Of course any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be taken into the accounts of that year. But if in any year the increased annuity could not be paid without loss after taking any such existing excess or balance into account, then there was as to that year no liability to pay any increased annuity."

"I think there can be no doubt that any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada since the 111th section of the British North America Act, 1867."

"I am also of opinion that this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act."

"I do not think that Ontario and Quebec have, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30). The

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matter was never considered or taken any account of in such capitalization or in any of the proceedings leading up to the award of Sept. 3rd, 1870, or in the award itself."

"With respect to the Act of 1873, its effect, so far as it is necessary now to consider it, was to substitute the sum of $73,006,088.84 for the sum of $62,500,000.00 in the 112th section of the British North America Act, 1867, the result being that Ontario and Quebec became and remained conjointly liable to Canada for any excess of debt over the former instead of the latter sum. That is the clear construction of the Act itself, and it is one that has been acted upon without question by all parties since the Act of 1873 was passed. The contention for a different construction is now raised for the first time. It is now said that the Act of 1873 was conclusive of the amount of the debt with which the old province of Canada entered the union. If so, the province of Canada account was closed in 1873, and the negotiations between the parties that have occurred since the agreement of 1888 (Exhibit Z, Report of Conference, 1888, p. 4), the settlement of particular items of that account coming in or ascertaining between the years 1873 and 1888 (*id.* pp. 19 to 22), and our awards in respect to that account and interest thereon all go for nothing. The question is not, it seems to me, open to fair debate."

"With reference to the question of interest on any increased annuities that may be now ascertained to have been payable prior to the union to the Indians under the treaties in question, it is obviously necessary to distinguish between the rights of the Indians to interest, and the question of interest as between the Dominion and the provinces of Ontario and Quebec as the successors in liability to the old province of Canada. The latter question has been concluded by the agree-

ment of 1888, and our award following that agreement. The question as to whether or not interest should be computed on any arrears of such annuities is another matter depending upon the right in law or equity of the Indians to interest as against the Crown, and it seems to me that they have no case either at law or in equity. I regret that I cannot see my way to a different conclusion. But I have no doubt that the debts and liabilities for which Canada became liable under the 111th section of the British North America Act are legal debts and liabilities, and that the excess of debt for which, under the 112th section, Ontario and Quebec became conjointly liable to the Dominion, cannot, without the conjoint consent of Ontario and Quebec, be increased by any debt or liability not enforceable in law or equity."

"If there is to be any consideration of any claim of the Indians to interest on any arrears of annuities payable before the union in recognition of any moral obligation or as a matter of good conscience, it is for Ontario and Quebec to consider the matter and admit or deny the claim as they see fit. The Dominion can collect from them only what they legally owe, and cannot by discharging moral obligations make Ontario and Quebec liable; and there is, if I may express an opinion on that point, obviously no obligation, legal or moral, on the Dominion to do more than collect for the Indians from Ontario and Quebec whatever amount of arrears the province of Canada owed to them, and to pay it over to the tribes entitled."

"Unless Ontario and Quebec will consent that in computing the amount of arrears due to the Indians at the union, such arrears shall be computed with interest, they must, it seems to me, be made up without interest."

"With reference to the period subsequent to the union, the case presented by the Dominion for the

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tribes of Indians interested in the treaties in question is, that the ceded territory became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein. The other question as to whether or not Ontario and Quebec are conjointly liable under the 112th section of the Act to the Dominion for such increased annuities with or without a right on the part of Quebec to be indemnified by Ontario against the same, is not now raised. That question is reserved to come up in some future proceeding or not, as the Dominion may think proper."

"Now, looking to the particular matter, my mind lends a ready assent to Mr. Robinson's argument that it is equitable that this burden should fall upon Ontario. Ontario has the advantages resulting from the ownership of the lands, and it should bear the burden. I agree to that; considered as a matter by itself it is highly inequitable that any part of the burden should fall upon Quebec, and even in a greater degree inequitable that Nova Scotia or New Brunswick or any of the provinces that came into the union since 1867 should be called upon as a part of the Dominion to contribute anything towards making good to the tribes entitled the increased annuities payable to them under the treaties mentioned; and were it not for the consideration to which I am about to refer I should for myself have little or no hesitation in joining in making an award upon the 'equitable principles' mentioned in the sixth section of the Acts under which we are sitting. But the union of the provinces was a large matter involving many issues and considerations of great moment, and the compact to which expression was given in the Act by which the union was con-

summated is one which should, I think, be guarded and maintained with great watchfulness and care. What one might think to be fair and equitable with respect to a particular matter dealt with in the Act, abstracted from other provisions therein, might in conjunction with such provisions be in fact and reality unfair and inequitable. So it seems to me that the only safe way is to adhere strictly to the compact or treaty that was made by the province that entered into the union; and that the highest fairness and equity will be found in giving to each the advantages, and imposing upon each the burdens, it has bargained for. The case is one in which we ought, I think, to proceed upon our view of 'a disputed question of law,' and I am better satisfied to follow that course as it will save to the party against whom any award is made a right of appeal to the Supreme Court of Canada, and thence to the Judicial Committee of the Privy Council [54 & 55 Vict. (D.), c. 6, s. 6]."

"Now with reference to the question of law in dispute, it seems to me clear that in a narrow and strict sense the Indians for whom this claim is made by the Dominion had at the union no interest in the lands constituting the ceded territory, other than the right or privilege of hunting thereon or fishing in the waters thereof so long as such lands were ungranted. These Indians were no doubt interested in such lands in the sense that it would be to them an advantage to have them managed with a prudence and forethought that would at the earliest possible time and for the longest time possible give them the increased annuities for which the treaties made provision. But the very object of the surrender was to give the Crown a free hand in the settlement and administration of the land and to divest the Indians of any title thereto or interest therein. And so too, looking to the parties to

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the treaties in question, the Crown on the one side and the several tribes of Indians on the other, it is possible that the Crown did not, after the surrender, hold the ceded territory on any trust that would be enforceable in law. But in a broader sense, and I agree fully with the learned Chancellor in thinking that the treaties in question and the British North America Act should be construed in a large and liberal way, it seems to me that the Indians, in entering into such treaties, reposed a confidence in the Crown that it would manage the ceded lands fairly for the advantage of all concerned, and so as to raise thereout, if that were fairly possible, the moneys to pay the increased annuities, and that there was a corresponding duty resting on the Crown to do so. In that sense the lands were at the union, it seems to me, subject to a trust or interest existing in respect of the same. It is objected that it was not the lands constituting the ceded territory, but the proceeds of the lands, that were impressed, if at all, with any such trust, or in which the Indians had any such interest, and it is 'lands' and not 'proceeds of lands,' that are mentioned in the 109th section of the British North America Act, 1867. But that objection does not, it seems to me, present any great difficulty in view of the facts of the case. These lands were, before the surrender, and have since been vested in the Crown. There was no change of title at the union. The Crown continued to hold them. Before the union the beneficial interest in such lands and the right to take and appropriate the revenues arising therefrom was vested in the province of Canada, and by the 109th section of the British North America Act, 1867, that right passed to the province of Ontario. The lands themselves did not pass in the sense that the title thereto was transferred. What passed was the right to administer and take the proceeds, the revenues arising from such

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lands. This is clear, I think, from two passages of the judgment of the Judicial Committee, delivered by Lord Watson in the *St. Catharines Milling and Lumber Company* v. *The Queen* (1), cited by Mr. Justice King in *Farwell* v. *The Queen* (2), and from what the same learned Lord said in delivering their Lordships' judgment in the 'Precious Metals' Case,' the *Attorney-General of British Columbia* v. *The Attorney-General of Canada* (3)."

"In the former case, referring to the effect of the Imperial statute, 3 & 4 Vic. c. 35, Lord Watson said:—

"'There was no transfer to the province of any legal estate in the Crown lands which continued to be vested in the Sovereign, but all moneys realized by sales, or in any other matter, became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.'"

"And then with reference to the distribution of property under the British North America Act, 1867:

"'It must always be kept in view that, whenever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, (as the case may be), and is subject to the control of its legislature, the land itself being vested in the Crown.'"

"The following are extracts from the judgment in 'The Precious Metals' Case.':—

"'The title to the public lands of British Columbia has all along been, and still is, vested in the Crown;

(1) 14 App. Cas. 46. (2) 22 Can. S.C.R. 559.
(3) 14 App. Cas. 295.

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but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, has been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only 'conveyance' contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion Government should occupy the position of a freeholder within the province.'"

"'In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the province for 'public lands,' which is, in substance, an assignment of its rights to appropriate the territoral revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.'"

"That view of what lands mean when vested in the Crown in the right of or for the use or benefit of the Dominion or of a province relieves us, I think, of any difficulty that might otherwise arise in respect to any

distinction between a trust or interest in such lands and in the proceeds of or revenues arising out of such lands."

"I think the ultimate burden of making provision for the payment of the increased annuities in question falls upon the province of Ontario, and that that burden has not, as against the Dominion or these Indians, been in any way affected or discharged. I express no opinion as to the effect of the award of 1870 on the respective rights of Ontario and Quebec. That question would arise in a case presented by the Dominion against the two provinces under the 112th section of the British North America Act, but does not arise here."

"With reference to interest on arrears of annuities accruing due after the union and not paid to those entitled, it seems to me that they stood in the same position as those that accrued before the union and that interest should not be computed without consent of Ontario. But as to the increased annuities paid by the Dominion to the Indians in 1874 and since, the Dominion should, I think, have interest on any amounts so properly disbursed, if our award as to interest on the province accounts permits thereof. The payments were made after notice and after certain negotiations between the Dominion and Ontario, in which, without determining on whom the burden should ultimately fall, it was admitted the Indians were entitled. The question, then, is not one of interest on unpaid annuities, but of interest on moneys paid by the Dominion in respect of a legal liability, for which it is entitled to indemnity against Ontario"

"I think any such moneys so properly paid should be charged against the province in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be

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affected by any previous ruling as to interest on that account."

The province of Ontario appealed from said award to the Supreme Court of Canada.

Æmilius Irving Q.C, *S. H. Blake* Q.C. and *J. M. Clark* appeared for the appellant, the Province of Ontario.

Christopher Robinson Q.C. and *W. D. Hogg* Q.C., for the respondent, the Dominion of Canada.

D. Girouard Q.C. and Hon. *J. S. Hall* Q.C., for the respondent, the Province of Quebec.

Irving Q.C. With your Lordships' permission, my learned friends Mr. Blake and Mr. Clark appear on behalf of Ontario; I am also in the case but I shall not address the court. My learned friend Mr. Blake will lead.

Blake Q.C. Ontario claims that there was no trust in respect to these lands; that no trust could have been declared in regard to them; that any trust would have absolutely defeated what the parties were endeavouring to arrange, which was that the lands were to be placed in the possession of Canada, so that they might deal absolutely with them. If there was to be any trust in favour of the lands it would have absolutely defeated what the province of Canada was desirous of carrying out. For what the province of Canada wanted to do was at once either absolutely to give away or absolutely to sell, or absolutely to deal with, these lands. If there had been any trust, or if there had been any interest retained in favour of the Indians, then the province would have been utterly unable to do what it desired to carry out. The arrangement was one to do away with any right, to do away with any interest, to do away with anything that in any possible way might check the freest dealing with this property. The

Indians, of course, are perfectly satisfied, because, instead of the illusory charge which they had of fishing and shooting, they get absolutely as much of the land as they felt they could possibly deal with. They retain—and it is specified in the treaty as all that they do retain—the right to fish and shoot on all the other lands until the Government chooses to sell them; but the moment it gives them away, or sells them, or leases them, that ends it. They take a certain sum of money down, and they take the promise of the Government, which embraces the honour of the Crown, which embraces all, it may be, that might come from the lands, which embraces all the revenues of the Government. They take that promise and set absolutely free all these lands; and if these lands are not set absolutely free from any trust and from any interest, then the whole object of the treaty is utterly and entirely defeated.

Trusts or charges, or anything of that kind, would be out of the question because it binds or touches the land; the very object of what was being entered into is utterly defeated, because the person that takes the land must take it with the trust or with the charge, and the land is not land absolutely free to be dealt with, as was the intention of those parties. I think that that should be emphasized, because while both the learned Chancellor and Mr. Justice Burbidge say that, taking this as an ordinary instrument, and construing it as an ordinary instrument, construing it so as to further the reasonable scope of the provisions, they are able to stretch it in such a way as to create upon the land that which did not exist. Now, my Lords, you will find that the learned Chancellor says:

"The course of construction applicable both to the constitutional Act and Indian treaty is not that a literal and strict meaning is to be given the words, but that they shall be construed liberally and comprehensively,

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so as to further the reasonable scope of the provisions." I have no objections whatever to the reasonable scope of the provisions being followed out; but is not the true scope here that the lands are not to be charged? Is not the true scope of the provision that the Government is to take the lands freed from any interest or charge?

It is only by the one solitary means that Ontario can be made responsible and that is by holding that they have taken the lands subject to a trust and holding the lands under the trust must discharge it; and in discharging it, must pay these annuities. Ontario alone did not enter into this bargain; Ontario was not known then. There was no contract with Ontario; it was a contract with the provinces composed of Upper and Lower Canada, and the only way that Ontario can be made responsible is, not by carrying out the reasonable scope of the instrument, but by freely and entirely negativing what is its scope, altering it entirely, altering it entirely to the detriment of Ontario, altering it entirely not to the betterment of the Indians. And this has not been stretched in order to help the Indian, because the Indian knows perfectly well that he has got the whole of the Dominion behind his back in this payment. But what I do submit is that here the true scope is that the lands are not chargeable. The true scope is that there is to be a personal payment by the Crown to the Indians; and if there is to be any such enlargement must not the enlargement be according to the scope of the instrument, and not to defeat the instrument? If you turn round now and say there is to be a trust—and it is admitted that that is an enlargement—why, my Lords, it is an enlargement that defeats the instrument and does not carry it out.

Then again, it is said that there is an implied obligation to pay them out of the revenue from the lands. I

submit not; no implied obligation to pay them out of this at all; a distinct bargain made for certain benefits on the one side and certain benefits on the other; that there will be, in case I make well out of my bargain, a certain additional sum or an augmentation in your favour.

So, I say there was no charge, no right, no interest, and one of my strong arguments is the language that has been used by these two learned judges, showing that the language, taken as it usually is taken, does not warrant it, and showing that the very object that was had in view would be utterly defeated if the language was so broad. But then they say "because these are Indians, you are to deal liberally with them," forgetting, my Lords, that it does not give the Indians one cent more or one cent less. The Indians are not dissatisfied with their paymaster; and, forgetting that, they are making this change in this bargain—for virtually it is a change—not in favour of those that they say are entitled to consideration, but in order to charge the one province as against the other.

I went through the cases that have been referred to, but I did not find that there was anything whatever in them which negatived the position taken by the province of Ontario here.

The case well known to his Lordship, the Chief Justice of the court, of the *Canada Central Railway* v. *The Queen*, in which his Lordship gave judgment in the first instance (1), was referred to. Well, my Lords, I gladly take the conclusion of his Lordship, Chancellor Sprague, there, at page 314, where it was urged there should be, even in an Act of Parliament, an extension or the like. He says: "I am in doubt whether the consequences were appreciated by the legislature, but our duty is to interpret it, and that is our only function."

(1) 20 Gr. 273.

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And then your Lordships will find at pages 326 and 328 of that judgment, a citation of cases in regard to the construction of Acts of Parliament. In that case of the Central Railway Company there was the express statement—and your Lordships will find that at page 275—that the company was to be entitled to a grant of land. I am simply referring to the cases cited, and referring to the fact that there is nothing in those cases which would warrant what the learned arbitrators have done. By section 18 of the Act there certain lands were set apart, and at page 289 it is said that it is taken for granted that, as between individuals, the right to that specific land existed. The only question was the making a selection out of four million acres of lands that were granted; and the court came to the conclusion that if there was a sale of 5 acres out of 100 that the party might make a selection of it. But there was the most absolute trust as declared by the Act of Parliament in favour of the Railway Company that was presenting the petition. And in *Booth* v. *McIntyre* (1), another case cited, it was held that the company had the power untrammelled by any restrictions to enter upon the lands of the Crown, and that that was not taken away but reserved by section 109 of the British North America Act. But there the right existed; it was plain and specific; no question about it.

Then there was a case in Maclean's Reports, as to the treaties with Indians and the tribes and others, and I do not find anything there. On the contrary it was held that the distinction was not authorized by the constitution; that is, to deal in treaties with Indians in different ways from other treaties. They are treaties within the meaning of the constitution, and as such should be laws of the land. Mr. Hallock, whose book was also referred to, says that they are to receive a fair and liberal interpretation, according to the inten-

(1) 31 U. C. C. P. 183.

tion of the contracting parties. That is all that is to be kept in view, according to the intention of the contracting parties—which I say would be utterly defeated by the interpretation put here—and be construed in good faith. Their intention is to be governed by the same rules which we apply to the determination of contracts. That is the third edition of Hallock's International Law, 296. Whitton says they are to be construed in the same way; and Story also, vol. 2, page 44.

I submit, therefore, my Lords, that the true conclusion in respect to this matter was that Ontario is not individually liable for the payment of this amount; that nothing has transpired to place upon Ontario any additional responsibility; and that this is a debt either of the old province of Canada in the augmentation of it, as well as in the original amount; and that it must either be discharged by that province, or else discharged by the Dominion of Canada.

Clark follows for the appellant. In the present appeal before your Lordships, and in the argument before the learned arbitrators, the whole question was as to whether there was a sole liability of the province of Ontario for payment of these annuities subsequent to confederation; the other question was not raised. Ontario asked before the arbitrators that the whole matter should be settled at once, but the Dominion reserved their right to make a claim afterwards against the province of Canada under section 112, if the present claim failed; but your Lordships will see that that matter is not adjudicated upon at all in the award, and was purposely left out by the arbitrators, and that matter, namely, the liability of the old province of Canada, as to whether the Dominion was liable under section 111, and had any right over against the province of Canada under section 112—that is against Ontario

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and Quebec jointly—is entirely left in abeyance, and is not the subject of the present appeal.

Then the whole question now before your Lordships is as to the construction of these treaties and of section 109, of course taken in connection with section 111, and so on, so far as they throw light on section 109.

First, I would like to call your Lordships' attention to the suggestion made in the factum of the Dominion and in the judgment of the learned Chancellor, namely, that all the meaning of these sections could be obtained by construing the British North America Act, or at least the sections in question, as if the treaties, which are the subject of the present bill, had been incorporated in them by way of preamble.

If we consider it in that way, we have first the treaties in question mentioned in the case, and of which my learned friend read sufficient to illustrate the present argument. Then we have the treaties declaring that the Indians surrender, and so on, using the largest possible words of grant, all their right, title and interest—using the very words of the British North America Act—in the lands in question, and give up all their right, title and interest in the land.

And what I submit is that the only interest that the Indians expressed on the face of the treaty—I shall deal afterwards, if necessary, with the question of the implication—refers to the reservations mentioned in the treaty, which are not in question, and to the rights to shoot, and so on, given to the Indians under the words of the treaty.

I submit that the previous arbitrators, in 1870, having dealt with the matter, there should not now be an award which is in direct conflict with the previous award, especially when your Lordships bear in mind that there was an appeal from the previous award to the Privy Council, and that the Privy Council con-

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firmed the award so far as the objections then taken. In the special case which is referred to in paragraph 6 of the judgment of the Privy Council, (your Lordships will find that special case printed in the Ontario Sessional Papers of 1878, number 42) your Lordships will see that this identical section, 109, is made part of the case. So that if there was anything in the award of 1870 which was in conflict with section 109, then that was the objection appearing on the special case before the Privy Council, and is, I submit, concluded in favour of Ontario by the judgment of the Privy Council, that so far as any objection was made to the award in the special case the award is valid.

Before the learned arbitrators, and in the factum of the Dominion, they argue in favour of the principle that Ontario getting the benefit of the lands should bear the burden of these annuities, and in support of that contention they rely, apparently, on the direction of the Privy Council in *St. Catharines Milling Company* v. *The Queen* (1); but all the decisions of all the courts are collected in the 4th volume of Cartwright, the cases under the British North America Act at page 107 and subsequent pages, commencing with the decision in the Privy Council. Now, your Lordships will see from the whole of the reports, and from the way in which the matter was discussed in the Supreme Court (2), that originally it was a matter entirely between the Attorney-General for Ontario and the St. Catharines Milling and Lumber Company. That was decided in that way by the Chancellor of Ontario, the Court of Appeal for Ontario, and this court. And it was only on the application for leave to appeal to the Privy Council that the question of the right of the Dominion came in at all; and the Dominion was allowed, on a special order made in that case, to intervene, and it is pointed out in

(1) 14 App. Cas. 46. (2) 13 Can. S. C. R. 577.

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the citation in the factum that the whole of the question in regard to the effect of that treaty then in question in 1873, was to be decided on the appeal to the Privy Council; and at page 60 of that case, in the judgment, Lord Watson says that, seeing that Ontario gets the benefit of the land there in question, that Ontario must recoup the Dominion the money payments which are there referred to; but what I point out to your Lordships is that the circumstances in that case were entirely distinct from the present case, and that that case can have no application to the decision here. Your Lordships will observe that the treaty there in question, being the North-west Angle Treaty, no. 3, was made in 1873, subsequent to confederation, so that the position was that at the time that treaty was made in 1873, Ontario took those lands, as was held in all the courts, subject to the burden of the Indian interest, whatever that interest may be.

There is a case in 31 Common Pleas which construes the word interest, and I submit the considerations there are entirely in favour of Ontario, and that only the class of matters which are referred to are intended to be covered by the words "trust and interest" in section 109.

Robinson Q.C. for the Dominion of Canada. There are two or three considerations, which may be put very shortly, which it seems to us is almost conclusive in favour of the constructions which the arbitrators have adopted. In the first place, as I understand, those principles which apply, and which my learned friends seek to apply, with reference to the legal authorities, as to the existence or non-existence of a vendor's lien, and different cases of that kind, and as to the existence or non-existence of a trust, are not relevant to the issue; there is no vendor's lien here; the Dominion is not seeking to retain a vendor's lien; it is

a transaction *sui generis*; you cannot find any transaction like it. The reason of it is this: this land undoubtedly, in the hands of the old province of Canada and before confederation, was certainly land in which the Indians had an interest. It was land subject to a trust for their benefit.

What would have been the position of things before confederation? Canada would have had to pay this debt out of the proceeds of this land. Well, now, does not Ontario, getting this land, hold it from Canada just as Canada held it? What is the difference? The Crown held it before for the benefit of the old province of Canada. There has been no sale and no transfer of title, as we all know. The Crown hold it now for the benefit of the province of Ontario. Why should the Crown hold it for the benefit of the province of Ontario in any different way or different position or free from any claims which attached to it while they held it for the province of Canada? I hold land for A. and hold it for A., with this interest which B. has in it, namely, to get the proceeds from it over and above a certain sum; I make an arrangement instead of holding it for A. I shall hold it for C.; why should I not hold it for C. under the same conditions as I hold it for A? Why should the interest in the land be changed by reason of a difference to the *cestui qui trust*? Because that is what it means. We submit the whole arrangement shows that plainly.

Now, then, let us consider for a moment clause 13 of the award of 1870. Let us see how things stood before that arbitration. Confederation had taken place; the division of assets between Ontario and Quebec had to be made by this arbitration; by confederation the lands in each province went to that province subject to the interest or trust of either people under section 109; but it was thought desirable that this question of

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Indian annuities should be dealt with by the arbitrators of 1870, and it was brought before them, and what did they say? I suppose they looked at section 109, and they said:

This land has become the property of the province. Now, if this land is subject to any annuity or to any claim to be paid out of the proceeds of the land, it must be quite understood that the province that gets the land is not to have any claim on the other provinces for it.

Now, let us see if this is not borne out by the very words of that award. I have not quite apprehended the force or foundation of my learned friend's argument that that award is against us:

"That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to, the said province in which they are so situate, by the other of the said provinces.

How does that affect the claim which is made here by the Dominion against one of the provinces? How has it any bearing upon it? I think that what they said is: "You Ontario, get these lands; you will have to pay the annuities. Now, you must recollect you will have no claim against Quebec or any of the other provinces for it."

The arbitrators have put this case on those grounds, which I submit are unanswerable. In the first place there is a trust or interest. Ontario has got the fund out of which is to come the proceeds or funds which have to pay the annuities. The payment of the annuities is conditional on the person holding the lands en-

abling the payment of those increased annuities. It could not be dealt with by the arbitrators of 1869, because you cannot tell from time to time what the proceeds will be. The case stands in a very peculiar position. Ontario has the lands and is administering the lands, and Ontario is the only person who can tell what the proceeds are. The proceeds depend upon the management of those lands and the receipts of Ontario from these lands. The arbitrators have based their finding on the equitable principle laid down in *Waring* v. *Ward* (1), that principle which is to be found in Broom's Maxims, page 634, 6th edition.

We say, these lands passing to Ontario were taken by Ontario subject to the interest of the Indians in them; that that is the fair meaning of the statute, as it would be if you would put the treaty and the statute in juxtaposition; and that that is the reasonable and fair construction of the statute, looking at the constitution as a constitution, and looking at the treaty as a treaty; because, looking at it on all principles of equity and justice, it should be interpreted that way; and we say, therefore, the judgment should be affirmed.

Hogg Q.C. follows. There is one question I wish to draw your Lordships' attention to, and that is with refereuce to clause 13 of the award of 1870; that clause deals with the rights only of the provinces; the arbitration was for the purpose of the distribution and division of assets and liabilities as between the provinces, as between Ontario and Quebec, or Upper and Lower Canada, and for the purpose of freeing one from the other It has the effect of freeing absolutely the one province from any claim the other province may have with reference to a charge such as the one at present, but it has no other effect. It does not affect the right of the Indians to say that

(1) 7 Ves. 336.

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they have a claim, nor of the Dominion on behalf of the Indians that this claim should be presented. In other words, if the clause 13 has the effect which my learned friends for Ontario have said, then if there is an interest of the Indians in those lands under the 109th section of the British North America Act, then that clause of the award is *ultra vires* the powers of the arbitrators of 1869.

There is just one other point, my Lords, that I had intended to draw your Lordships' attention to; that was with reference to the statement made by my learned friends from Ontario, as to the difference which exists between the treaty referred to in the St. Catharines Milling case, and the present treaty. My learned friend made the statement that the St. Catharines Milling case established the character of the interest which the Indians had in lands in this country; that is, that the interest there defined was the only interest which the Indians had in the lands. That is quite true with reference to the treaty in that case; for a fixed annuity under that treaty the Indians surrendered all their interest, whatever it might be. In the present treaties there was a fixed annuity, but there was a contingent annuity, or an annuity based upon the lands being of sufficient value or sufficient produced from those lands to pay a further annuity; and while the whole interest of the Indians in the lands in the North-west Angle Treaty was disposed of for a fixed annuity, the whole interest in the Robinson Treaty was not disposed of, because they retained an interest in the results or produce of the lands for the augmented annuity; and therefore at the time these lands came into the province of Ontario at confederation there was still this outstanding interest which the Indians had, and that is the interest which the learned arbitrators have defined in their judgments as an interest

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under the 109th section of the British North America Act.

Girouard Q.C. for the respondent, the province of Quebec.

(The learned counsel after pointing out that no suggestion was ever made until 1884 that Quebec should be liable for these payments, proceeded as follows):

Now, it seems to me, that in order to fully understand this case it will be proper to give a little history of the Indians on this continent, and to consider the purpose of these Robinson Treaties. On the one side Her Majesty, Queen Victoria, represented by the Hon. William Robinson, Commissioner of Crown Lands, and on the other side certain tribes of Indians called in the treaty Nation Indians of Lake Huron, and Ojibeways of Lake Superior. I would like to go back to the very beginning, and show the history of the Indians at the present time, to show they are not to be considered as individuals, to show their rights are not mere rights of subjects of Her Majesty. I shall show that these Indians have some greater rights than British subjects. When the Spanish, English and Dutch took possession of this northern America what did they do? They immediately put themselves into relations with what they called the Indian nation, not only one Indian nation but several of them. The English sought the friendship of what was called then the Confederacy of the Five Nations located at the south of lake Ontario, between Niagara and somewhere, the line of the province of Quebec and the province of Ontario to-day; and the French sought the friendship of the other Indian nations which were inhabiting the northern portion of the St. Lawrence as far as Sault Ste. Marie. It was admitted that these Indian nations formed distinct political communities in the country. Treaties were made with them, not only as far as the line was con-

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cerned, but also as far as peace and war were concerned. In 1698 came the end of that long war which commenced in 1667. In the month of September, 1698, there was a large gathering of all the Indian nations inhabiting the whole of this northern continent for the purpose of concluding the peace with the French King, represented by the colonial authorities in Canada. Then later on we find that the French King made some provisions for the maintenance of these Indians.

The cession of Canada took place in 1763, and then you find a different policy pursued by the English Government. The French Government took possession of all the lands of the province of Quebec as their own. They did not purchase anything from the Indians, but in some cases reservations followed; but it was a sale, it was a gift or donation from the King of France for the benefit of these Indians. The mission of Oka of Two Mountains is one; Caughnawaga is another; the mission of St. François du Lac is another; and another one will be at Quebec, at Lorette. There is a great difference between the wording of these Indian treaties made at the time with the French and those made with the English. Let us take one which has been the subject of contention before the court of justice in order to understand the scope of these treaties which the French King made for the Indians. I take the concession of Sault St. Louis, for the benefit of the Iroquois which was made in the year 1680 to the Jesuit Fathers:

"Our dearest and well-beloved, the Religious Order of the Society of Jesus, residing in our Dominion of New France, have caused it to be most humbly represented to us that the lands of the Prairie de la Magdelaine which were heretofore granted to them, being too damp for the purpose of sowing and providing for the sustenance of the Indians who have thereon settled,

and that it is feared they might leave if we were not pleased to give them the land called the Le Sault, containing two leagues in width from a point opposite the St. Louis Rapids, going up along the lake by an equal depth, with two islands, islets and shoals, which are in front and adjoining the lands of the said Prairie of La Magdelaine, which would allow them not only to receive the said Iroquois, but even to increase their number, and to spread by that means the knowledge of Faith and of Gospel."

And then the grant proceeds to say that the title to the land is given to the Jesuit Fathers "on condition that the said land called the Sault, shall belong to us free and clear, as it then may be, without any claim on us." And then there is a provision in the grant that the French people shall not reside on this reservation.

About the time of the cession to Great Britain the Jesuit Fathers undertook to sell to some white men pieces of that reservation. The Indians complained. There was a regular law-suit; and the decision was that although the title in the land was in the name of the Jesuit Fathers, still it was subject to a trust, and that trust was that it should be for the sole use of these Iroquois Indians. The word "trust" is not used in that grant or cession. It is not said that the Jesuit Fathers shall hold the land in trust for the Indians. It is a gift, a donation, to the Jesuit Fathers, without using the word "trust," but the trust can be construed just the same. It is a constructive trust from the very wording of the grant, which says that it shall be:

"To allow the Jesuit Fathers not only to receive the said Iroquois, but even to increase their numbers, and to spread by that means the knowledge of Faith and of the Gospel," and so on.

That decision will be found in the last volume of what is called Indian treaties and surrenders, published by the Dominion Parliament in 1891.

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The decision was rendered by General Gage, and I think it should have careful scrutiny and examination. He says that:

"At the surrender of this country, all things had been well arranged to maintain the said Indians in possession of their lands at Sault St. Louis, but that now the Jesuit Fathers, their missionaries, were granting continually to the French the lands forming part of the territory of Sault St. Louis, which, however, they believed belonged to them, by a title of grant given them by his most Christian Majesty."

Then he says:

"We are of opinion that the grant of the lands of Sault St. Louis was made to the Jesuit Fathers with the sole intention of settling there Iroquois and other Indians, and that all the soil could produce was intended for their profit and advantage."

I mention this case in order to show how liberally a treaty of this kind must be construed. It must be construed especially in favour of the Indian. Now let us take the policy of the British Government since the cession. After the revolutionary war, the Iroquois, who had been always friendly to the English, desired to cross the St. Lawrence and be located somewhere about the Peninsula of Niagara; and you find that about the end of the last century, treaties and surrenders were made by the British Government with the different Indian nations. All those treaties will be found in the volume which I had in my hand a moment ago. I have taken the trouble to compare all those treaties from say about the first cession—1785 I think is the date of the first one—to about the year 1856, and I find only about two kinds of treaties. First there is an absolute surrender for a fixed sum without any trust; for a sum say of a thousand pounds; such a treaty surrenders all titles, rights, and interests

in certain tracts of lands, and there is no reservation of any kind whatever. That is what I call a surrender absolute. I may say that most surrenders are absolute. And then you find also surrenders which are not absolute. I forgot to mention that all the land of Upper Canada, after the cession to Great Britain by France, was held by the Indians, with the exception of a few pieces at Cataraqui, at Niagara, and all along Windsor and Sault Ste. Marie. All that piece of land was still inhabited by the Indians, and it was therefore necessary for Great Britain, pursuing the policy they had followed in the United States, to extinguish what was known as the Indian title.

In twenty of these surrenders the word "trust" is to be found; in ten of them it is not to be found; the wording is the same, the only difference being that the word "trust" is not to be found in the treaty. Instead of reading "upon the trust and with the intent," it is "that His Majesty, his heirs and successors may out of the proceeds of the profits of the said lands and premises, arising from the sale or leasing or such other disposition of the lands or any part thereof as to His Majesty, his heirs or successors, may seem meet, make provision for the maintenance and religious instruction of the Indians."

The trust is provided for; the trust is created; the trust is stipulated, undoubtedly, just as in a case where the word "trust" is used. The treaty is worded in the same way, except the word "trust" is not there. Well, I do not think a court of justice ought to make any distinction because in a deed the word "sell," for instance, is used if it is a deed of sale, or the word "trust" is used if it is a deed in trust. But is the character different? Is the nature of it different, or the whole text of it, so that we may see whether, from the wording, you can make up or construe a trust? I

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say the wording is just the same, with the exception of the word trust.

Then, in the next place, supposing you come to the conclusion that because the word "trust" is used in some of these surrenders—including the surrenders by those Lake Huron and Lake Superior Indians—that there is no trust in those ten cases, but there is a trust in the other twenty cases, in what a state of confusion would the lands held for the benefit of the Indians be. You will have some subject to a trust, and some not subject to a trust. I say that with reference to all the lands which have been bought subject to a trust, whether the word "trust" is used in the deed or not used in the deed, but from the context of it we can infer a trust, that is, a promise on the part of Her Majesty that something should be done for the benefit of these Indians in the future—that then there is a trust. And I say more than that. I say that is the interpretation that has been given by all the authorities in this country from the end of the last century to the present time.

Now, my Lords, I intend to quote the statute to show that it was the intention of the late legislature that lands subject to the payment of annuities, lands subject to increased annuities, were construed as lands held in trust, and that these annuities formed a charge upon the land. I quote in the first place from the statute which has been already quoted, but I think it is very important that the special attention of the court should be called to it, that is 12 Victoria, chapter 200, commonly known as the Public Schools Lands Act, or Consolidated Statutes of Canada ch. 26. The statute proceeds to set apart acres of land for the purpose of education, but at the very end of the clause it says:

"But before any appropriation of the moneys arising from the sales of such lands shall be made, all charges thereon for the management or sale thereof, and all Indian annuities charged upon such lands or moneys, shall be first paid."

My learned friends say these school lands were located in a place where no Indian annuities were due; but it puts it still more strongly, it seems to me. But supposing it is the case—which I do not believe—it shows the intention of Parliament that it should not be possible that school lands should be set apart to destroy Indian annuities. The Indian annuities shall continue to be the first charge upon the lands. In the face of that interpretation given to it by our own Parliament, the late province of Canada, represented by Quebec and Ontario to-day, the very parties to this arbitration, are we going to be told that the Parliament of the late province of Canada did not intend to make a charge upon their land when their statute says so. If one treaty could be quoted where it says that for the said annuity the said lands shall be charged, I would understand it; but no such treaty can be found. There are two kinds of surrenders; one is absolute, on consideration of such money paid down, and the other one is subject to future annuities, or increased annuities. There is never a case where it states the lands shall remain charged, or a lien shall exist. But I say that when you find that declaration of the late Parliament of the province of Canada contained in the statute of 1849, it shows the intention of the parties then; that is to say, the late province of Canada, represented by Ontario and Quebec—the very parties to-day contending for a different interpretation—we find their declaration that Indian annuities which all stand upon the same footing, are a charge upon the lands which were surrendered.

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Now, I have only one more word to say. My learned friends representing Ontario hold that the arbitrators of 1870 did, in fact, deal with this question; but I submit they did not; I submit that they had no power to do it; and they did not do it. The only thing they said was that "all the lands in either of the said provinces of Ontario or Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon, or charge to the said province in which they are so situate, by the other of the said provinces."

I say in the first place that this exception made in favour of Ontario is only as to a claim the province of Quebec may have in this matter. Quebec claims nothing. Who claims it? The Indian. They may claim in their own name, or they may claim in the name of the Dominion; and even if these first arbitrators had in view to remove any claim of the Indian, they had no power to do so. If the Indians had a trust upon these lands under section 109, it was not in the power of the first arbitrators to set aside that section 109 of the Constitution, and the Privy Council has been very careful in deciding the special case which was submitted to them, to declare that the award was valid only as far certain points of form were concerned.

"The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said Special Case into consideration, and having heard counsel for the province of Ontario, and likewise for the province of Quebec, their Lordships do this day humbly advise Your Majesty that under the circum-

stances stated in the Special Case (to which circumstances all their answers must be taken to refer):

"1. John Hamilton Gray had not become disqualified to act as an arbitrator.

"2. That after hearing before the three arbitrators two of them could legally render a decision or award, and could do so in the absence of the third, absenting himself under the circumstances stated.

"3. That after the subsequent *ex parte* hearing before two arbitrators, in the absence of the third then two of them could legally render a decision.

"4. That the arbitrators appointed by Quebec had not the right to resign, and the Government of Quebec had not the right to accept his resignation and to revoke his appointment, and such resignation and revocation were not effectual and valid.

"5. That after one of the arbitrators had so affected to resign, and his resignation had been so accepted, and his authority had been so affected to be revoked, the remaining two could legally proceed to hear the case and make a final award.

"6. That so far as regards any objection made to the award in the Special Case, the award of the 3rd of September, 1870, is valid (save as affected by the Dominion Act therein set forth)."

The Dominion Act is the British North America Act.

Nothing is plainer than this decision of the Privy Council:

"Her Majesty, having taken the said report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said recommendations and advice of the Lords of the Judicial Committee of the Privy Council be adopted, and that the same be punctually observed, obeyed and carried into execution as the decision of Her Majesty upon this Special Case.

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Whereof the Governer General of the Dominion of Canada, the Lieutenant-Governor or Commander in Chief of the same for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

I forgot, when dealing with the legal status of the Indians, taken as nations and not as individuals, to say that the laws passed by these Indian nations had been recognized by the courts of our own country as binding upon themselves. Take the case of marriage; take *Connolly* v. *Woolwich* (1), which says that the marriage of a white man to an Indian, according to their own laws, was a valid marriage; and they have certain rules and laws of succession, certain rules and laws concerning the property, which was especially reserved for their own use. I forgot to mention that, as another illustration of the proposition I laid down at the beginning, that those Indians, as nations, must not be looked upon as a big corporation or company; but must be looked upon as a nation, having a political economy in the country.

Hall Q.C. followed. I would like to say one or two words with reference to section 109; and I would like your Lordships to bear in mind that in dealing with this question under the British North America Act, and in dealing with the question you have to deal with now, you are dealing, so to speak, with the three crowns. It is not a dealing between three individuals, or between the Crown and any one particular individual; and we are dealing with the British North America Act, which Mr. Girouard still says ought to be considered, not as a strict statute, but more as a compact and agreement between the various parties; and this section 109 is not only to be considered with reference to the interests of this particular claim, but with whatever interest there may have been with other

(1) 11 L.C. Jur. 197.

parties with reference to existing lands they may have held prior to the union.

I do not think adding the words "subject-to any trust," &c., destroys the intent which the parties had; and while that clause does refer to the various other provinces, it has more of a particular bearing between Ontario and Quebec. And what was the condition of affairs there? The Crown, if I may use the expression, of the old province of Canada, held all these lands in Ontario and Quebec, and of course they held these lands without any mortgage or hypothec being put upon them in the sense that they could not give a good title; and they had to be apportioned as between Ontario and Quebec in some manner or form; therefore, under section 109, the general rule is laid down—the lands in Ontario will go to Ontario, and the lands in Quebec will go to Quebec; and you in Ontario will take care of all the liability and all the obligations the Crown is under in respect to those lands, and we will not be troubled by any person who may have any claim or petition of right; and we in Quebec take these lands, not by a deed, not as a third party getting a deed in writing purporting to give us a title to lands under a deed; but we just take them by way of apportionment; they are still Crown lands; and instead of belonging to the Crown of Canada, if I may use that expression, they go to the Crown in Quebec; and the Crown in Quebec takes those lands and has to abide by all the conditions, liabilities, and anything of that kind there may be attached to those lands.

In construing this clause, section 109, in reference to that, the words "trust" and "interest" are not to be taken in their ordinary strict sense, or even in a municipal sense; but they must be taken in the broad sense made in the treaty with the Indians at that time. The Crown dealing with the Indians, as they had done

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for a number of years, clearly recognizing, as far as the Indians are concerned, whether it was right or wrong, or legal or illegal, clearly leading the Indians to believe they had some rights or title in the land. Now, having dealt with them in that way, have not the Indians got this interest in the lands? Have not they a right in the proceeds of the lands? Have not they a right to come in and protect themselves? And now we say, the lands having gone over to Ontario in that way, and being in the Crown, as it were, all the time, they must take them subject to the trust existing in the Crown. We think under the terms of the Robinson Treaty there is clearly a trust there that out of the proceeds of the lands the increased annuity must be paid; and it is out of those proceeds alone that the trust must be paid, and it could not be charged against the Consolidated Revenue Fund without some legislation. It is only a trust in respect to those, and no more; and it is only the party who has the administration of the lands, and who has the proceeds who can be reached in order that these increased annuities may be paid; and we say that is the province of Ontario.

Blake Q.C. in reply.

THE CHIEF JUSTICE.—This is an appeal from a portion of an award made on the 13th February, 1895, by the Hon. John A. Boyd, Chancellor of Ontario; the Hon. Sir Louis Napoleon Casault, Chief Justice of the Superior Court of the province of Quebec; and the Hon. George Wheelock Burbidge, Judge of the Exchequer Court of Canada, arbitrators appointed pursuant to three identical statutes passed respectively by the Parliament of the Dominion and the Legislatures of Ontario and Quebec, providing that for the final and conclusive determination of certain questions and

accounts, which had arisen or which might arise in the settlement of accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor General in Council might unite with the governments of the provinces of Ontario and Quebec, in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor and the Lieutenant-Governors of the provinces should agree to submit.

The sixth and seventh sections of these identical statutes were as follows:

6. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed on their view of a disputed question of law, the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

7. In case of an appeal on a question of law being successful, the matter shall go back to the arbitrators for the purpose of making such changes in the award as may be necessary, or an appellate court shall make any other direction as to the necessary changes.

By a document signed by counsel for the Dominion and the two provinces respectively, dated the 10th of April, 1893, and entitled "first agreement of submission," after reciting the statutes before referred to, and the appointment thereunder of the arbitrators before named, certain questions were agreed to be referred, including all questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and certain particulars were then specified, which it was agreed should be understood as included in this general submission, one of which specifications was as follows:—

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The claims made by the Dominion Government on behalf of Indians, and payments made by the Government to Indians, to form part of the reference.

This agreement of submission was adopted by the three governments of the Dominion, Ontario and Quebec, by Orders in Council of the Governor General and the Lieutenant-Governors in Council, made respectively on the 13th of April and the 15th of April, 1893.

The appeal now before us is from a portion of the award made by the arbitrators under this submission, disposing of the claim of the Dominion Government in respect of certain payments made to the Indians mentioned in the treaties hereafter referred to, and also of claims to further payments set up by the Dominion Government on their behalf.

On the 7th September, 1850, the Hon. William B. Robinson, acting as a commissioner on behalf of the Crown, obtained from the Ojibeway Indians of the Lake Superior district a surrender in favour of the Crown of certain Indian territory, situate within the limits of the late province of Canada, as described in a treaty entered into on that day between Mr. Robinson, on behalf of the Crown, and the chiefs and principal men of the Ojibeway Indians, inhabiting part of the northern shore of Lake Superior. And on the 9th day of September, 1850, the same Commissioner obtained a like surrender of certain other lands, by the Ojibeway Indians inhabiting and claiming certain portions of the eastern and northern shores of Lake Huron, represented by their chiefs and principal men, and which lands were described in a treaty entered into on the last mentioned day.

The surrender under the Lake Superior Treaty was in consideration of the sum of two thousand pounds paid down, and a perpetual annuity of five hundred pounds. The consideration for the Lake Huron sur-

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render was the sum of two thousand pounds paid down, and a perpetual annuity of six hundred pounds.

The Lake Huron Treaty contained the following clause, viz.:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should all the territory hereby ceded by the parties of the second part, at any future period produce such an amount as will enable the Government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

The Lake Superior Treaty contained a clause in the same words, with the exception of the statement of the number of Indians which in the latter treaty was stated as being 1240.

It is under the provision for the payment in a certain event of increased annuities that the question now presented for the decision of this court has arisen.

By the British North America Act provision was made for the disposition of the public lands which, on the 1st of July, 1867, the date of confederation, were the property of the province of Canada which became extinct by that Act. Provision was also made for the assumption by the Dominion of the debts and liabilities of the province of Canada, and for the payment by the new provinces of Ontario and Quebec of interest on any excess of that debt of $62,500,000, and for the deduction of that interest from the half-yearly subsidies payable to those provinces. Further, provision was

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made for a division and adjustment by arbitration of the debts, credits, liabilities, properties and assets of Upper and Lower Canada. The sections of the British North America Act material to be considered are sections 109 to 113 inclusive, and section 142. These sections are as follows:

109. All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

111. Canada shall be liable for the debts and liabilities of each province existing at the union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union, $62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth schedule to this Act, belonging at the union to the province of Canada, shall be the property of Ontario and Quebec conjointly.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

By an Act of the Dominion Parliament (36 Vict. ch. 30) passed on the 23rd May, 1873, the amount of debt to be absolutely assumed by the Dominion was increased from the sum of $62,500,000 as fixed by the 112th section of the Confederation Act, to $73,006,088.84 and thereafter interest was only to be deducted against the

provinces of Ontario and Quebec on any excess of debt over the last mentioned sum. I refer to this statute, not because I think it has any bearing on the questions now before us for decision, but because it is an alteration of the terms imposed by the British North America Act. The effect of this Act (36 Vict. ch. 30) has already been considered by this court on a former appeal from the same arbitrators (1).

At the date of the Robinson Treaties in 1850 the management of Indian affairs was not in the hands of the provincial government, those affairs having been administered by the Governor General as representing the Imperial Government until some time in or after the year 1854, when it was handed over to the province.

The province of Canada, however, paid the fixed annuities, amounting in the aggregate to $4,400, every year up to the date of confederation, and since confederation up to the present time the Dominion Government have paid the same amount. The question raised by this appeal is confined to the increased annuities. What is claimed by the Dominion is that the difference between the fixed annuities, which, distributed amongst the Indians, amounted to $1.60 per head, and the increased annuities of $4 per head stipulated for by the clause in the treaties before set forth from 1851 to 1867, and which have never been paid to the Indians, should be paid by the province of Canada with interest to 31st December, 1892, amounting in all to $325,440; and that the province of Ontario should pay to the Indians the sum of $95,200, being the amount of the increased annuities from the date of confederation in 1867, up to the year 1873, with interest added to the 31st December, 1892.

(1) See *Canada* v. *Ontario and Quebec* 24 *Can.* S. C. R. 498.

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Further, it is claimed by the Dominion that as the Dominion Government has from 1874 to 1892, inclusive, paid the increased annuities to the Indians, it should be reimbursed the amount so paid by the province of Ontario, the sum thus claimed for increased annuities paid by the Dominion since 1874 amounting, with interest to 31st December, 1892, to $389,106.80.

In 1874 the province of Ontario admitted that from the year 1851, up to 1892, the surrendered territory produced an income sufficient to enable the government to pay the increased annuities without incurring loss, and that the Indians are of right, under the treaties, entitled to the payment of the arrears. This has not been disputed by the province of Quebec and I regard it as a fact conceded on all hands.

As regards this debt or liability up to 1867, it was clearly one of the late province of Canada which must be considered as having been assumed by the Dominion under section 111 of the British North America Act, forming part of the general debt with any excess of which over the sum of $73,006,088.84, Ontario and Quebec were to be charged and were to pay interest on as provided for by section 116 of the British North America Act. This is, however, subject to a claim, not of the Dominion but of the province of Quebec, to throw the whole of this debt or liability existing at confederation on the province of Ontario. The contention of the Dominion, however, is that there was in respect of these annuities, payable subsequent to 1867, a charge in favour of the Indians upon the surrendered lands, or a trust of the rents, profits and proceeds thereof in their favour, and that when these lands became vested, under the 109th section of the Union Act of 1867, in the province of Ontario, that province took them *cum onerê* subject to the trust or charge in favour of the Indians.

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Ontario insists that there is no trust or charge created by the treaties, and that the liability to pay the increased amount of the annuities since confederation was, at the date of the British North America Act, a debt, or at least a liability, of the province of Canada which is to be dealt with under sections 111, 112 and 116 just as the annuities up to the date of confederation are to be dealt with. Further, it is contended by Ontario that the whole question is *res judicata*, having, as it is said, been disposed of by the 13th clause of an award made on the 3rd September, 1870, by arbitrators appointed under the 142nd section of the British North America Act. Under that provision three arbitrators were appointed in 1870, two of whom made the award already referred to, the third—the arbitrator for Quebec—the Hon. Charles Day, having resigned his office and retired from the arbitration. Two questions having arisen as to the validity of this award of 1870, one as to whether the award made by a majority of the arbitrators was valid, and the other as to the qualification of Mr. John Hamilton Gray, one of the arbitrators who made the award, these questions were referred to the Judicial Committee of the Privy Council who pronounced in favor of the legality of the award, and their report was accordingly confirmed by an order of Her Majesty in Council on the 26th March, 1878. The merits of the award of 1870 were not, so far as I can find, in any way before the Privy Council, the reference to them being confined to the two points mentioned. By the first clause of the award the arbitrators of 1870 fixed the proportions in which Ontario and Quebec respectively were to contribute to the excess of debt of the province of Canada assumed by the Dominion, over the amount fixed by the statute.

The 13th clause of the award of the 3rd of September, 1870, is as follows:

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That all the lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate, by the other of the said provinces.

This award has now stood for twenty-five years, its legality never having been disputed except as before mentioned.

This adjudication Ontario now sets up as a final disposition of the same question as that raised before the present arbitrators and now under appeal.

By their separate award of the 13th February, 1895, a portion of which is now under appeal, the present arbitrators found and awarded as follows:

In respect of the claim made by the Dominion of Canada against the provinces of Ontario and Quebec in reference to the Indian claims arising under the Robinson Treaties.

1. That if in any year since the treaties in question were entered into, the territory thereby ceded produced an amount which would have enabled the Government, without incurring loss, to pay the increased annuities thereby secured to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties, the annuities, if the revenues derived from the ceded territory permitted, without incurring loss, were to be equal to a sum that would provide $4 for each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity to a former year, in which an increased annuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and that this is one of the matters to be taken into account in ascertaining the ex-

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cess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not, in respect of any such liability, been discharged by reason of the capitalization of the fixed annuities, or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario; and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable on the arrears of such annuities accruing after the union, and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect to the matters hereinbefore dealt with, the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account as of the date of payment by the Dominion to the Indians, and so fall within and be affected by our previous ruling as to interest on that account.

The province of Ontario on the 4th of March, 1895, gave the following notice of appeal from the award:

Notice of appeal and limitation of contention of appeal.

Take notice that under the provisions of the statutes above mentioned the province of Ontario intends to appeal to the Supreme Court of Canada from the award of the arbitrators herein bearing date the 13th day of February, 1895, but delivered and published on the 14th day of February, 1895.

And further, take notice that Ontario will, on the hearing of such appeal, limit its contentions and except only to so much of the said award as determines and decides, as stated and formulated in paragraph 6 of the award, as follows:

That the ceded territory mentioned become the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening, after the union, of the event on which such payment depended and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in

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such event falls upon the province of Ontario; and that this burden has not been in any way affected or discharged.

And also as formulated in paragraph 9 of the award, as follows:

That as respects the increased annuities that have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario in the province of Ontario account, as of the dates of payment by the Dominion to the Indians.

Ontario will urge among other grounds for appeal against the matters assumed to be decided by paragraphs 6 and 9 of the award above set forth that the said matters are decisions of the learned arbitrators upon disputed constitutional questions, the same being raised and relied upon in the respective cases of Ontario and Quebec filed of record before the learned arbitrators, and which questions were renewed and pressed at the argument before the learned arbitrators, whereby Ontario disputed that any liability in respect of the said matters accrued or could accrue to Ontario except jointly with Quebec; and that the decision of the learned arbitrators in the premises are not final.

Subsequently to this notice of appeal the arbitrators made the following order:

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec, pursuant to statute of Canada, 54 & 55 V. c. 6, statute of Ontario, 54 V. c. 2, and statute of Quebec, 54 V. c. 4.

On motion of counsel for the province of Ontario, and on hearing what was alleged as well by counsel for the province of Ontario as by counsel for the Dominion of Canada, and the province of Quebec, we, the undersigned arbitrators, do, with reference to a certain award and decision dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that, in respect of the question of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union, as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law, but that in respect of the question of interest on such increased annuities so paid, which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

J. A. BOYD.
L. N. CASAULT.
GEO. W. BURBIDGE.

Dated at Quebec, this 26th day of March, 1895.

No appeal was lodged by the province of Quebec.

I now proceed to consider the questions thus presented by the appeal.

In the first place nothing in the clause of the treaties providing for the augmentation of the annuities in the event specified indicates that the undertaking to make these increased payments was to constitute them a charge or lien upon the surrendered lands. There is nothing shewing that either the original annuities of six hundred pounds and five hundred pounds per annum, or one dollar and sixty cents per head of the respective bands of Indians, were to be paid out of the proceeds of the lands or out of any particular fund, nor that in the event of a right to the increased amount arising it should be paid out of any particular fund; all that is specified is that in the event of the augmentations being payable without loss they were to be paid. This does not mean that the increase was to be paid out of the proceeds of the lands, but has reference only to the event in which the increase was to become payable. There is, therefore, no ground for saying that there was any express charge, lien or trust. Then, if there is any charge it can only be on the principle of the equitable lien of an ordinary vendor of real property, and from analogy to the rules of courts of equity applicable to such liens. I think this argument entirely inadmissible. At the date of these surrenders, in 1850, the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown. Not until 1854 was the management of Indian affairs transferred to the provincial governments. The Indians had therefore the highest security which could be given for the payment of the augmentations, the assurance and covenant of the Imperial Government

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There was, therefore, no reason for giving or implying any other. Then, as these lands were acquired by the Crown with a view to settlement, for developing mineral deposits, and for the purpose of applying the timber to purposes of utility, it would have been in the highest degree inconvenient that the power of dealing freely with them for these purposes should be fettered with any latent lien or trust. Again, even if we are to apply strictly the rules applicable between ordinary vendors and purchasers, numerous authorities show that this would not be a proper case for the implication of a lien. I refer to the cases cited in the Ontario factum as showing this conclusively (1).

Further, as against the Crown or Government, implications of this kind are not to be made. The Indian bands had as security the pledge of the Imperial Government whose commissioner and delegate, through the appointment of the Governor General, Mr. Robinson was, and they had the security of a charge on the consolidated fund of the province of Canada for the government of that province, which government, though the surrender was not made to it directly, obtained the benefit of it, the lands so soon as surrendered coming under the act of parliament by which the territorial and casual revenues had before the date of the surrender been transferred to the province, and the original annuities were therefore always paid out of the consolidated fund and not out of a specific fund provided from the revenue derived from the lands themselves. There, was therefore, no necessity that this security should be supplemented by any charge or lien not expressed in the treaties themselves.

(1) See *Dixon* v. *Gayfere*, 1 DeG. & J. 659; *Boulton* v. *Gillespie*, 8 Gr. 223; *Gilman* v. *Brown*, 1 Mason (U.S.) 212; *Parrott* v. *Sweetland*, 3 Mylne & K. 655; *Wilson* v. *Daniels*, 9 Gr. 491; *DeGear* v. *Smith*, 11 Gr. 570.

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An argument against the province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of *The St. Catharines Milling Co.* v. *The Queen* (1). In that case there was an Indian surrender to the Crown represented by the Dominion Government, made in 1873, subsequent to confederation. The Privy Council held that this surrender enured to the benefit of the province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown, and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the province of Canada which was to pay for them, and the present question only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities.

The statute which gives jurisdiction to this court to entertain this appeal in the section I have already quoted from provides that an appeal shall be only in respect of points decided by the arbitrators in which they shall indicate that their award has proceeded on disputed questions of law. In the 8th paragraph of the award it is stated that in the decision under appeal the arbitrators did so proceed. This of course limits this court to purely legal considerations in adjudicating on the matter in controversy, and it excludes all such equitable considerations as to what might be fair and reasonable

(1) 14 App. Cas. 46.

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outside the construction of the British North America Act, and the legal interpretation of the treaties, and I have so endeavoured to deal with the case. The question before us is, therefore, purely a question of law arising upon the construction of the treaties and the British North America Act.

The result is that the liability incurred by the Crown and the province of Canada to pay the increased annuities was, at the date of confederation, a general debt or liability of that province within the meaning of the 111th section of the British North America Act, and as such one required by that section to be assumed primarily by the Dominion, subject to such recoupment as is provided for by the 112th and 116th sections. That it was a "liability" though consisting of deferred periodical payments cannot be doubted, and that it was a "debt" though not payable *in presenti* is also clear; it therefore comes within the literal meaning of the 111th section, and we are not at liberty to unravel the arrangements between the two divisions of the old province, upon which it may be assumed the provisions of the Union Act as to the apportionment of assets and liabilities was based in order to arrive at some secondary meaning contrary to the ordinary and natural import of the language of the Act.

Then, turning to the award of 1870, I am of opinion that this point was substantially decided by the arbitrators appointed under the 142nd section of the British North America Act. I have already stated the 13th section of that award determining that lands in either Ontario or Quebec surrendered by Indians in consideration of annuities should be the absolute property of the province in which the lands might be situated, free from any charge, and that the annuities should be included in the general debt of Canada,

which was to be borne in the first place by the Dominion subject to such indemnity as the statute provides, as regards any excess over the fixed amount. The burden of the indemnity was of course to be borne by the provinces in the proportions declared by the arbitrators in the first section of their award. It is true that at the time this award of 1870 was made no question had arisen regarding the payment of the augmented annuities, but this in my opinion can make no difference. There is nothing before us to show that the arbitrators of 1870 did not intend to refer to the liability to pay the increased annuities when they made their award. That liability was clearly within the terms of the 142nd section of the British North America Act, and of the reference to them, and they had power to decide questions of law as well as questions of account and matters of fact, and were the sovereign judges of all such questions. It must therefore be intended that, having before them the treaties and the act of parliament under which they acted, they decided as a question of law that the increased annuities were not charged upon the surrendered lands, and that there was no trust of these lands for the purpose of paying the annuities. I think, as I have already said in disposing of the first point, that they were right in this view of the law. But whether they were or were not right can make no difference, for the award of 1870 must be conclusive on all the parties to it. It has stood for twenty-five years unimpeached except upon the points referred to the judicial committee, and now to re-open it and disturb one of its provisions, upon which other dispositions may have depended, would not only be most unfair but would be a proceeding without any legal warrant, statutory or otherwise. The arbitrators must therefore be taken to have had in mind all the annuities, the original fixed annuities as well as those

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contingently provided for. They held that the lands vested absolutely, free from any charge, and this must have included both. It is out of the question to say, as is argued in the factum of the province of Quebec, that in so deciding the arbitrators were assuming to alter the provisions of the 109th section of the British North America Act, by holding that the lands should be vested free from incumbrances, which the statute declared should be a charge. So to argue is to beg the question. Of course we are not to presume that the arbitrators intended so far to exceed their powers as to assume to repeal the statute. What they intended is clear. They meant to say, and did in terms decide, that the annuities in question, all of them, the increased as well as the original annuities, which formed the consideration for these cessions were not charged upon the surrendered lands at all but formed part of the general debts and liabilities of the former province of Canada.

This appeal must be allowed, and the award must be varied by substituting for the 6th paragraph thereof, the following:

> The ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, absolutely, and free from any trust, charge or lien in respect of any of the annuities as well those presently payable as those deferred and agreed to be paid in augmentation of the original annuities upon the condition in the treaties mentioned. And further, by striking out the 7th and 9th paragraphs of the award.

The province of Ontario is entitled to the costs of this appeal to be paid by the Dominion.

TASCHEREAU J.—Concurred.

GWYNNE J.—The sole question involved in this appeal simply is which of the governments, namely, that of the Dominion of Canada, or of the provinces of

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Ontario and Quebec conjointly, or that of the province of Ontario alone, is chargeable with the fulfilment of obligations and liabilities to the Ojibeway Indians of Lakes Superior and Huron, if any have accrued since confederation in virtue of the terms of the treaties entered into between Her Majesty and the respective Indian nations in the year 1850 before confederation.

By treaty bearing date the 7th day of September, 1850, entered into between Her Majesty the Queen through the intervention of the honourable William B. Robinson acting for her, duly authorized in that behalf, of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting the north shore of Lake Superior from Batchewanaung Bay to Pigeon River at the western extremity of said lake, and inland throughout that extent to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from the said tract and also the islands in the said lake within the boundaries of the British possessions therein, of the other part; it was witnessed that in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of five hundred pounds to be paid and delivered to the said chiefs and their tribes at a convenient season of each summer not later than the first day of August at the honourable the Hudson Bay Company's post of Michipicoton and Fort William, they the said chiefs and principal men did freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed; and by a certain other treaty, bearing date the 9th day of the same month of September, between Her Majesty the Queen

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through the intervention of the said honourable William B. Robinson acting for her and duly authorized on that behalf of the one part, and the chiefs and principal men of the Ojibeway Indians inhabiting and claiming the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie and thence to Batchewanaung Bay on the northern shore of Lake Superior together with the islands in the said lake opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the honourable the Hudson Bay Company from Canada as well as all unconceded lands within the limits of Canada west to which they have any just claim, of the other part, it was witnessed that for and in consideration of two thousand pounds of lawful money of Canada to them in hand paid and of the further perpetual annuity of six hundred pounds of like money, the same to be paid and delivered to the said chiefs and their tribes at a convenient season of each year, of which due notice should be given at such places as might be appointed for that purpose, they, the said chiefs and principal men on behalf of their respective tribes did fully, freely and voluntarily surrender all their right, title and interest to and in the whole of the territory above described, save and except the reservations set forth in a schedule thereunto annexed.

Each of the said treaties respectively contained a promise and undertaking of Her Majesty expressed in the terms following:

> The said William Benjamin Robinson on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that in case the territory hereby ceded by the parties of the second part shall at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time provided that the amount paid to each individual shall not exceed the sum of

cheque and provincial currency in any one year or such further sum as Her Majesty may be graciously pleased to order; and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present numbers (such numbers in the treaty with the Lake Superior Indians being stated to be then twelve hundred and forty, and of the Lake Huron Indians in the treaty with them to be then fourteen hundred and twenty-two), to enable them to claim the full benefit thereof, and should their numbers at any future period not amount to such two-thirds (of their then numbers respectively) the amount should be diminished respectively in proportion to their actual numbers.

The first point presented for our consideration is the construction of the above clause which is common to both of the treaties, and in the consideration of it it is altogether beside the question to insist that the title of Her Majesty to the lands mentioned in the treaties as being surrendered by the Indians were vested in Her Majesty in right of Her Crown to the fullest extent independently of the treaties and that the execution of those instruments neither added to, nor detracted from Her Majesty's title to the ceded territories. It is not contended that Her Majesty's title to the lands was not perfect, independently of the treaties, or that Her Majesty derived title to the lands in virtue of the surrender by the Indians mentioned in the treaties; what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instru-

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ments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.

Now, by the claims under consideration Her Majesty was graciously pleased to promise and agree with the Indians, the parties of the second part to the said respective treaties, that in case the territories mentioned in the said respective treaties as being thereby ceded by the respective parties thereto of the second part should at any future period produce such an amount as would enable the government of the province of Canada, without incurring loss, to increase the fixed annuities thereby secured, that then, in such case, the same should be increased from time to time to an amount not exceeding one pound provincial currency to each individual of the respective tribes or nations. Now as the payment of the increased annuity is expressly made contingent upon the fund to be realized or produced out of the territories expressed to be ceded proving to be sufficient to enable the Government of Canada to pay such increased sum without incurring loss, the plain construction of Her Majesty's promise and undertaking is that such increased sum (in the event of the fund permitting it) should be paid out of the funds so to be produced and so enabling the government to pay it without incurring loss. The fulfilment of that promise and undertaking involved a trust graciously assumed by Her Majesty affecting the fund to be produced and realized out of the territories expressed to be respectively ceded to Her Majesty. It cannot, I presume, admit of a doubt that if the province of Canada had continued, and was still in existence as

it was in 1850 when the treaties were entered into, the increased sum, though first charged upon the consolidated fund of that province, must have been charged upon and paid out of the fund realized and produced out of the ceded territories, which were paid into the consolidated fund, if such proceeds enabled Her Majesty's provincial Government of Canada to pay the increased amount without incurring loss; but that government no longer being in existence, although the fund is, that same fund, in whose hands soever it is, appears to be the sole fund which, if it be sufficient to enable the payment to be made without incurring loss, is naturally and reasonably still chargeable with the payment, unless there be some different provision of statutory obligation made in that behalf upon or since the confederation of the provinces into the Dominion of Canada.

At the time of the union of the provinces in 1867 there does not appear to have been any claim or inquiry made for the purpose of ascertaining whether or not sufficient funds had been produced out of the ceded territories or either of them to have enabled the Government of the late province of Canada, without incurring loss, to have paid the increased annuity or any part thereof by the said treaties agreed to be paid; but in 1873, upon the petition of the Indians, suggesting that the proceeds from the respective territories must then be sufficient to entitle them to fulfilment of the stipulations of the treaties in that behalf, the matter was, by an order in council of the Dominion Government, made the subject of a communication with the Government of the province of Ontario, and by an order in council of that government, bearing date the 31st October, 1874, it was admitted by that government that the proceeds from the ceded territories were then sufficient to entitle the Indians to the in-

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creased sum, and while repudiating all liability of the province to be charged with the Indian annuities, it was suggested that this point as to the liability of the province should be either forthwith submitted to the Court of Chancery upon a statement of facts to be concurred in by the governments concerned, or that the Dominion Government should settle with the Indians without prejudice as to what government ought ultimately to pay the proposed increase. Upon this order in council having been communicated to the Government of the Dominion, the suggestion that that government should settle with the Indians in respect of the increased sum claimed, without prejudice to the question of liability to be determined at a future period, was adopted and accepted by the Dominion Government by an order in council of 22nd July, 1875, and accordingly thenceforth the increased annuity, as promised by treaties, has been advanced by the Dominion Government.

Now, by three several Acts, viz., 54 Vic., ch. 4 of the legislature of the province of Quebec; 54 Vic., ch. 2 of the province of Ontario, and 54 & 55 Vic., ch. 6 of the Parliament of the Dominion of Canada, all three being in identical terms, after reciting therein respectively that certain questions had arisen, or might thereafter arise, in the settlement of the accounts between the Dominion of Canada and the provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had hitherto been arrived at, and that it was advisable that all such questions of account should be referred to arbitration, it was by the said several Acts enacted, among other things, that for the final and conclusive determination of such accounts, the governments of the respective provinces and of the Dominion might unite in the appointment of three arbitrators, to whom

should be submitted such questions as the Governor General and the Lieutenant-Governors of the said provinces should agree to submit; that the arbitrators, or any two of them, should have power to make one or more awards, and to do so from time to time; that the arbitrators should not be bound to decide according to the strict rules of law or evidence, but might decide upon equitable principles, and when they did proceed on their view of a disputed question of law, the award should set forth the same at the instance of either or any party, and that any award made under the said Acts should be, in so far as it related to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council in case their Lordships were pleased to allow such appeal.

Arbitrators were duly appointed to act in the premises by and on behalf of the Governments of the Dominion of Canada and of the provinces of Ontario and Quebec respectively, under the provisions of the said respective Acts in that behalf. Thereupon an agreement was made and entered into between the said respective governments through their respective counsel acting in their behalf, and bearing date the 10th day of April, 1893, which agreement, as an agreement of submission to arbitration, they recommended for adoption by the said respective governments. By this agreement after reciting the above mentioned statutes and that arbitrators had been appointed in pursuance of the provisions thereof, and that

it is intended by these presents to define and agree upon certain questions in difference which shall be submitted to the said arbitrators for their determination and award.

Now, therefore, it is agreed by and between the several governments, parties hereto, that the following questions as mentioned in the order of the Governor General in Council of the twelfth day of December, eighteen hundred and ninety, be and they are hereby re-

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ferred to the said arbitrators for their determination and award in accordance with the said statutes, namely:

1. All questions relating to or incident to the accounts between the Dominion and the provinces of Ontario and Quebec, and to accounts between the two provinces of Ontario and Quebec.

2. The accounts are understood to include the following particulars:

Here follow several particulars, including the following paragraphs, lettered "*d*" and "*e*."

d. The claims made by the Dominion Government on behalf of the Indians and payments made by the government to Indians to form part of the reference.

e. The arbitrators to apportion the liability of Ontario and Quebec as to any claim allowed the Dominion Government, and to apportion between Ontario and Quebec any amount found to be payable by the said government.

This agreement of submission was approved and adopted by order in council of the Government of the province of Quebec, bearing date the 13th day of April, 1893, and by orders in council of the Government of the province of Ontario and of the Dominion of Canada bearing date respectively the 15th day of April, 1893.

This submission referred to the award of the arbitrators, as a matter concerning which no agreement had been arrived at at the time of the passing of the said several statutes passed in the 54th and 55th years of Her Majesty's reign, and therefore as being within the province and operation of those statutes, the determination of the claim made by the Indians of Lake Huron and Lake Superior in 1873 for an increase of $2.40 per head in their number under the provisions of the above treaties of 1850. In such submission were involved two questions, namely: 1. Whether and when first the increase claimed had become due and payable; and 2, assuming it to have become due and payable within the terms of the treaties by what government and out of what fund it was to be paid.

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Upon the arbitration the Government of Ontario insisted, among other things, that in point of fact the lands ceded by the treaties have not produced revenues sufficient to permit of the payment of the augmentation claimed by the Indians or any part thereof; and even though the revenues so received should prove to be sufficient for that purpose, denied all liability upon the Ontario Government to pay the increase claimed or any part thereof either conjointly with Quebec, or separately.

As to these two questions, it was agreed by all the parties to the arbitration. with the approbation of the arbitrators, that this latter question affecting liability to pay, assuming the fund to be sufficient, should be in the first place determined, leaving the question of fact as to whether the liability had accrued and when first, and the amounts so accrued due and payable, to be subsequently entered into; accordingly, the arbitrators in the exercise of the authority vested in them by the said statutes in virtue of which they were acting to make one or more awards from time to time, in respect of these matters have in an award made by them awarded adjudged and determined:

1. That if in any year since the treaties in question were entered into the territory thereby ceded produced an amount which would have enabled the government, without incurring loss, to pay the increased annuities thereby accrued to the Indian tribes mentioned therein, then such tribes were entitled to such increase not exceeding $4 for each individual.

2. That the total amount of annuities to be paid under each treaty is, in such case, to be ascertained by reference to the number of Indians from time to time belonging to the tribes entitled to the benefit of the treaties. That is, that in case of an increase in the number of Indians beyond the numbers named in such treaties the annuities, if the revenues derived from the ceded territory permitted without incurring loss, were to be equal to a sum that would provide $4 to each Indian of the tribes entitled.

3. That any excess of revenue in any given year may not be used to give the increased annuity in a former year in which an increased an-

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nuity could not have been paid without loss, but that any such excess or balance of revenue over expenditure in hand at the commencement of any given year should be carried forward into the account of that year.

4. That any liability to pay the increased annuity in any year before the union was a debt or liability which devolved upon Canada under the 111th section of the British North America Act, 1867, and this is one of the matters to be taken into account in ascertaining the excess of debt for which Ontario and Quebec are conjointly liable to Canada under the 112th section of the Act; and that Ontario and Quebec have not been in respect of any such liability discharged by reason of the capitalization of the fixed annuities or because of anything in the Act of 1873 (36 Vic. ch. 30).

5. That interest is not recoverable upon any arrears of such annuities.

6. That the ceded territories mentioned became the property of Ontario under the 109th section of the British North America Act 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such an event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

7. That interest is not recoverable upon any arrears of such annuities accruing after the union and not paid by the Dominion to the tribes of Indians entitled.

8. That in respect of the matters hereinbefore dealt with the arbitrators have proceeded upon their view of disputed questions of law.

9. That as respects the increased annuities which have been paid by the Dominion to the Indians since the union, any payments properly made are to be charged against the province of Ontario account as of the date of payment by the Dominion to the Indians and so fall within and be affected by our previous ruling as to interest on that account.

This award was made on the 14th February, 1895. On the 26th day of March, 1895, an order was made and signed by all the arbitrators in the words following:

In the matter of the arbitration between the Dominion of Canada, the province of Ontario and the province of Quebec pursuant to statute of Canada 54 & 55 Vic. ch. 6, statute of Ontario 54 Vic. ch. 2, and statute of Quebec 54 Vic. ch. 4.

On motion of counsel for the province of Ontario, and upon hearing what was alleged as well by counsel for the province of Ontario as by

counsel for the Dominion of Canada and the province of Quebec, we the undersigned arbitrators do with reference to a certain award and indenture dated on the thirteenth and published by us on the fourteenth day of February, eighteen hundred and ninety-five, certify and declare that in respect of the liability of the province of Ontario for the increased annuities which have been paid by the Dominion to the Indians since the union as in such award is mentioned, the arbitrators proceeded upon their view of a disputed question of law; but that in respect of the question of interest upon such increased annuities so paid which question was dealt with in the ninth paragraph of the first part of such award, by determining the time when such annuities should be charged against the province of Ontario, in the province of Ontario account, the majority of the arbitrators did not proceed upon their view of a disputed question of law.

The matter in this order contained was thus attached to the said award and the eighth paragraph of the award above cited was inserted for the purpose of complying with the provisions of the statutes above cited in virtue of which the arbitrators were acting, namely:

8. The arbitrators shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles, and when they do proceed in their view of a disputed question of law the award shall set forth the same at the instance of either or any party. Any award made under this Act shall be, in so far as it relates to disputed questions of law, subject to appeal to the Supreme Court of Canada and thence to the Judicial Committee of Her Majesty's Privy Council, in case their Lordships are pleased to allow such appeal.

The award does not state in terms any disputed question of law upon which the arbitrators proceeded, their dealing with which might be subjected to appeal. The question which was in dispute was simply the liability imposed by the sixth paragraph of the award upon the province of Ontario to pay all sums by way of increased annuities, if any such had accrued due and payable, by force of the stipulations in the said treaties of 1850 in the several or any of the years subsequent to the union in 1867. We were repeatedly

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informed by the learned counsel for the appellants, the province of Ontario, during the argument that this is the sole matter at present in appeal. No question therefore arises before us as to the liability imposed by the 4th paragraph of the award upon Ontario and Quebec conjointly in respect of any such sums by way of increased annuities if any accrued due and payable under the stipulations of the treaties between the making of them and the treaty of union in 1867. Any such sums which so had accrued due and payable prior to the union may well be held to have constituted part of the debt of the province of Canada existing at the union.

Now, by the treaty of union, the Dominion of Canada assumed the debts and liabilities of Canada existing at the union subject to the provision and condition that Ontario and Quebec conjointly should be liable to the Dominion of Canada for the amount, if any, by which the debt of the province of Canada exceeded at the union sixty-two millions five hundred thousand dollars, and should be charged with interest at the rate of five per centum per annum thereon. The sole obligation which in substance was incurred absolutely by the Dominion in the union, was the assumption of the debt of the province of Canada existing at the union and the liability to pay such interest, if any, as the province of Canada was subject to at the union in respect of so much of the debt of that province existing at the union as exceeded the said sum of sixty-two millions five hundred thousand dollars. Now by a Dominion Act passed in 1873, 36 Vic. ch. 30, after reciting therein that the debt of the late province of Canada as then ascertained exceeded the said sum by the sum of ten millions five hundred and six thousand and eighty-eight dollars and eighty-four cents, enacted that, in the accounts between the several

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provinces of Canada and the Dominion the amounts payable to and chargeable against the said provinces respectively, in so far as they depend upon the amount of debt with which each province entered the union, should be calculated and allowed as if the sum fixed by the 112th section of the British North America Act, 1867, was increased from sixty-two millions five hundred thousand dollars to seventy-three millions six thousand and eighty-eight dollars and eighty-four cents.

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This Act is not to be construed as a statutory declaration by Parliament binding upon the Dominion Government that the total debt of the province of Canada existing at the union was the sum of $73,006,088.84, and no more, but reciting that so far as then ascertained, the debt of the province of Canada exceeded $62,500,680 by $10,506,088.84, and the true construction of the Act is that the accounts between the Dominion and the provinces of Ontario and Quebec shall be taken as if the sum of $73,006,088.84 had been inserted in the 112th section of the British North America Act, 1867, instead of the amount which was therein inserted, thus making that section for the purpose of taking said accounts read as follows: "Ontario and Quebec conjointly shall be liable to Canada for the amount, if any, by which the debt of the province of Canada exceeds at the union $73,006,088.84, and shall be charged with interest at the rate of five per centum per annum thereon."

As the object of the Act was simply to subject the Dominion Government to a greater burden than it had assumed by the treaty of union, there can be no doubt that it was quite competent for the Dominion Parliament to pass the Act so altering the effect of the 112th section of the British North America Act.

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Now it is sufficiently obvious, I think, that if any debt or liability to pay to the Indians, parties to the treaties of 1850, by any augmentation in their annuities under the stipulations of those treaties, has accrued in any of the years subsequent to confederation, such cannot be held to have constituted a debt or liability of the late province of Canada, which ceased to exist upon confederation being accomplished, much less can it be said to have constituted a debt or liability of the late province of Canada existing at the union. True it is, no doubt, that the treaties in virtue of the stipulations of which such debt or liability, if any there be accrued, were entered into prior to confederation, but these treaties did not in themselves, nor did anything contained in them or either of them, constitute a debt or liability upon the late province of Canada to pay any sum of money by way of augmentation of the fixed annuities stipulated for therein respectively. By the terms of the treaties no augmentation of the fixed annuities stipulated for was to take place in any year unless, nor until, the following conditions should concur:

1st. That the territories respectively ceded by the treaties should produce such an amount as would enable the Government of the then province of Canada, without incurring loss, to increase the annuity from time to time to an amount not exceeding one pound provincial currency in any one year, or such further sum as Her Majesty might be graciously pleased to order; and

2nd. That the number of the Indians entitled to the benefit of the respective treaties should amount to two-thirds of their number at the time of the treaties being entered into, and mentioned in the respective treaties. If the number of Indians benefited by the respective treaties should in any year fall short of two-thirds of the number mentioned in the respective treaties,

no augmentation of annuity in such year accrued. The concurrence of these conditions being necessary to entitle the Indians, parties to the respective treaties, to any augmentation in their annuities in any year, no debt or liability, nor any claim under the stipulations of the treaties could accrue save in each particular year as it should come into existence, and in which those conditions should concur. No augmentation, therefore, claimed as having accrued due in any year subsequent to confederation can by possibility be held to have constituted a debt or liability of the late province of Canada, which province ceased to exist before the accruing of such debt or liability, much less a debt or liability of that province existing at the union. And the case, therefore, is not one which in any respect falls within the 111th or 112th sections of the British North America Act, 1867. Consequently the claims of the Indians to any augmentation in their annuities in respect of the years subsequent to confederation and all liability in respect thereof must be determined and adjudicated upon, either under the provisions of some other clause in that Act or upon some principle of law and justice applicable to a point or question which, it may be, is not in express terms covered by the Act.

Now, as has been already observed, what Her Majesty, according to the true construction of the treaties, was graciously pleased to undertake and promise was, that the augmentation of annuities which, if any, should accrue due and payable within the stipulations of the respective treaties should be paid to the Indians, parties thereto, respectively out of the proceeds of the respective territories ceded. No other fund was contemplated out of which such augmentations should be paid, and the promise did certainly not operate as imposing a personal obligation upon Her Majesty. The condition then in which the matter

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stood prior to confederation, was that while Her Majesty was seized in fee in right of Her Crown of the lands mentioned in the territories as ceded to Her Majesty, she held the same for the benefit of the province of Canada, to be sold and disposed of by Her Government of that province as the property of that province, and notwithstanding that letters patent of the said lands granted by the Government of Canada would pass an absolute title in fee simple to the grantees thereof, still Her Majesty's gracious undertaking and promise in the treaties as to the augmentation of the annuities constituted a trust assumed by Her Majesty in the interest of the Indians to the fulfilment of which Her Government of the province of Canada, so long as that province existed, was in conscience bound. Now by union of the British North America provinces into the Dominion of Canada, upon the completion of which the province of Canada ceased to exist, it was enacted by the 109th section of the British North America Act, 1867, that "all lands, &c., belonging to the province of Canada at the union, and all sums then due and payable for such lands, &c., shall belong to the several provinces of Ontario, &c., in which the same are situate, or arise subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

Her Majesty's undertaking and promise constituted a trust obligation existing in respect of the proceeds arising out of the ceded territories which, until the union, belonged to the late province of Canada, and in the fulfilment of such obligation the Indians, parties to the treaties, had an undoubted interest. The above clause in the British North America Act was never framed with intent to provide for the case of a trust capable of recognition in a court of law or equity, as being attached to the lands themselves so as to affect a

purchaser with notice, as contended by the learned counsel for Ontario. The estate of Her Majesty in the ungranted lands of the Crown in the province never were, nor were supposed to be nor indeed could be, subject to any such trust, but the undertaking of Her Majesty in the treaties, constituting as it did a trust obligation assumed by Her Majesty in respect of the proceeds of the ceded territories, the language of the section appears to be quite appropriate to the expression in the Act of a provision, in accordance with the principles of law, equity and common sense, that the fund out of which the augmentation in the annuities were contemplated to be paid by the treaties should, after the union equally as before, provide for the payment of any augmentations which should accrue due and payable after the union. And as by the 109th section of the British North America Act the province has become entitled to that fund, Her Majesty's government of that province must take the same subject to the trust obligation in the interest of the Indians assumed by Her Majesty by the stipulations of the treaties. Her Majesty's government of the province of Ontario must in all reason and justice take the property mentioned in the section subject to the same obligation as to the payment of augmentations of the annuities, if any such accrue due after the union, as the late province of Canada would have held them if no union had taken place. This was the unanimous judgment of the arbitrators upon this point. That judgment is not at variance with any principle of law, or any statutory provision; on the contrary it is in perfect accordance with the plainest principles of justice and is not open to any sound legal objection.

It was argued that the question under appeal had already been concluded by a paragraph in an award between the province and the Dominion made in 1870.

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The clause of that award relied upon for the above purpose by the province of Ontario is as follows:

13. That all lands in either of the said provinces of Ontario and Quebec respectively, surrendered by the Indians in consideration of annuities to them granted which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate free from any further claim upon or charge to the said provinces in which they are situate by the other of the said provinces.

Now as to this clause in that award it is to be observed:

1. The submission by the Government of the province of Ontario by the order in council referring the very question under consideration to the present arbitrators as a question as to which no agreement had hitherto been arrived at, seems to afford answer to the contention that the matter had been disposed of by the award of 1870.

2. The present case is not for the determination of or adjudication upon any claim made by any of the provinces against the province of Ontario, but for the determination of and adjudication upon the single question as to where exists the liability to discharge the obligation assumed by Her Majesty in the interest of the Indians to pay any increased annuities stipulated for by the treaties of 1850 which have accrued due and payable since the ceded territories became by the union the property of the province of Ontario.

3. As already shown, augmentations so accruing since the union did not in point of fact form and indeed could not have formed, any part of the debt of the late province of Canada mentioned in 36 Vic. ch. 30 as then ascertained as being $73,006,088.84; the fixed annuities only as the only sums then known to exist as a debt of liability of Canada were included in that sum.

4. There seems therefore, to be no foundation whatever for the contention that the question now under consideration involves a matter concluded by the award of 1870.

The determination of the question by the present arbitrators is in conformity with every principle of justice and with the provisions of the 109th section of the British North America Act which seem to be indeed simply declaratory of what law and justice would have required if the clause had not been inserted in the Act, namely, that the proceeds of the ceded territories should bear the burden of discharging Her Majesty's obligation to the Indians under the stipulations of the treaties as to any augmentation of annuities, if any have accrued due under the treaties since the union, whereby the ceded territories became the property of Ontario.

The award, therefore, must be maintained, and the appeal dismissed with costs.

SEDGEWICK J.—It is admitted, but only for the purpose of this appeal, that the Indians in question are entitled to be paid the augmented annuities which they have been receiving since 1874. It is not, however, admitted by the appellant province that there is any liability on the part of that province to pay these annuities, and it contends that should it in any way be found liable it is only liable conjointly with the province of Quebec. The questions are, first: Do the annuities in question constitute a debt or liability under section 112 of the British North America Act? And secondly: If such liability exists, shall it be borne by Ontario and Quebec jointly or by Ontario alone? The first contention was but feebly put forward by counsel for Ontario, and I must confess that I see no ground for giving it any weight.

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By the scheme of the Union Act, Canada was to become liable for the debts and liabilities of the confederating provinces, in other words, she entered into an obligation to liquidate and satisfy all provincial creditors. The scheme, however, did not contemplate that the Dominion was to commence its existence with an indebtedness measured by the full extent of provincial liability. As between the Dominion and the provinces the public debt of Canada was fixed at $77,500,000; $62,500,000 being the amount absolutely assumed on behalf of Ontario and Quebec, and $8,000,000 and $7,000,000 on behalf of Nova Scotia and New Brunswick respectively, and it was provided that, should the debt of the old province of Canada exceed the $62,500,000, assumed by the Dominion, those provinces should be liable to Canada for that excess, with interest at five per cent per annum. No similar provision was made in regard to Nova Scotia or New Brunswick, inasmuch as the debts of those provinces did not amount to the sums assumed on their behalf by the Dominion. It is very clear that the Dominion entered upon its national existence with a fixed and indisputable debt. While it was under an obligation to pay all existing provincial debts or liabilities, no matter how large or how much in excess of the $77,500,000 they might eventually be found to be, it had a right to recoup itself by calling upon Ontario and Quebec to make good the difference between the actual indebtedness and the net amount which as between the provinces and itself it undertook to pay. The actual amount of that excess has never yet been definitely ascertained. By the Dominion Act of 1873, the $62,500,000 assumed by the Dominion on behalf of Ontario and Quebec was increased to $73,006,088.84, but even that increased amount does not fully represent the liabilities of the old province, and it is one of the objects

of the tribunal from whose award this appeal is taken, to determine definitely the exact amount of that excess in order that there may be a complete and final adjustment of accounts between the Dominion and these provinces.

Now, the annuities payable to Indians by virtue of pre-confederation treaties made with them, having in view the surrender of the Indian title to the Crown in any public lands, clearly constituted a liability on the part of the old province of Canada, which liability was assumed by the Dominion under the British North America Act. The argument is, that section 112, in making Ontario and Quebec liable for the excess of debt beyond the $62,500,000, does not make it liable for pre-existing liabilities which are not debts, and that the annuities in question, though they are liabilities, do not come within the meaning of that expression. As already stated, I dissent from this view. These annuities, though perhaps not debts in the strict sense of that term until they become due, are debts immediately thereafter, but whether or not, they are, in my judgment, debts within the contemplation of section 112, for which the provinces are liable. It may not have much bearing on the case, but it is proper to notice that in the award made in pursuance of section 142 of the Union Act, clause 13 expressly states that these annuities, or that portion of them which was fixed by the original treaties "are included in the debt of the old province of Canada." I entertain no doubt but that this is the correct view, and that in the adjusting of the accounts between the Dominion and the old province of Canada, the annuities payable to the Indians since the 1st of July, 1867, whether these annuities are to be augmented as therein provided for, or remain as originally fixed, constitute a liability or debt which the old provinces, whether Ontario alone, or Ontario and Quebec jointly, must assume.

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The other question involved in this appeal is a more difficult one. Is Ontario alone liable for these annuities, or is it conjointly liable with Quebec? The matter, as I view it, is of no significance to the Dominion. It is solely a question as between Ontario and Quebec. The case, however, is put forward by the Dominion insisting that Ontario is solely liable. I extract from its statement of claim the following:

9. The Dominion of Canada claims that under the "Robinson Huron Treaty" and the "Robinson Superior Treaty" for the 16 years from the dates of the said treaties until the date of confederation of the provinces in 1867, and based upon the increased annuity of $4 per head, and after giving credit for the sum of $1.60 which was yearly paid to each individual Indian during the said period, there is due and payable by the late province of Canada to the Indians aforesaid the sum of $325,440 for principal money and interest, and the Dominion asks the board to award payment of the said sum by the said province of Canada.

10. By the British North America Act, 1867, the tracts of land which had been ceded to Her Majesty, under the said Robinson treaties, became and formed portions of the public lands of the province of Ontario.

11. By the 111th section of that statute it is enacted that "Canada shall be liable for the debts and liabilities of each province existing at the time of the union," and by the 109th section it is provided that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of the union, and all sums then due and payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate, or arise, subject to any trusts existing in respect thereof, or to any interest other than that of the province in the same."

12. The Dominion submits that at the time of confederation the lands which had been ceded by the said Indians, under the said treaties as aforesaid, came into the hands and possession of Ontario subject to the trusts contained in the said treaties and subject to "an interest other than that of the province in the same" within the meaning of said section 109, namely, the right of the Indians to receive and be paid the annuities under the terms and stipulations of the said treaties, and that from and after the 30th June, 1867, the province of Ontario, as the beneficial owner of the said lands, and recipient of the revenues derived therefrom, was legally liable to provide the Dominion with moneys necessary to pay the said annuities to the Indians under the said treaties.

13. By section 91 of the British North America Act, the Parliament of Canada is given legislative authority over "Indians and lands reserved for Indians," and the Dominion acting under said authority has enacted laws for the government of the Indians of Canada, and has undertaken the administration of, and has since the passing of the said act administered, the affairs of the Indians throughout Canada.

14. The Dominion submits that it was and is the duty of the province of Ontario to pay into the Dominion treasury, out of moneys received as revenues from the lands which were ceded as aforesaid, such sums as would enable the Dominion to carry out the provisions and requirements of the said treaties; but the province of Ontario has hitherto declined to admit any liability, and has paid no sum to the Dominion for the purposes aforesaid, although often requested to do so, and although it has been admitted by the said province of Ontario that the revenues received by the said province out of the said ceded territory have been more than sufficient for many years past to have satisfied the claims of the said Indians to be paid the full increased annuities mentioned in the said treaties of $4 for each individual Indian.

15. From the year 1867 until the year 1875, the Dominion annually paid to and distributed amongst the said Indians the annuities of $2,400 and $2,000 mentioned in the said treaties respectively, and the Dominion now claims on behalf of the Indians, for the reasons above set out, that the province of Ontario ought to pay all arrears of annuities since the 30th June, 1867, made up of the difference between the sum of $1.60 and the sum of $4 for each individual Indian, which arrears of annuity with interest thereon from the 30th June, 1867, to the 31st December, 1892, amount to the sum of $95,200, and the Dominion asks the board to award payment of the said sum by the province of Ontario.

16. Since the year 1875 the Dominion, for the reasons before mentioned, has paid in each year up to and including the year 1892, the full increased annuity of $4 to each individual Indian within the said treaties, and the Dominion now claims to recover from, and be paid by, the province of Ontario the sum so paid, which sum with interest thereon amounts to the sum of $389,106.80.

Quebec supports the Dominion view, while Ontario contends upon this point that the case is one in which Quebec is jointly liable with her.

The clause of the treaty giving rise to the conflict is as follows: (the clauses are the same in both treaties).

Should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall

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be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of the treaty shall amount to two-thirds of their present number, which is fourteen hundred and twenty-two, to entitle them to claim the full benefit thereof. And should they not at any future period amount to two-thirds of fourteen hundred and twenty-two, then the said annuity shall be diminished in proportion to their actual numbers.

And section 109 of the British North America Act referred to in the Dominion case is as follows:

> All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the time of the union and all sums then due and payable for such lands, mines, minerals and royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, or arise, subject to any trusts existing in respect thereof, or to any interest other than that of the province in the same.

Now in my view this section is material for the purposes of this case, only in so far as it transfers to Ontario the Crown lands, &c., within its territorial limits. It does not purport to deal with property or rights or interests other than those of the Crown. As far as I can at present see the section would have been equally effectual for its purpose had the words "subject to any trusts existing in respect thereof and to any interest other than that of the province in the same" been left out. The Dominion took those large areas known as "Ordnance lands" under section 108. The *quantum* of the interest which passed by the operation of that section was not greater, and not less, because these words were omitted. In the case of the Crown lands, Ontario took the whole of old Canada's interest—in the case of the Ordnance lands the Dominion took the whole of the old provinces' interest—private rights in both cases remaining undisturbed. The section is, however, material in so far as it operates as a transfer.

There is a principle referred to by the learned Chancellor that where in ordinary cases a vendor sells lands charged with a mortgage or other burden in respect to which he the vendor is under a personal obligation the purchaser takes them not only subject to that burden, but subject, too, to the duty of indemnifying the vendor in respect to his obligation, and that too irrespective of contract. In other words the law imposes upon the buyer the duty of discharging the burden, and, as between him and the seller, relieves the latter from it. And this principle has been more than once recognized by this court. *Williston* v. *Lawson* (1), *Fraser* v. *Fairbanks* (2).

Then too, there is the principle expressed in the maxim *qui sentit commodum sentire debit et onus.* If a person accept anything which he knows to be subject to a duty or charge it is rational to conclude that he means to take such duty or charge upon himself, and the law may very well imply a promise to perform what he has so taken upon himself (3).

On the whole I am of opinion that if the lands in question or the proceeds of those lands are burdened by the operation of the Indian treaties, if they have been put in pledge or hypothecated in order to render more secure the stipulated annuities, if the Indians have in them a property right whether legal or equitble capable of being enforced or adjudicated upon by petition of right or otherwise in a court of justice, then Ontario having under the Union Act taken these lands, she has taken them subject to this burden, and is therefore bound to relieve Quebec therefrom.

But the question still remains: Do these treaties as they are called in law create a burden upon or give to the Indians an interest in the lands they purport to cede?

(1) 19 Can. S. C. R. 673. (2) 23 Can. S. C. R. 79.
(3) Broom 7th ed. p. 703.

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Before minutely examining the phraseology of the contract, a few words may be necessary as to some preliminary considerations that should not be lost sight of in endeavouring to arrive at its meaning.

A self respecting state in dealing with its citizens in matters of contract does not usually give the public property as a security for the fulfilment of its obligations. It gives its promise, it pledges the national faith, but nothing more. A person contracting with it, should he ask more, would so far manifest a distrust in either its good faith or its credit, and a state by yielding to the request would so far admit that such distrust was not wholly groundless. Not during the present century has any powerful civilized state pledged to its subjects state property (crown jewels for example), as security for a national obligation. On the other hand a state may consistently with its dignity pledge its revenues or other property when it takes upon itself the obligations of another state, or when it goes into the foreign money markets to raise money for the purposes of the nation. When in the old provinces the casual and territorial revenues of the Crown were surrendered, and in return they assumed the burdens of the civil list, as well as the other obligations of the Imperial Government previously incurred in connection with the administration of affairs of British North America, the provinces, by special act, pledged the whole of the provincial revenues as security for the performance of such obligations in the case of old Canada including in such secured imperial obligations the annuities payable to Indians under the then existing treaties. That pledge, however, was made, not to or for the benefit of the functionaries or classes mentioned, but to the Crown itself and for its security alone.

Another consideration has a bearing on the matter. The contest in this case is not between the Indians on

the one hand and the Government on the other; it is in its last analysis a contest between Ontario and Quebec. The principle of generous construction so ably and correctly pointed out by the learned Chancellor would very properly be applicable were it a case of the former kind. Had the rights of the Indians been in question here—were their claims to the increased annuity disputed—did that depend upon some difficult question of construction or upon some ambiguity of language—courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost limit all ordinary rules of construction or principles of law—the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must be not only justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.

But I do not see that where the question is solely between the two provinces these high ethical doctrines should have weight. It is one thing from motives of grace or from a sense of moral obligation to do more than justice to the Indian races. It is quite another thing in the construction of a legal instrument to give weight to these motives in favour of one province at the expense of another, especially when these races are in no way benefited thereby.

In my view this contract is in the present controversy to be read like any other contract as between parties who are *sui juris*, and dealing with each other at arms' length.

Another question is involved. It is in my view immaterial whether the treaties give to the Indians an interest in the ceded lands themselves or in the proceeds of those lands. The authorities, I think, clearly

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establish the proposition that under the Statute of Frauds and the Statutes of Mortmain, and similar statutes, an interest in the proceeds of the sales of lands is an interest in the lands themselves. Leach, Vice-Chancellor, in *Attorney-General* v. *Hanley* (1), thus expresses it:

> That money to arise from the sale of land is an interest in land admits of no doubt.

In the well-known case of *Jeffries* v. *Alexander* (2), the House of Lords, although divided in opinion, so held. In that case Mr. Justice Blackburn (one of the six learned judges who gave their opinion) (3) says:

> But the devise of land to be sold on the bequest of the mortgage money does actually give the objects of the bounty of the testator an equitable interest on the land which is to be sold, or in the mortgaged estate, and therefore is within the very words of the statute a gift of an interest in land.

And so the late Master of the Rolls held in *Lacey* v. *Hill* (4); and Mr. Justice Kay in *Re Thomas. Thomas* v. *Howell* (5). Nor was any different rule laid down in this court in the case of *Stuart* v. *Mott* (6), as I understand that case.

I now come to the treaty itself, and the question is as to the effect of these words:

> Should the territory hereby ceded at any future period produce such an amount as will enable the Government, without incurring loss, to increase the annuity hereby secnred to them (the Indians), then, and in that case, the same shall be augmented.

Now there is here no express creation of a charge, whether upon the lands or upon their proceeds. Are we to read into or add to this stipulation what, it is argued, it impliedly contains "and the lands hereby ceded, or the proceeds thereof, after deducting cost of

(1) 5 Madd. 327.
(2) 8 H.L. Cas. 594.
(3) At p. 626.
(4) L.R. 19 Eq. 346.
(5) 34 Ch. D. 166.
(6) 23 Can. S.C.R. 384.

administration, is hereby charged with the payment of such augmented annuities"?

If we are, then I think the Indians have an interest and Ontario is bound to discharge it. But is that the true meaning of the contract? Was that the intention of the parties? Did the Indians, in consideration of the cession, get the personal obligation of the Crown *plus* an interest in the proceeds of the ceded lands to bolster it up as it were and make it more binding, or did they get that obligation only?

Let me consider the case had this provision as to the augmented annuities been left out. In that case the Indians would have been entitled to a perpetual annuity of £1,100. As to this sum there are no words from which it could possibly be implied that any property was to be pledged as security for its payment. The only security was the personal covenant of the Sovereign. The Indians do not appear to have asked —the idea of implementing that covenant by further pledges never seems to have been contemplated or suggested. Then, when in the course of the negotiations the question of augmentation came up and was settled in the manner specified, was it the intention either of the Indians or the Crown that their rights to the increased annual sum should be secured not only by the Crown's covenant, but by the pledging of the property as well? Let us suppose that in the case of the fixed annuity some Sachem—wise above his fellows —had suggested: "We are giving up our lands and you are giving us £4,000 and our reserves, but what security have we that you will pay us to the end of time the eleven hundred pounds a year? Give us a mortgage as security." Would not the answer have been refusal—a kindly one it may be, but an explanation that the Queen Mother did not so deal with her children—that they must take her at her word or not at

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arbitration was held and an award made. That award did not purport to determine the amount of such debts or liabilities. It did, however, purport to divide that amount and to fix the proportion to be borne by Ontario and Quebec respectively. Clause 1 of the award specifies that proportion, Ontario being declared liable to pay such a proportion of the excess as the sum of $9,888,728.02 bears to the sum of $18,587,520.57 and Quebec being declared liable to pay such a proportion as the sum of $8,778,792.55 bears to the same sum; or, approximately, Ontario is to pay five-ninths and Quebec four-ninths of the old province's liabilities. It appears to me that both provinces are still bound by this award and that this finding determines the question involved in this appeal. It is a finding that Quebec as well as Ontario is liable to recoup the Dominion on account of these Indian annuities and it determines the proportions to be borne by each.

KING J.—The question is whether Ontario alone, or jointly with Quebec, is liable to be charged in account with the Dominion with the amounts paid by the Dominion since the union in satisfaction of increased annuities payable to certain Indian tribes under the Robinson treaties of 1850.

It is held by the arbitrators that the amounts are chargeable against Ontario alone.

In the year 1850 it was deemed advisable by Her Majesty's Government to extinguish Indian rights in and over extensive districts on the shores of Lakes Huron and Superior occupied by tribes of the Ojibeways and it was in accordance with practice that the conclusions should take the form of a treaty between Her Majesty and the chiefs and principal men representing the tribes. Treaties were concluded by Mr.

Robinson acting on behalf of the Queen, which in the provisions material to the present inquiry are alike.

It was declared (citing from the Huron treaty):

That for and in consideration of the sum of £2,000 currency * * to them in hand paid, and for the further perpetual annuity of £600 (£500 in the case of the Superior treaty) * * * they the said chiefs and principal men, on behalf of their respective tribes or bands, do hereby fully, freely and voluntarily surrender, cede, grant and convey unto Her Majesty, her heirs and successors for ever, all their right, title and interest to and in the whole of the territory (saving and excepting certain reservations), and the said William Benjamin Robinson on behalf of Her Majesty and the Government of the province hereby promises and agrees to make or cause to be made the payments as above mentioned, and further to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded to them, and to fish in the waters thereof as they have hitherto been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals, and occupied by them with the consent of the provincial government.

There was then this further stipulation:

The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that, should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the government of this province without incurring loss to increase the annuity hereby secured to them, then and in that case the sum shall be augmented from to time provided that the amount paid to each individual shall not exceed the sum of one pound currency in any one year, or such further sum as Her Majesty may be graciously pleased to order, and provided further that the number of Indians entitled to the benefit of this treaty shall amount to two-thirds of their present number which is 1422 (in the Lake Superior case 1240), to entitle them to claim the full benefit thereof. And should they at any future period not amount to two-thirds then, the said annuity shall be diminished in proportion to their actual numbers.

At and before the passing of the British North America Act, 1867 (and at and before the making of the cession), the casual and territorial revenues from the Crown lands of Canada had been granted by the

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Imperial Government to the province of Canada. The effect of this was that the lands were thereafter held by the Crown in right of the province of Canada.

Then came the union in 1867. By sec. 109 of the British North America Act, it was enacted that

all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Secs. 111 and 112 are as follows:

111. Canada shall be liable for the debts and liabilities of each province existing at the union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of 5 per cent per annum thereon.

In the accounts heretofore adjusted and settled the fixed annuities under the above treaties have been regarded as a portion of the debt of the province of Canada, and the provinces of Ontario and Quebec have been charged with a capital sum sufficient to yield such annuities according to the terms of the award of 1870, made under the provisions of section 114 of the British North America Act. These fixed annuities were regularly paid by the Dominion Government, as having the administration of Indian affairs. As for the augmented annuities, nothing was paid in respect of them, either by the old province of Canada or by the Dominion Government, until about the year 1874, when a claim for them was made on behalf of the tribes. The Dominion Government becoming satisfied that the increased amounts were properly payable (as seems to be the fact) paid over the same, upon an understanding

with the provinces that the question of ultimate responsibility as between the different governments should be afterwards settled.

The present arbitration is for the purpose of settling (amongst other questions of account and claims) "the claims made by the Dominion Government on behalf of the Indians."

Upon that portion of this claim involved in the present appeal, viz., the claim for payment of increased annuities for the period subsequent to the union, the arbitrators have found (par. 6):

> That the ceded territory mentioned became the property of Ontario under the 109th section of the British North America Act, 1867, subject to a trust to pay the increased annuities on the happening after the union of the event on which such payment depended, and to the interest of the Indians therein to be so paid. That the ultimate burden of making provision for the payment of the increased annuities in question in such event falls upon the province of Ontario, and that this burden has not been in any way affected or discharged.

The arbitrators declare in their award that these conclusions proceed upon their view of disputed questions of law, the effect of which is, by the statute, to render them appealable.

In the reasons given by the learned Chancellor, concurred in by the other learned judges, it is held, in conformity with decisions of the Supreme Court of the United States, that treaties with the aborigines are to receive a generous interpretation in favour of them as public wards of the nation. Approaching it in this spirit, the learned Chancellor concludes that although the mere words used do not say that the increased annuity is to be paid out of the proceeds of the land, still that, in his opinion, is the plain and reasonable implication.

Upon the appeal the province of Ontario contests the position that the lands passed to it subject to any trust in respect of it, or to any interest in the Indians so far

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as relates to the claim in question. It is further contended that, as by section 111 the Dominion assumed the "debts and liabilities" of the old province of Canada, and by section 112 the provinces of Ontario and Quebec are liable over to the Dominion only for the excess of "debt" over $62,500,000, the effect of this is that the augmentations becoming payable after the union are to be assumed by the Dominion, under section 111, as a "liability" existing at the union, while they are not a "debt" under section 112 to be taken into account in calculating the excess of debt for which Ontario and Quebec are conjointly responsible over to the Dominion.

It was further claimed that if the amounts are to be charged against the provinces at all, it must be against both Ontario and Quebec jointly in the proportion fixed by the award of 1870, and not against Ontario alone.

In the second of the above contentions the province of Quebec joins.

Now, first, respecting such contention, it is to be noted that, while section 111 uses both words "debts" and "liabilities," section 112 does not use either of them, but instead, the comprehensive word "debt":

> Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the province of Canada exceeds at the union the sum of $62,500,000.

This general word "debt" may very well include all forms of indebtedness, whether ascertained or unascertained, determinate or indeterminate, except so far as particular provisions of the Act impose a limitation.

The financial provisions of the scheme of union were manifestly a matter of arrangement between the provinces of old Canada, Nova Scotia and New Brunswick; and while, for the public creditor, the Dominion was to be the paymaster, as between the provinces

and it, the amount of provincial indebtedness which the Dominion, as representing the people of the united provinces as a whole, was to assume was definitely determined and limited by the amount of debt of the several provinces stated to be assumed by it without recourse.

It follows, therefore, that the ultimate liability in this case must fall either upon Ontario alone, or upon Ontario conjointly with Quebec according to the ratio fixed by the award of 1870 for the division of the debts and liabilities of the old province of Canada in excess of the sum stated by the Act of 1873.

Then, as the main question, viz: whether the ceded lands were subject to a trust or interest as claimed. In *St. Catharines Milling & Lumber Co.* v. *The Queen* (1), it is laid down that:

> Wherever public land with its incidents is described as "the property" of or as "belonging to" the Dominion or province, these expressions merely import that the right to its beneficial use or to its proceeds has been appropriated to the Dominion or the province (as the case may be) and is subject to the control of the legislature, the land itself being vested in the Crown.

When therefore it is declared that upon the union the lands shall belong to the province in which they are situate, subject to any trust in respect thereof or to any interest other than that of the province in the same, the saving clause extends to trusts or interests affecting the beneficial use of the land; or its proceeds.

The question then is: Did the Crown, or the province of old Canada to whose rights Ontario has succeeded, hold the proceeds to be derived from the ceded lands upon any trust to pay to the Indians the augmented annuities?

There is no doubt that the Indians were dealt with as though they were possessed of substantial rights which at least imposed a burden upon the lands. In

(1) 14 App. Cas. 46.

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St. Catharines Milling Co. case already alluded to, Lord Watson said that it was not then necessary to express any opinion upon the precise quality of the Indian right, but it was sufficient to say that there has been all along vested in the Crown a substantial and paramount estate underlying the Indian title which became a *plenum dominium* when that title was surrendered or otherwise extinguished.

The consideration to the Indians for the ceding of their rights was threefold, the cash payment, the fixed annuity, and the further annuity up to a certain amount depending upon the proceeds of the lands. Although the promise on the part of the Crown to pay the augmentations is separated from that relating to the fixed annuity and the cash payment, and although it is introduced by reference to the liberal intentions of the Crown, still all that was promised by the Crown constituted the consideration for the act of cession.

Practically it does not now, and it never did, make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or not. Their assurance of payment would be equal in either case.

Nor, on the other hand, would it practically make any difference to the Crown whether or not the Indians were declared to have such interest in the proceeds. *Ex hypothesi*, the lands were to be sold, and there could be no fetter upon the right to dispose of them.

The matter only came to have practical significance when it became necessary to consider the nature of the transaction in relation to the provisions of the British North America Act.

The question is to be solved by the light of what is expressed and by the application to it of general principles of law.

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The law is very considerate of the rights of a vendor of an interest in lands. It proceeds upon the principle that one who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it and not to pay the full consideration money. This is a general principle of most systems of law. Hence the lien of the vendor, which is deemed to be based upon a natural equity.

This may even exist where the price, or a part of it, is payable in the way of an annuity, but in such case the circumstances may be such as to exclude the notion that the parties could have reasonably contemplated such a lien.

Here it was manifestly contemplated that the land might be sold, and as there was to be no limit to the continuance of the annuity it would not be reasonable to suppose that there was to exist a perpetual lien.

But it was agreed that if the ceded territory should at any future period produce, *i.e.*, from sales, rents, royalties, &c., such an amount as would enable the Government of the province of Canada, without incurring loss, to increase the stated annuity, then the same should be augmented from time to time to an amount not exceeding, in the whole, a payment to each individual of the sum of £1 currency.

Now this may mean merely that the revenues shall furnish a measure of increased price or be a circumstance to determine whether or not it shall be paid; or, on the other hand, it may mean that a part of the revenue shall go to the Indians by way of increased annuities in a certain event.

Where two interpretations of such an agreement are open, one consistent with and the other inconsistent with a provision for the security of the unpaid vendor, it would seem more appropriate to treat it as giving the more effectual security to the unpaid vendor, and

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more in accordance with the general principles of the law to do so.

It would give to the undertaking a more simple and less circuitous operation, and one more in accordance with the natural meaning of the language, to construe it as providing that the augmented annuities should be paid out of the fund, the existence of which is the condition and the reason for its payment. Take the words in which the condition is expressed:

> Should the territory produce such an amount as would enable the Government, without incurring loss, to increase the stated annuity.

Is it not the natural meaning of this, that if the territory should produce such an amount as would enable the Government out of it, and without incurring loss, to increase the stated annuity, then etc.? I am inclined to think so. Upon the whole, therefore, but not without doubt, it seems to me that there is a reasonably clear manifestation of an intention to devote a portion of the proceeds of the ceded lands in certain events to the increased annuities.

If this is so, it would follow that Ontario, getting the lands subject to the trust, would have to discharge the burden which before that was upon the province of Canada, now represented by the provinces of Ontario and Quebec, unless there is something in the British North America Act, or in some other binding instrument or act, to make it otherwise.

It is contended that the award of the arbitrators made in 1870 under the provisions of section 114 of the British North America Act has such effect. By that section it was provided that:

> The division of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada.

In accordance therewith arbitrators were appointed, and on 3rd September, 1870, their award was made, by paragraph 1 of which it was determined that:

> The amount by which the debt of the late province of Canada exceeded on the 30th day of June, 1867, $62,500,000, shall be and is hereby divided between, and apportioned to, and shall be borne by the said provinces of Ontario and Quebec respectively, in the following proportions,

i.e., in a certain named ratio.

By paragraph 13 it was determined:

> That all the lands in either of the said provinces of Ontario and Quebec surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late province of Canada, shall be the absolute property of the province in which the said lands are respectively situate, free from any further claim upon or charge to the said province in which they are so situate by the other of the said provinces.

Before that tribunal the province of Quebec had contended that the amount at which the fixed annuities had been capitalized should be charged against the province of Ontario upon grounds similar to some of those urged in the present appeal respecting the augmentation of the annuities, but the arbitrators rejected the contention and held as already stated in par. 13 of their award.

Accordingly, the capitalized amount of the fixed annuities was finally adjusted and settled, and in respect of it Quebec had no right further to contend that it should be dealt with as a charge upon the ceded territory in Ontario, nor would the Dominion have the right so to contend inasmuch as the result of a contrary decision would be to give to Quebec in the ultimate accounting a charge or claim against Ontario in respect of it.

But the matter of the augmentation of annuities was not raised before the arbitrators, and if the views herein stated upon the main point are correct, it is apparent

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that the two things do not rest entirely upon the same foundations. The finding of the arbitrators that the claim as to the fixed annuities that was brought before them did not constitute a charge upon the lands, is therefore not conclusive as to the matters in question here. Par. 13 is to be read in the light of the contention before the arbitrators, and not as an abstract and general denial of all charges, etc., respecting the annuities, but simply as a denial of the lands being subject to the alleged charge to which it was then claimed to be subject.

The result therefore, in my view is, that while the word "debt" in the 112th section is comprehensive enough by itself to include a liability for increased annuities becoming payable after the union, this particular liability, or part of the debt, of the late province of Canada is to be regarded as cast upon the province to which by sec. 109 the land is given subject to the burden. I think, therefore, that the appeal should be dismissed.*

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*The Dominion of Canada and the province of Quebec have respectively obtained leave to appeal from the judgment in this case to the Judicial Committee of the Privy Council.

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Jan. 19.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

AND

WILLIAM THOMAS.....DEFENDANT.

Cancellation of a land-patent—The Manitoba Act—33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1—R. S. C. c. 54 s. 57—Improvidence in granting patent.

T., a half-breed, was on the 15th July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874 he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the commissioner who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip.

Held, that under *The Manitoba Act*, and amendments, (33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1) he was entitled to letters-patent for the lot mentioned.

THIS was an information, filed by Her Majesty's Attorney-General for the Dominion of Canada, whereby the Crown sought to obtain a declaration by the court that a certain patent for land had been improvidently granted to the defendant and should be delivered up to be cancelled.

The facts of the case are fully stated in the judgment.

June 5th and 6th, 1890.

Aikins, Q.C. and *Culver* Q.C. for the plaintiff:

The defendant assented to the treaty, and admitted

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he was an Indian. He must be bound by his action in accepting treaty-money. The defence admits that the land in question formed part of the Reserve; and that being so, and there being no surrender to the Crown, it could not properly be disposed of by the Crown's patent. The Crown is bound to look carefully to the execution of the treaty, and to see that the lands belonging to the Indians are maintained for their benefit. The question is not what the Crown may or ought to do as to the patent, but whether or not it was properly advised in issuing such patent (Cites *The Attorney-General* v. *Contois* (1); *Graham* v. *The Northern Railway Co.* (2); *The Attorney-General* v. *McNulty* (3); *Martyn* v. *Kennedy* (4); *Rees* v. *The Attorney-General* (5); *The Attorney-General* v. *Fonseca* (6); Reg ex. rel. *Gibb* v. *White* (7).)

Howells, Q.C. and *Cumberland* for the defendant:

The taking of treaty-money under a mistake of his rights and position as a half-breed should not deprive defendant of his property. He was in possession of the property before the patent issued, as a settler, and outside the patent altogether he has a good right to the land. He is not an Indian within the meaning of the Indian Act of 1874. He did not belong to any band or tribe of Indians. As soon as he discovered his position with respect to receiving treaty-money, he returned the money he had received for the then current year. The *onus* to establish improvidence in the granting of the patent is on the Crown, but so far from doing that the evidence shows that all the facts were before the Crown.

(Cites the judgments of Gwynne and Patterson, JJ in *Fonseca* v. *The Attorney-General* (8).)

(1) 25 Grant 346.
(2) 10 Grant 259.
(3) 8 Grant 324.
(4) 4 Grant 61.
(5) 16 Grant 467.
(6) 5 Man. L. R. 173, and 17 Can. S. C. R. 612.
(7) 5 Pr. R. 315.
(8) 17 Can. S. C. R. 612.

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Aikins, Q.C. in reply, cites *The Queen* v. *Clarke* (1); *The King* v. *Clarke* (2); *The Attorney-General* v. *Garbutt* (3); *Bacon's Abridgement* (4); *Stephen's Blackstone* (5).

Reasons for Judgment.

BURBIDGE, J. now (January 19th, 1891) delivered judgment.

This information is brought to annul letters-patent issued on the 27th of October, 1887, in favor of the defendant, for lot numbered 22 in the Parish of Saint Peter and Province of Manitoba.

The ground upon which the cancellation of the patent is sought, is, briefly, that the defendant is not, as at the time when it was issued he was supposed to be, entitled to the lot in question under *The Manitoba Act* and its amendments (6), and that, therefore, it was issued through error and improvidence within the meaning of the 57th section of chapter 54 of the *Revised Statutes of Canada*.

It is admitted that the defendant is a half-breed, and it appears from the evidence that he has during all his life lived after the manner of white men, and never according to the mode and habits of life of the Indian. He is by trade and occupation a carpenter and farmer. For many years he was a warden of the church at Saint Peter; and on several occasions he has been a representative from that church to the Synod. After the transfer of Rupert's Land and the North-West Territory to Canada, and before the Treaty to which reference will be made, he was appointed a Justice of the Peace.

It is also clear that since the year 1864, when for the sum of seventy-five dollars he purchased the lot in question from one Robert Sandison, he has been in

(1) 7 Moo. P. C. 77.
(2) Freem. 172.
(3) 5 Grant 181.
(4) Vol. 8 p. 150.
(5) Vol. 1 p. 624.
(6) 33 Vic. c. 3 s. 32 sub-sec. 4, and 38 Vic. c. 52 s. 1.

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undisturbed occupancy thereof, and that on the 15th of July, 1870, the date of the transfer, he was in actual peaceable possession of the same. This is not denied, but it is said that by participating in the gratuity given to certain Chippewa and Swampy Cree Indians in 1871, under a Treaty made with them at Lower Fort Garry on the 3rd of August of that year, and in the annuities payable thereunder, the defendant lost his status as a half-breed, and forfeited his right to the lot and letters-patent in question.

The defendant admits that in 1871, 1872, 1873 and 1874 he received for himself, his wife and two daughters, the annuity of three dollars for each person payable under the Treaty, and it appears that he shared in the gratuity given when the Treaty was concluded He says, however, that before taking any money under the Treaty he asked Mr. Simpson, the commissioner acting for Her Majesty, if by taking the same he would interfere with his private property, and that Mr. Simpson told him he would not; and that when, in 1874, he learned for the first time that by the acceptance of such annuities he would deprive himself of his rights as a half-breed, he returned the amount paid to him in that year, and that since he has not taken any money under the Treaty; and that the Crown has recognized his rights as a half-breed by the issue to him, in October, 1876, of half-breed scrip.

The enquiry is, I think, somewhat narrowed by the fact that none of the statutes of the Dominion relating to Indians and Indian Affairs were in force in Manitoba prior to 1874, when by 37 Vic. c. 21 certain provisions of 31 Vic. c. 42, and of 32-33 Vic. c. 6, were extended to that province. It may be admitted that if in 1874, and thereafter, the defendant had participated in the annuities payable under the Treaty, he would have brought himself within the definition of an Indian contained in the

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Acts mentioned (1), and that he could not subsequently have regained his status of a half-breed except in accordance with the law or practice in that behalf for the time being in force.

The first question to be decided is: Did the defendant by participating in the gratuity and annuities mentioned make an election and renounce the status and personal condition of a half-breed, and acquire that of an Indian? Unexplained, his conduct would no doubt raise the presumption that he had done so. But looking at all the circumstances of the case, it does not appear to me that such was at any time his intention. We have seen that he was careful before taking any money under the Treaty to enquire of the commissioner whether his acceptance would prejudice his position in respect of his private property; and that when in 1874 he realized the true state of the case he returned the annuity then lately paid to him, and that in 1876 his status as a half-breed head of a family was formally recognized by the Crown. It is said that Mr Simpson could not bind the Crown by any such assurance as that alleged to have been given to the defendant. Possibly not, and yet it may be right and proper to weigh the defendant's acts in the light of such assurance. But take it that the defendant's status, from the day he received his first payment under the Treaty until he returned the last, must be deemed to be that of an Indian, the further question presents itself: By virtue of what law did he forfeit his interest in the homestead that he purchased, and on which, with his wife and family, he was residing. The only answer suggested in reply to that enquiry is, that such is the effect of the 19th section of *The Indian Act* (*R.S.C.* c. 43), whereby it is, amongst other things, provided that every Indian in the Province of Manitoba who has,

(1) 31 Vic. c. 42 s. 15, and 37 Vic. c. 21 s. 8.

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previously to the selection of a Reserve, possession of a plot of land, included in or surrounded by a Reserve, upon which he has made permanent improvements, shall have, in respect thereof, the same privileges as are enjoyed by an Indian who holds under a location title. But that provision was first enacted in 1876 by 39 Vic. c. 18 s. 10, and cannot, I think, be construed to deprive the defendant of any rights of property theretofore acquired, seeing that there is no pretence that he was at that time an Indian or liable to be considered or treated as an Indian within the meaning of the statute.

Mr. Aikins, for the plaintiff, upon the authority of the cases cited, further contended that although the defendant might be found to be entitled to the letters-patent issued to him, they should be set aside because the Minister of the Interior acted in ignorance of the fact that that the defendant had not refunded the forty-eight dollars paid to him under the Treaty in the years 1871, 1872 and 1873. It seems that this fact was not, as it should have been, brought to the attention of the Minister either in 1876, when half-breed scrip was issued in favor of defendant, or in 1887, when his claim to lot 22 was disposed of. This issue is not, however, raised by the pleadings, and it is not necessary to decide it, or to consider how far the earlier cases referred to have been modified by *Fonseca* v. *The Attorney-General* (1), in which the 57th section of the *Revised Statutes*, chapter 54, has been so recently and fully considered. On the issues presented by the pleadings the defendant is, I think, entitled to succeed.

Judgment for defendant with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendant: *Archibald, Howell & Cumberland.*

(1) 17 Can. S. C. R. 612.

[PRIVY COUNCIL.]

DOMINION OF CANADA . . . . . PLAINTIFF;

AND

PROVINCE OF ONTARIO . . . . . DEFENDANT.

J. C.*
1910
July 19, 21, 29.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Treaty of October 3, 1873, extinguishing the Indian Interest in Lands — Payments by the Dominion under the Treaty—Suit by the Dominion against the Province of Ontario for Contribution as respects Lands within the Province.

By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments and other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty:—

Held, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the province, the Dominion Government did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests—that is, for distinct and important interests of their own—in pursuance of powers derived from the British North America Act, 1867.

St. Catherine's Milling and Lumber Co. v. The Queen, (1888) 14 App. Cas. 46, considered.

APPEAL by special leave from a judgment of the Supreme Court (February 12, 1909) which reversed a judgment of Burbidge J. in the Exchequer Court of Canada (March 18, 1907) and dismissed the appellant's suit.

The jurisdiction of the Exchequer Court to decide the controversy in suit between the Dominion and the province was

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

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conferred by R. S. C., 1906, c. 140, s. 32, and R. S. O., 1897, c. 49, s. 1.

By the statement of the Dominion of Canada filed in the Exchequer Court on June 13, 1903, the claimant set forth that by a treaty No. 3, known as the North West Angle Treaty, and dated October 3, 1873, between Her late Majesty Queen Victoria by her Commissioners therein named of the one part, and the Salteaux tribe of the Ojibeway Indians of the other part, the said Indians ceded, released, surrendered, and yielded up to the Government of the Dominion for Her Majesty the Queen and her successors for ever all their rights, titles, and privileges whatsoever to the lands thereinafter mentioned, such lands embracing an area of 55,000 square miles more or less, to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen thereby agreed and undertook to lay aside reserves of lands in the territories thereby ceded for the benefit of the Indians as therein mentioned, and further to give to her Indians certain presents of money, and also annually to pay to them certain annuities and to give to them certain presents and sums of money for the chiefs and subordinate officers as therein mentioned. And Her Majesty also entered into further agreements with her said Indians as therein mentioned.

The claimant also set forth that in pursuance of the treaty the Dominion had made payments to and for the benefit of the Indians in accordance with its provisions, the details of which were set out in schedules A and B to the said statement, and that the Dominion had also been obliged to make large expenditures of money in making surveys of reserves for the Indians and in conducting the necessary business of the administration of the treaty, the details of which expenditure were set forth in schedule C thereto. Also that after the admission into the Union of the Province of Manitoba in the year 1870 a dispute arose between the Dominion and the Province of Ontario as to the correct northern and western boundary of the said Province of Ontario, and that, arbitrators having been appointed to determine the correct boundary, an award was made, by the effect of which out of the 55,000 square

miles within the limits of the treaty about 30,000 square miles were found to be within the boundary of the Province of Ontario. Subsequently, in the year 1888, in an action brought by the Attorney-General of Ontario against the St. Catherine's Milling and Lumber Company, Limited, the Judicial Committee of the Privy Council decided that the portion of the ceded lands found by the Court to be within Ontario formed part of the public domain of Ontario, and were public lands belonging to Ontario by virtue of the provisions of the British North America Act, and the claim that the said lands were the property of the Dominion by reason of the cession of the Indian title to the Dominion was dismissed.

The claim of the Dominion of Canada was for a declaration that (1.) inasmuch as the benefit of the aforesaid surrender accrues to Ontario, that province shall relieve the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty by virtue of the said treaty, and which have been, or may be, fulfilled by the Dominion of Canada; (2.) the Province of Ontario has held, and now holds, the portion of the ceded lands which lie within the province charged with and subject to the payment of a proportion of the annuities and other moneys paid to and for the Indians under the terms and stipulations of the treaty; (3.) the Dominion of Canada is entitled to recover from, and be paid by, the Province of Ontario a proper proportion of annuities and other moneys so paid as aforesaid; (4.) all proper accounts be taken to ascertain the amount payable to the Dominion in respect of the said annuities and other moneys so paid as aforesaid.

By its answer the Province of Ontario denied liability, and, further, counterclaimed in respect of certain revenues received by the Dominion pending a determination of the boundaries of the province and arising out of the lands eventually adjudged to belong to the province.

The judgment of the Judicial Committee in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) decided that the surrender of so much of the area of 55,000 square miles as was situated in the Province of Ontario enured to transmit

(1) 14 App. Cas. 46.

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to the province in terms of s. 109 of the British North America Act, 1867, the entire beneficial interest in such lands, and in the course of the judgment there occurred this passage (1): "Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

Burbidge J. by his judgment declared the province liable to pay to the Dominion all such sums paid by the Dominion as were referable to the extinguishment of the Indian title, in the proportion which the area of the treaty lands within Ontario bears to the whole treaty area. All other questions, including the question what sums of money so paid by the Dominion were referable to the extinguishment of the Indian title, were reserved for further consideration and adjudication. He considered that, with respect to that portion of the lands surrendered to the Crown which were situated within the province, "the Dominion Government occupied a position analogous to that of a bona fide possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order, and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered or the greater part thereof, raised no objection and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person in consequence of unskilful survey or in the belief that the land is his own makes improvements in lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of

(1) 14 App. Cas. at p. 60.

Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor. The case, however, appears to me to bear a closer analogy to one in which a bona fide possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright* v. *Boyd* (1), the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him." He also considered that the views expressed in Lord Watson's judgment (2) should be taken as a part or condition of the judgment in favour of the province, and that, although such views found no place in the formal judgment pronounced, it was proper that he should give effect to the view there expressed that the Province of Ontario was liable to indemnify the Dominion against a portion of the expenditure incurred in discharge of the obligations created by the treaty.

The judgment on further consideration (December 4, 1907) referred it to the registrar to take certain accounts necessary to give effect to the declaration.

Both judgments were reversed by the Supreme Court by a majority of one (Idington, Maclennan, and Duff JJ., Girouard and Davies JJ. dissenting).

The judgment of the majority dealt first with the scope of the jurisdiction of the Court of Exchequer, to which Court, by identical statutes, the Dominion and the province had committed jurisdiction over controversies between them, and held that the statutes in question required any controversy submitted under them to be determined in accordance with and by the application of legal principles, and not by considerations of mere convenience and propriety.

Idington J. held that there was no foundation in law or fact for the theory that the Dominion acted as an agent for the province, but that the Dominion was impelled to settle with the Indians by virtue of its obligations to the Province of British Columbia, and for other reasons not referable to its wardship

(1) (1841) 1 Story's Reports, 479, 498. (2) 14 App. Cas. 60.

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over or duties towards such Indians; and that the pronouncement in Lord Watson's judgment in 14 App. Cas. 60 was a mere dictum.

Duff J., with whose opinion Maclennan J. concurred, agreed with Idington J. as to the motives of the Dominion in making the treaty, and considered that under these circumstances there was no principle on which a Court of Equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations undertaken by the former; that Lord Watson's remark was a mere dictum, the preferable view of its import being that, upon the facts as they appeared, as a matter of fair dealing Ontario would be expected to assume the obligations in question, but that, in deciding controversies between the two Governments, the Exchequer Court could only apply some appropriate rule or principle of law, and that the pronouncement, even if more than a mere dictum, would not be conclusive of the appeal before them.

Newcombe, K.C., and *Clauson*, for the appellant, contended that the judgment of Burbidge J., whose decision was upheld by the dissenting judges in the Supreme Court, was right. The case was concluded by the authority of the principle laid down by Lord Watson's judgment in 14 App. Cas. 46. The majority of the Supreme Court recognized that the claim of the Dominion was naturally equitable, and that the province which obtained the benefits of the treaty, so far as it affected the lands in which it had the beneficial interest, should bear the burdens which the treaty imposed thereon. It was unnecessary to resort to any technical rule of law or equity as laid down by authority. It had been a public duty devolving on the Dominion to extinguish the Indian title; and it discharged that duty for the benefit of all concerned. The resulting burdens should be adjusted in proportion to the benefits accepted. It was contended that the Crown in right of the Dominion represented the union of all the provinces and that payment by the Dominion was payment by all the provinces jointly. If the sole benefit of a particular treaty provision made by the Dominion enured to the exclusive benefit of one province only, the resulting liability should be borne by that province and not shared by the other provinces which did not participate in

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the accruing advantages. The principle invoked by the Dominion in this case was that the obligations and liability incurred to obtain the surrender of the Indian title were in effect a commutation of the burden of that title upon the lands, and as such remain a charge upon the lands. In such a case as this no distinction should be drawn between the Crown acting in right of the Dominion and the Crown acting in right of the province. If a distinction can be made, it should be held that the Dominion acted in obtaining the treaty and freeing the lands from the Indian title, so far as regards the lands situated within the province, as agent for the province. The benefits secured by the treaty passed to the province upon the acceptance by the province of the lands surrendered. By that acceptance the province accepted also the liabilities which the treaty created in respect thereof. Even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States, and by those principles a State accepting advantages under a public treaty must bear the liabilities involved thereby, thus accepting the treaty as a whole. It cannot accept such portion as is in its favour and repudiate the liability which acceptance involves and ratifies. Reference was made to the judgment of Strong C.J. in *Province of Ontario* v. *Dominion of Canada, In re Indian Claims* (1), and to *Attorney-General for the Dominion* v. *Attorney-General for Ontario* (2); *Ontario Mining Co.* v. *Seybold* (3); *Johnson* v. *M'Intosh* (4); *Worcester* v. *State of Georgia* (5); *Mitchell* v. *United States.* (6)

C. H. Ritchie, K.C., and *Shepley, K.C.*, for the respondent, were not heard.

1910
July 29.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. In this appeal the only question argued was whether or not the Dominion of Canada is entitled to

(1) (1895) 25 Can. S. C. R. 434, 505.
(2) [1897] A. C. 199, 210.
(3) [1903] A. C. 73.
(4) (1823) 8 Wheaton (21 U. S.) 543.
(5) (1832) 6 Peters (31 U. S.) 515.
(6) (1835) 9 Peters (34 U. S.) 711.

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recover from the Province of Ontario a proper proportion of annuities and other moneys which the Dominion bound itself in the name of the Crown to pay to an Indian tribe and its chiefs under a treaty of October 3, 1873. There has been a marked difference of opinion in the Canadian Courts. Burbidge J. decided in favour of the Dominion, but on appeal to the Supreme Court of Canada three out of five learned judges reversed that judgment. The various opinions delivered in both Courts have dealt with the case so exhaustively and so clearly that nothing new really remains to be said, and the matter at issue has been reduced to a simple though extremely important point.

The treaty of 1873 was made between Her late Majesty Queen Victoria, acting on the advice of the Dominion Government, and the Salteaux tribe of the Ojibeway Indians. Its effect was to extinguish by consent the Indian interest over a large tract of land about 50,000 square miles in extent, and in return it secured to the Indians certain payments and other rights agreed to and promised by Her Majesty. At that time it had not been ascertained whether any part of this land was included within the Province of Ontario, but it is now common ground that the greater part of it lies within the Ontario boundaries. In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole.

When, however, by subsequent decisions it was established that, under the British North America Act of 1867, lands which are released from the overlying Indian interest enure to the benefit, not of the Dominion, but of the province within which they are situated, it became apparent that Ontario had derived an advantage under the treaty. And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion toward the Salteaux tribe as may properly be attributed to the lands within Ontario which had

been disencumbered of the Indian interest by virtue of the treaty.

Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable.

To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province and in the belief that the lands were not within that province. They neither had nor thought they required nor purported to act upon any authority from the Provincial Government.

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Again, it seems to their Lordships that the relation of trustee and cestui que trust, from which a right to indemnity might be derived, cannot, even in its widest sense, be here established. The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, but in so doing they were not under any special duty to the province. And in regard to the proprietary rights in the land (apart from the Indian interest) which through the Crown enured to the benefit of the province, the Dominion Government had no share in it at all. The only thing in regard to which the Dominion could conceivably be thought trustees for the province, namely, the dealing with the Indian interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and their discretion for the public welfare.

Another contention was advanced on behalf of the appellants —that this is analogous to the case of a bona fide possessor or purchaser of real estate who pays money to discharge an existing incumbrance upon it without notice of an infirmity of his title. It is enough to say that the Dominion Government were never in possession or purchasers of these lands, that they had, in fact, notice of the claim thereto of the true owner, though they did not credit it, and that they did not pay off the Indian incumbrance for the benefit of these lands, but for distinct and important interests of their own.

This really is a case in which expenditure independently incurred by one party for good and sufficient reasons of his own has resulted in direct advantage to another. It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of this outlay. But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable.

If the opinions of Burbidge J. and of the two dissenting judges in the Supreme Court are examined, it will be found that they rely almost entirely upon a passage in the judgment delivered by Lord Watson at this Board in the case of

St. Catherine's Milling and Lumber Co. v. *The Queen.* (1) It must be acknowledged that this passage does give strong support to the view of those who rely upon it, and their Lordships feel themselves bound to regard this expression of opinion with the same respect that has been accorded to it by all the learned judges in Canada. They consider, however, that Idington J. and Duff J. have stated conclusive reasons against adopting the dictum alluded to as decisive of the present case. The point here raised was not either raised or argued in that case, and it is quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so intend, the passage in question must be regarded as obiter dictum.

In the course of argument a question was mooted as to the liability of the Ontario Government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians. No such matter comes up for decision in the present case. It is not intended to forestall points of that kind which may depend upon different considerations, and, if ever they arise, will have to be discussed and decided afresh.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Freshfields.*

(1) 14 App. Cas. 60.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE TERRITORIAL COURT OF THE YUKON TERRITORY.

THE PROVINCE OF ONTARIO (RESPONDENT) ..... APPELLANT: 1908 *Dec. 1-3.

AND

THE DOMINION OF CANADA (CLAIMANT) ..... RESPONDENT. 1909 *Feb. 12.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Indian lands—Extinguishment of Indian title—Payment by Dominion—Liability of Province—Exchequer Court Act, s. 32—Dispute between Dominion and Province.

Where a dispute between the Dominion and a Province of Canada, or between two Provinces comes before the Exchequer Court as provided by sec. 32 of R.S.C. [1906] ch. 140, it should be decided on a rule or principle of law and not merely on what the judge of the court considers fair and just between the parties.

In 1873 a treaty was entered into between the Government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By said treaty the Salteaux agreed to surrender to the government all their

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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right, title and interest in and to said lands and the government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands and pay each Indian $5 per year and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario and in 1903 the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The Province disputed liability and, by counter-claim, asked for an account of the revenues received by the Dominion while administering the lands in the Province under a provisional agreement pending the adjustment of the boundary.

Held, reversing the judgment of the Exchequer Court (10 Ex. C.R. 445) Girouard and Davies JJ. dissenting, that the Province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the Province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada(1) condemning the Province of Ontario to pay a portion of the amount claimed by the Dominion as having been expended for the benefit of the province.

In 1873 the Dominion Government made a treaty with the Salteaux tribe of Ojibeway Indians by which the latter surrendered all their rights and privileges in land covering the area from the watershed of Lake Superior to the North-West Angle of the Lake of the Woods and from the American border to the height of land from which the streams flow towards Hudson Bay, containing about 55,000 square miles. The pay-

(1) 10 Ex. C.R. 445.

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(1) 10 Ex. C.R. 445.

ments to be made for such surrender and the obligations to be performed by the Dominion are stated in the above head-note.

At the time this treaty was made the boundary between the Provinces of Ontario and Manitoba had not been defined and the lands were administered by the Dominion and Ontario jointly pending such definition.

In 1878 the position of the boundary was referred to arbitration and finally determined in 1884, when it was found that some 30,000 square miles of the territory surrendered by said treaty was in Ontario. The Dominion eventually took proceedings in the Exchequer Court to recover from the province its proportionate share of the sums expended in carrying out the treaty.

The judgment of the Exchequer Court as published in the report(1), holds the province liable to re-pay the Dominion the amounts necessarily expended in extinguishing the Indian title to the lands in question and the question as to which of the sums claimed were so expended was reserved for further hearing. On Dec. 4th, 1907, judgment on the further hearing was given and formally entered as follows:

"Wednesday the 4th day of December, 1907.

"The further consideration of the questions involved in this action reserved by the judgment of this court of the 18th day of March, 1907, having come on for hearing at Ottawa on the 3rd and 4th days of December in the year of our Lord, 1907, before this court, in the presence of counsel for the respondent as well as the claimant, upon hearing the evidence and what was alleged by counsel aforesaid.

(1) 10 Ex. C.R. 445, at p. 473.

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"1. This court doth order and adjudge that the Dominion do recover from Ontario three hundred and five, four hundred and ninety-thirds (305-493) of all the following expenditures made by the Dominion to or on behalf of the Indians:—

"(*a*) All expenditures made by the Dominion to the Indians in payment of annuities under the treaty in the pleadings mentioned at the rate of five dollars per annum for each Indian person from the date of the treaty to the date hereof.

"(*b*) All expenditures made by the Dominion for ammunition and twine for nets for the use of the Indians as provided by the said treaty, not however exceeding in the whole one thousand five hundred dollars per annum.

"(*c*) All expenses reasonably incurred by the Dominion for provisions and presents supplied to the Indians at the treaty negotiations, but not to exceed in the whole the sum of twenty-one thousand two hundred and ninety-six dollars and ninety-six cents, claimed in Schedule "B" of the statement of claim of the Dominion herein.

"(*d*) In respect of the payments made by the Dominion for or on account of the present of twelve dollars per head stipulated by the treaty to be paid to each man, woman and child of the bands of Indians represented at the treaty and claimed under the first item of Schedule "A" in the said statement of claim, the sum of five dollars per head.

"2. This court doth further order and adjudge that the action of the Dominion with respect to all classes of claims in the schedules of the said statement of claim, other than those in respect of which the Dominion has hereinbefore been adjudged to be entitled to recover, be dismissed, without prejudice, however,

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to the right of the Dominion to claim against Ontario by way of set-off to the counterclaim of Ontario the expenditures made for the surveys of reserves for farming lands and the other reserves for the Indians agreed for under the treaty, as part of the expense properly incurred by the Dominion in the administration of the disputed territory pursuant to the conventional boundary agreement between the Dominion and Ontario. of the 26th day of June, 1874.

"3. This court doth further order and adjudge that it be referred to the registrar of this court to inquire into and take an account of all sums expended by the Dominion in respect of the several classes of expenditure as to which the Dominion has hereinbefore been adjudged to be entitled to recover and report thereon to this court.

"4. This court doth further order and adjudge that it be referred to the registrar of this court to inquire into and take an account of all revenues collected by the Dominion under the said conventional boundary agreement, and also of all disbursements and expenditures duly made in the administration by the Dominion of the territory falling to be administered by the Dominion under the said agreement, and report thereon to this court.

"5. And this court doth reserve further directions until after the said registrar shall have made his report.

"6. This court doth make no order with respect to the question of costs in this action.

"(Sgd.) L. A. AUDETTE, Registrar."

The province appealed to the Supreme Court of Canada from both judgments and the Dominion cross-appealed for the amounts disallowed.

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Sir Æmilius Irving K.C., G. F. Shepley K.C., C. H. Ritchie K.C. and *H. S. White,* appeared for the appellant, the Province of Ontario.

E. L. Newcombe K.C., Deputy Minister of Justice, and *W. D. Hogg K.C.,* appeared for the Dominion of Canada, respondent.

Ritchie K.C. opens for the appellant and deals first with the history of the proceedings in the Exchequer Court and with the general features of the Indian treaty. He then proceeds to argue that there was no liability on the part of the province to indemnify the Dominion Government for the financial burdens imposed by carrying out the treaty and goes on: The paramount object of the Dominion Government in entering into that treaty was not to extinguish the Indian title in favour of Ontario, but to enable the Dominion Government to carry out certain obligations into which it had theretofore entered. Under the "British North America Act" to the Dominion was assigned the obligation to maintain peace, order and good government throughout Canada. In addition to that, the care of the Indians and all responsibility in connection with the Indians was assigned to them; so that there were two obligations thrust upon them, the principal one being the maintenance of peace, order and good government throughout Canada. In 1870 the rebellion occurred and it was necessary to construct a route over which the troops might pass and they were most anxious to complete what was then known and is now known as the "Dawson Route." The rebellion cost Canada a very large amount of money to quell, and in 1872 and 1873, spreading over these

years from the time of the Riel Rebellion, there was a sense of uneasiness among all the Indians; they were disaffected more or less and there was also present to the Dominion Government the fear of another uprising among the Indians and they were, therefore, most anxious to do everything possible in order to effectually extinguish any ill-feeling that might exist on the part of these Indians.

IDINGTON J.—Is there anywhere in the legislation affecting that point or anything in the practice that has prevailed upon it, to shew that the Dominion would have a claim over against any particular province that derived some direct benefit from its steps, whatever they were?

Mr. Ritchie: Nothing whatever, my lord. The liability was cast upon the Dominion and it is a national question. It was cast upon the Dominion, as the Dominion, representing all the provinces. It was something that the Dominion and the Dominion alone was liable for. If they had not made this treaty and another rebellion had occurred, an uprising of these same Indians, it would have cost, no doubt, ten times the amount of money that they are paying under this treaty to have quelled that rebellion and restored peace and order and that obligation rested on the Dominion under the express provisions of the "British North America Act." So that it was not Ontario they were looking after; it was not the extinguishment of the Indian title so that Ontario might get a benefit; but they had the particular paramount object to which I have referred, as also other objects of a Dominion character, a national character, which they were obliged to carry out and in order to carry these out it was necessary for them to secure

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a passage through the territory occupied by these Indians, and to see that people passing over this line were not molested; it was also necessary for them to endeavour, as far as possible to obtain the good will of the chiefs of these tribes so as to get them to undertake that they would do all in their power to preserve peace and good will and to prevent subjects of Her Majesty crossing this territory, from being molested. That is shewn by the treaty itself. When you look at the last clause of the treaty, see what it is that they get from the Indians. The undertaking they get from the Indians is an undertaking that enures to the benefit of the Dominion and the Dominion alone. All the obligations undertaken by these Indians were obligations which it was necessary that the Dominion, in the national interests, should secure. After pointing out the presents they were giving, what they were to do in the way of maintenance of schools and so on, they take from the Indians the covenants which are the consideration for what they are giving. "And the undersigned chiefs on their own behalf and on behalf of all other Indians inhabiting the tracts within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract, and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or in-

terfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment, any Indians offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded." These are the covenants and promises of the Indians.

DAVIES J.—Are these considerations any different from the considerations which enter into the negotiation of all Indian treaties?

Mr. Ritchie: I am not able to say how that is. Probably similar stipulations have been put in other treaties. All I am emphasizing is that these are stipulations which enure to the benefit of the Dominion, to whom was assigned the obligation of maintaining peace, order and good government. Then, as I pointed out to your lordships, if a rebellion had broken out the cost of quelling that would rest upon the Dominion and be paid out of the Dominion Exchequer and no portion could be charged up against any of the provinces.

Then, after referring to the conventional boundary agreement and the surrender by the Hudson Bay Co. of their interest in these lands counsel proceeds as follows on the question of the obligation of the Dominion to build the Canadian Pacific Railway.

There is an Imperial order in council of 16th May, 1871, that after the 20th of July, 1871, British Columbia shall become part of the Dominion.

Clause 11 of that Imperial order in council is that the government of the Dominion undertake to secure the commencement simultaneously within two years of the date of the Union, the construction of

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a railway from the Pacific to the Rocky Mountains and from the east to the Rocky Mountains, and to complete that within ten years. The documents put in here shew that that is one of the objects they had in view. The documents shew, by the reports of those who were through there that the whole of this territory was not as valuable as 100 acres on the Red River.

Then there is a report of those who were negotiating, and at that time your lordships will bear in mind that they were negotiating for a right of way simply, and the report is that they can acquire the whole title of the Indians, giving them reserves anywhere, the whole title just as easily as they can get the right of way. In other words, they could get the whole title just as easily as they could get the easement. Now, there is a letter from the Lieutenant-Governor to the Dominion of the 7th April, 1871. He says, "practically you may count on having to deal with 1,000 savages in any treaty you make for a right of passage. Mr. Pither seems to think they would give up their rights to the whole country for much the same price they would ask for the right of way. If so, it would be useless to confine the purchase to a mere easement, though, after all, with the exception of the strip on Rainy River, they have no land worth owning." Up to that time they were negotiating for the passage of a right of way for an easement and they were negotiating for that easement in fulfilment of the obligations they had incurred in connection with this surrender and in connection with their obligations with British Columbia. Now then, what I say is that these are the reasons which operated upon the the mind of the Dominion in endeavouring to negotiate

the treaty at that time. Ontario, who owned the land, was not anxious to negotiate at that time. They had no idea of extinguishing the Indian title. They might not have done it for many years afterwards. They might have effected the surrender or extinguishment of that title on very much more advantageous terms than those obtained by the Dominion, and what right, I ask, has the Dominion to come in and simply say because for objects of their own in order to enable them to fulfil obligations they have entered into apart altogether from Ontario: We will negotiate this treaty on our own terms; true, we know you have claimed the land, but we will ignore that fact and we will go on and acquire that title, and if we find afterwards we get nothing by it we will turn around and ask you to bear the burden simply because you get the benefit of the extinguishment of the title?

DUFF J.—Would Ontario have had power without the concurrence of the Dominion to make any arrangement to extinguish the title?

Mr. Ritchie: Perhaps not unless they could get it under the Proclamation of 1763, which did allow them to make arrangements with any one representing the government. Of course Ontario would represent one branch of the government and under that proclamation probably any arrangement entered into between Ontario and the Indians would be valid and binding as an extinguishment of the Indian title, unless it was contended that inasmuch as the "British North America Act" assigned to the Dominion the exclusive right to deal with Indian affairs, that that to some extent overrode the terms of the proclamation and would require Ontario to obtain the assent of the Dominion to any agreement that might be entered into.

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However that may be, I suppose there is no doubt that we could not go in there and deal with the Indians apart from getting an extinguishment of their title in any shape or form. In connection with that, as to settlement and opening up of the land, it was just as much in the interest of the Dominion, I submit, to have that opened up as Ontario. At all events to a very great extent, because when opened up for settlement, settlers were coming in from time to time and the revenues of the Dominion would be increased; the customs and excise duties would be increased. There was an interest that the Dominion might very reasonably be supposed to have in view, because the greater the settlement the greater the amount of revenue they are likely to obtain.

Now let us consider the question on the admitted facts that the Dominion knew of the claim of Ontario to these lands; then without asking the assent of Ontario, having no mandate from Ontario and knowing, as I say, that Ontario was claiming the land as its own, the Dominion goes on and makes a treaty with the Indians, it being clear that there were many natives that would induce them to make this treaty, peculiar to the Dominion itself, and it turns out afterwards that the title they sought to acquire and which they thought might be a valid title, availed them nothing; can they turn around as a matter of law or equity and say to Ontario—who claimed these lands, who did not authorize the Dominion in any way to negotiate in respect of this territory—and say, because you have received some benefit you must assume the whole burden?

In other words, simply because two people are claiming to own a particular piece of property, why

should one arrogate to himself the right to say, I know you are claiming, but I don't think your claim is good, I will ignore you and I will make a bargain off my own bat, so to speak, I will make my own bargain, I won't consult you, I will pay whatever I please and if it turns out that I get nothing by that bargain then I saddle you with the burden I have created. I submit that to permit any doctrine of that kind to get abroad would be subversive of all the interests in connection with property. If a bargain is made under these circumstances, surely the man makes the bargain at his own peril; knowing that another person is claiming to own this particular property, he enters into some contract and under that he benefits this particular individual who owns the property; I submit there is no principal of law or equity upon which he is entitled to recover. On that point take the case, for instance, of co-tenants, tenants in common of property, where one co-tenant goes on and makes improvements on the property owned by both, which necessarily benefits the other. It has been held by the Court of Appeal in England, that if he does that without the assent of the other he cannot claim any contribution, although the other undoubtedly receives a benefit. That I submit is a stronger case than the present one.

The most recent case I have been able to find is directly in point and I will just read the head note. The principle is laid down in this way: "There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it." That is a decision of the House of Lords; I shall not take up your lordships' time in reading the case, but the cases are all collected there. That is *Ruabon Steamship Co.* v. *London Assurance*

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Co.(1). That is the statement of law laid down by the Lord Chancellor. That was a case where, during a voyage covered by a policy of marine insurance, the vessel was injured and put in dry dock; the loss had to fall upon the underwriters alone and could not be apportioned between them and the owners.

The learned counsel then analyzes at some length the judgment of the Exchequer Court, which is the subject of the appeal.

Shepley K.C. follows for the appellant; My lords, there are two or three observations which have fallen from the Bench during the argument of my learned friend as to which before dealing at all with the principal questions involved in the appeal, I desire to say a word or two. Perhaps the most important subject is that suggested by his lordship, Mr. Justice Duff, which, if I appreciate the point, was this: Assuming that the Indian right in these lands was a burden on the interests of the province within the meaning of the "British North America Act," and assuming further, that there was residing in some sovereign power, say the Imperial or Dominion, the right to deal with that interest, is there not implied a corresponding obligation on the part of Ontario to indemnify that sovereign power in whatever shape that Indian interest may be transmitted? Have I appreciated what your lordship said?

DUFF J.—May I carry it a little further, to indicate the idea in my mind at the time? Whether Ontario came under the implied obligation to assume the burden of extinguishing the title, whenever the Do-

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minion in the exercise of its powers should think it desirable to extinguish it.

Mr. Shepley: That is putting the question in another form.

IDINGTON J.—The way it struck my mind at the time was the possibly analogous case of a person who, having a trust to discharge and incurring some expense incidentally to the discharge of that trust, has to be indemnified.

Mr. Shepley: Out of the trust estate.

IDINGTON J.—That is the point. Where is the trust estate here?

Mr. Shepley: That is one of the answers I was going to attempt to make. But it seems to me there are two or three considerations that ought to be dwelt on briefly in this aspect of the case. In the first place the Crown—whether the Crown represented by the sovereign at home or the Crown represented by the Dominion—the Crown by the very terms of the "British North America Act," vested all the rights that the Crown had in these lands in Ontario. And as a Crown claim no such claim as this can possibly be maintained. It must be maintained, if at all, because the interest of the Indians, subject to which Ontario took the lands, has been transmuted in the claim to the Dominion and is recognizable as the interest of Ontario because it represents some form of the Indian interest. The first answer to that seems to me that by the decision of the Privy Council in the *St. Catharines Milling Case* (1) there never was any transmutation or transfer of that interest to the Crown or anybody else. There was the bare extinguishment of it and nothing more. Perhaps your lordships will let me dwell a

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little upon a passage in the judgment in the Privy Council at the top of page 60. Lord Watson said: "By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration and such other purpose as to Her Majesty might seem fit, 'to the Government of the Dominion of Canada,' for the Queen and her successors for ever. 'It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown." What is that but a statement that the argument was that the Indian right had been transmuted into something else in the hands of the Crown? "That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the Commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial statute of 1867." It occurred to us that that afforded a complete answer to your lordship's question; that it was not possible in the negotiation of this treaty for the Crown to set up anything arising out of these negotiations, or out of this treaty, by way of claim against the Province of Ontario. Then there is another consideration which I think your lordships have not clearly appreciated. It seems to us that the Dominion had put it out of its power to raise any such question as this by an issue

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which has been made and which is upon this record. In presenting the documents, my learned friend Mr. Hogg put in an agreement between the two Governments made on the 16th of April, 1894. It recites the treaty and it recites that by the treaty certain reserves were to be selected and laid aside for the benefit of the Indians; the Indians were, amongst other things, to have the right to pursue their avocations of hunting and fishing throughout the tract surrendered, subject to such regulation as might be made by the Government and saving such tracts as might be taken up for settlement and so on. Then it recites that the two boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the treaty and other territory north of the height of land with respect to which the Indians are understood to make a claim as being occupants thereof according to their mode of occupying and as not having yet surrendered their claim thereto or their interest therein. "And whereas before the true boundaries had been declared as aforesaid, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the said treaty and the said Government of Ontario was no party to the selection and has not yet concurred therein." Then it is stated that it is deemed desirable for the two Governments to come to a friendly understanding and it is therefore agreed between the two Governments as follows, "with respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes, and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered

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tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been made, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves." There is a declaration that in order to effectively deal with the question of reserves and therefore to effectively deal with any interest Ontario has in these lands or had in these lands, the consent of Ontario was necessary. That brings me to the second answer to your lordship's question, and that is, it is perhaps for this purpose necessary to admit—perhaps not at all undesirable to admit—that the Dominion had the sole treaty making power, that that power did not reside with Ontario; but inasmuch as the making of such a treaty involved the dealing with the property of Ontario, the consent and concurrence of Ontario would be necessary in the making of any such treaty.

The learned counsel then deals with the questions of the conventional boundary, the surrender of Rupert's Land by the Hudson Bay Co. and the acquirement of the whole territory instead of enough only for the right of way of the Canadian Pacific Railway because the land was of so little value. He then criticizes the judgment of the Exchequer Court reading from pages 482-5 of the report in 10 Ex. C.R. and proceeds.

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Here your lordships are called upon to administer the *lex loci*, because it is a contract with regard to lands in the Province of Ontario, and it is a law of Ontario that the Court of Exchequer and your lordships must administer in disposing of these questions. Then after referring to the statutes which the Dominion and the Province of Ontario passed and which enabled this controversy to be brought into the Court of Exchequer, his lordship says: "I agree with Mr. Shepley that the mere fact that there is a controversy does not give the court authority to decide against the province simply because it should think that as a matter of good conscience and honourable dealing the province, having derived the benefit from the treaty, should relieve the Dominion from a proportionate part of the burden arising therefrom; that it is not simply a question of what the court might think to be fair in the premises without regard to the principles of law applicable to the case."

So his lordship disclaimed any intention or right to adjudicate upon the grounds of conscience merely.

"At the same time," he said, "as Mr. Newcombe pointed out the question arises between governments, each of which within its own sphere exercises the authority of one and the same Crown. For that reason one cannot expect the analogies of the law as applied between subject and subject to be perfect or in every way adequate to the just determination of the case." I do not know just what his lordship means by that, but I think it answers itself in the subsequent part of the case because he comes to the conclusion that for the purposes of this controversy the Dominion and the province are upon the same footing as two subjects. Then after that he deals with the question of what was

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cline such benefit, and it had accepted it, then the province would have been liable for its bare proportion. But that is not the case. The burden of the Indian title was removed from these lands before it was determined whether any part of them was within the province or not. When it was decided that a large proportion of such lands was within the Province of Ontario, there was nothing the province could do but accept the lands and administer them free from such burden."

Then he refers to the *Ruabon Case* (1) and he says the principle which that case lays down, "is, I think, as clearly applicable to the transaction of the Dominion and Provincial Governments as it is to those which occur between individuals."

So far your lordships will see that everything he has said is in favour of the contentions which we are making. Then he says: "If the Parliament of Canada should appropriate and the Government of Canada should extend public moneys of the Dominion for Dominion purposes, with the result that a province was benefited, and there was no agreement with the province or request from it, then it would be clear that the province was under no obligation to contribute to such expenditure or to indemnify the Dominion against any part thereof." That is at page 491. That is as strong a statement as anything that can possibly fall from us in the course of this argument. "Equally it seems clear that if the Parliament of Canada should appropriate and the Government of Canada should expend the public moneys of the Dominion for a provincial purpose for the benefit of a province, there being no agreement with the province or

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request from it, no obligation would arise on the part of the province to contribute towards such expenditure or to re-imburse the Dominion for any part thereof."

He carries it a step farther. He is assuming here that the Dominion had, with the intention of benefiting the province and, therefore, of carrying out some provincial purpose or some provincial object, expended moneys, there would be no right to contribution or indemnity against the province without the previous acquiescence of the province. "The principle would apply as well to expenditures made by a province, with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary and no obligation to contribute would arise."

Then comes the principle upon which he has decided this case and that I venture to criticize, respectfully but strongly. He says: "The present case appears to me to differ from those stated in some material respects. At the time when the treaty was negotiated the boundaries of the province were unsettled and uncertain." That is common ground, of course. "The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That, of course, did not affect Ontario's title to such part of the lands claimed by the company as were actually within the province. But on the admission of Rupert's Land and the North-Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had the right to administer. And with re-

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spect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analogous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person."

I have always been unable to understand why the Hudson's Bay surrender was adopted as the basis of this judgment. Every word that is said with regard to the Hudson Bay surrender is equally applicable to the Indian surrender. The Dominion did not acquire any title by either, but by either or both it thought that it got some title. I do not know why the Hudson's Bay Company surrender was the one picked out rather than the Indian surrender. Either would have answered the purpose which the Hudson's Bay Company surrender is made to do in this judgment. What he says is, it is true the Hudson's Bay could not give you any title, it is true you did not get any title but you got into the position of a *bonâ fide* possessor or purchaser of Ontario lands. By virtue of what? The transfer or the surrender of those lands by the Hudson's Bay Company to you. Then what follows? "The question of the extinguishment of the Indian title in these lands could not, with prudence, be deferred until such boundaries were determined." It could not, of course, having regard to the national objects to be served by the treaty. It could with reference to the provincial objects. As Mr. Justice Burbidge himself has said, the lands were not then wanted for settlement or any other purpose and the surrender was not obtained because of that; the surrender was obtained because it served the national purposes to which reference has been made. "It was necessary to the peace,

order and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion, and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection, and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person, in consequence of unskilful survey, or in the belief that the land is his own, makes improvements on lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor."

IDINGTON J.—If it existed in law already, why was there a necessity for this statute?

Mr. Shepley: That seems to me an entirely pertinent question. If there ever could have been a right at law, if there ever was, why were these statutes passed? The creation of any lien or right of that kind required a statute, but you cannot find in our law, in the law of Ontario or the law of England any such right apart from the statute.

Then, my lords, how does Mr. Justice Burbidge conclude? At page 495 after referring to what is laid down in *Beaty* v. *Shaw*(1), he says: "It appears, therefore, that if the question in issue were to be determined by analogy to the law of Ontario applicable to

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individuals, the province could not maintain its counterclaim for the moneys which the Dominion collected as revenue from the disputed territory, without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the charges incurred in extinguishing the burden of the Indian title; but that it is, to say the least, extremely doubtful if this equity could be enforced in an action by the Dominion against the province."

Let me pause there for a moment. My learned friend has already pointed out to your lordships how utterly foreign to this controversy is the question arising on the counterclaim. By the conventional boundary agreement the Dominion and the province mutually undertook with each other in the event of the boundary award determining or the boundary dispute resulting in shewing that the territory which had been administered did not belong to the person administering, to account for all the revenues they had derived from the territory during the course of that administration. It was just as simple as that, and our counterclaim says to the Dominion, in the course of our administration under the conventional boundary agreement, of the territory which that agreement assigned to your administration and management, you derived certain revenue and you undertook under that agreement to account, that is, if we turned out to be the owners of the land and entitled to those revenues, to account to us accordingly. That is our counterclaim. What has that to do with the Indian title or any question resting upon contract? If we brought an action against the Dominion upon a promissory note, could the Dominion say, your coming into court against us on that promissory note gives us an oppor-

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munity of setting up every equitable claim and having you refused relief unless you agree to it? Now that is what this case has been decided upon. That is the point which has been taken by Mr. Justice Burbidge and upon which the case has been decided.

Then, my lords, he goes on to deal with what is no doubt at the bottom of all this litigation. In the course of the delivering of the judgment in the *St. Catharines Milling Case*(1), Lord Watson used this language, and I will read the whole of two sentences here rather than confine myself to the one which is the foundation of this claim. "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercised their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit."

IDINGTON J.—Is there any track of that having been argued?

Mr. Shepley: I will tell your lordships how that is. I was reading from page 60 of the report. In order to determine the weight to be given to that, let us see what the St. Catharines litigation was about, what the issues in it were, and what place in the adjudication of those issues this obligation had. As I told your lordships, the Dominion, notwithstanding the adverse

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result of the boundary dispute, claiming to have acquired the paramount title to that of Ontario by virtue of the alleged transfer of the Indian title under this treaty, issued a license to cut timber to the St. Catharines Milling Company in territory which was within that in question. The Attorney-General of Ontario brought an action in the courts of Ontario against the licensee, alleging that the licensee was trespassing upon Crown lands belonging to Ontario and obtained an injunction restraiuing that trespass. The Dominion was no party to that at all and the sole question for adjudication there was whether or not the St. Catharines Milling Company, the liceusees, setting up as it did the license of the Dominion, justified the acts of trespass. That is, iu other words, whether the licensee had acquired a right to cut that timber as against the rights that Ontario had by virtue of the license issued by the Dominion. That was the sole question. I will give your lordships a reference to the case in its various stages. Your lordships will find it first in 10 Ontario, at page 196. That is the decision of the Chancellor, a very lengthy decision and your lordships are very familiar with it no doubt. I only refer to it because I want to shew just what the Chancellor had in his mind with regard to the very question which Lord Watson afterwards expressed himself upon. At page 235 of the report he says: "In the present case, my judgment is, that the extinction of title procured by and for the Dominion enures to the benefit of the province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the province to this as part of the public domain of Ontario.

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"Whatever equities—I use this word for want of a more suitable one—may exist between the two governments in regard to the consideration given and to be given to the tribes, that is a matter not agitated on this record."

That case went to the Court of Appeal and came to this court and then to the Privy Council and up to that time the Dominion had not been a party to the controversy at all. Of course it goes without saying that none of the evidence which is on the present record before your lordships was before either the Chancellor or either of the appellate courts. There was not a word of the evidence which Mr. Justice Burbidge heard or which is before your lordships to-day with regard to the circumstances under which the treaty was negotiated. The whole question was: Did the treaty confer upon the Dominion such a title as was paramount to that of Ontario, and by reason of that paramount title was the license of the alleged trespasser a license which authorized him to do what he did and which effectively answered the claim of the Province of Ontario for an injunction?

Then what happened in the Privy Council is this and it is stated in the judgment. I will take the statement from the judgment. At pages 52 and 53 Lord Watson says: "Although the present case relates exclusively to the right of the Government of Canada to dispose of the timber in question to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the Province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment

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of the court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case, raising the legal question in dispute. The Dominion Government elected to take the first of these courses and their lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario." They appeared upon that intervention; they intervened in the *St. Catharines Milling Company Case*(1) on that appeal and they argued that the St. Catharines Milling Company ought to succeed in that appeal; that is, that the St. Catharines Milling Company's license gave a valid right to cut the timber as against any right on the part of Ontario. The whole question was argued there and that is the whole question raised upon that record, and in the result the order that was made simply dismissed the licensees' appeal and no more. It made no declaration between the Dominion and the province. Your lordships have upon this record the formal judgment before you. All that the formal order of the Privy Council did was to dismiss the licenseholder's appeal. The whole thing done was to dismiss the appeal.

DUFF J.—Is there anything to shew, Mr. Shepley, that this statement of Lord Watson's was the result of any concession or confession made on behalf of the province?

Mr. Shepley: We thought we had here a copy of the shorthand notes of the argument; unfortunately we have not, but it can be found and given to your lord-

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ships, or a reference to the sessional papers in which it will be found. I can tell your lordships from recollection—because of course we studied that matter very carefully—from time to time spasmodic attempts during the argument were made to introduce that discussion and, in the *St. Catharines Milling Co. Case*(1), invariably the court said, "We have nothing to do with that, that does not arise in this appeal; it has not to do with any question as to whether or not Ontario ought to bear any portion of the burden." That was during the argument. Then to say, my lords, in these circumstances, that the Privy Council has gone out of its way, without any evideuce before it whatever and in a case where the question was not raised, to determine our rights, rights between the Dominion and the province, was going much farther than it was possible to go. No doubt that dictum is the foundation of this litigation and your lordships will find, I think, that the right of the Dominion in this statement of claim is in the words of the dictum. We say it cannot be binding between the parties in this controversy; that was not a controversy between the Dominion and the province and there was no estoppel.

DAVIES J.--What was the controversy? There must have been some or they would not have been allowed to intervene.

Mr. Shepley: Whether or not the right of Ontario against the licenseholder should be sustained. There was nothing before the Privy Council to indicate the circumstances under which the Dominion Government had extinguished the title, whether it had done that for the benefit of Ontario or for reasons such as are shewn to your lordships to-day. They could not have

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known whether Ontario acquiesced or was consulted or not.

My learned friends have found a good deal of comfort in the civil law, the law of *negotiorum gestor,* but that is not our law. Apart from that, there was no mandate, no commission from Ontario to the Dominion to go and extinguish this title on behalf of Ontario and no ratification.

DUFF J.—Except such mandate as the "British North America Act" would give the Dominion. Though that is going back to the same thing.

Mr. Shepley: Yes, my lord, perhaps that is coming back to the same point again. I have tried to shew how any mandate from the "British North America Act" can only be construed as a mandate to deal with the lands of Ontario with the concurrence of Ontario. You cannot go adversely to Ontario and deal with Ontario's rights. What Mr. Justice Burbidge says with regard to that statement, at page 496, is—and I find it very difficult to understand exactly what he means by it—"So far as the questions in this case relate to the extent to which the province is liable to contribute to the expenses incurred by the Crown in fulfilment of the obligations created by the treaty this case, no doubt, differs materially from the *St. Catharines Milling and Lumber Company's Case*"(1). That is what we say. We say the two cases raise entirely different issues. Then he goes on to say: "But with respect to the principal question at issue, namely, whether the province is liable to contribute anything, this case presents, I think, no new fact or aspect." I confess I am utterly unable to understand that. First he says that to the extent to which the province is

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liable to contribute there is a new case, but with respect to the question of whether it is liable to contribute anything there is no new factor. I should have thought that neither of these issues was before the Privy Council. Then he says: "The province's main defence here is that it was not a party to the treaty." That is not our main defence. Your lordships have heard elaborated, at perhaps too great length, what we think our defences are, but your lordships have not, I am sure, got the idea that our main defence is that we were not a party to the treaty. That is one of our comments upon the situation, of course.

Then he says: "By the order which gave the appellants leave to bring the judgment of that court under review, Her Majesty was pleased to direct that the Government of the Dominion should be at liberty to intervene in the appeal or to argue the same upon a special case, raising the legal question in dispute. The Dominion Government elected to take the first of these courses, with the result that between the Dominion and the province there was no formal judgment on the questions at issue between them." Well, the question at issue between them was the question at issue between the province and the licenseholder. There was no other question. You could not extend the record by mere intervention on the licenseholder's appeal. The record could not be expanded by the intervention of the Dominion. Then he says further: "In the *St. Catharines Milling and Lumber Company's Case*(1) the Province of Ontario stood in the position of a plaintiff; and as between the province and the Dominion the views of their lordships as to the province's liability to indemnify the Dominion

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may, I think, with fairness, be taken as a part or condition of the judgment of the province. although such views found no place in the formal judgment pronounced." That again I am unable to understand. The judgment was a judgment dismissing the licenseholder's appeal. I do not know whether Mr. Justice Burbidge means that they would have allowed the appeal if they had not imposed this condition upon Ontario. There is no indication of any such view in anything that I have been able to find in the record.

One other question I propose to trouble your lordships with and that is the question which has already been quite fully covered, perhaps, by my learned friend Mr. Ritchie, namely, whether or not upon the hypothesis of this judgment it was essential that the relative part played by the various considerations moving the Dominion to this treaty should have been played. In other words, in 1873, that all the elements entering into the negotiation of the treaty, which Mr. Justice Burbidge speaks of, the obligation imposed by the "British North America Act," the obligation imposed by the Hudson Bay Company's surrender, the obligation imposed by the terms made with British Columbia when British Columbia came into the Union and the surrender of the title to this barren piece of territory as it was supposed to be, that these considerations upon the theory of this judgment entered into the treaty. Then why is the Dominion to recover against Ontario any more than a measured proportion having regard to the respective values of these different considerations? Mr. Justice Burbidge acceded to that in the principal judgment; he said it was difficult of ascertainment, but further evidence might be given. Further evidence was given, but not upon that

point. The thing is incapable of measurement, that is why. The Dominion made no attempt to produce any evidence upon that subject. We venture to think that it is inherently incapable of measurement; that you cannot say at this time—that indeed at any time you could not have said—this great project the trans-continental road, the Canadian Pacific Railway Company, this great territory, Rupert's Land, that we want to open up and want a road to, the pacification of the Indians, the acquisition of the title to the few barren rocks that they have got here, you cannot put those together, you never could have put them together and said, so much for this and so much for that and so much for the other. The thing is unthinkable, that you can sit down and make a sum in arithmetic of propositions such as these. If that is so, how can the Dominion hope to recover anything here?

DAVIES J.—Does the extinguishment of the Indian title depend at all upon the value of the land? I suppose there would be some evidence of general dealing.

Mr. Shepley: That is a point that I had almost overlooked. It is said by Mr. Justice Burbidge that we know pretty generally what other treaties have cost; but we do not know what was the value of the lands those treaties covered, nor do we know the value of the lands covered by this treaty. You cannot compare the price paid for a farm in a county away north with the value of a farm situated along the River St. Lawrence. You must have some evidence. Supposing the fact to be—I do not say it is at all, but it is fair to test the question that way—that the whole of the 30,000 square miles of land which Ontario got the Indian title extinguished in, supposing the whole value of that was nothing whatever, that it was all

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rocks like the north shore of Lake Superior without any valuable mineral, this judgment must have proceeded upon precisely the same principle and Ontario would have had to pay for land which she never would have opened up for settlement; she would have had to pay because the Dominion extinguished this title not for the purpose of getting the land at all, but for the purpose of the construction of these great national works.

Newcombe K.C. opens for the respondent. After referring to the material parts of the treaty and to the conventional boundary agreement the learned counsel combats the argument that the land surrendered was of no value, contending that the grounds on which it was based were not sufficient and then proceeds as follows.

Before going further with the question in difference here, let us consider what was the state of the title at Confederation and what sort of an asset did the Indians have in this territory. That has been pretty clearly defined by the numerous cases which have been before the courts and before the Judicial Committee, I think. The judgment of Chief Justice Strong in the *St. Catharines Milling Co. Case*(1), which was a dissenting judgment, is nevertheless a very instructive judgment with regard to the nature of the Indian title, and it is the judgment, of all the judgments which were pronounced in the *St. Catharines Milling Co. Case,* which came nearest to accord with that of the Judicial Committee. I mean to say, he took the view that the title was in the Dominion but, so far as considerations of Indian title, the quality of the Indian title, the

(1) 13 Can. S.C.R. 577.

nature of the Indian reserves and considerations of that sort are concerned, which are more or less material here, the view of the learned Chief Justice coincided entirely with that later expressed by Lord Watson in appeal.

Now it seems to have been supposed in the Ontario courts that the Indian title was nothing except such as might be recognized as a matter of grace; that they had no legal right; that they might be recognized or not, as the authorities determined. But that is not the case, as shewn by Chief Justice Strong. His judgment is a long one and I do not propose to refer to it at length.

Now, in the judgment in the *St. Catharines Milling Co. Case*(1), at pages 58 to 60, it is said: "The Crown has all along had a present proprietory estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the Union land vested in the Crown, subject to an interest other than that of the province in the same within the meaning of section 109, and must now belong to Ontario in terms of that clause unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." That is to say at Confederation this territory, in so far as it ultimately turned out to be within the boundaries of Ontario, was by force of the "Confederation Act" vested in Ontario subject to an interest other than that of Ontario therein. That is the Indian interest. Now that is further explained in *Attorney-General of Canada* v. *Attorney-General of Ontario*(2), known as the *Robinson Treaties Case,* and there Lord Watson said, at pages 210 to 211, that the expression in sec-

(1) 14 App. Cas. 46. (2) [1897] A.C. 199.

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tion 109, "an interest other than that of the province in the same appeared to their lordships to denote some kind of right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the province." Therefore, previous to this surrender, from the time of Confederation down to the time of the surrender the Indians had an interest in the land other than that of the province and an interest capable of being vindicated in competition with the beneficial interest of the province. So that, my lords, they had a title, as I submit, of occupation and possession; a title which made it legally impossible for the province to administer the lands, to make grants and administer the lands in the way in which they have administered them since the surrender was made.

Your lordships will see, too, by the proclamation of 1763, which is the evidence of the Indian title here, that the Government was prohibited from dealing with these lands, from making grants, or doing anything with them pending the cession of the Indian title. The proclamation declares that "no governor or commander-in-chief of any of the new colonies of Quebec, East Florida or West Florida do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the boundaries of their respective governments, or until our further pleasure is known, upon lands which, not having been ceded or purchased as aforesaid are reserved to the Indians or any of them. It is further declared to be our royal will to reserve under our sovereignty and protection all the lands not included within the limits of our said three governments or within the limits of the lands granted to the Hudson Bay Company." Therefore I

submit that the Indians had title inconsistent with the right of Ontario to do any of the things with this land which she immediately proceeded to do after this treaty was made.

Counsel then quotes at length from the speech of the Lieutenant-Governor on opening the legislature of Ontario, in January, 1874, in which he speaks of the boundary question and refers to these lands as "the important territory in dispute," and to a report from Mr. Laird to the governor in council dated June 2nd, 1874, quoting from it as follows:

"That as the Indian title of a considerable part of the territory in dispute had not then been extinguished, it was thought desirable to postpone the negotiations for a conventional arrangement, under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians."

That is very strong evidence, my lords, as to what was taking place. The project was the settlement and administration of this territory. There was the mineral wealth, the timber and the settlers going in and contention and strife to be avoided, and there was the question of the boundary to be settled. Negotiations had been begun and then, according to this report, by mutual consent between Ontario and the Dominion it had been conceded as expedient that those negotiations should be postponed pending the surrender of the Indian title, which, of course, the Dominion undertook to bring about as speedily as possible.

Then he says: "That barrier being now removed, the undersigned has the honour to recommend that as some considerable time must yet elapse before the boundaries of Ontario can be finally adjusted, it is desirable in the meantime to agree upon conventional

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boundaries, otherwise the development of that important portion of Canada lying between Lake Superior and Lake of the Woods will be seriously retarded, as applications to take up lands in that section are being constantly made, and the inability to obtain recognition of claims from either the Government at Ottawa or Toronto is impeding the settlement of the country."

Then there is a recommendation of the appointment of Commissioners and this report is communicated to Ontario under order in council printed on the following page and then there is a memorandum of supplementary agreement, the conventional agreement, where it is mentioned that Ontario acted on the suggestion of the Privy Council by appointing a Commissioner. They acted on the suggestion set out in this report of Mr. Laird. There is no question by Ontario that that does not represent the state of the facts as they existed.

There can be no doubt, it seems to me, that this project was mainly in aid of the settlement of the country. What sort of a position would it have been in? My learned friend says: "Oh, they wanted to build a railway through there; they wanted to build a railway and they might just as well take a release of the whole thing." Suppose they had stipulated with the Indians, as they might have stipulated with them, to get the surrender of the right of way of the Canadian Pacific Railway and gone through there with that and left the whole thing. How much less, I would like to know, would Ontario have had to pay if she waited and got a surrender from the Indians afterwards, after the settlers began to come in and the railway to go through there?

Then, after referring to a letter from the Under

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Secretary of State to the Lieutenant-Governor of Ontario, dated July 15th, 1874, respecting the selection of Indian reserves under the treaty and asking for a schedule or plan of the mineral lands in the territory surrendered and the reply thereto on July 31st enclosing such plan he proceeds:

Now we pass from that to the statutory agreement, to the Dominion statute of which the agreement is a schedule. The statute I do not think is set out in the case, but the agreement is. The Dominion statute simply contained one section, that it shall be lawful for the Governor in Council, if he shall see fit, to enter into an agreement with the Government of Ontario, according to the schedule to this Act, and such agreement when entered into and every matter and thing therein shall be as binding on the Dominion of Canada as if set forth by statute. The Ontario Act I have not got, but presumably it is to the same affect.

Now this agreement is with respect to what we call the special reserves. Your lordships are aware that under the treaty by the first provision, the first covenant on behalf of the Crown, the Crown was to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the Indians. "Also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band of Indians." Then the Dominion proceeded to lay aside these reserves. You see the effect of the treaty or surrender as ultimately held by the

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Judicial Committee, was to vest the whole title in Ontario. The Indians did not reserve or except their special reserves; they surrendered their original Indian title, the title which existed under the proclamation; they surrendered the whole thing to the Crown and it enured to the benefit of Ontario. Therefore Ontario held the whole freed from their interests. The Indians reserved nothing, but they took a covenant from the Crown that the Dominion would give them special reserves. The Dominion did so without any special acquiescence by Ontario. I have shewn your lordships that there was some reference to the subject because they did not want to give them the mineral lands, but without Ontario becoming bound the Dominion laid aside these reserves, and then questions arose, Ontario claiming that we had set them aside out of their Crown lands in which the Indians had no interest, we had taken their Crown lands and made reserves of them. They said we had no right to do that. That was ultimately conceded, but the Indians had been put on these reserves and were occupying them in fact, and the situation had been dealt with and it was dealt with by this agreement. Now this agreement recites the treaty. "Whereas by articles of a treaty made on the 3rd of October, 1873, between Her Most Gracious Majesty the Queen, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of Manitoba and the North-West Territories," and so on, "the Ojibeway Indians, inhabitants of the country within the limits thereinafter defined and described by their chiefs chosen and named as thereinafter mentioned, of the other part, which said treaty is usually known as the North-West Angle Treaty No. 3, the Salteaux tribe of the Ojibeway Indians and all other Indians inhabiting the country therein defined and

described surrendered to Her Majesty all their rights, titles and privileges whatsoever to the lands therein defined and described on certain terms and considerations therein mentioned." Now that was the recital they made of it in 1894, and it is a correct recital. It states the effect of the treaty precisely, in a solemn agreement ratified by the statutes of both Governments; and it says what is apparent on the face of the instrument, that they did surrender these to Her Majesty on certain terms and considerations therein mentioned. That is, they gave up their title to the Crown and the Crown in consideration of that gave them certain covenants, and I am going to refer to that again. One of those covenants is as much a consideration for this transfer as another. There is no method of separating them. Then it goes on with further recitals and the last one is: "Whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, and the Governor-General of Canada in Council and the Lieutenant-Governor of Ontario in Council have given authority for the execution on their behalf respectively, pursuant to the said statutes of an agreement in terms of these presents." It is therefore agreed as follows: "With respect to the tracts to be from time to time taken up for settlement, mining, lumbering, or other purposes, and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not includ-

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ing the reserves to be made thereunder do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves."

There Ontario is saying that inasmuch as this treaty has been made, these lands have become provincial Crown lands and the Indian rights have been extinguished.

Now, by lords, there is the other agreement made with regard to these reserves. That is the agreement between Mr. Blake and myself made in London. "Agreement between counsel on behalf of the Dominion and Ontario, intervening parties upon the appeal to the Judicial Committee of the Privy Council in *Ontario Mining Co.* v. *Seybold et al.*(1).

"As to all treaty Indian reserves in Ontario (including those in the territory covered by the North-West Angle Treaty) which are or shall be duly established pursuant to the statutory agreement of 1894, and which have been or shall be duly surrendered by the Indians, to sell or lease for their benefit, Ontario agrees to confirm the titles heretofore made by the Dominion and that the Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate.

"The Dominion agrees to hold the proceeds of such lands when or so far as they have been converted into money upon the extinction of the Indian interest

(1) [1903] A.C. 73.

therein subject to such rights of Ontario thereto as may exist by law.

"As to the reserves in the territory covered by the North-West Angle Treaty which may be duly established as aforesaid, Ontario agrees that the precious metals shall be considered to form part of the reserves, and may be disposed of by the Dominion for the benefit of the Indians to the same extent and subject to the same undertaking as to the proceeds as heretofore agreed with regard to the lands in such reserves.

"The question as to whether other reserves in Ontario include the precious metals to depend upon the instruments and circumstances and law affecting each case respectively.

"Nothing is hereby conceded by either party with regard to the constitutional or legal rights of the Dominion or Ontario, as to the sale or title to Indian reserves or precious metals, or as to any of the contentions submitted by the cases of either Government herein, but it is intended that as a matter of policy and convenience the reserves may be administered as hereinbefore agreed."

This agreement was made and acted upon and it settled the differences existing between Ontario and the Dominion in that case, so that while it was argued by the parties it was not argued by the Dominion.

DUFF J.—I see that presents a point that did not occur to me before. You put it, but I did not appreciate it. The making of these reserves under the treaty involved giving the Indians an interest in the land which even after the *St. Catharines Milling Co. Case* (1) might have been contended at all events to be a

(1) 14 App. Cas. 46.

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greater interest than they had before the treaty, than the original interest.

Mr. Newcombe: Yes, my lord.

DUFF J.—And that would necessarily involve Ontario?

Mr. Newcombe: Yes. I may be in conflict with some decisions, but not in conflict with any decision of the Judicial Committee—doubtless in conflict with the Chancellor of Ontario, at all events—but I submit that with regard to those special reserves which are set aside for the Indians uniformly upon the surrender of their original title in the large areas over which they claimed it, in those special reserves which are set aside, the Indians acquire a larger interest, a different interest from the interest which can be conveyed by surrender to the Crown for sale.

DUFF J.—That is a disputed point.

Mr. Newcombe: I admit it is a disputed point, but the reasons in favour of that proposition appeal very clear to me. What happened in the *Seybold Case* was this: One of these special reserves, "38B" which had been laid off for the Indians by the Dominion without any reference to Ontario and out of the Ontario Crown lands, was found to contain mineral and it was deemed desirable that it should be sold and converted into money so that the Indians might have greater enjoyment of their property. It was surrendered under the terms of the "Indian Act" to the Dominion and sold to this mining company who thereupon took up the mining, and Ontario made a grant, I think, of the same property. The question arose as to whether the Ontario patent was to prevail or whether the Dominion patent was to prevail. It was held or assumed that this was a good reserve. It was assumed by the courts

below, at all events by the Chancellor, and I think by this court too; it was not decided that it was a good reserve, but it was disposed of on the assumption that it was a good reserve. And it was said that when the Indians surrendered that to the Dominion for sale that a patent could only be made by Ontario and therefore the Dominion patent was no good, and the Ontario patent was good. Of course that was a serious question and upon that and upon the denial of Ontario that the Indians were to have the metal in these properties the Dominion intervened and proposed to argue that question in the Judicial Committee, but the settlement was made and the Committee decided what, of course, was the turning point of the case, that there was no reserve there, that Ontario had to acquiesce in the reserve, that the reserve never was laid off, and the point upon which the Chancellor had decided the case had never arisen.

Now, in dealing with this case and what I have to say in the following part of my argument, it must not be forgotten that it is not like an ordinary case between individuals. There is only one Crown and really only one party to the case; while we speak of Ontario and Quebec and the Dominion and so on, they are not separate and independent governments like the governments of the United States.

Each represents the same Crown in respect of separate departments of the same government. As illustrating that to some extent I want to refer to a case, *Williams* v. *Howarth*(1). That was a case where the Government of New South Wales, I think it was, sent a force of soldiers to the war in South Africa, and they had contracted with these soldiers to pay them

(1) [1905] A.C. 551.

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certain rates per day during the period of their enlistment. When these men reached South Africa they fell under Imperial command and Imperial regulations and they got certain allowances, certain pay from the Imperial Government for their services there. I do not remember what the amounts were, but we will suppose that the Government of New South Wales was to pay them ten shillings a day and they got four shillings from the Imperial Government. They went back, having served out the enlistment and one of these men brought his action claiming his ten shillings a day. They said, you have received four shillings a day from the Imperial Government and we only owe you six, and that was the question before the court. The courts in the colony held that there were two separate transactions altogether, that the Government of New South Wales had contracted with this man to pay him so much. But when it went to the Judicial Committee, the Committee held that this was all a transaction on behalf of the Crown, that there was one Crown, not a Crown for New South Wales and another for the Empire and that the man was entitled to what he had contracted for with the Crown, and he had got so much and he was entitled to the balance. The decision, doubtless, would have been different if it had been the case of an allied power, if it had been some foreign government. But here was a matter of the same Crown.

That illustrates the point that I make as to the indivisibility of the Crown. In these circumstances the Dominion claims that Ontario, who received the benefit of the treaty, shall assume and discharge the burdens of the treaty and this seems to be, I submit, a proposition founded in common honesty and justice.

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But we do not have to rely on that solely because the right has been affirmed both in the Judicial Committee and in this court. I remember in arguing this case below I quoted an observation from a very eminent judge that seems to me to apply to this case better than it does to most cases, perhaps. He said that the business of a judge was to find a legal reason consistent with the conclusions of common sense. If your lordships approach this case with the idea of finding a legal reason which will give effect to the common sense idea, to the view which would ordinarily be taken by the man in the street, I do not think there would be any difficulty about the result to which your lordships would come; because there was this very valuable territory with an encumbrance upon it which stands in the way of Ontario's enjoyment, removed at the expense of the Dominion by the payment of a comparatively very reasonable amount, Ontario entering in and taking the benefit and denying the obligation to make compensation.

Now let me refer to the words of Lord Watson in the *St. Catharines Milling Co. Case*(1). "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

GIROUARD J.—Is that a dictum?

Mr. Newcombe: No, my lord, we say not.

IDINGTON J.—How do you shew that it is not?

Mr. Newcombe: Will your lordship allow me to refer to the judgment of this court upon that point in

(1) 14 App. Cas. 46.

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the *Robinson Treaty Case*(1). That was the case of a treaty made in 1850, a case of a treaty very much the same as this, made between the Indians and the old Province of Canada, whereby the Indians surrendered a territory situate wholly in the Province of Ontario and there were annuities and continuing benefits to the Indians under that treaty which had to be discharged after Confederation. The Dominion became pledged to do that by reason of the "British North America Act." This was an obligation of the old Province of Canada which was cast upon the Dominion, but inasmuch as these payments constituted part of the excess debt over the amount limited by the "British North America Act," there was an express statutory obligation by Ontario and Quebec jointly to indemnify the Dominion. Now in this case the Dominion based its claim upon the *St. Catharines Milling Co. Case*(2), that is this very judgment of Lord Watson wherein he said, "seeing that Ontario receives the benefit she must bear the burden." The Dominion said that seeing Ontario got the benefit of the Robinson Treaty made in 1850, because the whole property fell to her afterwards at the division, at Confederation, she got the territory discharged from the Indian claim, and seeing that that property fell to Ontario she must bear the burden and, therefore, the Dominion was entitled to indemnity solely from Ontario and the claim was made against Ontario. The arbitrators held that Ontario was responsible. That was reversed in this court and the Privy Council upheld this court. Because of no reason other than the "British North America Act" had come in in the meantime and con-

(1) 25 Can. S.C.R. 434. (2) 14 App. Cas. 46.

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verted this into a statutory obligation, it had put this obligation upon the new government of the Dominion and it provided that Ontario and Quebec, conjointly, should indemnify; therefore the proceeding had to be taken against Ontario and Quebec who, of course, had to indemnify conjointly, although Quebec, as far as that individual transaction was concerned, had no benefit whatever from the surrender. That was the action and it was argued in this court upon the authority of the *St. Catharines Milling Co. Case* (1). In the judgment of the court Chief Justice, Sir Henry Strong, says: "An argument against the Province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of the *St. Catharines Milling Company* v. *The Queen* (1). In that case there was an Indian surrender to the Crown, represented by the Dominion Government, made in 1873, subsequent to Confederation. The Privy Council held that this surrender enured to the benefit of the Province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the Province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the Province of Canada, which was to pay for them, and the present ques-

(1) 14 App. Cas. 46.

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tion only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities." In the case before the Privy Council the words are, "as between two departments of the government of the Crown" and "the most obvious principles of justice require." Now, my lords, there is no place here for the authorities which my learned friend quotes, that you cannot recover a payment made on behalf of a man unless it is made by his request. That is a general principle of the common law. The principle of the civil law is the other way. You can recover if a man gets a benefit. As between individuals you may say there are certainly exceptions in the common law to which I am going to refer. But you may say the general rule is to that effect and the general rule of the civil law is the other way. But here you have got a question between two departments of the same government and it is a question to be worked out according to the justice of the case.

Is this case going to be decided differently from what it would have been if the area had been in Quebec? Take the case of a restrictive building covenant and the division of the property afterwards, the one man getting a release. There is, perhaps, not so much difference, except in measuring the value of it. This question I submit is really one under the "British North America Act."

What we are doing here is to determine a controversy. Section 140 of the "Exchequer Court Act" founds the jurisdiction of this court. A statute passed by each giving the jurisdiction.

IDINGTON J.—On what ground are we to proceed under that Act?

Mr. Newcombe: You are to proceed, my lord, to

give effect to the principle that has been laid down heretofore by the Committee and by this court; to have regard to the "British North America Act" and the constitutional situation and the fact that there are two departments of the same government, with a controversy and you are to try to determine that controversy according to justice.

That being so the release or surrender having been brought about by the act of the Indians, concurred in and authorized by the Dominion, as it must have been, and upon considerations involving the payment of money which the Dominion undertook to execute, the lands were relieved of the Indian title for the benefit of the province, as the Judicial Committee has determined.

The liability of the province may rest upon either one or other of two views and I will put them both to your lordships. That is, it may rest upon some other views, some of the views which have been discussed, or it may rest upon the view which the learned judge has taken, although I am not going to argue that; I leave that with your lordships as to how far it may commend itself to your lordships' judgment. But this treaty I submit, may have operated to vest the title in Ontario and impose an obligation upon Ontario by virtue of the constitutional agency of the Dominion, in view of the peculiar circumstances of the case.

Either that or, the Dominion not being an agent in any sense, it made a contract which could only operate for the benefit of the province. And this contract being only capable of operation for the benefit of the province, became operative when the province came in and took the benefit of it, and, therefore, as a direct party became subject to the burden. Now these are

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the two views on either one of which the obligation may rest. I will deal with the first situation first.

Now, I submit that there is no constitutional anomaly or impropriety or anything which might not be fairly expected as the result of the perusal of a constitutional measure like the "British North America Act," in supposing that whether Ontario was a party to the surrender or not and irrespective of the measure of benefit, whatever that might be, derived by Ontario in the discharge of these lands from the Indian title, the payment of the consideration for the surrender should fall upon Ontario as the department of the King's Government in aid of whose title the surrender had been made. That is a no more extraordinary result I submit than that which took place in the case of *Williams* v. *Howarth* (1), about the soldier. What is the nature of the trust or interest other than that of the province in these lands arising out of the Indian title? The interest is in the Indians and the control and management of the lands and property is with the Superintendent-General of Indian affairs. That is, it is with the Dominion Government. The first legislation after Confederation with relation to Indians is the Act providing for the organization of the Department of State, 31 Viet. ch. 42, sec. 5. Section 5 says that the Secretary of State shall be the Superintendent-General of Indian Affairs and as such have the control and management of the lands and property of the Indians in Canada. Then by section 8 of the same Act it is provided that no release or surrender of lands reserved for the use of the Indians shall be binding except assented to by the chiefs in the presence of the Secretary of State or a

(1) [1905] A.C. 551.

person authorized by him and accepted by the Governor-General. That is to say, in the presence of an officer authorized by the government and who must be accepted by the government. Now there can be no doubt as to the legislative authority of the Dominion to pass these Acts, they being given the exclusive legislative authority over these lands which are reserved for Indians. That is, lands reserved for Indians within the meaning of that expression as used in the "British North America Act," as determined by the Judicial Committee in the *St. Catharines Case* (1). That had been a matter of debate. It was held otherwise by all the courts here, before that was determined. So that was the legislative position. Then section 10 of the same Act provided that no release or surrender of any such lands to any party other than the Crown shall be valid. That was in 31 Vict. Then in 1873 the Act was passed, assented to on the 3rd of May, 1873, establishing the Department of the Interior. Chapter 4, section 3, provides that the Minister of the Interior shall be the Superintendent-General of Indian Affairs and shall, as such, have the control and management of the lands and property of the Indians in Canada. The general purpose of that Act so far as the Indians were concerned was to transfer the administration from the State Department to the Interior Department. That was the legislation as it stood at the time this treaty was made and, of course, the whole thing is continued in the "Indian Act" at present. The present statute is chapter 81, R.S.C. 1906. Therefore in view of that legislation I say it was not competent to Ontario to make a treaty with the Indians or to obtain any trans-

(1) 14 App. Cas. 46.

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fer or surrender from the Indians. Neither has the Provincial Government the right to require the Dominion upon any terms to obtain a surrender or refrain from obtaining a surrender. The whole administration is exclusively in the hands of the Dominion Government.

Now, is it not possible to provide by the use of the legislative power that the Indians shall enjoy in some other form the interest which they have in their lands and can it not be provided that they shall have that in money rather than in lands even if the province is unwilling? Does not that follow? Wherein rests the jurisdiction, for instance, with regard to Indian lands similar to that which the Imperial Parliament exercises in passing a "Settled Lands Act," as to tenancies? A tenant for life, a settled estate and a remainderman, the tenant for life has his interest in the land which he can only enjoy as land until the legislature comes in, as it does, and says he can sell it and convey the whole interest and he enjoys the value of that estate in money. Is it not competent for the Dominion to do that with regard to the Indian title?

We find the obligation to recoup the Dominion in the general intention of the Act. The Indians were scattered all over the country, from one end to the other, in various provinces. The same band very often inhabited different parts of the same province. It was necessary no doubt that there should be a uniform policy in dealing with them and that they should be under one legislative power and one executive power. At the same time they owned their property, if we may call it so, their territories, under various provincial governments. The only way to work it out was to put the whole thing, so far as legislative and execu-

tive power is concerned, in the hands of the Dominion Government. That being so, why should not the province on the extinguishment of the title, within whose lands the area happened to be, bear the burden of the extinguishment of the title? Is it not fair and reasonable? Is it not that which you ought to read into this constitutional Act as the apparent intention.

Now, the other view simply involves this, that it takes two parties to make a contract. It takes two parties to make a treaty. The province had the beneficial interest in the lands subject to the Indian title. The Indian title could not be transferred or assigned, but while it existed and was recognized by the law it was only capable of being extinguished; that is as it were, transferred to the province, so as to merge in the paramount title. Now the Dominion had no interest in the lands and no interest in the transaction at all, except as the guardian of the Indians for the purpose of seeing that their interests were safeguarded in any surrender that might be made. Consequently, if Ontario desired to have this surrender made, she could go to the Dominion and ask the Dominion to negotiate, or stand by while she negotiated with the Indians for a treaty whereby the surrender would be made, the Indians surrendering through the Dominion and Ontario accepting. Now that might have been done; they might have done it in that way and I am not so sure that they did not do it in that way. If Ontario had gone to the Dominion, and said, we want to open up this territory but we cannot touch it because of the Indian title and we want you to go to work and get the Indian title surrendered, and then they had gone, the three parties together, the Indians and Ontario being the contracting parties, the Dominion present as the guardian and trustee of

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the Indians as it were, and a contract had been made just as was made in this case between the Indians on the one side and the Crown on the other, the obligation of the covenants to pay and provide which are in this treaty would unquestionably have fallen on Ontario.

Then it was said that in the circumstances here Ontario was not a party. The Dominion made a contract with the Indians that nobody had anything to do with except Ontario. It made a contract in the name of the Crown. The Crown is the name that stands for Ontario just as much as it stands for the Dominion. It took an assignment to the Crown of property, which could not operate except in favour of the Crown, represented by Ontario, and it assumed in the name of the Crown a number of obligations in consideration of that transfer. That transfer was taken, communicated to Ontario, and what does Ontario do? Does she say, it is unreasonable, we don't want this, we had no part in this? No, she said, that is just the thing we wanted, we wanted to go in there, it is ours, it belongs to us, and she took advantage of it, made her grants, sold her timber, made her mining leases, and has administered the property from that day to this.

I put it first, that it is a matter that rested wholly with the Dominion; that is the way I argued it first, and that the Dominion could negotiate the treaty independently, as it must, make its terms and provisions and stipulations and take the surrender which then operates for the benefit of the province, and the consequence of that is that the province has to bear the burden. That is the one view of it. The other view of it is that the province cannot be bound with-

out its consent and then you have the contract made which operates when the province consents, and here there is no doubt that both antecedently and subsequently the province was anxious to assume the administration. It has been designated a principle of universal application that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing the burden; the contract must be performed in its integrity. Accordingly where a person adopts a contract which was made on his behalf, but without his authority, he must adopt it altogether, he cannot ratify that part which is beneficial to himself and reject the remainder, he must take the benefit to be derived from the transaction, *cum onere*.

Then so far as the question of area is concerned, his is exactly what happened; the judge puts a paragraph in his judgment in this way: "Now it is to be observed that whatever moneys have been expended under this treaty by the Dominion Government have been expended in respect of the Indians inhabiting a tract of land part of which only is within the Province of Ontario, and it is suggested by Mr. Newcombe for the Dominion that the province should contribute to such expenditure in the proportion that the area of the surrendered territory within the province, bears to the whole area surrendered by the treaty. There is no other suggestion on that branch of the case, and I do not see that any fairer or better rule could be adopted." No one could pretend to say that an acre of this land or the whole of it within Ontario is proportionately of any greater or less value than that without. There is an area of 55,000 square

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miles purchased, presumably each square mile of the same value; and one-third of that goes to the Dominion and two-thirds to Ontario. It is to be paid for proportionately.

That is all I wanted to say about the area, because my learned friend referred to it. Then the other question is equally simple, I think.

I refer to the terms of the treaty again. The Indians having surrendered this territory to the Crown, Her Majesty undertakes and agrees for, I think, nine different things. In the first place to lay aside these special reserves. Secondly, with a view to shew the satisfaction of Her Majesty with the behaviour and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of $12. Thirdly, to maintain schools for instruction. Fourthly, to suppress the liquor traffic. Fifthly, to distribute and pay annuities of $5 per head, yearly. Then to expend the sum of $1,500 per year for the purchase of ammunition and twine. Then to furnish agricultural implements; and an annual salary of $25 to the chiefs. Now that is all done in consideration, so far as the basis of the treaty is concerned, of the surrender of these lands. Now, my lords, I say you cannot go outside of that and imagine other considerations. All these things are referable to the surrender. None of them would have been undertaken as and when they were or at all if it had not been for the surrender. The only asset the Indians had was their interest in the land. That was the occasion and the only occasion for going there and bargaining with them. The best evidence in the record, to which I have referred, shews that the object was to let the settlers in and to get rid of this title. In other words that the trans-

action was what it professes to be upon the face of it, a transaction whereby they, on the one part, parted with an asset which they had in consideration of certain obligations which the Crown undertook. Now, my learned friend wants to make the tail wag the dog, because he reads this last covenant here; the undersigned chiefs solemnly promise to be good and loyal subjects, to obey the treaty and observe the law and all that sort of thing. That is what he says is the principal consideration, but what is the fact; that form is the usual form; if they had printed forms of treaties that would be printed in every one of them. It is a common form of covenant which they put in, because it is a good enough thing, no doubt, to impress upon these Indians that they ought to obey the law, but does any one suppose if they had had no title to surrender that we would have gone up there and paid a lot of money to them to take a covenant from them to keep the peace?

Here is a treaty made in 1871. This is a book that is in evidence called the Indian Treaties and Surrenders. On page 293 is a treaty with another tribe of Indians altogether, with the very same term in it. Word for word the same. "Do hereby solemnly promise and engage to strictly observe the treaty and behave themselves as good and loyal subjects."

Here is one in 1781, the 21st year of George III. Here is another treaty that I open to off-hand. It says that the undersigned chiefs do hereby bind and pledge themselves and their people to observe this treaty and maintain perpetual peace between themselves and Her Majesty's white subjects and not interfere with the property or molest the persons of Her Majesty's white subjects.

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Is it a question of dividing the consideration? What does my learned friend's argument involve? Does it involve more than this, that the time this surrender was taken was an inexpedient time, that it was taken too soon. The present position is, we have got so far in the argument that we are considering now what is Ontario to pay. Ontario is to pay the consideration of this treaty. The consideration I mean of the surrender. There was only one thing surrendered, only one thing dealt with so far as the Indians were concerned, and that is their title to this real estate. That is what passed. On the face of the treaty, as I have said, all the covenants we enter into are relative to that.

Whatever the motive was that actuated the Dominion, that had nothing to do with the Indians; the Indian was selling that for the best he could. Now they may say, you bought that too soon. I say we are the judges of the time when it was to be bought. But to say we paid any more for it because we wanted to build a railway or settle Hudson Bay claims or anything of that sort, that is not so on this evidence and your lordships, I submit, cannot find it.

Hogg K.C. follows. Your lordships are now seized, I think, not only of the facts of this case, but also of the principles which underlie our claim and contention. My observations will be directed more to the cross appeal, taking it for granted that my learned friend, my leader, in his able argument has placed the matter so completely before you that it will not be necessary for me to take up time.

The cross appeal arises in this way. It has been explained to your lordships that first there was a

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trial before the judge of the Exchequer Court, and the question that was then debated and decided was the question of general liability; whether there was a liability at all or not; whether Ontario was liable under the treaty. What his lordship found was this: "This court doth declare that the Province of Ontario is, in respect of the obligation incurred by the Dominion under the North-West Angle Treaty, No. 3, which involved the payment of money, liable to pay to the Dominion all sums paid by the Dominion which are referable to the extinguishment of the Indian title in the lands described in the said treaty in the proportion that the area of such land within the Province of Ontario bears to the whole area covered by the treaty," which we have discussed. Then followed a further consideration of the question of the classes of items under the treaty for which Ontario should be held liable, and what might be called a continuation of the trial took place. Evidence was taken upon the different items mentioned in the treaty itself, that is the different classes of expenditures which were undertaken by the Dominion, and upon that continuation of the trial, or as it was called, the further consideration of these questions, his lordship gave a judgment and by that judgment he decided as follows: that there was to be 305-493rds of specified expenditures made by the Dominion to or on behalf of the Indians, paid by Ontario. That direction has reference to the territorial area. In other words there was 49,500 square miles found by the evidence instead of 55,000 as it was generally stated, of which 30,500 miles were within Ontario. Then he says, these are the expenditures which the province should be liable to repay the Dominion (see p. 4). The judgment proceeds:

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"(*d*) In respect of the payments made by the Dominion for or on account of the present of $12 per head stipulated by the treaty to be paid to each man, woman and child of the bands of Indians represented at the treaty and claimed under the first item of Schedule A in the said statement of claim the sum of $5 per head."

Now we say that to the extent that he has allowed in favour of the Dominion, his judgment is right, but what we complain of is that he overlooked the instructions in the treaty and endeavoured to appropriate certain amounts which he said Ontario should be liable for and other amounts for which the Dominion should be liable itself, and he put it upon two grounds. One was that in any case where it had been the policy of the government of the Dominion or the policy of the Province of Canada to make allowances to the Indians as a matter of policy, in those cases Ontario should not be asked to pay.

Then the other ground that he places that judgment upon is that to the extent to which the payment of any of these amounts came within the proper administration of the Department of Indian Affairs, the province should not be liable. Now, of course, upon both of these his lordship was to some extent naturally and necessarily speculating. There was not evidence to support these exceptions which he made.

Take the question of schools. He excluded that, all expenditure for schools.

I say that upon the evidence there were no schools in this territory prior to 1873. There was nothing in the way of schools till this treaty was made, and then there were treaty schools or schools that were asked for by the Indians under the treaty.

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Then again, while it is a fact that there were schools for Indians in other parts of the country, and while the government were allowing the Indians to have schools in other parts of the country, in the Province of Quebec and in other provinces, these were schools which were built and maintained out of funds which belonged to the Indians themselves. In other words, for many years, the Province of Canada and the Dominion were accepting surrenders from the Indians of parts of their reserves and selling for the benefit of the Indians and at Confederation a very large fund, a fund amounting to about two million dollars, had come into existence.

IDINGTON J.—As a result of sales of lands?

Mr. Hogg: Yes, as the result of sales of reserves; where the Indians did not require so big a reserve they gave up part of it and asked the government to sell. These were treated as Indian trust funds. This was a revenue-bearing fund—that is, the government were allowing interest upon it, and out of this revenue schools were maintained. While that was part of the policy of the government to allow the Indians to have schools, the Indians were having the schools and maintaining them out of their own money. So that it was not until we have this treaty, and I think one or two prior to it—the one of '71 my learned friend referred to—it was not until this treaty that the government agreed as part of the consideration for the surrender of the title to maintain schools when they were requested by the Indians. We say then that while it may have been a policy to educate the Indians and to guard their funds and to use their funds for the purpose of civilizing them, still that did not take away or make less the fact that the maintenance of

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schools under the treaty was a consideration for the extinguishment of the Indian title and whatever sum was expended in that way was, I submit, a payment which must be made by Ontario.

My learned friends on the other side have said that the question of twine, and fishing lines and so on should not have been allowed by his lordship. Well, I simply say that that is one of the considerations and that it should be allowed and that his lordship was right in that.

Then he has excluded the supply of cattle and the farming implements and all the things that were necessary to help the Indians to become farmers and civilized. Now these were expressly given by the treaty. It was one of the considerations, part of the general consideration for the extinguishment of the title. There is no good ground that I have ever been able to see why he should allow the twine and fishing tackle and exclude the cattle and implements of trade to make them civilized. It is said these things were given to them as a matter of policy and that, therefore, the judge was right in excluding them, but all the evidence really is that occasionally, for the purpose of relieving extreme distress, it was better to give them a gun and a pound of shot and some powder to carry on and make a living than to give them money. But here we have a case where the government are giving them cattle, tools and so on for the purpose of civilizing them and making them good citizens, and I can see no distinction between giving them $5 a head which has been allowed and which seems to have been assented to all round, $5 a head as an annuity, and giving cattle and implements of trade.

Then just a word with reference to the surveys.

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I think I have finished now with reference to the classes of items that his lordship has excluded from his consideration. Now, my learned friends have stated in advance in answer to the cross appeal, that the amount for surveys should never have been allowed by his lordship. His lordship put it in this way. Following the making of the treaty they immediately, or very shortly afterwards, within the next year, I think, commenced to lay out the reserves, and they had communications, as my learned friend has read, of the necessity of these reserves being laid out and a map was sent shewing the areas in which mineral land occurred, which were to be excluded and, if possible, not taken into the reserves. They then went on and made these surveys; that is they went on to expend money in carrying out the objects of the treaty, and his lordship in the court below allowed these surveys.

There were surveys of two kinds, for the purpose of opening up the country for settlement and surveys consequent upon the making of the treaty; that is the laying out of certain reserves for the Indians. Now what his lordship said was this; that it is true there is an agreement that these reserves are to be consented to later on, but to the extent that you have made surveys for both purposes, these are a proper expenditure by the Dominion under the treaty, and outside of the treaty if you like; these are proper expenditures and it is only fair and right and the proper way to deal with that is to set it off against the counterclaim of the province. He does not allow it as one of the items which is chargeable against Ontario by the treaty, but he says it is a proper charge against Ontario's counterclaim and when

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you come to take your accounts the referee will take that into consideration.

Mr. Newcombe: My lord, I have my learned friend's permission, if your lordships will allow me to refer to one treaty which I intended to quote yesterday and which I omitted. It was on the point I made that this territory is vested in Ontario subject to an interest other than that of the province; that that interest constitutes a burden on the land which has to be discharged some time or another and whenever it is discharged that the obligation falls upon Ontario to pay the consideration for the discharge. That is under the "British North America Act." The fact that Ontario cannot herself bring about the discharge or that perhaps she has no voice in it or of the fixing of the consideration does not affect that situation. Section 109 I had referred to which provides that all lands, mines, minerals and realties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due, shall belong to the several provinces in which they are situate, subject to any trusts subsisting in respect thereof and to any interest other than that of the province in the same. Now that section fell to be construed in the *Robinson Treaties Case* (1), which I cited yesterday and I referred to what Lord Watson said at pages 210 and 211 of that case(1). In addition to what I read yesterday—I may read it again to make it clear—these words are from the judgment: "The expressions 'subject to any trusts existing in respect thereof,' and 'subject to any interest other than that of the province,' appear to their lordships to be intended to

(1) [1897] A.C. 199.

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refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor. * * On the other hand, 'an interest other than that of the province in the same,' appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. Their lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly, if not wholly, based upon the provisions of section 109 with respect to trusts." That is pages 210 and 211. Now then during the argument in amplification of that and shewing what I think follows from the judgment, Lord Watson said this, and this is what I intended to read yesterday. Your lordships will find this, I may say, reported in Lefroy on Legislative Power in Canada, page 612 in the note, what I am going to read. The case is reported, but this is an observation made during the argument and your lordships will have to refer to Lefroy for that at page 612. "If the Crown right was subject to a burden upon the land, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown." There was no change in the position of the Crown, neither

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was there any change in the position of the Indians, at Confederation. "I think the whole effect of this clause is to appropriate to the Province of Ontario all the interest in lands within that province as vested in the Crown, subject to all the conditions under which they were vested in the Crown." * * "The policy of these sections of the Act, 109 and 112 and 111 and 142, when read together, appears to me to be generally this beyond all dispute. * * The intention obviously was to provide with regard to all those debts and liabilities of the old Province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of section 142. On the other hand to this extent it is made plain—at least I hold it to be made very plain under section 109—that any debt or liability which was made a proper charge upon any property or assets passing to the province under section 109, was to remain that charge, and was not to be satisfied by the Dominion Government under section 111."

Mr. Hogg: I said, my lords, that the judge of the Exchequer Court dealt with the expenditure on surveys by giving the Dominion the right to set-off the amount against the counterclaim of Ontario. That was the judgment of his lordship in the court below. Now we complain that that is one of the items which constitute part of the consideration referable to the extinguishment of the Indian title.

I have only now a reference to one other item and that is this present of $12 which was made to the Indians at the time the treaty was made.

No treaty could be made without giving them some present. In all these treaties you will find that they got some amount of money as a present for their good behaviour.

For several years efforts were being made to get a treaty; in '71 and '72 Commissioners were sent and they could not arrive at an agreement, and it appears they had grievances more because they had been trespassed upon, because their rights had been invaded and infringed, and it was true that for the purpose of the Dawson route some timber had been taken, I think to build a boat on one of the lakes and for other purposes of that kind.

DAVIES J.—The point is that the only way to settle that was to extinguish the right there quoad the land over which the road ran, or to extinguish the whole matter. Ontario had no interest in having it extinguished over a mere 50 foot road, therefore it had to be extinguished over the whole land or not at all. Your point is how far we are bound to hold all of these considerations mentioned in the treaty are necessarily attributable to the extinguishment.

Mr. Hogg: Yes, my lord, and his lordship below, as I say, divided them and we cannot see why that should have been done.

Ritchie K.C. in reply: From what has been developed on the argument I think it may be said to be reasonably clear now that the whole Dominion case is based on the dictum of Lord Watson in the *St. Catharines Milling Co. Case*(1). That that is a mere dictum and no part of the judgment and not necessary

(1) 14 App. Cas. 46.

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for the determination of the issues involved is, I think, abundantly clear.

Having regard to the record in that case, no evidence could have been adduced such as has been adduced here to shew the moving consideration, to shew the state of affairs as between the Dominion and the province. What could the Privy Council have known in 1888, when that case was before them, of what the state of affairs was in Canada in 1873? We know now here, that there was a fear of an uprising, and there were all these other considerations to which my learned friend Mr. Shepley has alluded, the contract with British Columbia, the contract with the Hudson Bay Company and all these other factors that have been adduced in evidence here. None of these were before the learned law lords.

I submit that expression was not at all necessary for the determination of the issues involved in that suit, and if that question had been in any way agitated on the record and if the Province of Canada had been represented there, all these considerations that are now presented to your lordships would have been presented to the Judicial Committee. I can say no more on that subject.

Then I propose to refer briefly to the conventional boundary agreement of 1874, and I desire to point out to your lordships that by that agreement what was stipulated for was that when the true boundary was ascertained the whole of the moneys received by the Dominion in respect of the particular portion that was found to be within Ontario should be paid over to the Province of Ontario. It was manifestly not intended at that time to put forward any claim on behalf of the Dominion in respect of the obligations assumed

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under the treaty. If there had been any such idea we would have found, no doubt, in this conventional boundary agreement a provision for deduction of such sums as Ontario might be liable for to the Dominion arising in any way out of the obligations assumed by the Dominion under that treaty.

In 1874 there was no stipulation in the agreement as to the liability of Ontario arising out of any obligation under the treaty. Then I pass on from that to the agreement of 16th April, 1894, some twenty years after the conventional boundary agreement, and some six years after the decision in the *St. Catharines Milling Co. Case* (1).

Now let us see what the provisions of that agreement are. I say the Dominion itself must have regarded that as a mere dictum or at all events they felt that they had no claim against Ontario, as I submit is evidenced by this agreement of 1894. They must have known of that dictum at that time, or at least of that statement, whether dictum or not, but what do we find them doing? We find this agreement entered into on the 15th of April in which they recite the treaty itself. Reference is made to the treaty; "and whereas by the said treaty out of the lands so surrendered reserves were to be selected and laid aside for the benefit of the said Indians, and the said Indians were, amongst other things hereinafter provided, to have the right of hunting and fishing" and so on, throughout the tract. "And whereas the true boundaries of Ontario have since been ascertained"—I am just giving the skeleton, not reading the clauses in full—"and whereas certain reserves have been laid out in intended pursuance of the said treaty and the

(1) 14 App. Cas. 46.

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said Government of Ontario was no party to the selection and has not yet concurred therein." "And whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters" and so on. "Therefore it is hereby agreed between the two governments, with respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario."

Then it is agreed that the concurreuce of the Province of Ontario is required in the selection of the said reserves. Manifestly Ontario was taking objection to the treaty and simply said, these are our lands, you have no right to agree to reserve to the Indians any right of hunting or fishing over our territory, you have no right to select reserves there without our concurrence. These are the two matters affecting the property itself; Ontario objected and the Government of the Dominion acceded to it, and not only that, but they expressly entered into this agreement.

Then, my lord, we have clause 6: "That any future

treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario." There Ontario was manifestly asserting its right to this territory freed from any burden placed upon it by the Dominion of Canada under that particular treaty and we find the Dominion assenting to the position taken by Ontario, presumably for this reason, that the question arose, could they select these reserves without paying for them? They could not, of course, without legislation. But could they legislate so as to expropriate these lands for the purpose of reserves for these Indians without making just compensation for them? Presumably that was one of the matters that they were considering and they wished to get Ontario's acquiescence in the selection of these reserves, the Dominion not being required to pay Ontario anything for it.

Now we would naturally expect in reciting this treaty, if these large sums of money were due by Ontario to the Dominion in respect of the obligations entered into by the Dominion under that treaty, to find that matter dealt with by that agreement or dealt with at that time; but all these years have elapsed and from 1873 until 1903, the time the action is commenced, so far as I know, no formal demand has ever been made for this money. No pretence that the province is liable in any way to the Dominion in respect to the obligations assumed by the Dominion under that treaty. Now then, if, as a matter of fact, it is conceded, that they had no right to enter into an obligation as to hunting and fishing, no right to enter into an agreement to select and give reserves so as to

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bind Ontario, does it not follow from that that they had no right to enter into any obligations at all that would bind Ontario without Ontario's consent? I submit that the moment you concede that you must concede the rest, that without the consent of Ontario you have no right to impose a burden upon Ontario with respect to obligations entered into by the Dominion. The agreement, your lordships will observe, was not entered into until the 16th of April, 1894. The agreement is set out in full in the statute 54 & 55 Vict. ch. 5, the Dominion statute of 1891.

"It shall be lawful for the Governor in Council, if he shall see fit, to enter into an agreement with the Governor of Ontario in accordance with the terms of the draft contained in the schedule to this Act, together with any additional stipulations which may be agreed to between the two governments and such agreement shall be as binding on the Dominion of Canada as if the same were specified and set forth in an Act of this Parliament and the Governor in Council is hereby authorized to carry out the provisions of the agreement." I need not press my argument any further. I say the moment it is conceded that they had no right to bind Ontario in connection with the agreement as to hunting or fishing or in connection with their obligation to set aside special reserves, the moment that is conceded I say it follows that they had no right to bind Ontario by any of the other obligations which appear in that treaty.

Now in that connection I refer to *Ontario Mining Co.* v. *Seybold*(1), commencing at page 73, the judgment of the court as delivered by Lord Davey.

(1) [1903] A.C. 73.

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I refer particularly to pages 79 and 80 and to 82 and 83. Lord Davey says: "In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the 'British North America Act, 1867,' 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." The reference there is to the *St. Catharines Milling Co. Case*(1). Then Lord Davey says: "Their lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province." Then on page 80, speaking of this same surrender: "This surrender was made in accordance with the provisions of the 'Dominion Act,' known as the 'Indian Act, 1880.' But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises." Then he says, dealing with the *St. Catharines Milling Co. Case*(1) again: "By section 91 of the 'British North America Act, 1867,' the Parliament of Canada has exclusive legis-

(1) 14 App. Cas. 46.

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lative authority over 'Indians and lands reserved for the Indians.' But this did not vest in the government of the Dominion any proprietary rights in such lands or any power by such legislation to appropriate land which, by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their lordships repeat for the purpose of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Provincial Fisheries Case*(1), as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the government of the province, taking advantage of the surrender of 1873"—that is the very surrender that is before your lordships—"came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and therefore to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves." There he puts it as an honourable engagement; no suggestion that it is based upon any legal or equitable liability, but an honourable engagement. Then he says: "The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two governments."

"It is unnecessary to say more on this point, for, as between the two governments, the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. ch. 5), and the Legislature of Ontario (54 Vict. ch. 3), and subsequently signed (April

(1) 26 Can. S.C.R. 444.

16th, 1894), by the proper officers of the two governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario have been ascertained and declared to include part of the territory surrendered by the treaty and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not concurred therein; and it is agreed by article 1 (amongst other things), that the concurrence of the Province of Ontario is required in the selection. By subsequent articles provision is made, 'in order to avoid dissatisfaction or discontent among the Indians,' for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last named government with any of the reserves already selected or in case of the selection of other reserves, for the appointment of a joint commission to settle and determine all questions relating thereto."

There your lordships will see the view that was taken. They certainly did not take the view that the question of legal liability had been settled by Lord Watson in the *St. Catharines Milling Co. Case* (1). He says: "Assuming that they came under an honourable engagement," not putting it under the question of liability at all, that honourable obligation was to be fulfilled because this agreement had been entered into and was validated by the Dominion and the province respectively.

Now my learned friend Mr. Newcombe relied upon

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the recitals in this treaty as to what was the true consideration. I point out to your lordships that Ontario is a stranger to it; Ontario is no party to it, and what is there to prevent a stranger to a treaty or a contract who is sought to be made liable in respect to some of the obligations contained in it, from shewing what the true consideration was, or that there were considerations other than those specifically entered in the treaty. Of course if he had been a party to it that would be an entirely different thing. But here the Dominion is seeking to make us liable in respect of these obligations and claiming that the only consideration was the surrender of this title. Surely it is open to us to shew that that, if it was a consideration, was only a very small part of the true consideration.

My learned friend also says that the Dominion had no interest except that of their wards, the Indians. I point out that they had a very much greater interest than that. The recital is that they wished to open up this particular tract for the purpose of settlement. That, of course, is quite true, they wished to open that up. But no one at that time ever thought that this land was land fitted for settlement in the ordinary way. What they wanted to do was to settle with the Indians so as to open a right of way to the fertile prairies of the west, in which the Dominion was interested. Moreover, they had an interest, as we now know, to the extent of about one-third of this surrendered territory, and they had the Dominion interest at large of opening up the Dominion for settlement and of increasing the population. The Dominion has as much interest in that as Ontario has.

Now my learned friend referred to the "Indian Act of 1868" and claimed that Ontario could not,

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under any circumstances, have entered into any arrangement with the Indians for a treaty, and he relied upon section 8 of chapter 42 of the Act of 1868, that no release or surrender of land reserved for the use of the Indians or any tribe should be valid or binding except on the specified conditions the assent of the Dominion officials being required. I merely refer to it now to point out to your lordships that it only extends to a surrender of lands reserved for the use of Indians. These lands were not reserved for the use of the Indians within the provisions of that Act at all. By that was intended reserves set apart such as the Dominion undertook to set apart in this particular tract. Not lands over which the Indians had a right to roam, but lands specially set apart for the Indians and which became their property.

DUFF J.—Mr. Newcombe rather put it, or at least his argument proceeded, on the assumption that lands reserved for Indians, reserved for the use of the Indians in the statute, would have the same scope as the similar words in the "British North America Act" which the Privy Council held applied to the whole of this tract by reason of the proclamation of 1763. Is there anything whatever in the statute there that would restrict the use of the words?

Mr. Ritchie: No, my lord, I do not think there is.

DUFF J.—Why do you say these were not lands reserved then under that statute?

Mr. Ritchie: I had forgotten the construction placed upon the words in the "British North America Act." I do not know, I will ask my learned friend to look and see if there is anything. It struck me that lands reserved for Indians would naturally mean

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that, but if that is the decision under the "British North America Act" my argument goes for nothing.

No surrender of lands reserved for the use of the Indians shall be binding. I will have a search made to see if it is limited. Of course if it is not limited, I have to bow to the decision in construing similar words in the "British North America Act."

Now we have dealt with this case so far upon narrow grounds. I take the broad general ground now that under no circumstances, in no manner, shape or form could they impose the burden, the obligation which the Dominion incurred under this treaty, upon any province. Suppose, for instance, that the Dominion should, as a matter of national policy decide to agree with the Indians to have one large Indian reservation in either the North-West Territory or the Maritime Provinces or any other part of Canada; should agree to supply them with ammunition and twine and establish schools, enact laws and enforce them for the suppression of the liquor traffic, could it be contended that each province would have to contribute to the obligation assumed by the Dominion in proportion to the number of Indians in that particular province? I submit that under the "British North America Act" wherever there is a subject assigned to the Dominion to deal with and incur money obligations, in every case these money obligations were to be discharged and intended to be discharged out of the Dominion treasury. Now, amongst the special subjects assigned was Indians and lands reserved for Indians. That was one of the subjects specially assigned and in respect of which there was to be uniform legislation by the Dominion affecting these different bands of Indians and their

lands, and I say it was contemplated that these expenditures, just in the same way as all expenditures for railways, canals, ferries, improvements to harbours, all these were to be paid out of the Dominion treasury. The scheme of Confederation never contemplated any such thing as a local improvement plan. It was never intended that each province should be assessed for the cost of a Dominion object in proportion to the benefit derived by it. Suppose that in the Maritime Provinces they expended a million dollars on the seashore for improvements. Could it be said that the whole of that should fall upon the Maritime Provinces? It is something that comes within the federal jurisdiction; they and they alone are authorized to legislate in respect of it. And I submit that it was contemplated under the "British North America Act" that all these expenditures that were to be made by the Dominion in furtherance of Dominion national policy were to be paid out of the Dominion treasury, and there is not to be found within the four corners of the "British North America Act" that any of these were to be assessed back on the provinces under what might be called a local improvement system.

Now we have presented to your lordships many reasons why this treaty should have been entered into and entered into at that particular time. The Dominion regarded the making of that treaty as one coming within their jurisdiction and as one coming within the scope of national authority. We find that they went on and made this treaty without ever consulting Ontario. Is not that the best evidence that they were not contemplating benefiting Ontario by the making of this treaty?

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They had no right to consider what the effect might be on Ontario, on any one province, whether a benefit or a burden. Their sole consideration was to legislate in the best interest of the Indians and their lands. They had the exclusive authority and when, without consulting any one of the provinces, they make this bargain, is it not manifest that they were making it under the jurisdiction conferred upon them by the "British North America Act?" The care of the Indians was assigned to them, they were charged with the maintenance of peace, order and good government throughout the provinces, we have the fact that there had been a rebellion and there was disaffection among the Indians. We have the additional fact that there was a highway to be built to connect the Province of Ontario with Manitoba and so on, a transcontinental railway to be built and in addition to that the further obligation which they had to discharge under their contract with the Hudson's Bay Company. I say that all these were considerations within the sphere of the Dominion Government and that the Dominion Government in pursuance of its powers and for these national objects entered into that treaty, and having entered into that treaty for these purposes, for the purpose of preserving the peace, order and good government of Canada, that they cannot assess against Ontario, Manitoba or any province any portion of the cost, but it must all come out of the Dominion treasury. It might be said that we get the benefit because these Indians who were roaming over our territory are removed to some locality far distant and will trouble us no more; they are taken off our lands. In order to accomplish that, the Dominion says we want all these Indians put in one place and

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they select land for that in Manitoba. And suppose they were not obliged to give compensation, could Manitoba come back and say to Ontario, this land has been taken by the Dominion in pursuance of its powers under the "British North America Act" as a reserve for Indians; all the Indians in your territory have been removed, the Indians from Nova Scotia and Quebec have been removed there and we ask you and Nova Scotia and Quebec to contribute to the value of this land in proportion to the benefit you have derived by the removal of the number of Indians within your territory? I submit the case upon that broad ground alone and that is the view the Dominion has taken until 1893, and it was only after that that they ever dreamed of making this claim as against the Province of Ontario. I submit upon that broad general ground that nothing can be assessed as against this province and that the decision of this court may rest upon, as I submit, that broad ground, without going into all the arguments that have been advanced in connection with the burden and benefit and so on, all based, as I submit, upon what I conceive to be a mere dictum of Lord Watson's in the *St. Catharines Milling Co. Case*(1).

It is said that this is a benefit. The Canadian Pacific Railway going through Ontario was a very great benefit. It might just as reasonably be asked that Ontario should bear a portion of the cost of the construction of that railway having regard to the benefits derived under it. The same way as to any Dominion expenditure in respect of matters coming under Dominion control. The Dominion must first determine whether in the national interest a certain thing should be done, and having determined that in

(1) 14 App. Cas. 46.

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the national interest a certain thing shall be done, the cost of doing that must be paid wholly out of the Dominion treasury and cannot be apportioned upon the different provinces.

Then with reference to the cross-appeal. My learned friend has referred to schools and stated that there were no schools, of course, in this district—I apprehend that is quite correct—prior to the making of this treaty. But I point out that there was an Indian fund, something like, as my learned friend says, $2,000,000 at the time of Confederation, which was afterwards increased, and out of this, irrespective of whether Indians were treaty or non-treaty, schools were established at places where the government saw fit to establish them.

This was a general fund that the Province of Canada took over from the Imperial Government and that fund at Confederation, as you will see by the evidence of Mr. Scott, went to the Dominion and was not confined, as I submit, to the establishment of schools for Indians in any particular province.

My learned friend will admit that these were appropriations. They say, under this particular treaty they made an agreement to establish schools and instead of paying it out of this general fund as they otherwise would have had to do, they say, we won't take it out of this general fund, but we will go to Parliament and ask for an appropriation and that appropriation was charged against these particular treaties, but these expenditures within the boundaries of the reserves created were all under appropriations by Parliament and did not come out of the Indian fund.

Let us see what the legislation was with regard to that long prior to this treaty in 1873.

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In 1860, the Legislature of the Province of Canada enacted that "the Governor in Council may direct how and in what manner and for whom the moneys arising from sales of Indian lands and the property held or to be held in trust for the Indians shall be invested from time to time and how the payments to which the Indians may be entitled may be made." I am reading, my lords, from the Act of 1860, ch. 151, sec. 8. They may do all these things and may from time to time pay out these moneys for repair of roads passing through such land and by way of contribution to schools frequented by Indians. That is, they were allowed to contribute to the support of these schools. That is followed up in 1868, ch. 42, sec. 11. This is after Confederation and it is carried in in the same terms.

That is all I have to say, my lords, on the question of schools.

Now one of the claims made there is for expenditure in connection with the enforcement of the liquor law; that is preventing the sale of liquor to Indians.

On that I refer your lordships to the Act of 1860, ch. 38, sec. 2, and the Act of 1868, ch. 42, sec. 9. These are laws for the suppression of the liquor traffic among the Indians. I shall not take up time more than giving references. I merely point to that to shew that long prior to the making of the treaty it was the policy of the Crown to enforce these laws and that, no doubt, would be done under the head of peace, order and good government.

Then my learned friend referred to farming implements and seeds. All I say on that point is to call your lordships' attention to the language of the treaty itself. "To be given once for all for the encouragement of the practice of agriculture among the Indians." The treaty itself, on its face, shews why that

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was done, for the encouragement of the practice of agriculture among the Indians. Surely that was something coming within the purview of the Indian authority and not referable at all to a benefit to the Dominion.

Then as to surveys. His lordship Mr. Justice Idington has referred to the fact that we have not yet concurred in them and they have not been set aside, and if there is any liability this action is premature in this respect. There were two classes of surveys; there were what are called block surveys, and surveys of the Indian reserves. As to the surveys of the Indian reserves, if there is any liability the action is premature. As to the block surveys, these were made in respect of Dominion property, the Dominion expecting the lands would belong to them, and their base lines were put in so as to connect the system with Manitoba and the West, instead of being designed to benefit Ontario in any shape or form. The evidence of Mr. Kirkpatrick shews that with some trifling exceptions they were absolutely useless to the province so that the province did not receive any benefit with respect to these.

GIROUARD J. (dissenting).—I agree with the opinion expressed by Mr. Justice Davies.

DAVIES J. (dissenting).—The two main questions to be determined upon this appeal are, first, the liability of the Province of Ontario to repay to the Dominion certain expenditures made by the latter under the treaty obligations assumed by it where it made the treaty with the Salteaux tribe of the Ojibeway Indians in October, 1873, known as the North-West Angle Treaty, No. 3, for the extinguishment of

the Indian title in the lands covered by the treaty; and secondly, whether if such liability does exist at all it extends to all of such expenditure incurred under the obligations of the treaty or to only part, and if part only, which part?

The learned judge of the Exchequer Court, the late Mr. Justice Burbidge, before whom the case was heard held that the liability of the province did exist, but limited that liability in his judgment to such expenditure as in his opinion could fairly be attributable to the extinguishment of the Indian title to the lands described in the treaty, and rejected the claim beyond that on the ground that it was expenditure incurred not simply in extinguishing the Indian title, but as part of the general policy of the Government of the Dominion in their administration of Indian affairs.

From this judgment so far as it imposes a liability upon it the Province of Ontario appeals and the Dominion cross-appeals against that portion of the judgment which rejects part of their claim.

The tract of land in which, under the treaty, the Indians surrendered their title covers the area from the watershed of Lake Superior to the North-West Angle of the Lake of the Woods and from the American border line to the height of land from which the streams flow towards Hudson Bay, and was proved at the trial to contain about forty-nine thousand three hundred (49,300) square miles.

Of this great area it was subsequently found when the boundaries of Ontario and Manitoba were finally adjusted that 30,500 square miles only were part of Ontario.

In 1873, however, when the treaty was made the

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westerly boundary of Ontario had not been determined, and this boundary was not definitely established until the Imperial order in council of 11th August, 1884, was passed.

The liability of the Province of Ontario was limited by the judgment to the expenditure made by the Dominion and which was found to be referable to the extinguishment of the Indian title in the treaty lands and in the proportion that the area of such lands within Ontario bore to the whole area covered by the treaty. If liability existed at all that seemed to be the only and proper way to adjust it.

After the treaty was entered into the Dominion commenced and continued to carry out its provisions and to pay the annuities and make the other expenditures mentioned therein and which on the face of the treaty formed the consideration to the Indians for the extinguishment of their title and the release of their claims.

In view of the fact that in consequence of the confirmation of the arbitrators' award with respect to its boundaries the benefit of the surrender of the Indian title to the lands within those boundaries accrued to Ontario, the Dominion contends that the province must be held liable for such a proportion of the amounts paid by it under and for the purposes of the treaty as the area of land within its boundaries relieved from the burden of the Indian title bore to the whole area released in and by the treaty.

At the time of the making of the treaty the Dominion no doubt entertained the view that no part of these lands were within the boundaries of Ontario, but that the whole of the tract covered by the treaty belonged to the Dominion, and as a fact no notice of their inten-

tion to enter into the treaty was given to Ontario, though it was contended that the province knew informally of such intention, and of the making of the treaty.

The Dominion subsequently adopted the position that by virtue of the surrender of the Indian title the beneficial ownership of the treaty lands had become vested in it; and this question and contention was litigated at great length in the courts until it was finally disposed of by the Judicial Committee of the Privy Council in favour of the Province of Ontario: *The Queen* v. *St. Catharines Milling and Lumber Co.* (1).

In the present action Ontario in its defence denied all liability alleging that the treaty was made without the privity of or any mandate from the province. It set up that the interests of the province were in no way involved in the considerations which induced the Dominion to undertake the negotiation of the treaty, and specified the laying out of highways and the building of railways to connect eastern and western Canada, and the relation of the Indians towards the Dominion as its wards or pupils as forming some of such inducing considerations.

It also set up as a reason underlying the treaty and in which Ontario was not concerned a condition contained in the surrender of its lands and rights by the Hudson's Bay Company to the Dominion made in pursuance of the Imperial Act, 31 & 32 Vict. ch. 105, by which condition the Dominion was bound to extinguish the Indian claims to the lands surrendered by the company, but as the Dominion was the only authority that could negotiate a treaty extinguishing the

(1) 14 App. Cas. 46.

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Indian rights, and as those rights had to be extinguished by treaty before the lands could be settled, I have not been able to see how this condition can affect the relative rights of the parties to this suit.

The proposition of law upon which Ontario relies for its exemption from liability for any of the expenditures incurred by the Dominion under the treaty in question is that no expenditure made for his own purposes by one will entitle him to contribution or indemnity from another because that other receives a material benefit from the expenditure, and in support of this the case of *Ruabon Steamship Co.* v. *London Assurance Co.*(1), and other cases cited in their factum were relied upon.

The Dominion does not in support of its claim controvert this proposition or any of the decisions referred to, simply denying their application to the facts and litigants of this case.

That claim, as I understand it, is based upon the relative rights, obligations and duties given to and imposed upon the Dominion and the provinces respectively by the "British North America Act, 1867," and upon the liabilities which may arise from one to the other from the discharge of those obligations and duties of government.

By section 91(24) the exclusive power to legislate with respect to "Indians and lands reserved for the Indians" was given to the Dominion, and in the *St. Catharines Milling Co. Case*(2) above referred to, these words were held by the Judicial Committee to be broad and comprehensive enough

> to include all lands reserved upon any terms or conditions for Indian occupation. It appeared to their lordships to be the plain

(1) [1900] A.C. 6.

(2) 14 App. Cas. 46.

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policy of the Act that in order to ensure uniformity of administration all such lands and Indian affairs generally should be under the legislative control of one central authority.

The Dominion Parliament by its legislation of 1868, 31 Vict. ch. 42, prescribed the manner in which the Indian title to lands might be surrendered up or ceded. I take it that after this exercise of legislative power, the Dominion and the Dominion alone could act so as to extinguish the Indian title to any lands within the Dominion. As to the argument as I understand it put forward by the Province of Ontario that the Dominion could only act in this matter, so far as the lands within that province was concerned, when they were requested to do so by the province, and that if they did so act without such mandate or request and extinguished the Indian title to such lands their action could not impose any obligation or liability upon the province, I am not able to accept it.

The right and duty of determining when and the terms on which such title ought to be extinguished rests with the Dominion and with it alone. Considerations arising out of and affecting the peace, order and good government of Canada and other considerations affecting the best interests of the Indians may well have entered into the minds of that government when determining the times and seasons at which it was desirable or necessary to make such a treaty as the one made in the case before us.

It probably would act in all cases where the interests and rights of the province and the Dominion were concerned as a matter of policy in unison and conjunction with the Provincial Government interested, but the mandate or authority of that government to proceed would certainly not be necessary to the valid-

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ity of the treaty, nor it seems to me would the Dominion Government, entering into such treaty without the express mandate or request of the province, cease to be its constitutional agent for the purpose. As such constitutional agent, authorized by the law and having alike the power and the duty of entering into a treaty, I am unable to see why it could not in that way, when extinguishing the Indian title, impose upon the province for whose benefit it was extinguished a liability commensurate with the consideration agreed to be given to the Indians for the cession of their rights. In the case before us there was, of course, no mandate from the province to the Dominion to enter into the treaty, nor was the province consulted in the matter. No one knew at the time whether the lands formed part of the Province of Ontario or of Manitoba, or of the North-West Territory. The Dominion authorities believed them to form part of the North-West Territories, and no doubt entered into the treaty under that belief. The Province of Ontario did not know exactly where its western boundary line was. But everything was done *bonâ fide* and it was not till years afterwards when the boundary award was made and confirmed that the lands were found to form part of the territory of Ontario.

The fact that the Dominion Government after the treaty was made wrongfully claimed that the cession from the Indians of these treaty lands vested them in the Crown for its beneficial use and not for that of the province has, it appears to me, little or nothing to do with the question before us.

As far as I am concerned I am of the opinion that this court should feel itself bound by the clear and definite pronouncement made on the point now before

us by the Judicial Committee in the case of the St. Catharines Milling Co.(1), and I am not prepared to accede to the argument that such pronouncement was nothing more than a mere dictum of Lord Watson's which we should ignore as not correctly expressing the law on the subject.

That case as originally instituted and carried on in the courts of Canada was brought in the name of the Queen on the information of the Attorney-General of Ontario to test the validity of a license to cut timber granted by the Dominion Government to the St. Catharines Milling Co. on the treaty lands in question. The Dominion, as I have said, claimed that the legal effect of the extinguishment of the Indian title had been to transmit to it the entire beneficial interest in the lands as then vested in the Crown. The province claimed such entire beneficial interest had been transmitted to it. When the case reached the Judicial Committee on appeal that Board directed that the Dominion should be at liberty to intervene in the appeal or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to intervene and the case was most elaborately argued.

The Judicial Committee decided that the conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario were wholly dependent upon the provisions of the "British North America Act, 1867." After reviewing such of the sections of that Act as appeared to their lordships pertinent to the question in dispute and setting out section 108 in full, their lordships went on to say, p. 57:

(1) *St. Catharines Milling Co.* v. *The Queen*, 14 App. Cas. 46.

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The enactments of section 109 are in the opinion of their lordships sufficient to give to each province subject to the administration and control of its own legislature the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown with the exception of such lands as the Dominion acquired right to under section 108 or might assume for the purposes specified in section 117. Its legal effect is to exclude from the duties and revenues appropriated to the Dominion all the ordinary territorial reveuues of the Crown arising within the provinces.

And further, on page 58, they say:

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer*(1) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has had all along a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was, at the time of the union, land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

Having decided that the lands in question became, within the meaning of section 109, on the extinguishment of the Indian title the property of Ontario in terms of that clause and giving their reasons for not assenting to the argument for the Dominion founded on section 91(24), their lordships go on, at page 60 of the report, to state their opinion of the effect of the extinguishment of the Indian title so far as the liability of the province was concerned for the considerations which the Dominion Government had paid or agreed to pay for that extinguishment in the following terms:

Seeing that the benefit of the surrender now accrues to her Ontario must of course relieve the Crown and the Dominion of all

(1) 8 App. Cas. 767.

ligations involving the payment of money which were undertaken by Her Majesty and which are said to have been in part fulfilled by the Dominion Government.

I do not look upon this as merely a dictum. It did not form part of the formal judgment, it is true. That was not absolutely necessary as between the parties to the original suit. But it was a clear and distinct pronouncement as between the two governments then before the court on the general question they were debating to the effect that neither of their contentions were unreservedly accepted, but that while the lands belonged to Ontario in terms of section 109 they did so subject to the obligation that the province should refund to the Dominion the considerations paid by the latter for the removal of the Indian title burden on these lands which they held to be within the terms of the section 109, "an interest other than that of the province in the same."

For me this clear and unambiguous expression of judicial opinion on the question what as between the two governments was the nature of the interest acquired by the province is sufficient. I feel that it is my duty, so far as this controversy before us is concerned, to give effect to that opinion. I feel the less doubt upon the point from the very strong expression of opinion given by Chief Justice Strong in the *Robinson Treaty case*(1), at page 505, as to the meaning and effect of the above statement of their opinion by the Judicial Committee. He there says:

An argument against the Province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of the *St. Catharines Milling Company* v. *The Queen*(2). In that case there was an Indian surrender to the Crown, represented by the Dominion Government made in 1873, subsequent to Confederation. The Privy

(1) 25 Can. S.C.R. 434. (2) 14 App. Cas. 46.

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Council held that this surrender inured to the benefit of the Province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the Province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the Province of Canada, which was to pay for them, and the present question only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities.

So far, therefore, as the main question before us is concerned I would dismiss the appeal and confirm the judgment of the Exchequer Court.

With respect to the subordinate, but important question as to the extent of the liability of the province for these treaty obligations undertaken by the Dominion Government, I find it difficult to accept the reasoning by which the learned judge supports all of his conclusions.

The treaty expresses upon its face the considerations which the Indians were to receive in return for the extinguishment of their title. Some few of these considerations may be found to be in excess of those which in former years were accustomed to be given in analogous cases, and one or two of them may perhaps be held to be simply a declaration of the general policy of the government in their administration of Indian affairs. Some others may be new and additional for which precedents may not be found. But while I can gather from the evidence much to convince me that the Dominion Government was moved to enter into this treaty at the time it did by public considerations affecting alike the interests of the Indians as those of the Dominion and its peace, order

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and good government, I am not able to say that I have any evidence on which I could determine that any of the considerations appearing on the face of the treaty, with the possible exception of the three subjects of expenditure for schools, agriculture and the liquor traffic, were agreed to or given for any other purpose than that of extinguishing the Indian title.

The facts that the government desired for broad public reasons to see highways and roadways running from east to west through the ceded territory as early as might be so as to enable the fertile prairies of the North-West Territories to be settled by way of Canadian territory instead of through a foreign country, or that they had entered into obligations with the Province of British Columbia for the construction of a transcontinental railway and desired to remove all possible impediments to the fulfilment, when the time came, of their obligation are not grounds, even if proved, which would justify me in assuming that greater obligations were incurred for the extinguishment of the Indian title than otherwise would have been. They merely indicate a condition of things which in the opinion of the Government made a treaty desirable and probably would determine them to forward its being entered into earlier than in the absence of such conditions it might have been. Nor can I draw any inference from the last clause of the treaty wherein the Indians agree "to obey and abide by the law and to maintain peace and good order between each other and also between themselves and other tribes" and other people, and not molest person or property in the ceded district or interfere with any person passing or travelling through it, etc., from which I would be justified in concluding

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that the considerations of the treaty had been agreed to for other purposes than those of extinguishing the Indian title. Such a clause appears to have been common to many, if not all, treaties with the Indians made by Canada.

I think it is not unfair to hold that while many public considerations may have existed at the particular season when the treaty was made for entering into it and may have had the effect of anticipating the time when such a treaty might otherwise have been made, none of them can be determined to have been the things or objects or purposes for which the considerations of the treaty were agreed to be paid.

And so on like reasoning I am not able to support the reduction of the $12 made as a present to each man, woman and child of the bands represented at the time the treaty was entered into down to $5.

Nor am I able to agree to the judge's refusal to allow the expenditures made for the salaries of the chiefs and for a triennial distribution of clothing to them. I think all these things should be allowed.

With regard to the expenditure for schools, the suppression of the liquor traffic and the encouragement of agriculture, I am inclined to think the learned judge's disallowance of all these items might be justified on the grounds stated by him. They were really intended when put in the treaty more as a declaration of the general policy of the government on these questions than as considerations referable to the extinguishment of the title and were, as the judge says, legitimate objects of administration.

I would therefore allow the cross appeal in part as above stated, and dismiss the main appeal with costs.

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IDINGTON J.—We should, I think, first consider the nature of the jurisdiction given by section 32 of the "Exchequer Court Act" in assigning to that court the power to determine "controversies" arising between the Dominion and a province that has acceded thereto.

The language is comprehensive enough to cover claims founded on some principles of honour, generosity or supposed natural justice, but no one in argument ventured to say the court was given any right to proceed upon any such ground. It seemed conceded that we must find a basis for the claim either in a contractual or (bearing in mind that the controversy is the Crown against the Crown for both parties act in the name of the Crown) quasi-contractual relation between the parties hereto or on some ground of legal equity.

This is supplemented in the respondent's factum by an argument resting upon quasi-contracts of the civil law respecting which a long list of authorities is cited. But on argument that law and these authorities did not seem to be pressed.

Let us bear all this in mind when measuring the claims in question.

The appellant's counsel in opening had challenged the applicability of any law but that of Ontario, and pointed out that the contest arose out of dealings relative to land in Ontario and what was done in regard thereto; and might have added that the seat of each government concerned was and is in Ontario. Save a casual allusion to the authorities on civil law or French law as set forth in the factum of the respondent I heard no serious attempt to confute this claim for the law prevailing in Ontario as that proper to be observed herein.

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As to the civil law, invaluable as it often is to afford light upon the origin of what is found in much of the Civil Code of Quebec and the exceptional cases arising in that province, left unprovided for by that Code, it is no disparagement of the civil law to say that it is not of much direct service when we come to consider questions arising upon the "British North America Act," or upon legislation of the Dominion which usually applies uniformly to all the provinces; and of still less value is it when we have, as here, to consider the legislation of another province than Quebec.

The civil law is the ultimate origin of much that concerns property and civil rights in Quebec, but when these subject matters were relegated by the "British North America Act" to the respective jurisdictions of the provinces there was no longer need for its consideration as having any binding or operative effect in relation to the formation of the Government of the Dominion as a whole or its relation to its several parts or anything springing therefrom.

Moreover, such lessons as may be derived therefrom do not furnish to my mind much encouragement for the respondent here when due regard is had to the facts presented to us. Not only is that law inapplicable for the reason I point out, but that law does not furnish any basis upon which to rest a claim in favour of one acting, not for another, or as representing another, or instead of another, but for itself solely, in direct hostility to that other, discards that other when and where present and in defiance of the other's claim proceeds to expend accordingly; not in ignorance of fact or want of opportunity to know the law and the fact.

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I think we therefore must assume that the law in force in Ontario is to govern the rights between the parties hereto, so far as we are given any authority to pass upon them.

I might add that having regard to the possible technical difficulty arising from each power representing or being represented by the same Crown when we come to work out the statutes assigning this jurisdiction and seek for the law applicable, we may well assume and hold it to have been designed by each enacting power to treat each actor, Dominion and province, as a separate and independent legal entity, capable of legal relations notwithstanding the technical difficulty that I allude to, which would be swept away by thus interpreting the said statutes.

The claim in the case made by the Dominion (which by the way rests on transactions had seven years before these statutes) is to be re-paid moneys disbursed in procuring and in observing the terms of a treaty made on the 3rd of October, 1873, with Indians and known as the North-West Angle Treaty No. 3. How did this treaty come about? A brief historical reply to this question ought to go far to solve the question of liability raised here.

The negotiations leading up to the treaty spread over three years and kept pace, as it were, with some of the events to be referred to.

A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.

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That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.

In these surrendering treaties there generally were reserves provided for Indians making such surrenders to enter into or be confined to for purposes of residence.

The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of *The Queen* v. *The St. Catharines Milling Co.*(1).

The North-West Angle Treaty No. 3 made by the Dominion is of that class.

Important as it was at all times to secure the continuation of the policy I have referred to the Confederation of the provinces, in 1867, rendered it doubly so because it was anticipated then that Rupert's Land and the North-West Territory, a land of vast extent and Imperial possibilities, yet roamed over by Indians, would soon become part of the Dominion.

Provision was made in section 149 of the "British North America Act" for such event.

It was thus well known then, that instead of the Indian problem being likely soon to diminish in importance or the burthens incident to it become less, the contrary was almost certain to be the case and hence as a matter of the greatest importance for the welfare of Canada as a whole the subject was assigned to the Dominion by section 91, sub-section 24, of the "British North America Act," which is as follows:

Indians and lands reserved for the Indians.

(1) 10 O.R. 196.

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In the first session of the first Parliament of the Dominion the Senate and Commons of Canada adopted an address to Her late Majesty praying that she would be graciously pleased by and with the advice of Her Most Honourable Privy Council under the section 146 I have already referred to of the "British North America Act," to unite Rupert's Land and the North-West Territory with the Dominion and to grant to the Parliament of Canada authority to legislate for their future welfare and good government, and assuring Her Majesty of the willingness of the Parliament of Canada to assume the duties and obligations of government and legislation as regarded those territories.

In that address a special paragraph relative to the Indians was inserted as follows:

> 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.

In pursuance of this address and the agreement of the Dominion with the Hudson Bay Company, arrived at with the concurrence of the British Government, for the surrender of those territories to Her Majesty, upon the understanding that upon their transfer to the Dominion the latter should pay the company £300,000, and also of an Act of the Imperial Parliament assented to on the 31st of July, 1868, they were transferred by an order in council on the 23rd June, 1870, to come into force on the then ensuing 15th of July.

It was supposed by many concerned in these proceedings that these territories extended over a very

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large part if not all of those lands now in the Province of Ontario and in part respect of which the treaty now in question was arrived at.

The Province of Manitoba was created out of part of the new acquisition of territory. A rebellion broke out there. It becomes necessary to send troops through a long stretch of wilderness forming part of the land in question on which only Indians dwelt or over which they roamed. Many of those who had risen in rebellion were partly of Indian blood. It was thus brought home to those who had to deal with such a situation that the sooner these Indians roaming over the lands looked upon by them as their land and across which the troops had been transported were settled with the better for Canada.

Prior to this rising the negotiations pursuant to section 146 of the "British North America Act," for British Columbia becoming a Province of Canada, had so taken shape that the terms of that project were practically settled. British Columbia thus became part of Canada from first of July, 1871. The terms of this acquisition imposed upon the Dominion the obligation to build within a few years the Canadian Pacific Railway which of necessity must pass through the same territory I have already referred to as having to be crossed by the troops.

Contemporaneously with the progress of these events leading to these annexations to the Dominion a waggon road, known as the Dawson route, was built by the Dominion, through parts of the same territory to aid in travel to the North-West.

In the course of doing so, as well as of the transportation of troops, timber was cut and incidentally the land used as of right, and the Indians complained

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of these invasions of their territory and the incidental cutting of what they claimed was their timber.

The items allowed them, by the treaty, to soothe their wounded feelings in respect of these last mentioned grievances, form part of the claims now in question.

The chief items, however, are for the price paid for the extinction of what for want of a better term is spoken of as the Indian title, and of which in the case of *The St. Catharines Milling Co.* v. *The Queen*(1), at p. 54, Lord Watson said that

> the tenure of the Indians was a personal and usufructary right dependent upon the good will of the Sovereign.

The extinction of this Indian title, shadowy as it was, no doubt was a most substantial advantage to Ontario.

But what was there in that which of necessity would give to any one extinguishing it the legal right to be re-paid the money expended in bringing its extinction about?

The extinction of the Hudson's Bay Company's title was directly and indirectly of tenfold more importance to Ontario.

The removal of that shadow from Ontario's title paved the way for the removal of the other.

If benefits derived from acts of, and money expended by, government were to be held, without more, a legal basis for directing re-payment to the government of money or part of money expended, a share of the £300,000 paid the Hudson Bay Co. might as well be held due. Then where would the matter end? Where should the line be drawn?

(1) 14 App. Cas. 46.

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It is not pretended that there was anything said or done on behalf of Ontario that induced the Government of the Dominion to move in the matter of negotiating the Indian treaty; nor is it pretended that there was any actionable legal obligation resting on the Dominion towards Ontario to discharge this burthen; nor can it be maintained that, in the largest sense which a trust can have in law such as indicated by Lord Selborne in *Kinloch* v. *Secretary of State for India*(1), at pp. 625 and 626, in truth a trust existed out of which or the execution of it or something incident to such execution of it, there could arise a legal or equitable claim to be repaid by any one money expended as the moneys in question were expended; nor can it be claimed now, even if there was some reason for claiming so before the decision of the *St. Catharines Milling Co.* v. *The Queen*(2), that the Indian title passed to the Dominion; nor can it be as put in an argument I may not have properly grasped, that, as the land thus freed has been from time to time occupied by Ontario as the Indians receded in consequence of being compensated, Ontario has become under some legal obligation as a result thereof; nor can it be that the Dominion erred through ignorance of any of the facts that bore on the matter in any way, upon discovery of which by any imaginable circuity of actions for which this may be taken as a substitute it could recover for money paid by mistake.

I confess I seem to myself chasing shadows for the utmost pressure could not induce any one in argument to put the claim on any legal principle of law or equity that is usually recognizable. I have tried to reduce what was said as possibly falling within any of

(1) 7 App. Cas. 619. (2) 14 App. Cas. 46.

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these possible or impossible grounds. In light of the details of the history of which I have given only an outline, the agency theory put forward, I respectfully submit, seems altogether without foundation in law or fact.

So far from acting as an agent or as representing another, not only was the Dominion by virtue of its obligations to British Columbia and by other reasons of interest and duty which I will advert to later on, impelled to settle with the Indians, but was also so careful to exclude any such notion that it purposely awaited, as the report of the Minister of the Interior shews, its entering into contractual relations with Ontario on the very subject of these lands pending the negotiations of the treaty until after it had been finally agreed to.

The boundary between Ontario and Rupert's Land and the North-West Territory had never been well defined. The Hudson Bay Company's claims covered nearly, if not the entire, land that became the subject of this North-West Angle Treaty, No. 3.

As things turned out Rupert's Land and the North-West Territory covered, according to the judgment appealed from, about two-fifths and Ontario three-fifths of that land.

The matter of fixing this boundary of Ontario was ultimately referred, by the parties hereto, to arbitration and determined by an award made on the 3rd of August, 1878.

The negotiations leading to this result were begun in July, 1871, and continued for some years before the arbitrators were appointed.

On the 26th July, 1874, the parties hereto entered into an agreement for the establishment of a conven-

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tional boundary pending the ultimate result of the determination of the true boundary and for the issuing of patents for lands on either side of this conventional boundary; those to the east and south thereof to be issued by the Government of Ontario, and those to the west and north thereof to be issued by the Dominion Government, and that when the true boundaries had been definitely adjusted each government should confirm such patents as had been issued by the other and should also account for the proceeds of such lands as the true boundaries when determined might shew to belong of right to the other.

But why if it ever had been supposed that in any event any such claims as those now set up could be conceivable were they not provided for when the parties concerned were dealing with what was the actual corrollary of the very transactions which had so recently given rise to such claims, if at all possible?

And above all why should such a claim be recovered in a judgment founded, as that appealed from appears to be, on the assertion of the rights this very agreement gives rise to? The one was deliberately adopted and we are left to infer the other was either not supposed to exist or almost as deliberately abandoned.

If ever such a claim as now set up had arisen in law it existed then, and if a court had existed to try it and this action could conceivably have been brought then I venture to think the considerations I have adverted to would have furnished a complete answer thereto.

It may be interesting to follow its later history.

It is alleged Ontario entered into possession and therefore must pay.

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It always had been in possession. Its civil laws and administration of justice reigned over it all. The administration of criminal justice so far as needed devolved upon that province. Its inhabitants hunted and fished there as well as the Indians, and when the cloud was removed the duty devolved, as of course, on its government to facilitate the land's development. It is alleged the land had turned out rich in minerals and timber. Is the obligation one turning upon the nature of the soil? Or would it not exist if timber and gold had not been found there, but only a vast barren waste?

Nor did the province come to the court seeking aid as against the Dominion or any one else to recover possession of the lands in question. The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things when given a chance.

We have not, therefore, any ground upon which to say that in seeking equity it must do equity.

Indeed, the province has not yet got any actual, but only in a limited legal sense, possession of much of the land over which the Indian roams in his hunting and fishing as he had done before. His reserves, of a more limited character, are not yet finally selected. If, contrary to my impressions, any contract could be implied as suggested in the argument I have already referred to, from the Dominion doing something and the province entering into and accepting that, it has not yet been completed, for the contract

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of 1894, hereinafter referred to, defines how that is to be done, and it appears it is not yet done.

But we are told the liability has been already passed upon by the judgment of the Privy Council in a dictum found in the case of *The St. Catharines Milling Co.* v. *The Queen*(1).

It seems to me there are two answers to this: One that it is mere dictum; and the other that the parties concerned by their action I am about to refer to so recognized it and proceeded to agree upon such an entirely different view of it from that now pressed by one of them that it is hardly open to the respondent to rely much on such a contention.

Let us appreciate the true value of that dictum for our present purpose by considering what happened.

The boundary award, after confirmation by the Privy Council to which it was submitted, was confirmed by the parties hereto under such circumstances as I need not state in detail, but finally so in 1883.

In that year the Dominion Government issued a license to the St. Catharines Milling Co. to cut timber on the land found by this award to have been part of the Province of Ontario and also forming part of the land over which the Indian title had been extinguished by the said Treaty No. 3.

Ontario claimed the land in question fell within section 109 of the "British North America Act," and hence was the absolute property of that province and began in the name of the Crown a suit against the Milling Co. to restrain its cutting of timber there.

The Milling Co. asserted that by virtue of the surrender of the Indian title (to the Dominion as the

(1) 14 App. Cas. 46.

claim was put) the Dominion was the absolute owner of the timber.

This suit already referred to was tried in 1885 by the learned Chancellor of Ontario and decided in favour of Ontario's contention.

The respondent was not a party to that suit. But when the case had passed through its various stages of trial, appeal to the Court of Appeal for Ontario, and an appeal to this court, with the result that each court maintained the contention of the present appellant in its claim that the timber belonged not to the present respondent, but to the appellant, it was carried by way of appeal to the Judicial Committee of the Privy Council.

When the case reached there the now respondent, for the first time, asked leave to intervene, and the result of such application was that counsel for the present respondent were heard.

No change took place in the record raising new issues. The issue raised here was not and could not appear on that record.

We are told that sometime during the argument the counsel thus representing present respondent attempted unsuccessfully to introduce the question of the right of the Dominion to be recouped what it paid to the Indians to procure the extinction of the Indian title.

It appears from the judgment already referred to that counsel also set up the entirely different claim that the Indian title had been acquired by the Dominion, and hence possessed the property in the timber in question. In the closing part of the judgment of Lord Watson the following sentences occur:

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Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

This has been pressed strongly upon us as an authoritative exposition of the law if not an absolute decision of the actual point raised in this case.

On such a case as and so presented can we accept as binding the dictum I have quoted from the judgment of Lord Watson?

It does not seem to me we can escape by that easy means the responsibility resting upon us.

The case as presented to us was not before the Judicial Committee; the arguments now presented were not possible for full presentation there, and the limitations that bind our jurisdiction were not and could not be, so far as I can see, present to the mind of that court.

If it had been intended by the court to have it held as binding I would have expected in the later case of *The Ontario Mining Co.* v. *Seybold*(1), to have found direct language to the effect that such had been the declared result or at all events was then the opinion of the court. The language used falls far short of any such thing.

I infer that on this latter occasion the court neither felt bound by the dictum nor quite sure that it contained that exposition of the law which it would expect to be observed by us as matter of course.

(1) [1903] A.C. 73.

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With great respect I venture to submit that the expression in the first sentence of the dictum "must, of course, relieve the Crown, and the Dominion" does not indicate (if I am permitted to draw an inference from the habitual accuracy of the writer) that consideration had been had to the peculiarity that it was as the representative of the Crown that Ontario had succeeded.

It indicates clearly enough, I submit, that the peculiar limits of our jurisdiction to decide between two (shall I say departments of government or branches of sovereignty), of which each represented the Crown, had not been fully and finally considered, much less the definite character of the obligation, if any.

I conclude that we have a duty to discharge and are not relieved by this dictum, which must be held *obiter*, yet received with that respect due to the first impressions of such high authority, and given due consideration.

Following the decision in that case and the dictum now rested upon came an agreement entered into on the 16th of April, 1894, between the parties hereto, not hastily, not as part of routine work of departments of the Government, when attention had not been drawn to the full import of the step taken, but as the deliberate result of each government and of Parliament and legislature having given due consideration thereto.

This agreement on its face purports to be in pursuance of the Statute of Canada passed in the 54th and 55th years of Her Majesty's reign, chaptered 5, and the Statute of Ontario passed in the 54th year of Her Majesty's reign, chaptered 3.

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It is provided by the first operative clause of it that as the Crown lands in the surrendered territory have been decided to belong to Ontario or Her Majesty in right of said province, the Indian rights of hunting and fishing, throughout the tract surrendered, not including the reserves to be made thereunder, do not continue so far as regards lands required for settlement, lumbering, mining and other purposes, by the Government of Ontario, "and that the concurrence of the Province of Ontario is required in the selection of the said reserves."

The 6th paragraph is as follows:

> That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

Not a word appears in this agreement in regard to these claims now made, though, if due to-day they had been for great part, if not the most part, then due for twenty-one years. One might have expected them if weak originally, to have attained their majority and full strength and to speak then or forever be silent when an abandonment so complete and utter of all old contentions was about to be thus deliberately made.

The dictum now relied upon had then been standing before all concerned for about six years, with the rights of the parties fully cleared up. But nothing is done for nearly eight years more.

Then when the case of *Ontario Mining Co.* v. *Seybold*(1) was pending before the Judicial Committee of the Privy Council and the Dominion was represented by counsel, besides those representing the parties, the

(1) [1903] A.C. 73.

dictum, I have no doubt, was pressed and evoked the reply I have already referred to.

Six months after we have these claims now in question presented for the first time and action brought.

Leaving out of view one thing to which I will advert later on, what would be said of such a claim if presented by one private individual as against another at such a length of time from its origin and with such a history of opportunities to put it forward yet kept in abeyance?

The probable answer to this question may be left to meet and cover the rather vague, but wide and persistent, demands for a kind of justice that does not fall within the narrow limits of the law.

I think we must, to appreciate the legal nature of this claim, have regard above all else to the terms of the "British North America Act" and understand the obligations arising thereunder and resting upon each actor and their relations to each other, and especially so in regard to these matters antecedent to the origin of the claim.

The case as it presents itself to my mind is that the Dominion was assigned by the "British North America Act," sec. 91, sub-sec. 24, quoted above, the high, honourable, and onerous duties of the guardians of the many races of Indians then within or that might at any future time fall within the borders of Canada; that these duties were to be discharged as occasion called for, having in mind always the peace, order and good government of Canada and, as part and parcel thereof and not the least factor in promoting all implied therein, the due observance of those duties towards the Indians, which the policy of the British Crown had rendered of paramount im-

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portance; that the discharging, in a statesmanlike way, when the several occasions I have recited called for, these high duties of national importance they were discharged all the better by being freed from the trammels of being confined within the narrow views that the provincial range of vision might have restricted action to, if the needs and wishes of a single province were to be considered, or even the dominant factor used as a guide, perhaps to the detriment of national interests; and that there arose on the part of Ontario no contractual or equitable obligation enforceable in a suit at law to make good any moneys expended in the way claimed. Nay, more, I am unable to see how short of an express understanding there ever could have arisen from the discharge by the Dominion of its responsibilities under sub-section 24 any such legal liability on the part of any province.

I think the appeal should be allowed, the cross-appeal be dismissed and the judgment for appellant on its counterclaim stand.

MACLENNAN J.—I concur in the opinion stated by Mr. Justice Duff.

DUFF J.—The "Exchequer Court Act" confers upon that court jurisdiction to decide a controversy such as this. It says nothing about the rule to be applied in reaching a decision; but it is not to be supposed that (acting as a court) that court is to proceed only upon such views as the judge of the court may have concerning what (in the circumstances presented to him) it would be fair and just and proper that one or the other party to the controversy should do. I think that in providing for the determination

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of controversies the Act speaks of controversies about rights; pre-supposing some rule or principle according to which such rights can be ascertained; which rule or principle could, it should seem, be no other than the appropriate rule or principle of law. I think we should not presume that the Exchequer Court has been authorized to make a rule of law for the purpose of determining such a dispute; or to apply to such a controversy a rule or principle prevailing in one locality when, according to accepted principles, it should be determined upon the law of another locality. This view of the functions of the court under the Act does not so circumscribe those functions as greatly to restrict the beneficial operation of the statute. Whatever the right of the Dominion in such a case as the present it is difficult to see how the province could (apart from the statute and without its consent given in the particular case) be brought before any court to answer the Dominion's claim. The statute referred to and the correlative statute of the province once for all give a legal sanction to such proceedings, and provide a tribunal (where none existed) by which, at the instance of either of them, their reciprocal rights and obligations touching any dispute may be ascertained and authoritatively declared.

The claim which is made in this action is that Ontario shall be declared to be liable to indemnify the Dominion in respect of the money payments assumed by the Dominion on behalf of the Crown under the treaty in question. In the view I take of the case it will not be necessary to distinguish the different undertakings. I think the claim fails in *toto*.

The learned trial judge, who has in part sustained the Dominion contention bases the liability upon this

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reasoning. He says it is a settled principle of law of England that where a person having the legal title to land and believing himself to be the true owner, makes improvements at his own expense, the equitable owner suing for possession and *mesne* profits in a court of equity may be compelled to make, as against his claim for *mesne* profits, an allowance for the cost of the improvements so made. That principle, he thinks (by reason of the counterclaim of the Dominion) comes into operation here.

Assuming this principle applicable in the circumstances, I am unable to follow the learned judge in the reasoning by which it is made the basis of his judgment. The receipts for which the Dominion is asked to account amount, roughly speaking, to something like $150,000. The judgment imposes upon Ontario a liability which, as regards past payments, is much greater than this sum and consequentially establishes an obligation extending to payments which may be spread over an indefinite period in future. That is a form of relief far beyond any mere allowance by way of set-off and is an extension of the principle invoked for which with great respect I can see no warrant.

But the rule has, I think, no sort of application to this case.

Admittedly the benefit of the treaty expenditures in part accrued to the Dominion. Admittedly, at the time they were made, the Dominion had full notice of Ontario's claim to the territory. In this state of facts the agreement on which the counterclaim is based was made, that is to say, after the obligation to make the expenditures had under the treaty been incurred, and while the claim of Ontario to the territory was being actively asserted; and that agree-

ment is silent upon the treaty obligations. With full knowledge of the equity, so called, which is now set up the Dominion undertook by an unqualified undertaking to account to Ontario for the sums now claimed by that province. Observe now that for our present purpose *ex hypothesi* the claims asserted by the Dominion were of such a character that in respect of them, independently of the alleged right of set-off, no liability rested upon Ontario. I cannot then imagine anything more repugnant to equity than to say in these circumstances, to the province: This agreement of yours cannot be enforced until you have satisfied claims of the Dominion (otherwise unenforceable) which were fully known to the Dominion at the time the agreement was made, but were not asserted until twenty years afterwards. The parties agreed irrespective of the alleged equities that in the contingency which occurred the payments should be made. The court is asked to declare that the Dominion is not liable to make these payments except upon the terms of satisfying those self-same unenforceable equities. If this, the true meaning of the parties had been put in words as I have put it, the true effect of the contention I am dealing with would at once appear, viz., that the court is asked, in order to give effect to these claims, to reform the bargain between the parties.

On the argument Mr. Newcombe supported the judgment upon other grounds.

First, he broadly asserts the right of the Dominion upon the principle (recognized in the civil law and applied by Story J. in *Bright* v. *Boyd*(1)) under which a *bonâ fide* possessor of real estate believing himself to be the true owner is entitled as against the

(1) 1 Story 478.

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owner seeking to recover possession to be repaid the sums paid by him in discharging an encumbrance.

The principle thus broadly stated has, as the learned judge says, no place in English law or in the law of Ontario except in the qualified sense of certain statutes which have no application here. It cannot, therefore, I think, be applied to this case because such a claim would plainly be governed by the *lex situs*.

But, assuming the principle to be applicable, consider briefly in the light of the evidence the circumstances which led to the treaty. The learned judge thus recounts them:

> The question of obtaining the surrender of the Indian title in the lands described in the North-West Angle Treaty No. 3, was in 1870, when Rupert's Land and the North-Western Territory were admitted to the union, a very urgent and pressing one, not because such lands were at that time required or deemed to be desirable or available for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada and the great and fertile western territory that was added to the Dominion. At that time a line of communication, known as the Dawson Route, was being opened up through such lands. During the summer of that year it became necessary to send through this territory a military force to maintain the Queen's authority, and establish order in the country about the Red River. Early in the year the Government of Canada had sent an agent to Fort Frances "to keep up a friendly intercourse" with the chiefs and Indians who assembled there, and to "disabuse their minds of any idle reports they might hear as to the views and intentions of the Government of Canada in reference to them." In May the government sent Mr. Simpson to the same place to secure from the Salteaux Indians a right-of-way for the troops and to prevent any interruption of surveying parties during the summer. The demands that the Indians made were considered so excessive that Mr. Simpson did not come to any agreement with them. They, however, stated that it was not their intention to try and stop the troops from passing through their lands on their way to the Red River, but that if Mr. Dawson was to make roads through their country they expected to be paid for the right-of-way. In the next year another attempt was made to arrive at a settlement with these Indians. But on this occasion it was not a question of obtaining merely a right-of-way through their lands, but of acquiring a surrender of the Indian title therein so that such

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lands would be open for settlement. By a commission issued under the Great Seal of Canada, and bearing date the 27th of April, 1871, and in which it was recited that the Indian title in the lands therein mentioned had not been extinguished, and that such lands were required for settlement, Her late Majesty appointed Mr. Simpson, Mr. Dawson and Mr. Pither commissioners to make a treaty with the several bands of the Ojibeway tribe of Indians occupying and claiming the lands in that portion of her North-Western Territory lying and being between Lake Shebandowan and the North-West Angle of the Lake of the Woods. The commissioners, as appears from their report of the 11th day of July, 1871, entered into negotiations with the Indians and settled, as they thought, "all past claims" that the Indians had, but "various causes prevented them from entering into a formal and permanent arrangement" with the Indians at that time. On the 20th day of July, 1871, by an order in council passed on the 16th day of May in that year, British Columbia was admitted into the union. By the terms of the union the Government of Canada, among other things, undertook to construct a railway "to connect the seaboard of British Columbia with the railway system of Canada." That involved the construction of a railway through the lands for the surrender of the Indian title in which the Government of Canada was in that year negotiating. It afforded another reason, if another were needed, for the early extinguishment of such title. It is put forward on behalf of Ontario that the conclusion of a treaty with these Indians was a prime necessity in the carrying out of the railway policy necessary to implement the agreement of the Dominion with the Province of British Columbia. That the construction of the Canadian Pacific Railway would in the course of time have made it necessary to extinguish the Indian title in these lands, or at least in so much thereof as was needed for a right-of-way through the same, cannot admit of doubt. But it is not at all clear that this matter was in 1871 pressing or urgent if anything were thought to turn upon that point. But it is, it seems to me, clear that for a number of reasons, either relating or deemed by the Government of Canada to relate, to the administration of the affairs of the Dominion, it was at the time necessary that the Indian title in these lands should be extinguished.

This latter the evidence clearly shews was only a means to an end. It was deemed advisable to provide a passage through this territory for immigrants into the newly acquired North-West. It was necessary if the obligations of the Dominion undertaken in the terms of union with British Columbia were to be fulfilled to arrange for the immediate commencement

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and prosecution of the construction of a line of railway between Eastern Canada and that province. These were objects of Dominion policy affecting the Dominion as a whole. To attain these objects it was necessary to induce the Indians to abandon their pretensions to occupy the whole territory in question to the exclusion of whites and to settle on more limited reservations. Upon this necessity the Dominion acted, hence the treaty.

The traditional policy in Canada respecting the Indians themselves pointed in the same direction. That policy was that when the progress of advancing settlement brought with it danger of collision between white settlers and Indians still in a savage and pagan state, to induce, if possible, the Indians to settle on limited areas and by slow degrees to lead them into the ways of civilized life. The responsibility in respect of all these matters is by the "British North America Act" cast upon the Dominion; and it is quite clear, I think, that if in the judgment of the Dominion apart from the considerations of policy above mentioned the time had arrived when in the interests of the Indian as well as of the settlers and to secure tranquillity, this course was to be taken—the evidence leaves no room for doubt that an essential condition of success would be that the rights the Indians believed they possessed in the larger area should be given up; and, that in order to procure the surrender of those rights something in the nature of compensation must have been promised, as always had been done in previous arrangements of the same character. The acquisition of the Indian title was not, I should think, in itself even in the slightest degree at that time an object of Dominion policy. Not until a date

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much later than the treaty does it appear to have occurred to anybody that the Dominion had acquired any territorial rights under the treaty. The surrender of the Indian interest was in truth a mere incident in a large policy looking to the settlement of that part of Canada lying between the Great Lakes and the Pacific, the prosecution of which necessarily required an arrangement with these Indians after the traditional practice.

In these circumstances, I cannot conceive on what principle a court of equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations undertaken by the former. It is a case very different from the simple case of the extinction by payment of a pecuniary charge; that there should be a right of indemnity in such a case is at least intelligible. Here we have a usufruct which, conceived as mere burden on the title, cannot be appraised; and we have the case of a petitioner who, to serve his own ends, to meet his own obligations, to protect his own interests, has been obliged to procure the surrender of the burden, and who, to procure that surrender, has, without consulting the owners, compounded for it in money on his own terms. Has a court of equity any rule or principle which will serve to effect a just distribution between the owner and the petitioner of the burden?

Or if we add, as we must to complete the parallel, that these ends, obligations and interests have no special relation to any interest in the land and that everything is done pending an active dispute with the true owner concerning the title and that the petitioner is not in possession—at all events has no better possession than the owner—can there really be any principle of justice upon which it can be averred that the

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whole of the burdens thus assumed by the petitioner must be borne by the true owner?

I think Mr. Newcombe's argument mainly rested, however, on his contention that in concluding the treaty and, therefore, in undertaking the obligations referred to the Dominion acted as the agent of Ontario. This contention was based on three grounds which are: 1st, the acquiescence of Ontario; 2nd, ratification by Ontario; and 3rd, a constitutional agency arising out of the powers and duties with which the Dominion is invested and burdened by the "British North America Act."

Of the first and second of the three grounds it is, I think, enough to say that the Dominion did not in concluding the treaty profess to act as the agent of Ontario and that the treaty having been concluded Ontario did nothing but accept what has been declared to be the legal result of it irrespective of any action or inaction on her part. In these circumstances it is difficult to see how in any sense *germane* to the question of the existence or non-existence of agency either acquiescence or ratification can be imputed to the province.

The third ground raises a question of the utmost general importance. It is a question which, I think, must be answered in a sense opposed to Mr. Newcombe's contention. It is, I think, true—as Mr. Newcombe argues—that the Dominion alone was competent to authorize the treaty in question. In that matter the Dominion, in other words, represented the authority of the Crown. But in what sense was the Dominion the agent of Ontario? I think the argument seems to come to this, that because the whole authority of the Crown in respect of the Indians and

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the Indian lands is committed to the Dominion, the Dominion may in the course of exercising that authority in the prosecution of Dominion policy conceived in the interest of the Dominion as a whole undertake on behalf of a province without its consent and thereby effectively bind the province to an obligation involving the payment of money. That is a far-reaching proposition, and one which I think cannot be maintained.

The Crown on the advice of the Legislature of a province (acting within the limits prescribed by the "British North America Act") may authorize the undertaking on behalf of the province of a financial or other obligation. I do not think the Act creates any other agency having authority to fasten upon a province as such any such obligation. The view advanced on behalf of the Dominion, as I have just indicated it, is, of course, the negation of this; but, as I conceive, that view is incompatible with the true view of the status of the provinces under the "British North America Act."

The status is thus explained by Lord Watson who, speaking on behalf of the Judicial Committee in *The Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick*(1), at pp. 441 and 442, said:

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion

(1) [1892] A.C. 437.

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Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government * * *.

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme.

The independence of the provinces as regards their control of the property and revenues appropriated to them by the Act has been emphasized in a series of decisions; and it has been frequently pointed out that the parts of the Act in which property and revenues are declared to "belong to" or to be "the property of" the provinces import simply that the public property and revenues referred to while continuing to be vested in the Crown are made subject to the exclusive disposition of the provincial legislatures. Thus Lord Watson in *St. Catharines Milling Co.* v. *The Queen*(1), at p. 56:

In construing these enactments it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or to the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown * * *.

And again at pp. 57 and 58:

The enactments of section 109 are, in the opinion of their lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown, with the exception of

(1) 14 App. Cas. 46.

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such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the provinces.

In *Attorney-General of Ontario* v. *Mercer* (1) Lord Selborne referring to the section just mentioned uses these words:

> The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and government to the provinces in which they are situate, or arise.

And in the *Attorney-General of Canada* v. *Attorney-General of Ontario et al.* (2) Lord Herschell delivering the judgment of the Judicial Committee after a full argument in which all the provinces participated, said, at pp. 709 and 710:

> It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

And again at p. 713:

> If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that in their lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the provinces and not vested in it.

(1) 8 App. Cas. 767, at p. 778. (2) [1898] A.C. 700.

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I am unable to reconcile these views touching the constitutional position of the provinces and the measure of control conferred upon the provincial legislatures respecting the property and revenues vested in them with the contention that the grant to the Dominion of legislative power in respect of the subjects enumerated in section 91 implies the right in the exercise of that power to dispose, indirectly (without the consent of the provincial legislatures) of such properties and revenues by fastening upon the provinces without any such consent obligations of a financial character. This view, if accepted, would, I think, be simply destructive of what Lord Watson in the passage quoted above describes as "the independence and autonomy of the provinces."

It remains to consider the observation of Lord Watson in the course of the judgment delivered in *The St. Catharines Milling Co.* v. *The Queen*(1), and that of Strong C.J. in the *Robinson Treaty Case*(2). The observation of Strong C.J. (being a dictum founded upon the observation of Lord Watson) will not require separate consideration.

The observation of Lord Watson forms, I think, no part of the decision of the Privy Council. The question which it touches upon was not raised upon the record nor discussed at the hearing or considered by the learned trial judge; it was neither raised nor considered before this court; it was not argued as one of the points in dispute before the Judicial Committee. The formal judgment of that tribunal does not mention it. These circumstances in themselves are, I think, sufficient to shew that it cannot be treated as a term of the judgment in favour

(1) 14 App. Cas. 46. (2) 25 Can. S.C.R. 434, at p. 505.

of the province; and as the consideration of any equities between the province and the Dominion arising out of the obligations assumed by the Dominion under the treaty was, obviously, not regarded by Lord Watson as in any way germane to the sole question decided (and the sole question litigated)—the legal title to the lands affected by the surrender—it should seem that the remark in question ought not to be regarded as indicating one of the grounds on which the decision proceeded.

It is, I suppose, needless to say that any observation of Lord Watson whether strictly authoritative or not (even a passing expression of opinion) is entitled to and would always receive the most careful and respectful consideration of this court; but when such an observation is addressed to an unargued question depending to some extent upon the consideration of facts and circumstances not brought to the attention of the court one cannot, I think, relieve one's self from one's responsibility by treating it as immediately decisive.

There are two reasons why, with great respect, I think the dictum in question should not govern our decision in this case. The first is based upon the circumstance I have just mentioned, viz., that the facts now before us were not all before the Privy Council in the *St. Catharines Milling Co. Case*(1), and even upon such as were before them there was no argument touching their bearing upon the point now in issue.

The second is that it is, I think, at least doubtful whether Lord Watson was in that observation intending to pass upon any question of legal right. The question of the legal right of the Dominion to in-

(1) 14 App. Cas. 46.

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demnity from the province had not, as I have said, been litigated; and it was consequently still open to the Dominion to raise it in another proceeding. I do not think that in these circumstances Lord Watson could have intended to anticipate the action of the courts in respect of a question which they might be called upon to decide in an appropriate proceeding and commit the Judicial Committee to an opinion upon it in a proceeding in which that question had not been discussed. The preferable view of the import of the remark seems to be that upon the facts as they appeared as a matter of fair dealing Ontario would be expected to assume the obligations in question. In the view I have expressed concerning the functions of the Exchequer Court in deciding controversies such as this, such an opinion, even if one should not, upon a consideration of all the circumstances, differ from it, would not be conclusive of this appeal.

The appeal should be allowed and the action dismissed without costs.

Appeal allowed without costs.

Solicitor for the appellant: *Æmilius Irving.*

Solicitor for the respondent: *W. D. Hogg.*

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IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH HENRY, CHARLES M. HERCHMER, JOHN W. McDOUGALL, CHARLES W. SALT AND JOHN CHECOCK, CHIEFS AND COUNCILLORS OF THE MISSISSAUGAS OF THE CREDIT, ON BEHALF OF THEMSELVES AND ALL OTHERS THE SAID MISSISSAUGAS OF THE CREDIT, AND THE SAID MISSISSAUGAS OF THE CREDIT..... SUPPLIANTS;

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May 8.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Indians—Mississauga Band—Claim for restitution of moneys to trust fund—The Exchequer Court Act, sec. 16 (d)—Declarations of right—Discretion of Superintendent General—Jurisdiction to interfere—Crown as trustee—Effect of treaties.

A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S.C.R. 35) referred to.

2. Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon common law. *Barraclough* v. *Brown*, ([1897] A.C. 623) referred to.

3. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust.

4. While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians

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in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indians Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers.

5 Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.

6. Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties.

PETITION OF RIGHT for an order declaring the suppliants entitled to a certain sum of money alleged to be witheld from them by the Crown.

The facts of the case are stated in the reasons for judgment.

September 9th, 1902.

J. Magee, K.C., A. G. Chisholm and *R. V. Sinclair* for the suppliants;

E. L. Newcombe, K.C., for the respondent.

Mr. Magee argued that as upon the face of the legislation respecting the Indians, both before and after the Union, the Crown stands in the relation of trustee in respect of their lands and moneys, the ordinary liabilities attaching to the position of trustee apply. Not only the deeds and the statutes, but also the order in council of 1861 treats the moneys which are

held in trust for the Indians upon the same basis as other trusts administered by the Government, and instead of being held in the usual way that trust funds are held between subject and subject, they are treated as an investment, money lent to the Crown, which the Crown owes to the *cestuis que trustent*, and upon which the interest is paid to them. Then it was and is the duty of the Crown to keep a proper and correct account of the trust funds in accordance with the terms of the trust. If mistakes in accounting are made then the Crown and not the Indians must bear the loss if there is any loss sustained.

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Now, upon the facts in evidence here, some $30,000 were taken over by the Receiver General at the time of the Union which were supposed to belong to the credit of these Indians.

They did not know the origin of this fund, but it was supposed to belong to the Indians and the Government took it over and placed it to the credit of the Indians. That being so, the money being already in the Consolidated Revenue Fund, the Government having received it, it was merely transferring it from the one fund to the other.

If it was put in the Consolidated Revenue Fund by mistake, if they had the right to take it from the Indians and put it in the Revenue Fund, they ought to have the right to take it from the Revenue Fund and give it to the Indians if there was a mistake made. An order in council was passed authorizing the money to be placed to the credit of the Indians, who had been claiming a balance due them.

Now, assuming that that money had been paid out to the Indians the trustees would not have been entitled, I think, to get it back. Where money is paid upon a compromise, after a claim made and after deliberation and after enquiry, and the mistake is then

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made, a mistake originally made by the man who makes the payment, the authorities I think will bear me out in saying that it could not be recovered back, had it been paid. Here, of course, it had not been paid out to the Indians, but was debited back to the fund. It was the interest which was paid, which it was the Crown's duty to pay under the Act of 1860, under which the Indian Department was taken charge of by the authority of the Provincial Parliament, 23 Victoria, chapter 171, which provides that the Governor in Council shall direct the investments and how they are to be made, and take charge of the investments. Now, these investments under the orders in council were to be treated in the same way as others, and interest was to be credited. It was therefore not a matter of grace by which the Crown allowed the interest, but it was a matter of duty and contract, the contract originally in the trust, the duty afterwards imposed by Act of Parliament and orders in council which had been passed. So that this money which was placed to their credit as income really belonged to the Indians, if they were entitled to the money upon which the interest accumulated. It is paid out to them, distributed for the purpose of being spent by them. They are induced to believe that it is money which they are at liberty to throw into the sea if they wish. But very early after the money had been credited, the Dominion were notified that the matter was not recognized by the Ontario Government. In placing it among the claims which they had against the Ontario Government, the Dominion were not in reality acting as trustees of the Indians. They had done their duty by the Indians, as they supposed, in placing the money to their credit. In trying to make the claim upon the Province they were trying to recoup themselves of the fund they had already dis-

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posed of, and the Superintendent General strongly believed that the payment was right; and, as the evidence is, they refused to make the correction when the difficulties which might arise were pointed out to them. They go on making these payments after the Auditor-General had called their attention to the difficulties, and had refused to give his consent to the credit of the $68,000, and during all that time they never said a word to the Indians that the matter was in any way in dispute between the Dominion and them, or that there was any danger whatever in their expending the moneys which were sent to them from year to year. In 1884 they informed the Indians very promptly after the order in council was passed and after the credit was made that it had been made, and soon after that, as is evident from the correspondence, the Ontario Government repudiated the matter. But the Indians had no idea that there was any question about it, or that there was any dispute between the Province and the Dominion in regard to it. They heard nothing of the arbitration that was going on until after their payments were stopped, and their capital was gone. During all these ten years this trustee allows the *cestuis que trustent* to believe that they are in receipt of these moneys as income, to believe their capital was not being impaired, and to prejudice themselves in the very worst way. We have evidence that this capital which was at the credit of the Indians largely consists of capitalization of their annuities. If we leave that out of the capital at their credit, some $84,000, there would be precious little left of all the money received for the lands of the Indians; and it was an exceedingly fortunate thing that there was anything left at all; but the amount of the capitalization of the annuities, which one might say is only a figurative capital after all, because it

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only represents the value of the perpetuity forever of the annuity. The actuarial value of an annuity in perpetuity is the amount which would produce it at a certain rate of interest; so that in that sense the capital is there, but I mean to say there was never a sum received by the Indians to represent that capital. It was an exceedingly fortunate thing that by the debt of $29,000 that the whole of the moneys placed in trust in their hands was not used up. Then the Indians, finding that the Government are asserting that the $29,000 would be wiped out and the $68,000 principal would be wiped out, they naturally take an interest in the arbitration proceedings which are going on, and they ask to be represented; but those arbitration proceedings are not any proceedings in which they had any right to be there. They were there by the courtesy of the Government and the arbitrators, but they had no standing. It was not an arbitration between them and anybody; it was between two governmental bodies.

[THE COURT: Is not the question very simply this? If a man is trustee and overpays interest by mistake, and funds are coming in from time to time, has he a right to rectify that mistake and recoup himself from the funds?]

Yes, I think that is practically the question, my lord. And for authority in support of the view that the trustee cannot so recoup himself, I would refer to *Skyring* v. *Greenwood* (1). In *Addison on Contracts* (2) The principle is laid down that if trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and they draw out the money and spend it as their own, the trustees or agents cannot recover back the money; nor can they retain other moneys in their hands by way of indem-

(1) 4 B. & C. 290. (2) 9 ed. p. 431.

nity. Again the law raises no implied promise to return in respect of money had and received where the rights of the receiver of the money had been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount. (*Watson* v. *Marston* (1); *Deutsche Bank* v. *Beriro & Co.* (2); *The Queen* v. *The Treasury Board* (3): *Brisbane* v. *Dacres* (4).

Mr. Newcombe: In the first place, my lord, I think the position is clear that if these plaintiffs are entitled to recover anything, it must be by reason of a mere technical rule of law, which they, of course, if such a rule exist, are entitled to invoke in their favour. It is not a case of any hardship; no injustice has been done; and the petitioners have been given a fiat because they have alleged that in the circumstances as they exist here there is a legal obligation on the part of the Crown, enforcible by petition of right, to restore these payments which have been made to them.

It is the same hardship a son suffers where the father has dissipated the estate Those who succeed the present members of the band will become entitled by petition of right as descendants of the present band; and it may be that this money that has been paid over to them has been spent, or it may have been invested. I do not know what they did with it. If they got it and squandered it, there may be so much less for those who come after them; but there is no right in those descendants, or those who may have become descendants, there is no right vested in them which they can assert here in a proceeding of this kind. We might consider, just as that point has been suggested, the position of the case under the pleadings. "The Petition of Right of Joseph Henry, Charles Herch-"mer," and several others who are named, Chiefs in

(1) 4 DeG. M. & G. 230.
(2) 73 L. T. N. S. 669.
(3) 16 Q. B. at p. 362.
(4) 5 Taun. 143.

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"Council of the Mississaugas of the Credit," etc. (Reads from Petition of Right.) The proceeding is not taken in the name of members of the band, who, as shown by the evidence here, were parties to these payments and received and are holding the benefit of the payments which have been made. It seems to me that they have no right to come in here in any representative capacity and say that they want to do this for the members of the band who are going to succeed. It is only the members of the band insofar as they are represented here on the pleadings, the individual members of the band, who can be recognized as parties before the court, and the question is whether they have the rights which they claim to have. The basis of their action, as I understand it, must be this: that there is somewhere evidence of the creation of a fund in respect of which the Crown has undertaken by an obligation which can be enforced to hold that fund for the benefit of these individual Indians, and invest it at interest and pay the interest over to them by way of annuity. If that is not generally the nature of their case, I confess I do not understand what sort of a claim they have. Taking it in that way there is nothing proved here. There is no treaty. They speak of a treaty, they speak of a deed, of a surrender and other general expressions of that kind, but when you come to get down to it there is nothing here establishing any fund, constituting any declaration of trust, or imposing otherwise the obligation of a trustee upon the Crown. It is clear that the Indians had nothing to start with; they had no right or interest of any kind which was known to the law. It is true reserves had been set apart for the Indians by the grace of the Crown, but the Indian has no right or enforcible interest in that reserve. He has a right to hold the reserve during the pleasure of the Crown, and that is all. That plea-

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sure may be revoked at any time, and he acquires no right of action because he is disposessed of property which he has been in the habit of occupying. That was the original position, and the position which they may have with regard to money which the Crown, at some stage in the history of the country, determines to hold for the benefit of the Indians is not any larger than the interest which they have in any reserve, in any piece of land. It has not been explained here where the money came from that they claim that the Crown holds, and it is very likely—in fact it rather appears—that the Crown does not actually hold any money at all, but that they have adopted the policy of paying amounts by way of annuities equivalent to what would be earned by the investment of certain moneys at six per cent., or five per cent., or three and a half per cent., as the case may be. But then when you take this sum of $29,000 which is in question, there is nothing whatever to connect that with any particular transaction respecting any fund.

What I submit on this part of the case is that there is no evidence here, and in fact there is no obligation existing, to limit the payment out of these funds to interest. The whole matter is committed to the discretion of the Crown. It depends originally upon the grace of the Crown, and the Crown has taken a large discretion to deal with the funds, as it sees fit, for the benefit of the Indians, and when you have a question whether a payment was a judicious and proper payment to make, I submit that is not a question to be reviewed by the court after the Crown has passed upon it. There is nothing about interest in this trust at all. There is no trust for us to pay the interest, but it is out of the proceeds or sale or other disposition of the land to make such provision for the maintenance and religious instruction of the people of the Missis-

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sauga Nation of Indians, etc. Under the express words of that declaration, the natural thing to do would be to pay the principal, and I would not have thought that the Government would have undertaken to bind itself in early times with regard to how these trust funds for the benefit of the Indians were to be administered. They were a people in more or less transient stage, in a stage of progress perhaps, and the Government saw fit to adopt a certain policy of protecting them, recognizing an interest in the way of an Indian title, giving them reserves, selling these reserves and taking the money for the benefit of the Indians; but it would have been very bad policy probably for them to have undertaken to define exactly how that money was to be applied. They said, no doubt, "We will hold these moneys the same as you have held your lands of which they are the proceeds; they are to be held for the benefit of the Indians, to be administered as a matter of discretion upon the part of the Crown."

[THE COURT: Was there in any of these treaties an undertaking to pay a given sum each year?]

Mr. Magee: Yes. In the treaty of 1818 there was an agreement to pay $2,090.

[THE COURT: Assuming the Crown is a trustee, and the trust may be enforced—I am not discussing that—but in respect of that they would be entitled to have that sum paid every year; and if there is a capital sum out of which it is paid, it ought to be kept good.]

Mr. Magee: The annuities were capitalized?

Mr. Newcombe: We have always paid the $2,090, and are still willing to do it; but this has no connection with the present case.

I think our position would stand any amount of investigation with regard to a claim of this character.

These payments were made to the Indians, and your lordship asked whether, assuming a trustee had paid too much interest, he could withhold that out of subsequent interest in dealing with his *cestui que trust*. My learned friend cited a good many cases, but I do not think he cited any that would require your lordship to hold that that could not be done. It would seem to be a reasonable thing to do where there is no wrong doing alleged as against the trustee. *Ex parte Ogle* (1). The trustee was allowed to do this in a case which my learned friend cited himself, *Daniel* v. *Sinclair* (2). This is a case binding directly on the court, and it seems to me to cover the point. But the King cannot be a trustee under the authorities at all; so that it is not perhaps necessary to look into the liability of an ordinary trustee. (*Bacon's Abridgement*, "Prerogative.") (3).

Then, following my argument that a petition of right will not lie in such a case as this, I say there is no precedent for it. There are cases where the Crown has collected money from foreign Governments and they have sued the Government, attempting to make the Crown account as a trustee, but they have always failed; and there is no case of a petition of right having been allowed to prevail where they were attempting to hold the Crown as a trustee. It is not within the class of cases in which petition of right will lie as stated in *Feather* v. *The Queen* (4).

My learned friend has referred to some statutes with regard to the application of Indian funds, authorizing payments to be made. Those statutes are not to be construed, I submit, as creating any trust or imposing any obligations upon the Crown, but merely as statutes relating to the administration.

(1) L. R. 8 Ch. 711.
(2) 6 App. Cas. 181.
(3) Vol. 8, p. 82.
(4) 6 B. & S. 257.

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[THE COURT: If there was a claim arising in favour of the Indians under any one of those statutes, then of course the court would have jurisdiction and a declaration might be made]

Reference has been made to sections 69 and 70 of *The Indian Act*, but those are merely administrative directions as regards certain funds which the Government has in its hands appropriated to certain purposes, and they would be construed subject to the rule, I think, laid down by Lord Hobart in *Hobart's Reports* (1), where it says there are also statutes which "were made to put things in ordinary form and to ease a sovereign of labour, but not to deprive him of power" which cannot be said to bind the King. I do not think those statutes can be construed in any way as implying a charge upon the Crown. The Crown is not to be bound either by contract or statute unless it is expressly and clearly bound, and the most that they can say is that these statutes would be unnecessary if the Crown had perfect liberty to appiy these moneys in any way it saw fit.

Mr. Magee replied, citing *Penn* v. *Lord Baltimore* (2); *Rustomjee* v. *The Queen* (3); *Kinloch* v. *The Queen* (4); *Clode on Petition of Right* (5).

Dec. 5th, 1902.

An order was made directing a further hearing on the question of the origin of the fund in controversy in this action.

February 15th, 1905.

The case was re-opened for the purpose above mentioned.

A. G. Chisholm and *R. V. Sinclair* for the suppliants; *E. L. Newcombe, K.C.*, for the respondent.

(1) At p. 146.
(2) 1 Ves. 453.
(3) L. R. 2 Q. B. 69.
(4) W. N., 1882, 164; W. N., 1884, 80.
(5) Pp. 78, 102, 141.

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THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The petition is brought to secure a declaration that a sum of $29,161.17 and interest thereon should be repaid or restored to certain funds that the Crown holds in trust for the Mississaugas of the Credit, a band of Indians residing on their Reserve, in the Counties of Brant and Haldimand, in the Province of Ontario, or for such further or other relief as the nature of the case may require.

By the 111th section of *The British North America Act*, 1867, it was provided that Canada should be liable for the debts and liabilities of each province existing at the Union. Among the liabilities of the late Province of Canada, for which the Dominion of Canada thereby became liable, were certain obligations in relation to the Mississaugas of the Credit. By an agreement or treaty made on the 28th day of October, 1818, between His Majesty the King and certain chiefs of the said nation of Indians, His Majesty, in consideration of the surrender of certain lands therein mentioned, promised to pay to the said nation of Indians the sum of five hundred and twenty-two pounds ten shillings in goods at the Montreal price (1). And by an indenture made on the 28th day of February, 1820, the Mississauga nation of Indians surrendered to His Majesty a parcel or tract of land therein described upon the trust and to the intent that His Majesty, His heirs, successors and assigns might out of the proceeds of the profits of the said lands and premises arising from the sale or leasing, or such other disposition of the same or any part thereof as to His Majesty, His heirs and successors might seem meet, make provision for the maintenance and religious instruction of the people of the Missis-

(1) Indian Treaties and Surrenders, No. 19, vol. 1, pp. 47 and 48.

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sauga nation of Indians and their posterity, according to His Majesty's gracious intention (2).

In 1860 the moneys that the Crown had realized from the sales of these lands, and which were then invested and bore interest at the rate of six per centum per annum, amounted to fourteen thousand one hundred and seventy-five pounds currency. And by an order in council of the 16th of January, 1861, passed, I infer, in pursuance of the 8th section of the Act 23rd Victoria, chapter 151, to which further reference will be made, the Receiver General was authorized to assume these investments, among others, on account of the Province, and to place the amount to the credit of the Mississaugas in the books of account of the Province, there to bear interest at the rate of six per centum per annum. It appears from the evidence that between the date last mentioned and the Union of the Provinces in 1867, further collections were made on account of the lands so surrendered by the Mississaugas amounting to the sum of $3,080.97. So that immediately before the Union the obligation or liability of the Province of Canada to the Mississaugas of the Credit was as follows:

First, to pay them the annuity of five hundred and twenty-two pounds, ten shillings, currency, or two thousand and ninety dollars, mentioned in the agreement of the 28th of October, 1818. Secondly, to hold for them at interest at the rate of six per centum per annum the sum of fourteen thousand one hundred and seventy-five pounds currency, or fifty-six thousand seven hundred dollars that had been put to their credit in the public accounts of the Province; and thirdly, to hold for them, at the current rate of interest, the further sum of eight thousand and eighty dollars and ninety-seven cents that has been mentioned.

(2) Indian Treaties and Surrenders, No. 22, vol. 1, pp. 50-53

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These liabilities formed part of the public debt of the Province, and in the settlement of the matter between the Dominion and the Provinces of Ontario and Quebec the annuity was capitalized at the rate of five per centum, that is, at a sum of forty-one thousand eight hundred dollars, and the provinces were debited and the Dominion credited in the Province of Canada accounts with the three sums mentioned, namely, $56,700; $41,800; and $8,080.97. Thereafter, in the Dominion books of account there was to the credit of this band of Indians the said sum of $56,700 bearing interest at six per centum per annum, the said sum of $41,800 bearing interest at five per centum per annum, and the said sum of $,8080.97 with such additions thereto as arose from further collections on account of the sales of the lands of the Mississaugas, on which interest, at a rate which varied from time to time, was allowed. Between the Union and the 31st of December, 1882, the rate allowed was five per centum; and from that date to June 30th, 1892, four per centum per annum. It was then reduced to three and one-half per centum; and on the 1st of January, 1898, it was further reduced to three per centum per annum On the 1st of July, 1883, there stood to the credit of the Mississaugas, in the public accounts of the Dominion, a capital sum of $119,638.17, consisting of the said sums of $56,700, and $41,800, and a balance of $21,138.17, which sums were then bearing interest at the rates respectively of six, five and four per centum per annum. That, I understand, was the amount of the capital moneys of the Mississaugas of the Credit on that date, as shown not only by the books kept at the Department of Indian Affairs, but also by the books of account of the Audit Office and of the Department of Finance.

In 1883 the Mississaugas put forward a claim to have a considerable additional sum placed to their credit,

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the claim being based upon a report, made in 1858, by the Special Commissioners who were appointed for the purpose of investigating Indian matters in the Province of Canada. The claim was taken up and considered by the Superintendent General of Indian Affairs, and enquiries made at the Crown Lands Department of Ontario, with the result that he came to the conclusion that the claim was well founded; and that the Mississaugas of the Credit were entitled to have a further sum of $68,672.01 placed to their credit in the public accounts of the Dominion. And on a report from him an order in council was passed on the 30th of June, 1884, giving authority for the transfer of the amount mentioned from the Consolidated Revenue Fund "to the credit of the Indian "Fund, with a view to the Mississauga band receiving "the benefit thereof and of which they had so long "been improperly deprived." The Mississaugas were informed of the passing of this order in council and a copy of it was sent to the Indian agent at their Reserve. On the 29th of August following the Department of Indian Affairs requested the Auditor-General to cause an entry warrant to be passed debiting the Consolidated Revenue Fund and crediting the Indian Trust Fund with the amount of $68,672.01 being, as stated, proceeds of sales of lands at one time the property of the Mississaugas of the Credit, together with interest to the 30th December, 1883, as set forth in the order in council of the 30th of June, 1884. It was also stated in the communication that the amount mentioned had been placed to the credit of Indian Funds in the Department of Indian Affairs for the fiscal year ending the 30th of June. There was no Parliamentary authority for debiting the Consolidated Revenue Fund with this amount, and it does not appear that the Auditor-General took any action in respect of the matter beyond asking to

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be furnished with the statement and papers relating thereto. On the 7th of October following, on a memorandum from the Superintendent General of Indian Affairs, dated the 8th of September, 1884, another order in council was passed whereby that of the 30th of June, 1884, was amended by giving authority to include the said amount of $68,672.01 amongst the items of account to be considered in the settlement between the Treasurers of Ontario and Quebec, respectively, and the Dominion of Canada, instead of charging the same to the Consolidated Revenue Fund. This claim, if good, was one against which the Provinces of Ontario and Quebec, as representing the Province of Canada, would have had to indemnify the Dominion. But these Provinces refused to recognize the claim, and on further search and enquiry being made certain old documents were discovered that showed the claim not to be well founded. In the meantime the Indian Department had from year to year credited the Mississaugas with the interest on the sum of $68,672.01 and had used or distributed the income for their benefit; while the Audit Office and the Department of Finance had only allowed interest on the actual balances at their credit, with the result that there was an annually increasing difference between the books of account of the Indian Department, on the one hand, and those of the Audit Office and Department of Finance, on the other; and in consequence an impairment increasing from year to year of the capital funds of the Band was shown in the books of the Audit Office and of the Department of Finance. By a minute of the Treasury Board of the 12th of May, 1893, after reciting that the Board had had under consideration a report from the Auditor-General with regard to the difference between the books of the Department of Indian Affairs and those of

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the Audit Office and of the Finance Department, caused by the Indian Department taking credit for an amount of $68,672.01 under authority of an order in council, dated 30th June, 1884; that this difference had continued to increase on account of the interest compounding from year to year, so that on June 30th, 1892, the total difference due to this cause was $93,982.53; and that the amount in question had never been collected by the Dominion but formed one of the unsettled and disputed accounts between the late Province of Canada and the Dominion,—it was directed that until the final settlement of the Provincial accounts the original entry made by the Indian Department be reversed and that steps be taken to make good, if possible, the over-expenditure of interest. Then on the 26th of October, 1894, an order in council was passed giving authority to charge the capital account of the Mississaugas of the Credit on the 30th June, 1894, until such time as the claim of the Indians was finally decided, with the amount of interest, $29,161,19, on the sum of $68,672.01 credited to the capital account of the Band under the order in council of the 30th of June, 1884, and distributed among the Indians under the authority of such order in council. The minute of the Treasury Board and order in council referred to had reference to the accounts of the Mississaugas as kept in the books of the Department of Indian Affairs; and not to such accounts as shown by the books of the Audit Office and of the Department of Finance, in which by reason of the payments made to and for this Band of Indians there had been, as stated, an annually increasing impairment of their capital funds. It will be observed that in the minute of the Treasury Board cited the difference between the amounts shown to the credit of the Mississaugas in the books of the

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different departments is stated to have increased on account of the interest compounding from year to year. The reason given is not altogether accurate or adequate. But as it was the practice of the Crown to allow the Indians interest on any balance standing to their credit in current account, as well as interest on their capital moneys, it came very much to the same thing; but the difference was in fact due in the first place to the Indian Department crediting, and the Audit Office and Department of Finance refusing to credit, the Mississaugas with interest on the sum of $68,672.01 mentioned; and in the second place, to the Department of Indian Affairs crediting the Indians with interest (not allowed by the other two departments) on capital moneys that had already been paid out to and for these Indians. Of the sum of $29,161.17, at which the difference stood, after debiting in the books of the Indian Department the capital sum of $68,672.01 that had been credited in the mistaken view that the Indians were entitled thereto, an amount of $23,777.68 represented interest credited by the Department of Indian Affairs on the capital sum mentioned; and the balance of $5,383.49 represented the aggregate of credits for interest allowed by the latter department on the amounts by which from time to time the balances of capital moneys exceeded in their books the balances as shown in the books of the Audit Office and Department of Finance. For the same reason the order in council of the 26th of October, 1894, does not express the true position of the matter when the sum of $29,161.17 is referred to as interest on the amount of $68,672.01. It is also to be observed, as has been noticed, that the authority given to charge the sum of $29,161.17 to the capital account of the Band had reference only to the account as it appeared in the books of the Indian Department, and there the

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entry was in substance and in fact one of adjustment only, and not a substantial charge on the funds occurring at that time. The capital moneys against which this sum was then charged had long before been paid out to or for the Mississaugas. With regard to these moneys the Crown, through the several departments of the Government mentioned, stood in more than one relation. It was the office of the Audit Department (whether alone or in connection with the Department of Finance, is perhaps not quite clear) to determine from year to year what amount of interest was due, and should be credited to this Band of Indians. Any interest credited by the Indian Department in excess of the amount so allowed was credited without due authority; and if there had been nothing except income that the latter department was entitled to disburse, the difference could never have arisen as the payments made would not have been honoured by the Audit Office after the balance at current account had been exhausted. But the Indian Department was from year to year collecting and expending moneys for these Indians on capital account as well. The Superintendent General of Indian Affairs, or the Governor in Council, determined what amounts might from time to time be paid out for the Indians on capital account. To illustrate this matter by the accounts in evidence it will be seen therefrom that in addition to the two sums of $56,700 and $41,800 there was, as has been mentioned, to the credit of the Mississaugas on capital account on the first of July, 1883, the sum of $21,138.17. Between that date and the year 1894 the department collected on their account, from sales of the lands, sums amounting in the aggregate to $7,035.76. But it also from year to year made expenditures from capital account, which, including a loan of $6,000, amounted to more than $13,000; and this altogether

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apart from any question as to the amount of $29,161.17 now in issue here. As the Department of Indian Affairs had capital moneys at the credit of the Indians which it was entitled to disburse on their account, the Audit Office had no check. When the annual expenditure by the Indian Department on account of the Indians exceeded the amount of their income, or the amount to their credit on current account, the payments fell upon and were charged by the Audit Office and the Department of Finance to capital moneys at the credit of the Band. So it happened that of the moneys annually distributed for the maintenance of these Indians between the years 1884 and 1894, which the Department of Indian Affairs intended to pay out of income, and which the Indians received and used as being income, a part each year was in fact taken from, and constituted an impairment of, the capital funds. Against this impairment of the capital moneys of the Band the suppliants for themselves and the Band now seek relief.

First, with regard to the parties to the action, it will be seen that the petition is brought by certain chiefs and councillors of the Mississaugas of the Credit, for themselves and other members of that Band of Indians. That, according to the practice of the court, is the proper course to follow where, as in this case, there are a considerable number of persons having the same interest in the cause or matter; and with respect to the incident that the suppliants are Indians it is only necessary to refer to the statute which gives them the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them; or to compel the performance of obligations contracted with them (1).

Then with regard to the nature of the relief sought by the petition, it is obvious, that any judgment to be

(1) R. S. C. c. 43, s. 79.

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entered must take the form of a declaration of the rights of the parties. But that does not of itself constitute an objection to the proceedings, for it is in accordance with the procedure prescribed by the twelfth section of *The Petition of Right Act*, whereby it is provided that the judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion, of the relief sought by his petition, or to such other relief and upon such terms and conditions, if any, as are just (1). At the same time the fact that the judgment in such cases takes the form of a declaration does not in any way enlarge the authority of the court, or give it jurisdiction in any case in which it would not otherwise have jurisdiction. Where a court has no jurisdiction to give relief in an action it has no authority to make a declaration binding the rights of the parties. *Barraclough* v. *Brown* (2). And that rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon the common law. If the statute does not give jurisdiction no declaration can be made, and no judgment given.

Then with regard to the moneys arising from the sale of the lands surrendered by the Mississaugas of of the Credit, it is clear, I think, that the Crown holds them in trust for that band of Indians. By the terms of the surrender of the 28th of February, 1820, to which reference has been made, the lands were to be held upon the trust therein mentioned. By the second section of the Act of the Legislature of the Province of Canada, 23rd Victoria, chapter 151, respecting the management of Indian lands and property, it was provided that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their

(1) R. S. C. c. 136, s. 12. (2) [1897] A. C. 623.

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benefit, should be deemed to be reserved and held for the same purposes as before the passing of the Act, but subject to its provisions. By the third section of the Act it was further provided that all moneys or securities of any kind applicable to the support or benefit of the Indians, or any tribe or band of Indians, and all moneys accrued or thereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, should, subject to the provisions of the Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with, before the passing of the Act. And by the eighth section of the Act it was provided that the Governor in Council might, subject to the provisions of the Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands should be invested from time to time, and how the payments to which the Indians might be entitled should be made, and should provide for the general management of such lands, money and property, and what percentage or proportion thereof should be set apart from time to time to cover the cost of and attendant upon such management under the provisions of the Act, and for the construction and repair of roads passing through such lands and by way of contribution to schools frequented by such Indians. In the distribution of legislative powers under *The British North America Act*, 1867, the Parliament of Canada was given authority to make laws for the peace, order and good government of Canada in relation, among other things, to "Indians and lands reserved for the Indians" (s. 91, (24) and in the statutes of the Dominion relating to that subject the provisions mentioned have from time to time, with some

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alterations and additions, been re-enacted (1). There are a number of other provisions of the Acts relating to the Indians and Indian Lands in which reference is made to lands or moneys being held by the Crown in trust for the Indians or to their use (2). But it does not follow that because the Crown is a trustee for the Indians in respect of such lands or moneys, that the court has jurisdiction to enforce the trust, or to make any declaration as to the rights of the parties. That authority, if it exist, must be found in the statutes which give the court jurisdiction. There are a number of authorities and cases in which the question as to whether the Crown may be a trustee has been considered (3), and there has been some difference of opinion on the subject. But the real question in any such case is not, it seems to me, whether the Crown may or may not be a trustee, but whether the court has any jurisdiction in respect of the execution of the trust. Where the jurisdiction to grant the relief sought is expressly given by statute, no difficulty arises in respect of either question. That was the position of matters in the case of *The Canada Central Railway Cy.* v. *The Queen* (4). There the company was entitled, under an Act of the legislature, to the lands in respect of which a declaration of its rights was sought, and the court had been given authority by the legislature to declare in such a case that the

(1) 31 Vict. c. 42, ss. 6, 7 and 11; 39 Vict. c. 18, ss. 4, 29, 58 and 59: 43 Vict. c. 28, ss. 15, 40, 69 and 70; R. S. C. c. 43, ss. 14, 41, 69 and 70; 58-59 Vict. c. 35, s. 2; and 61 Vict. c. 34, s. 6.

(2) C. S. C. c. 9, s. 10; 29-30 Vict. c. 20; 39 Vict. c. 18, s. 65; 43 Vict. c. 28, ss. 33 and 76; R. S. C. c. 43, ss. 37 and 77; 51 Vict. c. 22, s. 13.

(3) Bacon's Abridg. Prerogative, F. 1, vol. 8, p. 82; Lewin on Trusts, 11th Ed., pp. 2, 7 and 29: *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 452; *Canada Central Railway Co.* v. *The Queen*, 20 Grant, 289, 293; *Rustomjee* v. *The Queen* L. R. 2 Q. B. D. 74; *McQueen* v. *The Queen*, 16 S. C. R. 1, *per* Gwynne J. at page 58, and *per* Taschereau J. at page 117, and *The Canadian Pacific Railway Co.* v. *The Municipality of Cornwallis*, 7 Man. R. 1, *per* Killam J. at pages 21 to 23.

(4) 20 Grant, 289, 293.

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company was so entitled. With respect to the matters in controversy in this case any jurisdiction that the court has is derived from the provisions of the fifteenth and sixteenth sections of *The Exchequer Court Act* (1). By the fifteenth section of the Act it is provided that the court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might in England be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown. Now, so far as it is sought to maintain this petition upon the ground only that the Crown is a trustee for the Indians, it is conceded that there has been no case in England in which any relief has been given against the Crown as a trustee, and the general provision with which the section begins may, I think, be passed over without further consideration But it is contended that the case is one in which the money of the suppliants is in the possession of the Crown, and that the court has on that ground the jurisdiction that is invoked in support of the petition. With that contention I am not able to agree. It seems very clear that relief is not sought in respect of moneys now in the possession of the Crown, but in respect of moneys which have been paid over to the Indians and which are no longer in the possession of the Crown, but which it is alleged ought now to be in the possession of the Crown. If the subject's money is in the possession of the Crown the court has undoubted jurisdiction to declare that he is entitled thereto, and the

(1) 50-51 Vict. c. 16.

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amount so awarded to him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada (1). But that provision is not applicable to the present case where the suppliants seek to have a sum of money transferred from the Consolidated Revenue Fund to the Indian Trust Fund. It was suggested in argument that the sum of $29,161.17, in question in this case, had gone into the former fund when it was charged to the latter. But that is not the case, and even if it were, I do not see how the amount could now be taken out of the Consolidated Revenue Fund and restored to the Indian Trust Fund, without the authority of Parliament.

With respect, however, to the provision of the section that gives the court jurisdiction in any case in which the claim arises out of a contract entered into by or on behalf of the Crown, it seems to me that the court has jurisdiction so far as the claim set up is supported by the agreement or treaty, or by the surrender, to which reference has been made. Then by clause (*d*) of the sixteenth section of the Act (2) the court is given exclusive jurisdiction to hear and determine every claim against the Crown arising under any law of Canada. That provision was considered in the case of *Yule* v. *The Queen* (3), in which it was held that a debt or liability of the late Province of Canada, arising under an Act of the Legislature of that Province for which debt or liability the Dominion of Canada became liable under the 111th section of *The British North America Act*, 1867, was a claim arising under a law of Canada. So here, I think, that in so far as the present claim rests upon that section and upon the Acts of the Legislature of the Province of

(1) 50-51 Vict. c. 16, s. 47. (2) 50-51 Vict. c. 16.
(3) 6 Ex. C. R. 123; 30 S. C. R. 35.

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Canada, and of the Parliament of Canada, it is a claim arising under a law of Canada, and to that extent within the jurisdiction of the court.

The Crown, however, does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides. That has been the position of Indian affairs since the year 1860, when by virtue of the Act 23rd Victoria, chapter 151, s. 1, the Commissioner of Crown Lands became the Chief Superintendent of Indian Affairs. After the Union, the Secretary of State was Superintendent General of Indian Affairs from 1868 to 1873 (1), and since the latter year the office has been held by the Minister of the Interior (2). Subject to the terms and conditions of the several agreements or treaties with the Indians, or of the surrenders from them, and to the provisions of the statutes from time to time in force respecting Indians and Indian Lands, the Superintendent General of Indian Affairs has, under the Governor in Council, the management and control of Indian lands, property and funds (3).

For the manner in which the affairs of the Indians are administered the Government of the Dominion and the Superintendent General are at all times responsible to Parliament; and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the court has

(1) 31 Vict. c. 42, s. 5.
(2) 36 Vict. c. 4, s. 3; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, s. 4.
(3) 31 Vict. c. 42, s. 5; 36 Vict. c. 4, s. 3; 39 Vict. c. 18, ss. 2 and 29; 43 Vict. c. 28, s. 40; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, ss. 4 and 41.

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no jurisdiction. Then there is this further difference between the Crown as a trustee and an ordinary trustee; the Crown is not bound by estoppels; and no laches can be imputed to it; neither is there any reason why it should suffer from the negligence of its officers. (*Chitty's Prerogatives of the Crown* (1). In short it adds nothing to the argument to state that the Crown is a trustee Where it is a trustee the court has no jurisdiction to impose any obligation upon it, or to declare that any such obligation exists, unless the statute gives jurisdiction, and where the statute gives jurisdiction it is immaterial whether in the particular case the Crown is held to be a trustee or not.

With regard then to the moneys in question in this case, there is no occasion at present to make any further reference to the sum of $56,700 for which since 1860 the Crown has been a debtor to the Mississaugas of the Credit. That amount stands to their credit today, and the interest thereon has been credited to them from year to year. The balance of other capital moneys arising from the sales of their lands, collected before and since the Union, has been exhausted. Part of this has been expended in payments that it is couceded are proper charges against capital moneys, and part has been distributed to the Mississaugas for their maintenance and support. So far as appears there was no intention on the part of the Superintendent General of Indian Affairs to pay any part of their capital moneys to the Band for their maintenance. The general policy of the department has been against doing that. But in the present case, through error or mistake, that, as has been seen, has happened. Was such a distribution contrary to any contract or law of Canada, so as to raise a claim in favour of the Indians over which the court would have jurisdiction? That question I

(1) Pp. 379-381.

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answer in the negative. The contract between the Crown and the Indians in respect of these moneys is to be found in the Indenture of Treaty of February 28th. 1820; and there is, I think, nothing therein to prevent the Crown from making provision for their maintenance out of any of the moneys arising from the sale or leasing or other disposition of the surrendered lands. And no statute has been cited, and I know of none, prior at least to July, 1894, that would make any such distribution of capital moneys unlawful. In the year last mentioned, by the Act 57-58 Victoria, chapter 32, section 11, a number of sections were added to *The Indian Act*, by one of which (s. 139) the Governor in Council was authorized, with the consent of a Band, to make certain specified expenditures out of any capital moneys standing to the credit of the Band. In terms that is an enabling enactment, but its effect possibly is to limit the authority and discretion which otherwise the Governor in Council and the Superintendent General of Indian Affairs would have had in respect of such expenditures. But I express no opinion as to that. The question does not arise in this case, as the capital moneys in question had been distributed to the Mississaugas before that provision was enacted.

With regard to the Crown's obligation under Treaty No. 19, made on the 28th day of October, 1818, to which reference has been made more than once, the case stands, it seems to me, on a different footing. There the Crown's obligation was to pay to the Mississaugas of the Credit a fixed annuity of two thousand and ninety dollars. In respect of that obligation which, by virtue of *The British North America Act*, 1867, now rests on the Crown, as represented by the Government of Canada, the Crown is not a trustee, but a debtor; and the obligation is not to pay to the Indians the

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revenue arising from any sum of money, but to pay a fixed and definite sum annually. The capitalization of the Indian annuities was no doubt a convenient arrangement to adopt in settling the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, as representing the old Province of Canada, and no doubt it is also convenient in keeping the books of account of the Dominion to credit the Indian Trust Funds with the amount of such capitalization. But that does not affect the right of the Indians in any way. They were not parties to the arrangement. And in the present case it makes no difference in my opinion whether the capital fund that represents the principal of the annuity in question stands at ten thousand or at one hundred thousand dollars. What the Mississaugas are entitled to in that respect is an annual payment, or credit in current account of the sum of two thousand and ninety dollars, —neither more nor less. And as their right thereto rests upon the treaty or contract between the Crown and them, and upon *The British North America Act*, 1867, the court has, I think, jurisdiction so to declare.

The fiscal year 1889-1890 was the last year in which the Mississaugas were credited with the full amount of this annuity. Since that time something less than the full amount has been credited in each year, while the full amount should in my opinion have been credited. To that extent the suppliants and those for whom the petition is brought are, I think, entitled to relief. Whether any such relief will work out to the advantage of the Indians or not, is another question. I do not go into that matter. The office of the court is to define, as best it may, the legal rights and relations of the parties. All other matters arising out of the case are for the consideration of those upon whom rests the responsibility of advising the Crown, and of inviting the action and

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co-operation of Parliament, if it is found that such action is advisable.

There will be judgment for the suppliants, and a declaration that the Mississaugas of the Credit have been and are entitled to be paid or credited each year with the full amount of the annuity of two thousand and ninety dollars, payable under the agreement or treaty No. 19 dated the 28th day of October, 1818, and that they are in that respect and to that extent entitled to relief.

Judgment accordingly,

Solicitor for the suppliants: *A. G. Chisholm,*

Solicitor for the respondent: *E. L. Newcombe.*

THE PROVINCE OF QUEBEC.. .....APPELLANT; 1898

AND *Oct. 7.

THE DOMINION OF CANADA.....RESPONDENT.

IN THE MATTER OF

THE ARBITRATION BETWEEN THE DOMINION OF CANADA AND THE PROVINCES OF ONTARIO AND QUEBEC.

In re INDIAN CLAIMS.

ON APPEAL FROM AN AWARD OF THE ARBITRATORS.

Treaties with Indians—Contingent annuities—B. N. A. Act. (1867) *sec.* 112—*Debts of late Province of Canada—Res judicata.*

The award complained of by the Province of Quebec determined that certain payments made by the Dominion of Canada in virtue of the Huron and Superior Treaties with the Ojibeway Indians for arrears of augmented annuities and interest from 1867 to 1873, and for increased annuities in excess of the fixed annuities with interest paid subsequently should be taken into account and included in the debt of the late Province of Canada mentioned in the 112th section of the British North America Act, 1867.

Held, affirming the decision of the arbitrators, that the question of these contingent annuities had been considered and decided by Her Majesty's Privy Council in the case of *The Attorney-General of Canada* v. *The Attorney-General of Ontario* ([1897] A. C. 199), and that the payments so made by the Dominion were recoverable from the Provinces of Ontario and Quebec conjointly in the same manner as the original annuities.

APPEAL on behalf of the Province of Quebec from the award of the Arbitrators made on the 7th of January, 1898, in the matter arising out of the Huron and Superior Treaties with the Ojibeway Indians

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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maintaining the claim of the Dominion of Canada against the Provinces of Ontario and Quebec conjointly for $95,200, arrears of augmented annuities, with interest to 31st December, 1892, under the said treaties from the year 1867 to the year 1873, and the further sum of $389,106 80, amount of increased annnuities over the fixed annuities, with interest to 31st December, 1892, paid by the Dominion to the said Indians since the year 1874.

The arbitrators found "that in ascertaining and determining the debt of the Province of Canada mentioned in the 112th section of the British North America Act, 1867, the contingent obligation devolving upon the Dominion of Canada to pay the increased annuities mentioned in the Robinson Treaties of the 7th and 9th of September, 1850, and any increased annuities which have become due to the Indians since the 1st day of July, 1867, up to and including the 31st day of December, 1892, shall be taken into account and included in such debt."

Trenholme Q.C. for the appellant. No such award ought to have been made against the Province of Quebec, which ought not to bear any part of the increased annuities in question.

In the former appeals before this Court and the Privy Council (1) the question was whether or not Ontario took the lands acquired from the Indians under the Robinson Treaties subject to a trust or interest in favour of the Indians which imposed on Ontario alone the payment of the annuities. See remarks by Lord Watson, in delivering the judgment of the Privy Council, at pages 208-211. The fact that the Dominion claimed against Ontario alone in the previous case, and now claims against both Quebec and Ontario,

(1) *The Attorney-General of Canada* v. *The Attorney-General of Ontario*; (1897) A. C. 199; 25 Can. S. C. R. 434.

shews that the present case is not *res adjudicata* in this matter against Quebec. The previous case was expressly confined to the question of trust or interest in the lands, and the question of the joint liability of Quebec was not argued before the arbitrators, but was reserved for future action by the Dominion. The treaty provided that the Government which was to pay the increased annuities would only be liable to do so from time to time in the event of its receiving increased revenues from the lands. Quebec is now asked to pay increased annuities without receiving any revenue whatsoever, and the position is that the greater the revenue to Ontario the greater is the loss to Quebec. This may continue for an indefinite time and to an indefinite amount. Quebec does not and cannot fall under the conditions of the treaty which imposed the increased annuities, and there was no intention or assent on the part of Quebec at confederation to being placed in that position.

It is consistent with section 91 of The B. N. A. Act that such a contingent and uncertain liability connected with the Indians fell upon the Dominion at confederation, and did not go to increase the surplus debt existing at confederation to be borne by these provinces. Section 111 of the B. N. A. Act in declaring that Canada should be liable, not simply for the "debts," but for the "debts and liabilities" of each province existing at the union had for its object and effect the imposing of such obligations upon the Dominion, and when by sections 11[illegible], 114 and 115 the word "debt" alone without "liabilities" is used in dealing with the subject of the public debt something different and more restricted is meant than by the use of the more comprehensive terms "debts and liabilities" in section 111. The term "and liabilities"

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added after the word "debts" means something and adds something, and should be so interpreted.

The surplus debt which Ontario and Quebec jointly assumed by section 112, is the surplus debt in actual existence at the time of the confederation, not something that may or may not arise in future out of transactions which the provinces previously entered into. See remarks by Mr. Justice Gwynne in the former case (1) at pages 520 and 523. As a matter of law the liability to pay these increased annuities for the years since Confederation was not a debt of the Province of Canada at that time. *Pothier*, Obligations No. 218. The award of 1870 dealt with the whole subject and does not support or contemplate imposing such a burthen on Quebec. So far as Quebec's liability for these annuities is concerned, it does not go beyond the inclusion in the debt of the late Province of Canada of the capitalized annuities granted for the Indian lands.

Hogg Q.C. for the respondent, was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—(Oral.) The arbitrators came to a proper conclusion as to the point which is now raised and their award ought not to be interfered with, more especially as in the judgment of the Privy Council in the case of *The Attorney-General for the Dominion of Canada* v. *The Attorney-General for Ontario* (2), their Lordships, though not expressly deciding the question, may, from their interlocutory observations during the course of the argument, be presumed to have had under consideration contingent annuities as well as those presently payable.

We must dismiss the appeal.

(1) 25 Can. S. C. R. 434. (2) [1897] A. C. 199.

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GIROUARD J. stated that he did not take part in the judgment as there was a majority without him.

(His Lordship having formerly acted as counsel for the Province of Quebec, sat only by consent of the parties at the hearing of this appeal in order to form a quorum.)

Appeal dismissed.

Solicitor for the appellant: *N. W. Trenholme.*

Solicitor for the respondent: *W. D. Hogg.*

THE TOWN OF RICHMOND (PLAINTIFF)..... APPELLANT;

AND

JOSEPH L. LAFONTAINE AND OTHERS (DEFENDANTS)..... RESPONDENTS.

1899

*Oct. 11.

*Nov. 20.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Municipal corporation—Waterworks—Rescission of contract—Notice—Mise en demeure—Long user—Waiver—Art. 1067 *C. C.*

A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it would, under the circumstances, be inequitable to rescind the contract.

Held further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

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[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA . . . . . } APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA. RESPONDENT.

J.C.* 1888 Nov. 22, 23. 1889 April 3.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—British North America Act, 1867, s. 109—*Rights of the Province to the Precious Metals — Conveyance of "Public Lands" — Construction.*

Held, that a conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.

APPEAL from a judgment of the Supreme Court of Canada (Dec. 13, 1887), confirming the judgment of a judge of the Exchequer Court of Canada upon a case stated under "The Supreme and Exchequer Court Act," and Columbian Act, 45 Vict. c. 2.

The case stated was as follows:—"The Attorney-General of Canada alleges, and the Attorney-General of British Columbia denies, that the precious metals in, upon, and under the public lands mentioned in sect. 2 of the Columbian Act 47 Vict. c. 14, are vested in the Crown as represented by the Government of Canada, and not as represented by the Government of British Columbia."

The way in which the controversy arose is stated in the judgments of their Lordships. The report of the case in the Supreme Court will be found in 14 Sup. Ct. (Canada) p. 345.

The Supreme Court decided by three judges out of five in favour of the respondent.

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, and LORD MACNAGHTEN.

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Ritchie, C.J., held that the principle applicable to the case of grants of land from the Crown to a subject was not applicable to the present case, which was not the case of a grant or conveyance at all but of a statutory transfer to the Dominion by the Province of British Columbia of the right of that Province to the public lands in question, the title to the lands remaining throughout in the Crown. He held that the expression "public lands" was sufficient to pass the interest in question. He also relied upon the wording of a British Columbia minute of the 10th of February, 1883, as shewing how the transactions in question were understood by the Provincial Government.

Gwynne, J. (Taschereau, J., consenting), agreed with the Chief Justice, and relied upon the fact that nearly the whole of the belt of territory in question consists of mountain lands which are of no value for agricultural or other surface purposes, and that the value for surface purposes of such small portion thereof as consists of land in the valleys of the mountain streams is reduced to a minimum by reason of the large powers conferred upon the mining owner as against the surface owner by the Mining Acts of British Columbia, which Acts enable the former to enter upon the lands of the latter, and to dispossess him upon payment of compensation, and to appropriate the water from the mountain streams, and consequently that unless the precious metals pass to the Dominion the cession is illusory and of no value.

Fournier, J., held that the transfer under which the lands in question passed to the Dominion was in effect a contract between the Queen as chief of the Executive Government of the Province, and the Queen as chief of the Executive Government of the Dominion, whom for this purpose he held to be in effect different legal persons, and that to this contract the principles enumerated in the *Earl of Northumberland's Case* (1) applied. He considered that the words "public lands" in the British Columbia Act, 47 Vict. c. 14, did not transfer the right to the precious metals on or under such lands, that in sect. 109 of the British North America Act, 1867, the words "mines and minerals" are specified in addition to lands, and he drew a distinction in this respect

(1) 1 Plowd. 310.

between those words in the 109th section of that Act, and the words "public lands" in the 91st section of the same Act, which latter words he held were used in a sense exclusive of mines and minerals. He was also of opinion that the legislative control over the lands in question would pass to the Dominion. Henry, J., based his judgment upon a previous decision of his own, in a case of *The Queen* v. *Farwell* (1) in 1886, in which he decided that the title to the lands in question was not vested in the Queen.

Sir *Horace Davey*, Q.C., *Jeune*, Q.C., and *Clay*, for the appellant, contended that this decision was erroneous. As to the prerogative right of the Crown to the precious metals found in mines reference was made to *In re Earl of Northumberland's Mines* (2), and to *Woolley* v. *Attorney-General of Victoria* (3). It is a rule of law, settled by those authorities, that this prerogative right will not pass under a grant of land by the Crown unless by apt and precise words the intention of the Crown that it should pass is expressed. By the British North America Act, 1867, sect. 109 and sect. 10 of the Order in Council (May 16, 1871), by which the Province of British Columbia was admitted into union with the Dominion of Canada, that prerogative right remained vested in the Crown on behalf of the Province. Reference was made to British Columbian Acts 43 Vict. No. 11, and 47 Vict. c. 14. No transfer of prerogative right was effected thereby, nor by the grant in question made by the Province to the Dominion Government. That grant was in reality a grant of land to the Canadian Pacific Railway Company to aid in the construction of the railway. The lands in reference to which this question has arisen have not ceased to be part of the Province and subject to provincial legislation. Mining for gold and silver in these lands is regulated by the Provincial Gold Mining Ordinance, 1867, sects. 4 and 15, and by the Mineral Act, 1884. Under those Acts miners must be licensed by certificate of the provincial authorities. See also the Land Act, 1875, sects. 80 and 81, and Land Act, 1884, sects. 64, 65, which

(1) This judgment will be found, together with the judgments of the Supreme Court which reversed it, in 14 Sup. Ct. (Canada) 392.

(2) 1 Plowd. 310.

(3) 2 App. Cas. 163.

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reserve to such miners the right to enter on lands alienated by the Crown and search therein for precious metals. This is inconsistent with an intention to transfer to the Dominion the prerogative rights of the Crown to precious metals found in provincial territory. The claim of the Dominion is in violation of British North America Act, 1867, sect. 109: see *Attorney-General of Ontario* v. *Mercer* (1).

Rigby, Q.C., *Sedgwick*, Q.C. (Canada), and *Gore*, for the respondent, contended that the principle established by the cases in Plowden's Reports and 2 App. Cas. did not apply. This is not the case of a grant of land from the Crown to a subject. No question is involved of a grant from the Crown nor any question as between the Crown and a subject. The title to the belt of territory in question remained in the Crown after the cession by the Province to the Dominion, just the same as before the cession. The cession was made by the Queen as represented by the Province to the Queen as represented by the Dominion. Under these circumstances the expression "lands" primâ facie includes the prerogative right of the Crown to the precious metals upon and under the soil of such property. Such a right is an ordinary incident to the title to the soil on the part of the Crown. "Public lands" in sect. 92 of British North America Act, 1867, do not exclude mines and minerals upon such lands. If mines and minerals were excluded therefrom the legislative control over the sale and management thereof in the Province would not belong to the Province under sect. 92, but would be vested in the Dominion under sect. 91. This would be contrary to the case on both sides, as shewn by the whole course of provincial and dominion legislation since 1867. "Public lands" in sect. 92 are equivalent to the several descriptions of landed property specified in sect. 109, that is, include the precious metals. The same expression has the same meaning when used in art. 11 of the Terms of Union and in sect. 2 of British Columbian Act, 47 Vict. c. 14. Consequently the right to the precious metals in question passed to the Dominion Government, and is no longer vested in the Province.

(1) 8 App. Cas. 767.

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Sir *Horace Davey*, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

The question involved in this appeal is one of considerable interest to the parties, but it will be found to lie within a very narrow compass, when the facts, as to which there is no dispute, are explained.

By an Order in Council, dated the 16th of May, 1871, Her Majesty, in pursuance of the enactments of sect. 146 of the British North America Act, 1867, was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act, and to certain Articles of Union which had been duly sanctioned by the parliaments of Canada and by the legislature of British Columbia. The eleventh of the Articles of Union is in these terms:—

"11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right, or by Crown grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous

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public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land so to be conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of $100,000 per annum, in half-yearly payments in advance."

After the union, owing to engineering and other difficulties, there was considerable delay in constructing the line of railway through British Columbia. Various differences arose between the two Governments, and these were ultimately settled, in the year 1883, by a provisional agreement, which was subsequently ratified by the respective legislatures of Canada and the Province. Part of the agreement had reference to the 11th article of Union, which it modified to the following extent. The Government of British Columbia agreed to convey to the Government of the Dominion, as therein provided, the public lands along the railway, wherever it might be finally located, to a width of twenty miles on either side of the line, and, in addition, to convey to the Dominion Government three and a half millions of acres of land in the Peace River District, in one rectangular block, east of the Rocky Mountains, and joining the North-West Territory of Canada. On the other hand, the Dominion Government undertook, with all convenient speed, to offer for sale the lands within the railway belt, on liberal terms, to actual settlers; and also to give to persons who had squatted on these lands a prior right of purchasing the lands improved, at the rates charged to settlers generally. In accordance with this agreement, the lands forming the railway belt were granted to the Dominion Government, in terms of the 11th Article of Union, by an Act of the legislature of British Columbia, 47 Vict. c. 14, s. 2.

In 1884, a controversy arose between the Dominion and the Provincial Government in regard to the gold, which had then been found to exist in considerable quantities within the forty-

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mile belt. With the view of judicially ascertaining which of them was entitled to it, a special case was adjusted, commendable for its brevity, which simply states the issue to be, whether the precious metals in, upon, and under the lands within the forty-mile belt are vested in the Crown, as represented by the Government of Canada, or as represented by the Government of British Columbia? The case was first presented to Fournier, J., in the Exchequer Court of Canada, who, without hearing parties on the merits, gave a formal judgment in favour of the Dominion. On appeal, his judgment was, after a full hearing, affirmed by a majority of the Supreme Court of Canada, consisting of Sir William Ritchie, C.J., with Taschereau and Gwynne, JJ., the dissentient members of the Court being Fournier and Henry, JJ.

It was not disputed, in the arguments addressed to this Board, that the question raised in the special case must be decided according to the principles of the law of England, which, "so far as not from local circumstances inapplicable," was extended to all parts of the Colony of British Columbia by the English Law Ordinance, 1867.

Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the Province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a

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transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as partes soli, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case* (1) all the justices and barons agreed that, in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals

(1) 1 Plowd. 336, 336 a.

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in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of "public lands," which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

The grounds upon which the majority of the learned judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgment delivered by Sir William Ritchie, C.J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the provisions of the 11th Article of Union, which they regarded as a statutory compact between two constitutional governments. The learned Chief Justice said: "This was a statutory arrangement between the Government of the Dominion and the Government of British Columbia, in settlement of a constitutional question between the two Governments, or rather giving effect to and carrying out the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrangement, the Government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor-General, all right to certain public lands belonging to the Crown, or to the Province of British Columbia, as represented by the Lieutenant-Governor."

If the 11th Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion Government, the conclusion of the Court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the Federal Union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern

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the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with jura regia; it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that sect. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that Province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th Article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties." The scope and meaning of that term, as it occurs in sect. 109, underwent careful consideration in the case of *Attorney-General of Ontario* v. *Mercer* (1), which was appealed to this Board by the Dominion Government, in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force (2). The Earl of Selborne, in delivering the judgment of the Board, said (3): "It appears, however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals—even as to mines and minerals it here necessarily signifies rights belonging to the Crown jure coronæ."

It is not necessary for the purposes of this appeal to consider

(1) 8 App. Cas. 767. (2) 8 App. Cas. 777. (3) 8 App. Cas. 778.

whether the expression "royalties," as used in sect. 109, includes jura regalia other than those connected with lands, mines, and minerals. *Attorney-General of Ontario* v. *Mercer* (1) is an authority to the effect, that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands," "mines," and minerals." The exception created by the 11th Article of Union, from the rights specially assigned to the province by sect. 109, is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say, "mines" and "minerals," in the sense of sect. 109. Mines and minerals, in that sense, are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of Provincial legislation, to settlers who purchased land in British Columbia. But jura regalia are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the Provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act.

Their Lordships do not doubt that the 11th Article of Union might have been so expressed as to shew, by necessary implication, that some or all of the royalties dealt with by sect. 109 were to pass to the Dominion along with the lands constituting the railway belt. But there is not a single expression in the context which is applicable to gold or gold-mining rights. On the other hand, the whole terms of the Articles of Union, as well as of the subsequent Agreement of 1883, appear to their Lordships to point to the conclusion that the high contracting parties were dealing with public lands, in so far as these were available for the ordinary purposes of settlement, and had either excluded gold mines from their arrangements, or had them not in contemplation. It is right, however, to notice that the learned Chief Justice refers to a minute of the Council of British Columbia containing the recommendation of a committee, which was communicated to the Government of Canada, as evidencing an understanding, on the part of the Provincial Government, that mines

(1) 8 App. Cas. 767.

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of gold and other precious metals were to be conveyed along with the belt lands. The passage upon which the learned Chief Justice relies is in these terms:—"That it be one of the conditions that the Dominiou Government, in dealing with lands in the Province, shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in this Province at the present time, and that no delay shall take place in throwing open the land for settlement." The words "mining and agricultural industries," taken per se, might be of dubious import, because they would not disclose whether gold digging was referred to as one of the mining industries. But these industries are described as an integral part of the "land system;" and when it is considered that, at the date of the report, the system of land settlement in the Province, which included the baser metals, was regulated by special statute, and that gold mines, which were not given off to settlers, were not treated as part of that system, but were the subject of separate legislation, it becomes apparent that the Committee did not make any reference to gold in their recommendation.

Their Lordships are for these reasons of opinion that the judgment appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, snbject to the control and disposal of the Government of British Colnmbia, and they will humbly advise Her Majesty to that effect. There will be no order as to costs.

Solicitors for appellant: *Hepburn, Son, & Cutliffe.*
Solicitors for respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR CANADA . APPELLANT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC . . . } . RESPONDENT.

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Nov. 30.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Tidal Water Fisheries—Power of Province to grant exclusive Licences—Right of Public—Regulative Power of Dominion—29 Vict. (Can.), c. 11, ss. 3, 6—British North America Act, 1867 (30 & 31 *Vict. c. 3), s. 91, head 12.*

Having regard to the public right of fishing declared by 29 Vict. (Can.) c. 11, s. 6, and previous enactments having force in the Province of Quebec, the Government of that Province has not power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits, or arms of the sea of the Province and of the high sea washing its coasts; nor has the Legislature of the Province power to authorize the Government to do so. In so far as the soil is vested in the Crown in the right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing of private persons without the aid of engines.

Sect. 3 of 29 Vict. (Can.) c. 11, which empowered the Commissioner of Crown Lands to issue fishing leases, must be read with s. 6, which maintains the right of the public. The power no longer exists in its entirety, so far as it was regulative it passed to the Dominion under the British North America Act, 1867, s. 91, head 12. The Dominion power of regulation must be exercised so as not to deprive the Province or private persons of proprietary rights which they possess.

Attorney-General for British Columbia v. *Attorney-General for Canada* [1914] A. C. 153 applied.

Judgment of Court of King's Bench reversed.

APPEAL from a judgment (February 7, 1917) of the Court of King's Bench for the Province of Quebec upon questions submitted to that Court by the Lieutenant-Governor under art. 579 of R. S. Queb., 1909, and the amendments thereto.

The questions submitted related to the right of the

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and MR. JUSTICE DUFF.

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Provincial Government to grant exclusive fishing rights in the tidal waters of the Province, and are fully stated in their Lordships' judgments together with the effect of the answers given by the learned judges. The judgments in the King's Bench were by a majority in favour of the Province, and are reported at Q. R. 26 K. B. 289.

1920. July 19, 20, 22, 23; Aug. 2, 3. *Sir John Simon K.C.*, *Newcombe K.C.* (*Stuart Moore* with them) for the appellant. (1) The answer to each of the questions should have been in the negative. Questions relative to fishing rights in Canada have been considered by the Board in two cases. In the first, *Attorney-General for Canada* v. *Attorney-General for Provinces* (2), it was held that the British North America Act, 1867, s. 91, head 12, in giving to the Dominion legislative jurisdiction over fisheries did not confer a proprietary right therein, and that whatever proprietary rights were vested before confederation remained unaffected; the decision left open the question whether the proprietary right of fishing in tidal waters vested in the Provinces. In *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3) it was held that the right of fishing in tidal waters in British Columbia was a right of the public (whether inhabitants of the Province or not) and not a proprietary right, and that consequently the Province had no power over it, either to grant exclusive rights of fishing or otherwise. The second decision is conclusive of this case, since in Quebec there is a public right of fishing in tidal waters at common law and by statute. The contention that Quebec in this respect is in a different position from British Columbia fails. First, because, whether or not under French law there was formerly a public right of fishing in navigable waters in Quebec, the right of the public to fish in "any of the harbours or roadsteads, creeks or rivers" was affirmed before

(1) It was agreed that having regard to the observations in *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1914] A. C. 153, 174, the arguments should proceed as though that part of the questions which related to the sea beyond low-water mark were omitted.

(2) [1898] A. C. 700.

(3) [1914] A. C. 153.

confederation by a long course of legislation applying to Quebec. The first of these Acts was 28 Geo. 3 (Prov. of Queb.), c. 6, which is modelled on the English legislation with regard to Newfoundland sea fisheries (see 10 & 11 Will. 3, c. 25), and was passed in pursuance of the express instruction to the Governor dated January 3, 1775: see Shortt & Doughty's Constitutional Documents, p. 486, § 36. A series of Acts similarly declaring the public right followed: (of Lower Canada) 47 Geo. 3, c. 12, 4 Geo. 4, c. 1, 9 Geo. 4, c. 42, 6 Will. 4, c. 57; (of United Canada) 4 & 5 Vict. c. 36, 20 Vict. c. 21, 29 Vict. c. 11. Sect. 6 of the last named Act is headed "Deep Sea Fisheries," and clearly applies to fishing in tidal waters. After confederation the Dominion Parliament by 31 Vict. c. 60, s. 3, while repealing (by s. 20) the last named Act, by s. 3 reaffirmed the right of the public. This Act by s. 2 replaced the power of leasing contained in 29 Vict. c. 11, s. 3, by a similar power in the Minister of Marine, omitting such part of the repealed section as trenched upon rights of property in the Province. That provision was valid under s. 91, head 12. Secondly, conceding that French law is applicable generally to rights of property in Quebec, the right of fishing in tidal waters is not a proprietary right. Further, it is at least doubtful whether the French kings had a prerogative right to grant fishing in tidal waters: see Dalloz Répertoire, "eaux" No. 4, "pêche maritime" No. 2; Valin, Ordonnance de la Marine, vol. ii., p. 691; Pothier (ed. Bugnet), vol. ix., p. 121, "propriété." But in any case that prerogative, if it existed, did not survive to the English Crown; the public right became exercisable in Quebec as in other territory under British sovereignty: per Day J. in Seigniorial Questions (Lower Canada Reports, B. 50 *e*); *Pollard* v. *Hagan*. (1) The Civil Code of Quebec by art. 567 recognizes the right of fishing as a branch of public law: see also sixth Report of Codifiers, p. 226.

The objection in the first *Fisheries Case* (2) to the power of leasing contained in s. 2 of the Dominion statute 31 Vict. c. 60 was that it extended to inland fisheries and consequently

(1) (1844) 3 Howard, 212, 225. (2) [1898] A. C. 700, 714.

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to property vested in the Provinces, an objection removed by R. S. Can., 1906, c. 45, s. 8. The judgment does not support the view that tidal fisheries are a proprietary right of the Provinces. The Provincial Legislature is not competent to displace the public right declared and enacted by 29 Vict. c. 11, s. 6, and cannot use any power which survived to it under s. 3 to destroy that right: *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (1) If the power of leasing in 29 Vict. c. 11, s. 3, operated to destroy the public right in Quebec it equally did so in Ontario.

Lanctot K.C. and *Geoffrion K.C.* (*G. Lawrence* with them) for the respondent. The Parliament of Canada by 29 Vict. c. 11, s. 3, recognized as existing in, and granted to, the Crown the power to issue exclusive leases in respect of fishing in Upper and Lower Canada. That power, which could be exercised as to tidal waters, existed at the union in 1867, and passed by the British North America Act to the Provinces concerned, either as a "royalty" or a proprietary right under ss. 109 and 117, or by a transference to the Lieutenant-Governor under ss. 12 and 65, unless there was, as in British Columbia, such a right of the public to fish in tidal waters as was incompatible with the exercise of the powers to lease. In Quebec the right of fishing was never subject to the English common law; under French law no public right of fishing existed. The French kings frequently granted exclusive rights of fishing in tidal waters in Quebec; those grants have been upheld by a series of decisions in Quebec, and are recognized as valid by the series of Acts referred to by the appellant. The views of Valin and Dalloz on this question are not applicable in Quebec, because they are based upon the Ordonnance de la Marine of 1681, which was not registered in Quebec, and consequently was not effectual there. If there was any public right of fishing in tidal waters in Quebec it was not, as in British Columbia, a right which was destructive of the right of the Crown. As in the case of lands reserved for the use of Indians, it was

(1) [1896] A. C. 348, 362, 363.

merely a burden upon the Crown's title; the title of the Crown so burdened passed to the Province: *St. Catherine's Milling and Lumber Co.* v. *The Queen.* (1) The right of the public under s. 6 of the Act of 1865 is expressly declared to be subject to the right to lease given by s. 3. The latter right cannot be treated as merely a matter of regulation, for s. 4 expressly gives a right to make regulations, and treats the power to lease as a power different from the right to regulate. Sect. 17 treats persons other than lessees fishing in leased areas as trespassers. The right to lease was a right for revenue purposes, and was reserved to the Province in 1867 as a proprietary right. The residual legislative power as to proprietary rights is in the Provinces, the onus is therefore on the appellant. It is conceded that under s. 91, head 12, of the British North America Act, 1867, the Dominion may make regulations which are burdensome to the lessees from the Province. In any case the questions should be answered in favour of the Province so far as they relate to "engines fixed to the soil."

Sir John Simon K.C. in reply. Whether or not the rights of the Crown with regard to fishing in tidal waters in Quebec differed in character from those in British Columbia there was in each Province a public right of fishing. If there was a public right then the judgment in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2) is conclusive whatever power of leasing may have existed. The right to lease was merely regulative. In England the public right exists although the authorities under the power of regulation have power to, and do, prohibit fishing in certain areas. The power of leasing in 29 Vict. c. 11, s. 3, cannot be read as excluding the public right having regard to the express language in which that right is declared by s. 6. The public right is not qualified by s. 3, though its exercise may be limited by such leases as were validly granted under the section. With regard to the old French law a Réglement of 1717 (3), which was registered in Quebec, applied the Ordonnance de la Marine

(1) (1888) 14 App. Cas. 46. (2) [1914] A. C. 153, 175.
(3) Edits, Ordonnances, royaux, etc. (Quebec, 1854), p. 358.

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to the French colonies. Valin shows that the boundary of sea-fishing, to which alone the Ordonnance applied, extended as far as the tidal flow. With regard to "engines fixed to the soil," the matter falls within s. 91, head 12.

Nov. 30. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The controversy in this case arises over the answers to certain questions relating to the right of fishing in the tidal waters of the Province of Quebec. These questions were submitted to the Court of King's Bench of the Province by the Lieutenant-Governor in Council, who so submitted them under authority conferred on him by a statute of Quebec.

The questions were these: 1. Has the Government of the Province of Quebec, or a member of the Executive Council of the Province, power to grant the exclusive right of fishing, either by means of engines fixed to the soil, or in any other manner, in the tidal waters of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province, and of the high seas washing its coasts, to a distance of three marine miles from the shore: (*a*) between high-water mark and low-water mark; (*b*) beyond low-water mark, and if in the affirmative, to what extent?

2. Can the Legislature of the Province authorize the Government of the Province, or a member of the Executive Council of the Province or any other person, to grant the exclusive rights of fishing set forth in the preceding question.

3. If there existed heretofore, or if there still exist, restrictions upon the granting of exclusive rights of fishing in the tidal waters as aforesaid, and if such restrictions have been or are abolished, are the fisheries in such waters, after such abolition, the property of the Province, and has the Legislature or the Government of the Province, or a Minister of the Government, or any other person the powers mentioned in the preceding question with regard to these fisheries?

The learned judges of the Court of King's Bench of Quebec, by a majority consisting of the Chief Justice (Sir Horace

Archambeault), Trenholme, Lavergne and Carroll JJ. answered all these questions in the affirmative. The Chief Justice, however, so answered the first question subject to a reservation as regards waters beyond low-water mark out to the three-mile limit, regarding which he was of opinion, following an expression of view by their Lordships in a previous case, that no deliverance on a subject which was one of international law, ought under the circumstances to be made. He inserted a similar qualification into his answer to the third question. Cross J., who also heard the case, dissented as to the general principle laid down by his colleagues, expressing an opinion in the negative on the two first questions, and treating the third question as consequently not arising.

The questions thus raised relate to the Province of Quebec, where the common law is based on that of France, and it is the circumstance that the common law of the Province is different from that which obtains in the rest of Canada that gives rise to a distinction which has to be kept in mind. If the common law of Great Britain had obtained, the points that have arisen would have been covered in some measure by their Lordships' decision in the appeal from British Columbia: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), which applied principles previously laid down by the Board in *Attorney-General for Canada* v. *Attorneys-General for Provinces.* (2) It is accordingly desirable before proceeding further to refer to the principles which were laid down in the appeals in these two cases.

The decision of 1898 was concerned with a number of questions between the Dominion and the Provinces relating to rights of property and to legislative jurisdiction. It was pointed out that the proprietary right in the solum of Canada was vested in the Crown, whether the legislative and executive control is with the Dominion or with the Province, and that there is no presumption because legislative jurisdiction has been conferred on the Dominion that therefore a proprietary title has been conferred on it. What the Board on that

(1) [1914] A. C. 153. (2) [1898] A. C. 700.

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occasion had to determine was, among other things, whether the beds of rivers and other waters situate within the territorial limits of a Province and not granted before confederation, belonged to the Crown in right of the Dominion or of the Province. The answer was that, generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial. It followed that the fishing rights, so far as they depended on property, were likewise provincial. But to the Dominion had been given by s. 91 of the British North America Act, 1867, exclusive legislative jurisdiction over sea coast and inland fisheries. This power to legislate was so sweeping in its terms that it could extend to what practically might be a modification of the character of the proprietary title of a Province, and it was not possible to lay down in abstract terms a priori a limit to this power of legislation. All that Lord Herschell could say in delivering their Lordships' opinion was that if the Dominion were to purport to confer on others proprietary rights which it did not itself possess, that would be beyond its power. In other words, the capacity conferred by s. 91 extended to regulation only, however far regulation might proceed. It included the capacity to impose taxes for licences to fish. But the Dominion had no power to pass legislation purporting directly to grant a lease of an exclusive right to fish in property that did not belong to it, however much it might in other forms impose conditions on the exercise of the right to make such a grant. It was added that the enactment of fishery regulations and restrictions was within the exclusive competence of the Dominion Parliament, and was therefore not within the legislative power of any Province, although that Province might well have power, under the capacity that belonged to it under s. 92, to deal with property and civil rights within the Province, to pass statutes relating to modes of conveyance, or prescribing the terms and conditions upon which the fisheries that were the property of the Province might be granted, leased, or otherwise disposed of, or relating to succession to a provincial fishing right; for

such legislation would be concerned only with the proprietary title.

In the appeal decided in 1914: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), the principles laid down in the judgment of 1898 were further developed in their application. It was held that it was not competent for the Legislature of British Columbia to authorize the Government of the Province to grant exclusive rights of fishing in tidal rivers or in the sea, including arms of the sea and estuaries of rivers. It was laid down that in the sea, wherever the common law of England applies, the right of fishing is a public right, not dependent on a proprietary title, and that consequently the regulation of the right must rest exclusively with the Dominion Parliament. In the case of an inland lake or river, or other non-tidal water, where the solum is vested in a private owner or the Crown, the public in British Columbia have no such right. The fisheries are mere profits of the soil over which the water flows, and the title to fish follows the title to the solum, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit a prendre in alieno solo. With such inland fisheries it is of course only by way of regulation that the Dominion Parliament can interfere. Their Lordships were chiefly concerned in the decision under discussion with the right of fishing in tidal waters and in the sea. So far as these waters were concerned, the right of fishing in them was by English law a public and not a proprietary right, and was accordingly held to be subject to regulation by the Dominion Parliament only. So far as concerned waters which were navigable but non-tidal no question arose; for, as English law governed, the fishing in navigable non-tidal waters was the subject of property, and there was no right in the public generally to fish in them. As to the sea between low-water mark and the three-mile limit, although no doubt was raised as to the right of the public to fish there, it was pointed ou that the question of the title to the subjacent soil within this zone stood in a very different position. The topic was not

(1) [1914] A. C. 153.

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one that belonged to municipal law alone, for rights of foreign nations might be in question, and accordingly their Lordships did not deem it desirable that they should deal with it judicially, sitting as they did for the purpose of deciding the question of municipal law only.

Whatever the origin and character of the title of the public to fish in tidal waters, that title had, as their Lordships observed, been made unalterable, except by a Legislature possessing competent authority, since Magna Charta. And as Magna Charta had come to form part of the common law of England, it was part of the law of British Columbia. In speaking of the public right of fishing in tidal waters, their Lordships were careful to point out that they did not refer to fishing by way of kiddles, weirs, or other engines fixed to the soil. For such methods of fishing involved a use of the solum which, according to English law, cannot be vested in the public, but must belong to the Crown or to a private owner. They added that the question whether non-tidal waters were navigable or not did not bear on the question they had to decide; for the fishing in non-tidal navigable waters was the subject of property, and, according to English law, must have an owner and cannot be vested in the public generally. They held that, because the right of fishing in the sea is a right of the public generally which does not depend on any proprietary title, the Dominion must have the exclusive right of legislation with regard to it as such, and that accordingly the Province of British Columbia could not confer any exclusive or preferential right of fishing on individuals or classes of individuals.

The questions which their Lordships were called on to decide in 1914 were in certain important respects different from those now before them. In the first place, the questions then raised related to rights of fishing in British Columbia, where, as has been remarked, the common law applicable was that of England, whereas the common law applicable in Quebec is, generally speaking, the old French law, as it was introduced into the territory of the Province when it was subject to the rule of the King of France. The provisions of

Magnâ Charta, now the foundation of the public right wherever the common law of England prevails, could in that case have no application to Quebec. In the second place, under that old French law, it may be that the distinction was not between tidal and non-tidal waters, but between those waters that were navigable and those that were not.

But the French law applicable to the Province of Quebec, so far as concerns the right of the public to fish in the waters of the Province, has been modified by certain statutes competently passed to which reference will presently be made. Into the precise character of the old French law it will be found that these statutes render it unnecessary to enter for the purposes of the present appeal. Under the French régime the custom of Paris was in force in the Province, and the Government of French Canada was modelled on that of a province of France. If it were necessary to pursue the character of the French law from time to time applicable, it would have to be considered whether any part of the Ordinance, sometimes spoken of as the Code de la Marine of 1681, which declared all the subjects of the King of France to have the right of fishing in the sea and on its banks, was ever so registered as to become law in French Canada, a point which conceivably may still require investigation in view of materials which were brought to their Lordships' notice in the course of the argument. It might also be necessary to determine whether, on the cession of Canada to England in 1763, the French law as to the Royal prerogative was abrogated and the law of England substituted for it. Into this historical question, which is one over which there has been much controversy, it is, however, unnecessary to enter. For assuming that the right of fishing in navigable waters belonged, under French law, to the domain of the Crown, and that the public enjoyed the right of fishing in such waters only subject to the prerogative of the King of France to grant at his pleasure exclusive rights of fishing to individuals, it is plain that this state of the law was altered by local statutes passed after the cession of 1763.

In order to find the powers under which these statutes

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were enacted, reference must be made to the relevant Acts of the Imperial Parliament. The first of these was the Quebec Act of 1774. This Act defined the boundaries of the large Province of Canada which had been called Quebec in the Royal Proclamation that followed on the cession effected by the Treaty of Paris. It then went on to declare that notwithstanding previous proclamations, commissions, ordinances, etc., in all matters of controversy relative to property and civil rights, resort was to be had to the existing laws of Canada as the rule for their decision, unless varied by ordinances passed by the Governor with the advice and consent of a Legislative Council to be set up by the Crown. The criminal law was to be that of England. The effect of the Act was thus to retain or to reintroduce the old French law wherever applicable as to property and civil rights.

In 1791, under another Act of that year, the Province of Quebec was divided into the separate Provinces of Upper and Lower Canada, and large powers of legislation were granted. The existing laws were to remain in force until altered, but power was given to the new Government to make laws for the peace, welfare and good government of their Provinces.

In 1840, by a subsequent Act, the two Provinces were united into the single Province of Canada, which remained as such until confederation in 1867. This united Province possessed representative government from the beginning, and a little later on its government was made responsible also.

Acting under the powers conferred on it, the Province of Quebec from time to time had passed laws regulative of fisheries. In 1788 a statute was enacted which declared that all the King's subjects should have the right to fish and to use the shores for that purpose over a large part of the river St. Lawrence and another river which emptied itself into the Bay of Chaleurs. The right extended to rivers, creeks, harbours and roads. This statute, in conferring the right to fish on the King's subjects generally, in the language it adopted, substantially followed the model afforded by the Newfoundland Fisheries Act of 1699, in which the policy of

encouraging the people of Great Britain to go to Newfoundland, catch fish, and dry them on the shores and bring them back, was adopted. This policy explains the stress laid in the statute on fishing in the sea and using the banks for drying, etc. It extends, however, to the right to take bait and fish in rivers, lakes, creeks, harbours and roads generally, and rights similar for the purposes of this appeal were conferred by the series of fishery statutes passed in Canada in relation to Canadian waters.

In 1807 a further statute was passed by the Government of the Province of Lower Canada under which the right to fish and land was further extended, with the saving of rivers, creeks, harbours, roads, and land which had been made private property by title derived from the King of England, or by grant prior to 1760, or by location certificate. In 1824 a similar Act was passed extending the right of the public to fish to the Inferior District of Gaspé and two named counties. Further Acts regulating the rights of fishing in the District of Gaspé were passed in 1829 and 1836, by the Legislature of Lower Canada. In 1841, after the union of Upper and Lower Canada, the right of all the King's subjects to fish in the waters of Gaspé was reaffirmed, and in 1853 the Legislature of the Province of Canada further declared the right of the King's subjects to fish to extend to the Gulf of the St. Lawrence. In 1857 an Act of the Province anew declared the right of the King's subjects to fish in all the waters and rivers of the Province, with the exception of rivers lying within the territory known as the King's Posts, as to which it was provided that the Governor in Council might grant permission to fish in these rivers. In 1858, by another statute of the Province of Canada, the general right of the King's subjects was reaffirmed; but it was provided that the Governor-General might grant special fishing leases and licences for lands belonging to the Crown, for any term not exceeding nine years, and might make such regulations as should be found necessary or expedient for the better management and regulation of the fisheries of the Province.

In 1865 the Provincial Government of the united Provinces

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passed an Act for the amendment of the law and for the better regulation of fishing and protection of fisheries. It applied to the whole of Upper and Lower Canada without distinction between districts. By this statute the Commissioner of Crown Lands might, under s. 3, where the exclusive right of fishing did not already exist by law in favour of private persons, issue fishing leases and licences for fisheries and fishing wheresoever situated or carried on, and grant licences of occupation for public lands in connection with fisheries; but leases or licences for any term exceeding nine years were to be issued only under the authority of an order of the Governor-General in Council. By s. 4 the Governor in Council might from time to time make regulations for the better management and regulation of fisheries, to prevent the obstruction and pollution of streams, to regulate and prevent fishing, and to prohibit fishing except under leases and licences. By s. 6, which is headed "Deep Sea Fisheries," it was in the first place declared that every subject of the Sovereign might use vacant public property for the purpose of landing, salting, curing and drying fish, etc., and that: "All subjects of Her Majesty may take bait or fish in any of the harbours or roadsteads, creeks or rivers; subject always, and in every case, to the provisions of this Act as affects the leasing or licensing of fisheries and fishing stations, but no property leased or licensed shall be deemed vacant." Sect. 17 prohibits fishing in areas described in leases or licences now existing or hereafter to be granted. It, however, adds that the occupation of any fishing station or waters so leased or licensed for the express purpose of net fishing is not to interfere with the taking of bait used for cod fishing, nor prevent angling for other purposes than those of trade or commerce.

In 1867 the British North America Act was passed, and in 1868 the Dominion Parliament repealed the Act of 1865 by s. 20 of its Fisheries Act of 1868. The Act of 1865 was thus in force only for three years. Sect. 91 of the British North America Act, 1867, had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast

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and inland fisheries, and it was under this authority that the repeal was effected. By the Fisheries Act of 1868 that Parliament sought to exercise its powers by enacting a number of provisions in many respects resembling those of the Act of 1865, and by further regulating the exercise of both public and private rights of fishing throughout the Dominion. The substance of this Act was incorporated into the subsequent Consolidated Statutes of Canada on the subject of fisheries. As to one of the sections, s. 4 of the then Revised Statutes of Canada, c. 95, so far as it purported to empower the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to a Province, it was held by this Board, in the case before them in 1898, that the Dominion had no power to pass it. Their Lordships think that this is now settled law.

But the decision of this point does not conclude the question before them, which is not whether the Dominion has power to grant exclusive rights of fishing in waters the property of a Province, but whether the provincial Government has power to grant such an exclusive right of fishing in tidal waters. When the Act of 1865 was passed, the Government of the united Provinces of Upper and Lower Canada could unquestionably confer on itself the capacity to do this. For it had full power to make laws for the peace, order, and good government of the Provinces without any such restrictions as affected the right of a Province under the British North America Act, 1867, and it could consequently abrogate the fishing rights not only of private persons but of the public. After confederation, neither the Dominion nor any Province possessed this power in its integrity. The Dominion Parliament, having exclusive jurisdiction over sea coast and inland fisheries, could regulate the exercise of all fishing rights, private and public alike. As the public right was not proprietary, the Dominion Parliament has in effect exclusive jurisdiction to deal with it. But as to private rights, the provincial Legislature has exclusive jurisdiction so long as these present no other aspects than that of property and civil rights in the Province, or of matter

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of a local or private nature within it, in the meaning of the words of s. 92.

The result of this is that a Province cannot grant exclusive rights to fish in waters where the public has the right to fish. Now this right in the public was created by the series of statutes enacted in the old Province of Upper and Lower Canada prior to confederation, and as it continued to exist at confederation, only the Dominion could deal with it. As this Board said in the British Columbia case in 1914, the object and effect of the provisions of s. 91 were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the Province no right of property or control in them. These rights, as was observed, are rights of the public in general, and in no way special to the inhabitants of the Province. Even under the guise of their taxing powers the Government of the Province could not confer any exclusive or preferential rights of fishing on individuals or classes of individuals, because such exclusion or prefcrence would import regulation and control of the general right of the public to fish.

It is true that the public right of fishing in tidal waters does not extend to a right to fix to the solum kiddles, weirs or other engines of the kind. That is because the solum is not vested in the public, but may be so in either the Crown or private owners. It is also true that the power of the Dominion does not extend to enabling it to create what are really proprietary rights where it possesses none itself. But it is obvious that the control of the Dominion must be extensive. It is not practicable to define abstractly its limits in terms going beyond those their Lordships have just employed. The solum and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a privatc individual, and in so far as this is so it cannot be transferred by regulation. But regulation may proceed very far in limiting the exercise of proprietary rights without ceasing to be regulative.

It thus appears that the question which arises in this appeal

in reality bears a considerable analogy to that which arose in the British Columbia case. It is true that here their Lordships have nothing to do with the public title arising out of the English common law and strengthened by Magna Charta. But on the other hand, the main consideration, although not concerned with the common law of England, is not the old French law. It is the state of the public title established by the series of statutes passed by a former Canadian Legislature which had power to abrogate all such law. That series culminated in the Act of 1865, and s. 6 of that Act, which declares that the public have the right, subject to the power of the Government to grant exclusive leases and licences, to fish in the harbours, roadsteads, creeks or rivers of the old Province of Canada, is the foundation of the public title. This section occurs with the heading "Deep Sea Fisheries," a heading which, in their Lordships' opinion, affects its scope. The language of the section obviously owes its origin to that used in the Newfoundland Fisheries Act, 1699, which, as has been said, was passed for the purpose of encouraging the King's subjects at home to sail to Newfoundland in order to fish. The distinction between coast and inland fisheries could hardly at that time have been an important one, and no distinction was then drawn. There is, however, one significant difference between the enumeration in the Act of 1699 of the waters in which the public may fish and that contained in s. 6 of the Act of 1865. In the former the word "lakes" occurs; in the latter it does not. The introduction into the language of the statute of the heading to s. 6, "Deep Sea Fisheries," when taken in conjunction with the omission of lakes, which are referred to elsewhere in the Act, indicates, in the view their Lordships take of this section, that it was intended to apply only to such fisheries as were either "deep sea," or so accessible from the sea as to make them natural adjuncts to these fisheries. The fisheries to be regarded as so adjoining would not, accordingly, include either the fishing in inland lakes, which are not mentioned, or the right to fish in non-navigable waters. All tidal waters which were navigable would thus

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be included. Stated generally the test of inclusion appears to be whether the waters in question are such that those who resort to the sea coast to fish there would naturally have access to these waters and would in ordinary course conduct their fishing operations in such a fashion as to extend into them.

As to s. 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licences for fisheries and fishing wherever carried on, this was obviously within the competence of the Legislature which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that s. 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament. No question is at present raised as to existing rights created under any of its provisions. Although the power of the Dominion to legislate about the regulation of inland fisheries extends to all fisheries, even where the public has no right, it is obvious that in substance its powers may be more restricted in their operation wherever the only title to fish is a private one arising simply out of the property in the subjacent soil.

In the Court of King's Bench of Quebec, the first of the questions raised in this appeal was answered by the majority of the learned judges to the effect that the Government of the Province did possess power to grant exclusive rights of fishing in tidal waters. The Chief Justice thought that the effect of the Act of 1865 was that the public right to fish had been abrogated. This seems to import that s. 3 had brought about a transfer of the entire title to fish to the Crown in right of the Province. Their Lordships are unable to concur in this view. They think that s. 3 must be read along with

s. 6, which maintains the public right. No doubt that is maintained subject to the powers given in s. 3, and those powers might have been so exercised as to destroy the public right in a certain place. But if so exercised they would be fulfilling a double function; the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the Province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act of 1865 no longer exists in its entirety.

Exclusive rights actually granted while the Act of 1865 was in force are another matter. It has not been brought to the notice of their Lordships that any such have been granted. If there are their position will have to be separately considered.

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.

In the result the answer to the questions submitted must be as follows: (1.) To the first question, neither the Government of Quebec, nor any member of the Executive Council, has power to grant the exclusive right of fishing in the tidal waters so far as navigable of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province and of the high seas washing its coasts. In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons

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without the aid of such engines. The tidal waters may not extend so far as the limits of the navigable waters, but no distinction between the two descriptions is enacted in the statute of 1865, which is the governing authority. There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. This answer applies to waters between low and high mark. As to waters beyond low mark no answer can properly be given.

(2.) To the second question, as to the power of the Legislature of the Province, the answer is in the negative.

(3.) To the third question, the answer is that restrictions in the interest of the public on the granting of exclusive rights of fishing in tidal waters still exist, and that therefore the question does not arise.

Their Lordships will humbly advise His Majesty accordingly. There will, following the general practice, be no costs of this appeal.

Solicitors for appellant : *Charles Russell & Co.*

Solicitors for respondent : *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1897
July 28, 29, 30.
1898
May 26.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } APPELLANT;

AND

ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, AND NOVA SCOTIA . . . . . } RESPONDENTS.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

ATTORNEYS-GENERAL FOR THE PROVINCES OF QUEBEC AND NOVA SCOTIA . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, ss. 91, 92, 108—*Distribution of Legislative Power—Construction—Rivers and Lake Improvements—"Public Harbours"—Fisheries and Fishing Rights—Revised Statutes of Canada*, c. 92, c. 95, s. 4—*Revised Statutes of Ontario*, c. 24, s. 47—*Ontario Act of* 1892 (55 *Vict.* c. 10).

Whatever proprietary rights vested in the provinces at the date of British North America Act, 1867, remained so unless by its express enactments transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

Held, that the transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR HENRY DE VILLIERS.

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to the language employed, and is reasonably and probably in accordance with the intention of the Legislature:—

Held, that the transfer of "public harbours" operates on whatever is properly comprised in that term having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.

With regard to fisheries and fishing rights:—

Held, (1.) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enable it to affect those rights to an unlimited extent, short of transferring them to others.

(2.) a tax by way of licence as a condition of the right to fish is within the powers conferred by sub-ss. 4 and 12.

(3.) the same power is conferred on the Provincial Parliament by s. 92.

(4.) Revised Statutes of Canada, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is ultra vires the Dominion.

(5.) Revised Statutes of Ontario, c. 24, s. 47, is with a specific exception intra vires the province.

As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see s. 91, sub-s. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Lands":—

Held, further, that the Dominion Legislature had power to pass Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters."

THREE appeals by the Dominion of Canada, by the Province of Ontario, and by the Provinces of Quebec and Nova Scotia from a judgment of the Supreme Court (Oct. 13, 1896), delivered upon seventeen questions referred to it by the Governor-General of Canada pursuant to Revised Statutes of Canada, c. 35, as amended by Canadian statute 54 & 55 Vict. c. 25.

The questions referred were as follows:—

(1.) Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate, and is there in that respect any and what distinction between the various

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classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and the other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(2.) Is the Act of the Dominion Parliament, Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3.) If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4.) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5.) Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6.) Has the Dominion Parliament jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(7.) Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any, and which of them?

(8.) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

(9.) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee, or other grantee to take out a provincial licence also?

(10.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

(11.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled, "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

(12.) If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces, and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of fisheries, as for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13.) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, intituled "An Act respecting the Sale and Management of Public

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Lands"; and ss. 5 to 13, both inclusive, and ss. 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

(14.) Had the Legislature of Quebec jurisdiction to enact ss. 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15.) Has a province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16.) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work, or erection in or filling up of navigable waters?

(17.) Had riparian proprietors, before confederation, an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to him by the Crown?

The judges of the Supreme Court (Strong C.J., Taschereau, Gwynne, King, and Girouard JJ.) differed with respect to the answers to be given, and delivered separate written opinions.

The opinions of the majority of the judges were to the effect that the beds of all ungranted waters situate within the territorial limits of a province were the property of such province and not of the Dominion, with the exception only of public harbours, as to which the decision in *Holman* v. *Green* (1) was binding; that the Provincial Governments alone had power to grant leases and licences as to fishing in such waters; that the jurisdiction of the Dominion as to fisheries was limited to passing general laws which without derogating from the property in the beds of such waters or from the rights incident to the ownership thereof might provide in the interest of the owners and the public for the regulation, protection, improve-

(1) (1881) 6 Sup. Can. Rep. 707.

ment and preservation of fisheries, and that the Provincial Legislatures had jurisdiction to make regulations as to fisheries within their respective provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation.

With reference to the statutes referred to in questions 2, 10, 11, 13, and 14, the majority of the judges were of opinion that the Revised Statutes of Canada, c. 92, "An Act respecting certain Works constructed in or over Navigable Waters," was intra vires, and that the Dominion Parliament had power to declare what should be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters, but that as regards the Revised Statutes of Canada, c. 95, "An Act respecting Fisheries and Fishing," s. 4, when enforced outside Dominion waters, and ss. 14 sub-s. 1, 21 sub-ss. 1, 2, 3, and 22 were ultra vires; that s. 47 of the Revised Statutes of Ontario, c. 24, "An Act respecting the Sale and Management of Public Lands," ss. 5 to 13 and 19 to 21 of 55 Vict. c. 10, "An Act for the Protection of the Provincial Fisheries," and ss. 1375 to 1378 of the Revised Statutes of Quebec, were intra vires, provided that and so long as they did not conflict with Dominion legislation.

Robinson, Q.C., *Haldane, Q.C.*, *Mactavish, Q.C.*, and *Loehnis*, for the Dominion of Canada, contended that the beds of all waters referred to in question 1 are the property of the Dominion; and that the Dominion has exclusive jurisdiction to give by lease or licence the right of fishing in all non-navigable and navigable waters: that all the provisions of Revised Statutes of Canada, c. 95, are intra vires. They further contended that Revised Statutes of Ontario, c. 24, s. 47, Ontario Act of 1892, ss. 5–13 and 19–21, and Revised Statutes of Quebec, ss. 1375–1378, are ultra vires. In general they contended that all the questions should have been answered favourably to the jurisdiction claimed on behalf of the Dominion; and that the answers to questions 1, 6–8, 10, 11, 13–15 were, so far as they were adverse to the claim of the Dominion, wrong in law.

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The reasons given were that the Dominion was, under the British North America Act, 1867, the exclusive legislative authority for trade and commerce, defence, navigation and shipping, and sea-coast and inland fisheries. The executive power of the Dominion was, in the absence of express enactment to the contrary, coextensive with the legislative power. Accordingly, the Act of 1867 must be construed as vesting the beds of all waters not granted before confederation exclusively in the Crown in right of the Dominion. The common law as to the ownership of waters which, though non-tidal, are in fact navigable, is not applicable to the great lakes and rivers of Canada, or to waters separating two or more provinces of the Dominion, or separating the Dominion from foreign territory. Again, the rights of the Crown in all navigable waters are amongst the regalia or prerogative rights which are in the Dominion under sect. 102. Rivers, moreover, are specifically mentioned in Sched. III. to the Act of 1867, and consequently became the property of the Dominion under s. 108. As regards s. 109, there is excepted from the operation of that section the interest of the Dominion in so much of the regalia as is immediately connected with the subject of legislation exclusively assigned to the Dominion by s. 91. Legislative authority over property and civil rights so far as the same are connected with fisheries is in the Dominion by virtue of s. 91, sub-s. 12, and not in the provinces. The taxation of Dominion lessees and licensees by a province is ultra vires of provincial authority, and inconsistent with the powers of the Dominion to grant such leases and licences, and an interference with the power of the Dominion.

[Reference was made to *Reg.* v. *Robertson* (1); *Holman* v. *Green* (2); *L'Union Jacques de Montréal* v. *Bélisle* (3); *Bank of Toronto* v. *Lambe*. (4)]

Blake, Q.C., Irving, Q.C., and *J. M. Clark*, for the Province of Ontario, contended that so much of the answers as were adverse to Ontario were wrong in law; while the answers favourable to the province relating to the beds of waters, the

(1) (1882) 6 Sup. Court Can. 52.
(2) 6 Sup. Can. Rep. 707.
(3) (1874) L. R. 6 P. C. 31, 37.
(4) (1887) 12 App. Cas. 575.

waters over the beds, and the fish in such waters, should be affirmed.

It was contended that legislative jurisdiction and proprietary right are dealt with by the Act of 1867 on quite different principles. Their limits are not identical. Transfer to the Dominion of proprietary right in any subject cannot be inferred from the grant of legislative jurisdiction over that subject. It must be expressly given. The residue of proprietary rights not transferred to the Dominion by s. 108 and Sched. III. remain vested in the provinces subject to ss. 109 and 117. On the other hand, the residuum of legislative jurisdiction not comprised in ss. 91 and 92 is vested in the Dominion. Proprietary rights, therefore, conferred on the Dominion depend on the enumerations contained in Sched. III. Beds of lakes, rivers, public harbours, and other waters within the limits of Ontario were at the time of the union "lands" within s. 109, and "public property" within s. 117. It has always been held that such lands remain vested in the Crown in right of the province, and that there exists over such inland waters rights of navigation and fishing analogous to those which exist over British navigable waters. The waters over the beds, together with the fish therein, belong to the province to which the beds belong. The legislative jurisdiction of the Dominion over shipping and navigation and fisheries does not imply a transfer of proprietary right; nor does the implication of executive powers involved in legislative jurisdiction warrant the inference of such transfer. Rivers, again, are not made Dominion property under the enumeration of "rivers and lake improvements" in Sched. III. read with s. 108. The phrase means on its true construction the improvements on any lake or river. The Dominion has no jurisdiction to lease or license rights of fishing; it would be an interference with "property and civil rights" competent only to the province. Sect. 91, sub-s. 12, gives the right to legislate generally with regard to the regulation and conservation of fisheries—not to interfere with property and civil rights. Even if the Dominion could grant a lease or licence, the province has, for the purpose of provincial revenue, a right to impose on the lessee or licensee

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a provincial licence also. Revised Statutes of Canada, c. 95, so far as it extends beyond general regulation and infringes "property and civil rights," is ultra vires. With regard to the Ontario Act of 1892, it is competent to the province as owner to protect or secure the interests of the owner so long as it does not interfere with the fishery powers of the Dominion. The province has power to regulate and protect fisheries so far as is consistent with valid Dominion laws.

With regard to public harbours, any proprietary right of the Dominion must depend on the interpretation of that phrase as it stands in Sched. III. and s. 108. It was contended that only public harbours which were "public works and property of the province" were dealt with: see the words at the head of the schedule. This did not include the ownership of the beds of harbours further than the soil of so much of the harbour as had been the subject or site of the expenditure of public money by the province, and thus had become a provincial public work and property. With that exception, the ownership of the beds remained in the former in right of the province, subject to all public rights, as of navigation. Whatever legislative powers the Dominion may possess in reference to harbours, that does not involve transference of proprietary right. With regard to Revised Statutes of Canada, c. 92, so far as its provisions are within the heading "Navigation and Shipping," and limited to those of a general and regulative character, it would be intra vires; so far as they were in excess of such regulation, it is ultra vires. It cannot validly interfere with property and civil rights, or authorize local interference with the public right of navigation. As to Revised Statutes of Ontario, c. 24, s. 47, it was in effect a re-enactment of an Act of the late Province of Canada, 23 Vict. c. 2, s. 35, and its validity depends on provincial proprietary right.

Longley (*Attorney-General for Nova Scotia*) and *Coward*, for the Province of Nova Scotia.

Cannon (*Assistant Attorney-General for Quebec*) and *Coward*, for the Province of Quebec.

Robinson, Q.C., replied, and *Blake, Q.C.*, in the cross-appeal.

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1898. May 26. The judgment of their Lordships was delivered by

LORD HERSCHELL. The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights, and legislative jurisdiction of the Dominion of Canada and the provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects.

The Supreme Court having answered some of the questions submitted adversely to the Dominion and some adversely to the provinces, both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by

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any of its express enactments transferred to the Dominion of Canada.

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before confederation, became under the British North America Act the property of the Dominion.

It is necessary to deal with the several subject-matters referred to separately, though the answer as to each of them depends mainly on the construction of the 3rd schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects, numbered 1 to 10. The 5th of these is "rivers and lake improvements." The word "rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted the whole of the rivers so vested were transferred from the province to the Dominion. It is contended, on the other hand, that nothing more was transferred than the improvements of the provincial rivers, that is to say, only public works which had been effected, and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural, "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions. Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the Court below was right, and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled

together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover, it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion; but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the Legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green* (1), where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must

(1) 6 Sup. Can. Rep. 707.

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decline to attempt an exhanstive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerons. It mnst depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* (1) that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, snch as anchoring ships or landing goods, it would, no doubt, form part of the harbour; bnt there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

Their Lordships pass now to the qnestions relating to fisheries and fishing rights.

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in

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relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the provinces and not vested in it.

In addition, however, to the legislative power conferred by the 12th item of s. 91, the 4th item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish.

It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the

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arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned.

It follows from what has been said that in so far as s. 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument; but the subsidiary provisions, in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the Legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers, and lakes were vested.

The sections of the Ontario Act of 1892, intituled, "An Act for the Protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also in so far as it is not inconsistent with the Dominion legislation.

By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces, "and for greater certainty, but not so as to restrict the

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generality of the foregoing terms of this section," it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereinafter enumerated." The 12th of them is "Sea-Coast and Inland Fisheries."

The earlier part of this section read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of *Attorney-General of Canada* v. *Attorney-General of Ontario* (1) that a law passed by a Provincial Legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and Civil Rights," although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision

(1) [1894] A. C. 189.

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was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in s. 91.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures.

But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The Management and Sale of Public Lands" or under the class "Property and Civil Rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s. 92.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views, however, which they have expressed and the dividing line they have indicated will, they apprehend, afford the means of determining upon the validity of any particular provision or the limits within which its operation may be

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upheld, for it is to be observed that s. 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the Legislature of this province has authority to legislate for the purposes of this Act."

Sects. 1375, 1376, and the 1st sub-section of s. 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a Provincial Legislature.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled, "An Act respecting certain Works constructed in or over Navigable Waters." It is in their opinion clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

The parties will of course bear their own costs of these proceedings.

Solicitors for Dominion: *Day, Russell & Co.*
Solicitor for Ontario: *S. V. Blake.*
Solicitors for Quebec and Nova Scotia: *Hill, Son & Rickards.*

[PRIVY COUNCIL.]

J. C.* 1895 Aug. 1, 2, 6, 7. 1896 May 9.

ATTORNEY-GENERAL FOR ONTARIO APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION, AND THE DISTILLERS AND BREWERS' ASSOCIATION OF ONTARIO . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, ss. 91, 92—*Distribution of Legislative Powers—Liquor Laws—Power of Prohibition—Canada Temperance Act*, 1886—*Ontario Act* (53 *Vict. c.* 56), *s.* 18.

The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada;

Russell v. *Reg.* (7 App. Cas. 829) followed;

but not as regulating trade and commerce within s. 91, sub-s. 2, of the Act of 1867;

Citizens' Insurance Co. v. *Parsons* (7 App. Cas. 98) distinguished and *Municipal Corporation of Toronto* v. *Virgo* (ante, p. 93) followed.

Held, also, that the local liquor prohibitions authorized by the Ontario

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* *Present:* LORD HALSBURY L.C., LORD HERSCHELL, LORD WATSON, LORD DAVEY, and SIR RICHARD COUCH.

Act (53 Vict. c. 56), s. 18, are within the powers of the provincial legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886.

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APPEAL by special leave from a judgment of the Supreme Court (Jan. 15, 1895) consisting of Strong C.J., Fournier, Gwynne, Sedgwick, and King JJ. Under the Supreme and Exchequer Courts Act (Revised Stat. Can. c. 135), as amended by Dominion Act (54 & 55 Vict. c. 25), s. 4, the Governor-General of Canada, by Order in Council (Oct. 26, 1893), submitted to the Supreme Court of Canada the following questions:—

(1.) Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented, or other intoxicating liquors?

(2.) Or has the legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

(3.) Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4.) Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

(5.) If a provincial legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such legislature jurisdiction to prohibit the sale by retail, according to the definition of a sale by retail either in statutes in force in the province at the time of confederation, or any other definition thereof?

(6.) If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act, or any of them (Revised Statutes of Canada, 49 Vict. c. 106, s. 99)?

(7.) Has the Ontario Legislature jurisdiction to enact s. 18 of Ontario Act, 53 Vict. c. 56, intituled "An Act to improve the Liquor Licence Acts," as said section is explained by Ontario Act, 54 Vict. c. 46, intituled "An Act respecting local option in the matter of liquor selling"?

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Sect. 18, referred to in the last of the said questions, is as follows:—

"18. Whereas the following provision of this section was at the date of confederation in force as a part of the Consolidated Municipal Act (29th and 30th Victoria, chapter 51, section 249, sub-section 9), and was afterwards re-enacted as sub-section 7 of section 6 of 32nd Victoria, chapter 32, being the Tavern and Shop Licence Act of 1868, but was afterwards omitted in subsequent consolidations of the Municipal and the Liquor Licence Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864, 27th and 28th Victoria, chapter 18; and the said last-mentioned Act having been repealed in municipalities where not in force by the Canada Temperance Act, it is expedient that municipalities should have the powers by them formerly possessed; it is hereby enacted as follows:—

"The council of every township, city, town, and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment. Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal."

Act 54 Vict. c. 46, referred to above, declares that s. 18 was not intended to affect the provisions of s. 252 of the Consolidated Municipal Act, being Canada Act, 29 & 30 Vict. c. 51.

A majority of the Supreme Court, after hearing counsel for the Dominion, the provinces of Ontario, Quebec, and Manitoba, and also, under s. 37, sub-s. 4, of the Supreme and Exchequer Courts Act for the Distillers and Brewers' Association of Ontario,

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answered all the questions in the negative. Strong C.J. and Fournier J., while agreeing in a negative answer to questions 3 and 4, answered the remainder in the affirmative.

The case in the Court below is reported in 24 Sup. Ct. Can Reports, p. 170.

Maclaren, Q.C. (of the Colonial Bar), and *Haldane, Q.C.*, for the appellant.

Newcombe, Q.C. (of the Colonial Bar), and *Lochnis*, for the Attorney-General for the Dominion.

Blake, Q.C., and *Wallace Nesbitt* (both of the Colonial Bar), for the Distillers and Brewers' Association.

Maclaren, Q.C., and *Haldane, Q.C.*, contended that s. 18 of the Ontario Act of 1890 was authorized as relating to a subject comprised within the term "municipal institutions" in s. 92, sub-s. 8, of the British North America Act, 1867. *Citizens' Insurance Co.* v. *Parsons* (1) lays down the rule that provincial legislation is valid if it relates to the enumerated subjects in s. 92, and is not overriden by the enumerated subjects in s. 91. It was admitted that a provincial legislature could not give to a municipality control over any of the subjects mentioned in s. 91. But a power to create municipal institutions must involve a power to give them such powers as usually belong to such bodies. In Canadian legislation, prior to the Imperial Act of 1867, municipal institutions included a large number of subjects not specifically enumerated in s. 92. The expression had acquired a well-defined legislative meaning, and the term was used in s. 92 in the seuse so acquired. The Act of 1867 was founded on the Quebec resolutions, and expressions which came textually therefrom should be interpreted by the light of Canadian legislation.

[THE LORD CHANCELLOR. Then how do you define that technical meaning?]

It meant the conferring on them such powers as under Canadian legislation had been understood to belong to them; except such as were assigned to the Dominion under s. 91.

[LORD HERSCHELL. Canadian legislation varied. Municipal

(1) 7 App. Cas. 96.

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institutions had different powers in Canada from what they had in Nova Scotia and New Brunswick.]

Reference was made to *Hodge* v. *Reg.* (1) and *Russell* v. *Reg.* (2), and to a series of Canadian statutes passed before 1867, being, as respects those relating to Upper Canada, 12 Vict. c. 81; 16 Vict. c. 184; 22 Vict. c. 99, s. 245; Cons. Stat. Upper Canada of 1859, c. 54, s. 246; 29 & 30 Vict. c. 51; and as relating to Lower Canada—16 Vict. c. 214; 18 Vict. c. 100, s. 23; 19 & 20 Vict. c. 101, ss. 8, 11; 20 Vict. c. 129, s. 37; Cons. Stat. L. C. 1861, c. 24, s. 26, sub-ss. 10, 15, and s. 27, sub-s. 16. Reference was also made to 27 & 28 Vict. c. 18; 29 & 30 Vict. c. 32; Revised Stat. Nova Scotia, c. 75; Public Stat. of New Brunswick (1854), c. 15. The expression has also been interpreted in decided cases: see *Slavin* v. *Corporation of Orillia* (3); *Reg.* v. *Taylor* (4); *Keefe* v. *McLennan* (5); *In re Local Option Act* (6); *Corporation of Huntingdon* v. *Moir* (7); *Lepine* v. *Laurent* (8); *Huson* v. *S. Norwich.* (9) Sub-sects. 9, 13, and 16 of s. 92 were also relied on. It was further contended that the Act in question was valid unless and until the Dominion Parliament should legislate in a manner which would override its provisions. It does not conflict with Canada Temperance Act, 1878, for it could only apply to places where that Act has not been put in force. Reference was made to *L'Union St. Jaques de Montréal* v. *Bélisle* (10); *Attorney-General of Ontario* v. *Attorney-General for Canada* (11); *Bank of Toronto* v. *Lambe.* (12) The general result of the authorities is that the words "regulation of trade and commerce" in s. 91 mean general regulation in a broad sense; not of such specific matters as are involved in the Act in question, nor of any minute details, nor any regulation of matters of a merely local nature or private or peculiar to any particular trade.

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 829.
(3) 36 U. C. Q. B. 159; S.C. 1 Cart. 688.
(4) 36 U. C. Q. B. 183.
(5) 2 Cart. 400, 409.
(6) 18 Ont. App. R. 572.
(7) 7 Montreal L. R. Q. B. 281.
(8) 14 Legal News, 369.
(9) 24 Sup. Ct. Can. Rep. 145.
(10) L. R. 6 P. C. 31.
(11) [1894] A. C. 189.
(12) 12 App. Cas. 575.

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Newcombe, Q.C., contended that a provincial legislature has no authority to prohibit the sale, manufacture, or importation of spirituous, fermented, or other intoxicating liquors. Further, that it has no authority to prohibit the sale of such liquors either by wholesale or retail, or subject to the exemptions established by the Canada Temperance Act, s. 99. The subject of this reference is prohibition. *Russell* v. *Reg.* (1) ruled that prohibition as dealt with by the Canada Temperance Act was excluded from provincial authority.

[LORD HERSCHELL. No; not while the provincial legislature deals with the matter locally.]

Prohibition of the liquor traffic does not fall within any of the subjects enumerated in s. 92. The exclusive power with regard to municipal institutions only enables the legislatures to establish regulations for carrying on such institutions. Any authority which the legislatures can confer upon them must be derived from or have relation to the other subjects enumerated in s. 92, none of which include a power to prohibit. They can prescribe the mode in which the traffic may be carried on, but they cannot prohibit it. Sub-sect. 16, s. 92, relates to "local or private" matters, not provincial. On the other hand, prohibition strictly relates to matters within the exclusive power of the Dominion Parliament. It affects the peace, order, and good government of Canada in relation to matters not coming within those assigned by s. 92 to the provinces. To the Dominion is assigned authority to regulate trade and commerce. See *City of Fredericton* v. *Reg.* (2), *Russell* v. *Reg.* (1), and *Tennant* v. *Union Bank*. (3) It was contended that whether or not regulation involves prohibition, if the provinces may prohibit, the Dominion has nothing left to regulate. The provincial power of regulating a particular trade recognised in *Hodge* v. *Reg.* (4) must not be pushed so as to conflict with Dominion legislation; for wherever the two legislatures conflict that of the Dominion must be paramount. Here the field of legislation, that is with regard to the prohibition of the liquor traffic, is already occupied by the Canada Temperance

(1) 7 App. Cas. 829.
(2) 3 Sup. Ct. Can. 505.
(3) [1894] A. C. 45.
(4) 9 App. Cas. 117.

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Act, and there is therefore no room for a provincial law, for the interference of the province would interfere with the legislation of the Dominion.

[LORD WATSON. Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered.]

The legislation exists which at any moment the community may bring into force.

Blake, Q.C., contended that the provinces have no legislative authority except in the subjects enumerated in s. 92, according to the true construction of the British North America Act as ascertained by the Privy Council. On any matter so enumerated the provinces have no authority in any case wherein, or to any extent whereby, the exercise of such authority would interfere with the exercise by the Dominion of any authority comprised within any of the sub-sections of s. 91. Again, the subject of the prohibition of retail selling of intoxicating liquors is not comprised within s. 92 according to the same authoritative construction; and it follows that a fortiori the prohibition of wholesale selling, or manufacturing or importing, is not so comprised. Then it is settled that each of these subjects, being without the scope of s. 92, is within the general authority of the Dominion conferred by s. 91 for peace, order, and good government. The regulation of trade and commerce is placed by s. 91 under the exclusive authority of the Dominion, the object being to place the trade of the various provinces under the general control of the central authority, and thus effect uniformity as far as possible, and also enable the Dominion to obtain by an indirect system of taxation the amounts necessary to enable it to discharge the national obligations. The customs and excise duties on liquor are a substantial and necessary part of the fiscal resources of the Dominion, and it was not intended that those resources should be curtailed or abolished by the provincial legislatures throughout their jurisdiction. Exclusive authority over the liquor trade in its trade and revenue aspects means an authority to prevent any rival control over them which might impede the purposes for which such exclusive authority was granted. Besides, there is a broad distinction between an

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authority to prohibit a trade and an authority to regulate it, and even if, according to the appellant's argument, the provincial legislature could, under the sub-section relating to municipal institutions, regulate it, the power to prohibit nevertheless exclusively belongs to the Dominion. Sect. 18 of the Ontario Act purports to deal with a subject which comes under s. 91, sub-s. 2. It conflicts with the Canada Temperance Act, which covers the whole field of legislation, and therefore with the paramount authority of the Dominion, and, moreover, cannot be validated as a revival of pre-confederation law. Before confederation each province had full legislative authority, and one of them tried the experiment of entrusting municipalities with prohibitive power. But neither in the practice of the four provinces, nor in the nature of the subject, nor in the methods of the United Kingdom, is there any established meaning attached to the phrase "municipal institutions" which includes the subject of s. 18. Reference was made to *Reg.* v. *Justices of Kings* (1) and *Severn* v. *Reg.* (2), and to the cases cited by the appellant.

Maclaren, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON. Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively.

At the time when the British North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada,

(1) 2 Pugs. 535. (2) 2 Sup. Ct. Can. 70.

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which, though differing in expression, were in substance very similar.

The most recent of these enactments were embodied in the Temperance Act, 1864 (27 & 28 Vict. c. 18), which conferred upon the municipal council of every county, town, township, or incorporated village, "besides the powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licences therefor, within the limits of the municipality. Such by-law was not to take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal in deference to an adverse vote of the electors.

The previous enactments relating to the same subject, which were in force at the time of the Union, were contained in the Consolidated Municipal Act, 29 & 30 Vict. c. 51. They empowered the council of every township, town, and incorporated village, and the commissioners of police in cities, to make by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, had been duly approved by the electors of the municipality in the manner prescribed by the Act. After the Union, the Legislature of Ontario inserted these enactments in the Tavern and Shop Licence Act, 32 Vict. c. 32. They were purposely omitted from subsequent consolidations of the Municipal and Liquor Licence Acts; and, in the year 1886, when the Canada Temperance Act was passed by the Parliament of Canada, there was no provincial law authorizing the prohibition of liquor sales in Ontario save the Temperance Act, 1864.

The Canada Temperance Act of 1886 (Revised Statutes of Canada, 49 Vict. c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting, or declining to adopt, the provisions of the second part of the Act, which make it unlawful for any person "by himself, his clerk, servant or

agent, to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any licence of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade, or manufacture. The prohibition does not extend to manufacturers, importers, or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

For the purpose of bringing the second part of the Act into operation an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on which the poll was taken. When the vote is in favour of the petition, and is followed by an Order in Council, one-fourth of the qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order, which is to be granted in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any municipal council for the application of the Temperance Act of 1864.

The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the machinery thereby provided for bringing them into operation, (1.) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2.) as to every municipality within these limits

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in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3.) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.

With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed s. 18 of 53 Vict. c. 56, to which the seventh question in this case relates. The enacting words of the clause are introduced by a preamble which recites the previous course of legislation, and the repeal by the Canada Temperance Act of the Upper Canada Act of 1864 in municipalities where not in force, and concludes thus: "it is expedient that municipalities should have the powers by them formerly possessed." The enacting words of the clause, with the exception of one or two changes of expression which do not affect its substance, are a mere reproduction of the provisions, not of the Temperance Act of 1864, but of the kindred provisions of the Municipal Act (29 & 30 Vict. c. 51), which had been omitted from the consolidated statutes of the province. A new proviso is added, to the effect that "nothing in this section contained shall be construed into an exercise of jurisdiction by the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal. The Legislature of Ontario subsequently passed an Act (54 Vict. c. 46) for the purpose of explaining that s. 18 was not meant to repeal by implication certain provisions of the Municipal Act (29 & 30 Vict. c. 51), which limit its application to retail dealings.

The seventh question raises the issue, whether, in the circumstances which have just been detailed, the provincial legislature had authority to enact s. 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada

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Temperance Act; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of s. 18.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good government of Canada," within the meaning of the introductory and general enactments of s. 91 of the British North America Act; and, in the second place, upon the ground that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These sources of jurisdiction are in themselves distinct, and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are primâ facie committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that

(1) 7 App. Cas. 108.

To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

In construing the introductory enactments of s. 91, with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that s. 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An

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the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons* (1) and in *Cushing* v. *Dupuy* (2); and it has been recognised by this Board in *Tennant* v. *Union Bank of Canada* (3) and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion.* (4)

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.

(1) 7 App. Cas. at pp. 108, 109.
(2) 5 App. Cas. 409, 415.
(3) [1894] A. C. 31, 46.
(4) [1894] A. C. 189, 200.

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Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell* v. *Reg.* (1) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.* (1) must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the "regulation of trade and commerce" within the meaning of No. 2 of s. 91. If it were so, the Parliament of Canada would,

(1) 7 App Cas. 829.

under the exception from s. 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of s. 91 were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons* (1), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed on their behalf by Lord Davey in *Municipal Corporation of the City of Toronto* v. *Virgo* (2) in these terms: "Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

The authority of the Legislature of Ontario to enact s. 18 of 53 Vict. c. 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of s. 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed

(1) 7 App. Cas. 96. (2) Ante, p. 93.

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and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of s. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until confederation, the Legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8.

Their Lordships are likewise of opinion that s. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and other licences, in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge* v. *Reg.* (1) to include the right to impose reasonable conditions upon the licencees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.

The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1.) "property and civil rights in the province," and (2.) "generally all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the pro-

(1) 9 App. Cas. 117.

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vince. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling primâ facie within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed.

It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated.

In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far at least as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92. Upon the assumption that s. 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained that, whilst the restriction of the liquor traffic

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may be competently made matter of legislation in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy raised by the question with which they are at present dealing; and, before discussing the point, it may be expedient to consider the relation in which Dominion and provincial legislation stand to each other.

It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act, "until repealed, abolished, or altered by the Parliament of Canada, or by the provincial legislature," according to the authority of that Parliament, "or of that legislature." It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie* v. *Temporalities Board* (1), to consider the power of repeal competent to the legislature of a province. In that case the Legislature of

(1) 7 App. Cas. 136.

Quebec had repealed a statute continued in force after the Union by s. 129 which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (1) that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867"; and that it was beyond the authority of the Legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.

The question must next be considered whether the provincial enactments of s. 18 to any, and if so to what, extent come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it.

The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. They draw an arbitrary line, at eight gallons in the case of beer, and at ten gallons in the case of other intoxicating liquors, with the view

(1) 7 App. Cas. at p. 147.

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of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely forbidden, except to the two nominees of the Lieutenant-Governor of the province, who are only allowed to dispose of their purchases in small quantities for medicinal and other specified purposes. In the case of sales above the limit the rule is different. The manufacturers of pure native wines, from grapes grown in Canada, have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature.

On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactments strikes against sales of liquor by retail in any tavern, or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 Vict. c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit; and any retail trader may do the same, provided that he sells the liquor in the original packages in which it was received by him from the importer or manufacturer.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at

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one and the same time. In the opinion of their Lordships the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality. In *Russell* v. *Reg.* (1) it was observed by this Board, with reference to the Canada Temperance Act of 1878, "The Act as soon as it was passed became a law for the whole Dominion, and the enactments of the first part, relating to the machinery for bringing the second part into force, took effect and might be put in motion at once and everywhere within it." No fault can be found with the accuracy of that statement. Mutatis mutandis, it is equally true as a description of the provisions of s. 18. But in neither case can the statement mean more than this, that, on the passing of the Act, each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere until they have been locally adopted.

If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the

(1) 7 App. Cas. at p. 841.

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Canadian Act are not and may never be in force. In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll; and it hardly admits of doubt that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized the provincial parliament is to be debarred from exercising the legislative authority given it by s. 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful. Even if the provisions of s. 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act.

Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario Legislature had jurisdiction to enact s. 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886.

Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation. It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as

their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question.

Answers to questions 1 and 2.—Their Lordships think it sufficient to refer to the opinions expressed by them in disposing of the seventh question.

Answer to question 3.—In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shewn that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to question 4.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

Answers to questions 5 and 6.—Their Lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinion upon the points which the questions involve has been sufficiently explained in their answer to the seventh question.

Their Lordships will humbly advise Her Majesty to discharge the order of the Supreme Court of Canada dated January 15, 1895; and to substitute therefor the several answers to the seven questions submitted by the Governor-General of Canada which have been already indicated. There will be no costs of this appeal.

Solicitors for appellant: *Freshfields & Williams.*

Solicitors for first respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for second respondent: *Linklater, Hackwood, Addison & Brown.*

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Judicial Committee of the Privy Council, Viscount Simon, Lords Thankerton, Roche, Greene and Goddard. January 21, 1946.

Constitutional Law II—Validity of Canada Temperance Act—

The *Canada Temperance Act*, R.S.C. 1927, c. 196, Parts I, II & III, is valid Dominion legislation "for the peace, order and good government of Canada". In all material purposes it is identical with the statute held to be valid in *Russell* v. *The Queen* (1882), 7 App. Cas. 829 (a decision firmly embedded in Canadian constitutional law from which it is now impossible to depart), and as a replacement of that statute by way of consolidation with various amending Acts, it is equally valid.

Cases Judicially Noted: *Russell* v. *The Queen*, 7 App. Cas. 829, toll'd; *A.-G. Ont.* v. *A.-G. Dom.*, [1896] A.C. 348; *Toronto Elec. Com'rs* v. *Snider*, [1925], 2 D.L.R. 5, A.C. 396, 1 W.W.R. 785, refd to.

Constitutional Law II—Laws for peace, order and good government of Canada—Not dependent on emergency—Aspect doctrine—Legislation for prevention as well as for cure—

Dominion legislation depends for its validity on its aspect, and not on the existence of any emergency, although an emergency may be the occasion for its enactment. If it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will be competent as legislation "for the peace, order and good government of Canada". Legislation under this power competently enacted by way of cure for a particular state of affairs would be equally valid as a measure of prevention concerning the same state of affairs.

Cases Judicially Noted: *Toronto Elec. Com'rs* v. *Snider*, [1925], 2 D.L.R. 5, A.C. 396, 1 W.W.R. 785, consd and expld; *Re Aerial Navigation, A.-G. Can.* v. *A.-G. Ont.*, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, [1931] 3 W.W.R. 625; *Re Regulation & Control of Radio Communication, A.-G. Que.* v. *A.-G. Can.*, [1932], 2 D.L.R. 81, A.C. 304, 1 W.W.R. 563, 39 C.R.C. 49, refd to.

Courts IV—Privy Council not bound by own decisions—Position in constitutional matters—

The Judicial Committee of the Privy Council is not absolutely bound, as is the House of Lords, by its previous decisions, although on constitutional questions, such as arise in Canada, it will seldom depart from a previous decision presumably acted upon both by governments and by subjects.

Statutes Considered: *Canada Temperance Act*, R.S.C. 1927, c. 196, Parts I, II, III.

EDITORIAL NOTE: The importance of this decision is not in its re-affirmation of the validity of the *Canada Temperance Act*, but in

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its rehabilitation of *Russell* v. *The Queen*, 7 App. Cas. 829 through rejection of the explanation of that case offered in *Toronto Electric Com'rs* v. *Snider*, [1925], 2 D.L.R. 5, A.C. 396. Something new is added in constitutional decisions of the Judicial Committee by Viscount Simon's mention, qualified though it is, of the freedom of that body to depart from its previous decisions.

APPEAL from a decision of the Ontario Court of Appeal, [1939] 4 D.L.R. 14, upholding, (Henderson J.A. dissenting) the validity of the *Canada Temperance Act* on a reference to it by the Lieutenant-Governor of Ontario in Council. Affirmed.

Sir Cyril Radcliffe, K.C. and *C. R. Magone*, K.C., for A.-G. Ont.; *Wilfrid Barton*, K.C. and *Bethune L. Smith*, K.C. for The Moderation League of Ontario; *Aimé Geoffrion*, K.C., for A.-G. Can.; *A. T. Whitehead*, for Canada Temperance Federation, Ontario Temperance Federation, The Temperance Federations of the Counties, Perth, Peel, Huron and Manitoulin Island, The United Church of Canada, Social Service Council of the Church of England and the A.-G. Can.; *C. R. Magone*, K.C., for A.-G. Alta. and A.-G. N.B. interveners.

The judgment of their Lordships was delivered by

VISCOUNT SIMON:—On June 1, 1939, the Lieutenant-Governor of Ontario in Council referred to the Supreme Court of Ontario under the provisions of the *Constitutional Questions Act*, R.S.O. 1937, c. 130, the following question:

"Are Parts I, II and III of the *Canada Temperance Act*, R.S.C. 1927, c. 196, constitutionally valid in whole or in part, and if in part, in what respect?"

On September 26, 1939, the Supreme Court by a majority (Riddell, Fisher, McTague and Gillanders JJ.A.) answered the question as follows [[1939], 4 D.L.R. 14, O.R. 570, 72 Can. C.C. 145]:

"This Court is of opinion (Mr. Justice Henderson dissenting) that Parts I, II and III of the *Canada Temperance Act*, R.S.C. 1927, c. 196, are within the legislative competence of the Parliament of Canada."

Against this judgment the Attorney-General for Ontario and the Moderation League of Ontario have appealed to the Judicial Committee and their appeal has been supported by the Attorneys-General of Alberta and New Brunswick who were admitted as interveners and were represented on the hearing. The appeal was opposed by counsel appearing for the Attorney-General of Canada and for several Temperance Federations.

The object of the appeal is to challenge the decision of this Board in the case of *Russell* v. *The Queen* (1882), 7 App. Cas. 829, or at any rate to deny its applicability to the Act now in

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question. The majority of the Supreme Court held that that decision governed the present case and obliged it to answer the question referred to it in the affirmative. The statute which was declared to be within the legislative competence of the Dominion Parliament in *Russell's* case was the *Canada Temperance Act*, 1878 (Can.), c. 16. That Act has been amended from time to time by the Dominion Parliament and has been revised and re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the revision of Statutes of Canada. The last revision took place in 1924 under the provisions of the Dominion Act, 1924 (14 & 15 Geo. V., c. 65) and now appears on the statute roll as the *Canada Temperance Act*, R.S.C. 1927, c. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878.

The object of the Act of 1878 was to authorize the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the Dominion. By Part I elaborate provisions are made for bringing the Act into force within the area of any county or city. Following on a petition to the Governor-General in Council supported by a certain proportion of the electors in the area, a poll is to be taken, and if a majority supports the petition an Order in Council is passed bringing the Act into effect in that area for a minimum of three years. Amendments have from time to time been passed dealing with portions of the Dominion which were not divided into counties and substituting electoral districts as the area in such cases, but it is unnecessary to set these out in detail. Part II prohibits the sale of liquors in the areas in which the Act is brought into force, and Part III provides for prosecution and penalties, which in some cases are severe, for breaches of the Act.

The Act having been pased in 1878, its constitutional validity was challenged in 1882 in *Russell's* case (*supra*), which arose out of a conviction of the appellant Russell for unlawfully selling intoxicating liquor contrary to the provisions of Part II of the Act. It was argued in that case that the Act was *ultra vires* of the Dominion Parliament on the ground that the matter was one which fell within s. 92 of the *B.N.A. Act* and was therefore within the exclusive jurisdiction of the provincial Legislatures. The Board, however, held that the Act did not deal with any of the matters exclusively reserved to the Provinces and upheld the validity of the statute on the ground that it related to the peace, order and good government of Canada. This decision has stood unreversed for 63 years. More than that, it has received the express approval of the Board in subsequent cases.

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A notable instance is to be found in *A.-G. Ont.* v. *A.-G. Dom.*, [1896] A.C. 348. In that case Lord Watson, in delivering the judgment of the Board said at p. 362: "The judgment of this Board in *Russell* v. *Reg.* has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament." After pointing out that the provisions of the Act of 1878 were in all material respects the same as those embodied in the Act of 1886, which was the statute the Board had then to consider, he continued, "The reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *Reg.* must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada". In 1883, in the earlier case of *Hodge* v. *The Queen*, 9 App. Cas. 117, the Judicial Committee had referred to *Russell's* case without any indication of disapproval, nor is any to be found in the judgment of Lord Macnaghten in *A.-G. Man.* v. *Manitoba Licence Holders' Ass'n*, [1902] A.C. 73, where the decisions of 1882 and 1896 were contrasted. In many subsequent cases the case has been cited in judgments of the Board; it will be enough to mention *A.-G. Can.* v. *A.-G. Alta.* (*The Insurance Case*) 26 D.L.R. 288, 25 Que. K.B. 187, [1916] 1 A.C. 588, the *Board of Commerce Case* [*A.-G. Can.* v. *A.-G. Alta.*], 60 D.L.R. 513, [1922] 1 A.C. 191 and *King-Emperor* v. *Benoari Lal Sarma*, [1945] A.C. 14. It was also quoted as an authority by Lord Atkin in his speech in the House of Lords in *Gallagher* v. *Lynn*, [1937] A.C. 863, a case relating to the legislative powers of the Parliament of Northern Ireland.

But in 1925 *Russell's* case was commented upon in a judgment of the Judicial Committee delivered by Lord Haldane in *Toronto Electric Com'rs* v. *Snider*, [1925], 2 D.L.R. 5, A.C. 396, and it is upon this comment that the present appellants largely rely in support of their contention that it was wrongly decided. After contrasting that case with other decisions of the Board already mentioned above, Lord Haldane said at p. 15 D.L.R., p. 412 A.C.: "It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legisla-

tion is for the general advantage of Canada or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. . . . No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive provincial competency." And later (pp. 15-16 D.L.R., p. 412 A.C.) he said: "Their Lordships think that the decision in *Russell* v. *The Queen* can only be supported today, not on the footing of having laid down an interpretation, such as has sometimes been invoked, of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous."

The first observation which their Lordships would make on this explanation of *Russell's* case is that the *B.N.A. Act* nowhere gives power to the Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the Provincial Legislatures, merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act and no objection was raised to it on that account. In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case* [*Re Aerial Navigation, A.-G. Can.* v. *A.-G. Ont.*], [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108 and the *Radio Case* [*Re Regulation & Control of Radio Communication, A.-G. Que.* v. *A.-G. Can.*], [1932], 2 D.L.R. 81, A.C. 304, 39 C.R.C. 49 then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. War and pestilence, no doubt, are instances; so too may be the

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drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen* Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province.

It is to be noticed that the Board in *Snider's* case nowhere said that *Russell* v. *The Queen* was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.

The appellants' first contention is that *Russell's* case was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by governments and subjects. In the present case the decision now sought to be overruled has stood for over 60 years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada and it is impossible now to depart from it. Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the *B.N.A. Act*, which have been expounded in so many reported cases; so far as the *Canada Temperance Act*, 1878, is concerned the question must be considered as settled once and for all.

The second contention of the appellants was that in 1927,

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when the statute now in force was enacted, there were no circumstances which enabled the Parliament of the Dominion to legislate anew. The Act of 1927 is one promulgated under the provisions of the Act of 1924 for the revision of the Statutes of Canada. Its full title is "An Act respecting the traffic in Intoxicating Liquors" and its short title is the "*Canada Temperance Act*", R.S.C. 1906, c. 152. As has already been said, it is, in all respects material for this appeal, identical in its terms with the Act of 1878, and also with the Act of 1886 [R.S.C. 1886, c. 106] which itself was a revised edition of 1878 and was the Act in force in 1896 when the case of *A.-G. Ont.* v. *A.-G. Dom.* (*supra*) was heard. It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act. Then it was said (and this apparently was the opinion of Henderson J.A. who dissented from the other members of the Supreme Court of Ontario), that no circumstances could exist in 1927 to support the Act, in view of the legislation that had been passed in the Provinces, including Ontario, for the regulation of the liquor traffic. Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was *ultra vires*. The same ground is not covered by provincial legislation setting up a licensing system and making the sale of liquor a government monopoly. Moreover, if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that Legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again. Once it has been decided that the Act of

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1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. It is to be noted that in 1896 Lord Watson's judgment appears to take it for granted that the position was in no way affected by the fact that the Act of 1878 had been repealed and replaced by the Act of 1886.

Accordingly their Lordships are not prepared to hold either that *Russell* v. *The Queen* was wrongly decided or that it has ceased to be a binding authority by reason that the 1878 Act has been re-enacted in 1927. It is by repeal by the Dominion Legislature, and not by appeal to the Judicial Committee, that the enactment might cease to be effective. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There should be no costs awarded in respect of the appeal.

Appeal dismissed.

Que.
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ATTORNEY-GENERAL OF QUEBEC v. STEINBERG'S WHOLESALE GROCETERIAS LTD.

Quebec Superior Court, Tyndale J. August 27, 1945.

Taxes VI—Administrative Law—Tax on profits after deduction of "actual expenses"—Disallowance of bonus deduction—Discretion of taxing authority—Illegal exercise of discretion—Corporation Tax Act (Que.)—

The *Corporation Tax Act*, R.S.Q. 1925, c. 26, as amended, provided by s. 5a for a tax on the profits of corporations after deduction of "only actual expenses" and cl.d provided that "the Provincial Treasurer may disallow as a deduction from profits the whole or any part of any salary, bonus, commission or directors' fees which he may consider in his opinion in excess of what is reasonable for the services performed". A corporation liable to tax submitted a return showing as a deductible expense a "bonus" of $100,000 paid by way of salary adjustments. This was disallowed by the provincial authorities on the basis of a regulation as to bonuses and without making any enquiries or having before them any information on which to base an opinion whether the amount was reasonable for the services for which it was given. *Held*, no real discretion had been exercised by the taxing authorities and the disallowance was illegal.

ACTION on behalf of the Provincial Treasurer to recover profits tax under the *Corporation Tax Act*, R.S.Q. 1925, c. 26, in respect of a certain sum disallowed as a deductible expense.

Messrs. Fauteux, Bissonnet & Fauteux, for plaintiff.

Messrs. Robinson & Shapiro, for defendant.

TYNDALE J.:—This action is based upon that part of the *Corporation Tax Act* in force in 1938 (*i.e.*, R.S.Q. 1925, c. 26

RE BELL AND BELL

Ontario Supreme Court, Stortini, Co. Ct. J. (L.J.S.C.) May 27, 1977.

Constitutional law — Validity of legislation — Indians — Partition Act, R.S.O. 1970, c. 338, applicable to land held by Indians as joint tenants — Act not ultra vires provincial Legislature — Provisions of Act not contrary to ss. 88 and 89 of Indian Act, R.S.C. 1970, c. I-6.

[*R. v. Wesley* (1976), 9 O.R. (2d) 524, 62 D.L.R. (3d) 305, 25 C.C.C. (2d) 309; *Corp. of Surrey et al. v. Peace Arch Enterprises Ltd. & Surfside Recreations Ltd.* (1970), 74 W.W.R. 380, distd; *Grand Trunk R. Co. of Canada v. A.-G. Can.*, [1907] A.C. 65; *Re Caledonia Milling Co. v. Johns* (1918), 42 O.L.R. 338; *Campbell v. Sandy*, [1956] O.W.N. 441, 4 D.L.R. (2d) 754; *Sanderson v. Heap* (1909), 19 Man. R. 122; *Re Nelson et al. and Children's Aid Society of Eastern Manitoba* (1974), 46 D.L.R. (3d) 633, 18 R.F.L. 290, [1974] 5 W.W.R. 449 [affd 56 D.L.R. (3d) 567, 21 R.F.L. 222, [1975] 5 W.W.R. 45]; *R. v. Cardinal* (1971), 22 D.L.R. (3d) 716, 5 C.C.C. (2d) 193, [1972] 1 W.W.R. 536 [affd [1974] S.C.R. 695, 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, [1973] 6 W.W.R. 205], refd to]

APPLICATION by a joint tenant for an order of partition and sale under the *Partition Act*, R.S.O. 1970, c. 338.

J. deP. Wright, for applicant.
C. T. Murphy, Q.C., for respondent.

STORTINI, CO. CT. J.:—The applicant ex-wife as a joint tenant seeks an order for partition or sale under the *Partition Act*, R.S.O. 1970, c. 338, of land situated on an Indian reserve in Ontario. The respondent ex-husband is still in possession.

The respondent raises a preliminary objection on constitutional grounds that the provincial *Partition Act* does not apply to Indians and Indian lands as these are within the exclusive jurisdiction of federal legislation under the *British North America Act, 1867*, s. 91(24), which reads as follows:

> 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated, that is to say,—
>
> (24) Indians, and Lands reserved for the Indians.

Sections 24 and 25 of the *Indian Act*, R.S.C. 1970, c. I-6, restrict the right of transfer of Indian lands. In particular, s. 24 reads as follows:

> 24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or to another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

Section 29 removes reserve lands from seizure under legal process.

Sections 42 to 50 deal with descent of property of Indians.

Sections 88 and 89 of the *Indian Act* deal with legal rights, as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.
>
> 89(1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.

By s. 92(13), property and civil rights in the Province are subjects concerning which the Province has exclusive jurisdiction. The *Partition Act* of Ontario would fall under this heading. The *Partition Act* cannot be said to be legislation concerning Indians. It relates to the property and civil rights of those who share ownership of property.

Section 2 of the *Partition Act* of Ontario reads as follows:

> 2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

Prior to the enactment of s. 88, it was held that Indians are subject to all provincial laws which the Province has power to enact: see *R. ex rel. Gibb v. White* (1870), 5 P.R. Ont. 315, and *R. v. Hill* (1907), 15 O.L.R. 406.

In my view, the basic constitutional principles applicable in this case were enunciated by Lord Dunedin in *Grand Trunk R. Co. of Canada v. A.-G. Can.*, [1907] A.C. 65 (Privy Council). At p. 68, he says:

> But a comparison of two cases decided in the year 1894—viz., *Attorney-General of Ontario v. Attorney-General of Canada* ([1894] A.C. 189), and *Tennant v. Union Bank of Canada* ([1894] A.C. 31), seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

In *Re Caledonia Milling Co. v. Johns* (1918), 42 O.L.R. 338, Middleton, J., held that the provisions of the *Division Courts Act* relating to the imprisonment of debtors did not apply to Indians as the *Indian Act* prevented the judgment creditor from taking the assets of the Indian in execution, directly or indirectly.

That case was decided prior to s. 87 (now s. 88) which was enacted by 1951 (Can.), c. 29. In a subsequent case, *Campbell v. Sandy*, [1956] O.W.N. 441, 4 D.L.R. (2d) 754, Kinnear, Co. Ct. J., held that s. 87 makes Indians subject to any provincial laws of general application except in so far as they are inconsistent with Dominion enactment or regulation. She concluded, therefore, that Indians are now subject to the *Division Courts Act* save only in respect to the exceptions noted in now s. 89.

In *Sanderson v. Heap* (1909), 19 Man. R. 122, Mathers, J., held that the *Estoppel Act*, R.S.M. 1902, c. 56, applies to conveyances made by Indians. The land in question was not reserve land and the Court held that the *Indian Act* did not impose any restriction on an Indian's right of selling individual (non-reserve) property. At p. 125, the learned Judge says:

> Unlike the Indians of the United States, who are aliens, the Indians of Canada are British subjects and entitled to all the rights and privileges of subjects, except in so far as these rights are restricted by statute.

At p. 127 the Court dealt with the constitutional problem, as follows:

> It is said the Estoppel Act, being an enactment of the Provincial Legislature, does not, therefore, apply to the petitioner or his deed. By section 92, s-s. 13, property and civil rights in the Province are subjects concerning which the Province has exclusive jurisdiction. The law of estoppel would fall under this heading. The Estoppel Act cannot be said to be legislation concerning Indians. It relates to the property and civil rights of those who execute deeds containing certain covenants. That Indians are subject to all Provincial laws which the Province has power to enact is well established by such cases as *Regina ex. rel. Gibb v. White*, and *Rex v. Hill. supra.*

It appears to me that the *Sanderson* case presents an example of federal and provincial legislation existing side by side without conflict, with equal effect and influence within their respective jurisdictions.

In *Re Nelson et al. and Children's Aid Society of Eastern Manitoba* (1974), 46 D.L.R. (3d) 633, 18 R.F.L. 290, [1974] 5 W.W.R. 449 [affirmed 56 D.L.R. (3d) 567, 21 R.F.L. 222, [1975] 5 W.W.R. 45], Dewar, C.J.Q.B., held that the *Child Welfare Act* of Manitoba applies to Indians by virtue of s. 88 of the *Indian Act* which makes applicable to Indians all laws of general application within a Province except where those laws are inconsistent with the *Indian Act* or make provision in matters already dealt with under the *Indian Act*. The Chief Justice found no inconsistency between the *Indian Act* and the provincial statute, and that the latter did not terminate or destroy any rights or status that an Indian child may have under the *Indian Act*.

In *R. v. Wesley* (1976), 9 O.R. (2d) 524, 62 D.L.R. (3d) 305, 25 C.C.C. (2d) 309, Vannini, D.C.J., held that s. 88 of the *Indian Act* is subject to treaties which preserved an Indian's right to hunt on

unoccupied Crown land within the territory covered by the treaty. Accordingly, s. 88 will prevent prosecution of a treaty Indian for violation of provincial game legislation when he is hunting on unoccupied Crown land covered by an applicable treaty. The *Wesley* case confirms that in cases of direct conflict, s. 88 of the *Indian Act* overrides provincial legislation. However, in the case of *R. v. Cardinal* (1971), 22 D.L.R. (3d) 716, 5 C.C.C. (2d) 193, [1972] 1 W.W.R. 536 [affirmed [1974] S.C.R. 695, 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1], the Alberta Court of Appeal held that s. 37 of the Alberta *Wildlife Act* applies to an Indian and is *intra vires* since it is not inconsistent with any provisions of the *Indian Act*. Therefore, an Indian charged with trafficking in big game was subject to the provincial Act as it did not involve hunting for food by an Indian.

In *Corp. of Surrey et al. v. Peace Arch Enterprises Ltd. & Surfside Recreations Ltd.* (1970), 74 W.W.R. 380, the British Columbia Court of Appeal held that Indian reserve lands are not subject to the municipal by-laws providing for zoning, and specifications for buildings, water services and sewage disposal, and requirements under the British Columbia *Health Act* and Regulations passed thereunder. At p. 383, MacLean, J.A., states:

> In my view the zoning regulations passed by the municipality, and the regulations passed under the *Health Act*, are directed to the use of the land. It follows, I think, that if these lands are "lands reserved for the Indians" within the meaning of that expression as found in sec. 91 (24) of the *B.N.A. Act, 1867*, that provincial or municipal legislation purporting to regulate the use of these "lands reserved for the Indians" is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

In the *Surrey Corp.* case, the Court found a direct conflict between the federal and provincial legislation with regard to the use of Indian lands. It was held that the provincial and municipal legislation which lay down rules concerning the use of the land were not "laws of general application" and, therefore, inapplicable.

The preliminary issue in this matter can be stated in the form of the following questions:

Is the *Partition Act* a law of general application? If so, is it inconsistent with the *Indian Act* or any Order, Rule, Regulation or by-law made thereunder? If not so inconsistent, does the *Partition Act* make provision for any matter for which provision is made by or under the *Indian Act*?

I would answer the first issue question affirmatively. The *Partition Act* involves property and civil rights and is within the provincial jurisdiction. It cannot be said to be legislation concerning Indians. It does not terminate or destroy any rights or status that an Indian may have under the *Indian Act*. It does not deal with the use of Indian lands. It gives all co-owners, Indian and non-Indian, the same rights and privileges.

I would answer the second issue question negatively. While ss. 24 and 25 of the *Indian Act* restrict the right of transfer of possession of Indian lands, and s. 89(1) limits alienation of said lands, there is no provision made by or under the *Indian Act* which prevents partition or sale. In my view, s. 88 of the Act avoids the problem of "negative occupation of the field" which was dealt with by the Privy Council in *Union Colliery Co. of British Columbia Ltd. et al. v. Bryden*, [1899] A.C. 580.

In that case Lord Watson stated, at p. 588, that:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

It may be contended that Parliament's silence in legislating with respect to partition or sale of reserve lands cannot be said to be "negative occupation" of the field in view of s. 88 of the *Indian Act* which expressly accommodates laws of general application in the Province.

The third issue question is answered the same way as was the second.

I find, therefore, that the *Partition Act* of Ontario is applicable to all land within the Province, including lands reserved for Indians, and that the remedies contained therein are available to Indian and non-Indian co-owners of reserved and non-reserved lands, as the case may be.

The federal *Indian Act* and the provincial *Partition Act* are each valid within their respective fields, namely, Indians and Indian lands, and property and civil rights. I find no conflict between these enactments *per se*. It is only when an Indian attempts to transfer possession of reserve lands under the *Partition Act* that the restrictions set out in the *Indian Act* become operative. I refer, of course, to the limited group of transferees available to an Indian dealing with reserve lands. By virtue of s. 24 of the *Indian Act* he may transfer only to the band or to another member of the band, but no transfer is effective until it is approved by the Minister of Indian Affairs and Northern Development.

In considering the two Acts together one concludes that a joint tenant of reserve lands in Ontario may be compelled to make or suffer partition or sale of the land. However, any order made pursuant to s. 2 of the *Partition Act* which purports to empower a sale to any one other than another member of the band or to the band without the approval of the Minister would be ineffective as contravening s. 24 of the *Indian Act*. In other words, the terms of sale must be strictly in accord with s. 24 of the *Indian Act* to be constitutionally valid.

The *Indian Act* (s. 89(1)) prohibits any encumbrance or alienation of reserve lands in favour of a non-Indian. It does not occupy the field of partition or sale. It encumbers the land by restricting the body of possible transferees, in the nature of a statutory covenant running with land. However, there is no *prima facie* conflict between the rights prescribed by the provincial legislation and the requirements prescribed by the federal legislation. If an order is made for partition between the Indian co-owners, no conflict problem arises. If a sale is ordered and is restricted to the band or another band member, no inconsistency or contravention of the *Indian Act* will arise.

Therefore, I find that the preliminary objection to the application for partition or sale based on constitutional grounds does not prevail. I am now prepared to deal with the application on its merits.

Order accordingly.

CANADIAN LABORATORY SUPPLIES LTD. v. ENGELHARD INDUSTRIES OF CANADA LTD.

Ontario Court of Appeal, Arnup, MacKinnon, Lacourciere, Blair and Wilson, JJ.A.
June 22, 1977.

Torts — Conversion — Plaintiff's employee ordering platinum from defendant — Employee fraudulently reselling platinum as scrap to defendant under fictitious name — Whether defendant liable for conversion.

Sale of goods — Title — Estoppel — Plaintiff's employee ordering platinum from defendant — Employee fraudulently reselling platinum as scrap to defendant under fictitious name — Whether defendant liable for conversion — Whether plaintiff estopped from denying defendant's title.

Agency — Ostensible authority — Estoppel — Plaintiff's employee ordering platinum from defendant — Employee fraudulently reselling platinum as scrap to defendant under fictitious name — Whether defendant liable for conversion — Whether plaintiff estopped from denying defendant's title.

Agency — Ratification — Agent acting beyond actual authority but within ostensible authority — Whether principal must ratify transaction in order to rely on it — Whether principal may ratify agent's authority for one purpose and deny it for another.

The plaintiff bought, over a period of several years, quantities of platinum from the defendant. The platinum was ordered by one C, an employee of the plaintiff. C fraudulently took possession of the platinum and resold it to the defendant as scrap in the name of a fictitious customer of the plaintiff purportedly wishing to deal directly with the defendant. In an action by the plaintiff for conversion, the trial Judge held that the defendant was liable and that the plaintiff was not estopped from denying C's authority to sell since in selling the platinum C had not acted or purported to act as the plaintiff's agent or employee. On appeal to the Ontario Court of Appeal, *held*, allowing the appeal, C had been given apparent authority to deal generally with the plaintiff's platinum transactions. The plaintiff could not ratify C's authority in respect of the purchases and deny it in respect of the fraudulent re-

That leaves for consideration the alternate submission of the appellant that even if the Judge was right in quashing the resolution he ought not to have directed the issuance of a writ of *mandamus* but should have referred the matter back to the Council for its further consideration with directions as to the limits within which it could exercise its discretion to refuse the licence.

In my view there is merit in the contention that this is not a case where a writ of *mandamus* should issue. However, I do not think that the matter should be referred back to Council as suggested by counsel for the appellant. I say that because with the quashing of the resolution and the finding that s. 9 of the zoning by-law is invalid, the way is open for the respondent to either proceed upon its old application or to submit a new application for a business licence. It will then be open to the licence inspector to consider the application under the provisions of the licence by-law rather than under the provisions of s. 9 of the zoning by-law. It is because the application has never been dealt with on a licensing basis that I feel that it would be wrong to direct the licence inspector to issue the licence without having an opportunity to consider the application in its proper context.

In the result I would dismiss the appeal from that part of the order quashing the resolution but would allow the appeal from that part of the order directing the issuance of a writ of *mandamus* and would vary the judgment by deleting that part of it which directs that a writ of *mandamus* issue.

Appeal allowed in part.

RE BRITISH COLUMBIA PACKERS LTD. et al. AND BRITISH COLUMBIA COUNCIL UNITED FISHERMEN & ALLIED WORKERS' UNION

Federal Court, Trial Division, Addy, J. November 8, 1974.

Constitutional law — Distribution of legislative authority — Parliament purporting to legislate regarding labour relations of fishermen — Whether legislation in relation to trade and commerce, navigation and shipping, sea coast and inland fisheries, treaty-making powers, Indians, or property and civil rights — Canada Labour Code, ss. 107(1)(b), 108 — British North America Act, 1867, ss. 91(2), (10), (12), (24), 92(13).

Section 108 of the *Canada Labour Code*, R.S.C. 1970, c. L-1, which states that Part V (rep. & sub. 1972, c. 18, s. 1) of the Code ". . . applies in respect of all employees who are employed upon or in connection with the operation of any federal work, undertaking or business . . .", and s. 107(1)(*b*) of the Code which defines a dependent con-

tractor to mean a fisherman who is not employed but who is entitled under contract to a percentage of the proceeds of a joint fishing venture, do not extend so as to apply to the labour relations between processors of fish and the crews of fishing vessels who are all situate in one Province and who operate under such contracts which are made and enforceable in that Province. Such labour relations are a matter of property and civil rights in the Province within the meaning of s. 92(13) of the *British North America Act, 1867*. The legislation in question cannot be said to be regulation of trade and commerce under s. 91(2) of the *British North America Act, 1867* since Parliament does not have power under that head to legislate in respect of the contracts of a particular trade or business within one Province, nor in respect of the trade in particular commodities to the extent that such trade is local in nature. Nor is this legislation in relation to navigation and shipping under s. 91(10), since the work in question is purely local and the aspects of navigation and shipping are only incidental thereto. Nor does Parliament have jurisdiction in the matter by virtue of s. 91(12) which gives it jurisdiction over sea coast and inland fisheries, since that jurisdiction is of a general nature for the regulation, protection, and preservation of fisheries in the public interest, but only to the extent that it does not conflict with provincial jurisdiction over local matters and property and civil rights. Canada's treaty-making powers which would extend to treaties in respect of fisheries, does not give Parliament jurisdiction over labour relations in the fishing industry. Merely because Canada has such powers does not extend its jurisdiction over areas that are otherwise under provincial jurisdiction. Finally, the fact that many of the employees concerned are Indians does not confer jurisdiction upon Parliament in the matter by reason of its jurisdiction under s. 91(24) over Indians and lands reserved for the Indians, since the legislation is not directed to Indians, *qua* Indians. Nor does the fact that the Indians may or may not have certain original or treaty rights over fishing in the area transfer jurisdiction in this matter from the provincial Legislature to Parliament.

[*The Queen v. Robertson* (1882), 6 S.C.R. 52; *A.-G. Can. v. A.-G. Ont. et al.*, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299, [1937] A.C. 326, folld; *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al.* (1960), 24 D.L.R. (2d) 673, [1960] O.R. 416 *sub nom. R. v. Ont. L.R. Bd., Ex p. Underwater Gas Dev. Ltd.*, apld; *Citizens Ins. Co. of Canada v. Parsons; Queen Ins. Co. v. Parsons* (1881), 7 App. Cas. 96; *Reference re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, [1936] S.C.R. 398, 66 C.C.C. 180 [affd [1937] 1 D.L.R. 691, 1 W.W.R. 328, 67 C.C.C. 337, [1937] A.C. 377]; *Re Fisheries Act, 1914; A.-G. Can. v. A.-G. B.C.*, [1930]1 D.L.R. 194, [1929] 3 W.W.R. 449, [1930] A.C. 111; *Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers' Union et al.* (1972), 24 D.L.R. (3d) 585, [1972] 3 W.W.R. 641 [affd 38 D.L.R. (3d) 316*n*, [1973] S.C.R. vii, [1973] 3 W.W.R. 13], discd; *Vapor Canada Ltd. v. MacDonald et al.* (1973), 33 D.L.R. (3d) 434, 8 C.P.R. (2d) 15, [1972] F.C. 1156; *Workmen's Compensation Board v. C.P.R. Co.* (1919), 48 D.L.R. 218, [1919] 3 W.W.R. 167, [1920] A.C. 184; *A.-G. Can. v. A.-G. Alta. and A.-G. B.C.* (1916), 26 D.L.R. 288, 10 W.W.R. 405, [1916] 1 A.C. 588, 25 Que. K.B. 187; *The King v. Eastern Terminal Elevator Co.*, [1925] 3 D.L.R. 1, [1925] S.C.R. 434; *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, [1925] A.C. 396; *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529;

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Paquet v. Corp. of Pilots of Quebec Harbour (1920), 54 D.L.R. 323, [1920] A.C. 1029; *City of Montreal v. Montreal Harbour Com'rs*, [1926] 1 D.L.R. 840, [1926] 1 W.W.R. 398, 47 Que. K.B. 163, [1926] A.C. 299; *Re Jurisdiction over Provincial Fisheries* (1896), 26 S.C.R. 444; affd *sub nom. A.-G. Can. v. A.-G. Ont., A.-G. Que. and A.-G. N.S.*, [1898] A.C. 700; *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, refd to]

Constitutional law — Distribution of legislative authority — Federal legislation regarding labour relations of employees employed "... in connection with the operation of any federal work, undertaking or business" — Whether legislation affects labour relations between crews of fishing vessels and processors of fish — Canada Labour Code, ss. 2, 108.

Labour relations — Certification — Jurisdiction of Canada Labour Relations Board — Federal legislation regarding labour relations of employees employed ". . . in connection with the operation of a federal work, undertaking or business" — Whether legislation affects labour relations between crews of fishing vessels and processors of fish.

Section 108 of the *Canada Labour Code*, R.S.C. 1970, c. L-1, which states that Part V (rep. & sub. 1972, c. 18, s. 1) of the Code applies to all employees who are employed ". . . in connection with the operation of any federal work, undertaking or business" does not purport to affect the labour relations between the crews of fishing vessels and fish processors to whom they sell their catch. Section 2 of the Code defines "federal work, undertaking or business" as "any work, undertaking or business that is within the legislative authority of the Parliament of Canada". Parliament, however, has authority to legislate in respect of fisheries only in the limited sense of policing and controlling the exploitation of fisheries; it does not have legislative jurisdiction over the business of fishing and accordingly, while in the exercise of its regulatory function, Parliament may legislate so as to affect employees in the fishing industry, such persons cannot be said to be employed "in connection with" any "federal work, undertaking or business", giving the words "in connection with" their proper and restricted meaning of "necessarily incidental to".

[*Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, folld; *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, [1925] A.C. 396, refd to]

Administrative law — Judicial review — Privative clauses — Federal statute prohibiting judicial review under standard privative clause — Application for prohibition against inferior tribunal on ground that legislation under which tribunal acts ultra vires Parliament or that statute does not confer jurisdiction assumed by inferior tribunal — Application therefore alleging lack of jurisdiction — Federal Court, Trial Division, has jurisdiction to hear application — Canada Labour Code, R.S.C. 1970, c. L-1, s. 122(2) — Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 18(a).

[*Re British Columbia Provincial Council United Fishermen & Allied Workers' Union and British Columbia Packers Ltd. et al.* (1974), 45 D.L.R. (3d) 372, [1973] F.C. 1194, 1 N.R. 201, refd to]

APPLICATION for prohibition to prohibit the Canada Labour Relations Board from hearing the application for certification of the respondent union.

W. G. Burke-Robertson, Q.C., and *Gerald S. Levey*, for applicants.

P. D. K. Fraser, for Pacific Trollers Association.

W. K. Hanlin, for Fishing Vessel Owners of B.C.

S. R. Chamberlain, for United Fishermen and Allied Workers' Union.

N. D. Mullins, Q.C., for Canada Labour Relations Board and Attorney-General of Canada.

Donald R. Munroe, for Native Brotherhood of B.C.

N. J. Prelypchan, for Attorney-General of British Columbia, Attorney-General of Newfoundland and Attorney-General of Nova Scotia.

ADDY, J.:—This is an application for a writ of prohibition to restrain the respondent Board from proceeding with the applications for certification made before it by the respondent Union to be appointed official bargaining agent for the crews of the fishing vessels who sell fish to each of the applicants.

The applicants (hereinafter referred to as "the Processors") are firms engaged in the business of procuring various types of fish by means of purchases and also by special arrangements with the captains, crews and owners of fishing vessels. The Processors then process and pack the fish and sell it to outlets both inside and outside of the Province of British Columbia.

The respondent Union has applied in the case of each of the Processors to the respondent Board for certification as official bargaining agent for the crews of the fishing vessels, whose owners, captains and crews enter into special arrangements for the sharing of the selling price of each catch with each of the processor purchasers when a fishing boat returns to port.

The first three intervenors named in the style of cause were authorized to take part in the proceedings as such by order of my brother Walsh, J., dated September 9, 1974. The last three named intervenors, namely, the Attorneys-General for British Columbia, Newfoundland and Nova Scotia were, by the aforesaid order, authorized to intervene if they so desired. At the hearing before me, their counsel stated that for the moment he did not have any instructions to take an active part in the hearing but wished to be present as an

observer. He also stated that, in view of the important constitutional problems involved, his instructions were that he was to preserve his clients' rights to intervene at any time including any possible subsequent appeal, should they deem it advisable. Under the circumstances, in order to ensure that this right would be preserved, I ordered them included in the style of cause as intervenors. As it turned out, they did not in fact take any active part in the proceedings before me but merely maintained their role as observers.

The intervenor, Native Brotherhood of British Columbia (hereinafter referred to as "the Native Brotherhood"), is an association representing approximately 1,000 native Indians who form a good proportion of the crews of fishing vessels involved in the application for certification of the respondent Union. Some members of the Native Brotherhood are reserve Indians others are not and others are also enfranchised Indians. There was no indication in the evidence of the relative proportion of these three groups constituting the Native Brotherhood or actually engaged in the fishing industry. It appears that in the case of Indians, they sometimes form part of the crew of a fishing vessel operated as a family enterprise and at other times are merely members of the crews of other fishing vessels with mixed crews. The Native Brotherhood, at the hearing, opposed the application, adopted the arguments advanced on behalf of the respondents and also advanced other arguments based on the special status and rights of its members as native Indians.

The other two intervenors, namely, the Fishing Vessel Owners Association of British Columbia and the Pacific Trollers Association are associations representing independent boat owners or members of crews having an ownership interest in fishing vessels who, generally speaking, simply sell each catch to the various fish processors without any special arrangement with them as to an accounting or the sharing of profits or losses of each catch. They are not involved in the applications for certification made by the respondent Union before the respondent Board but are interested in the outcome of the proceedings, having regard to the possibility of future action or legislation in this area. They supported the application for prohibition and adopted entirely the position taken and the grounds advanced by the Processors.

The facts are relatively simple and are undisputed. They are contained almost entirely in the affidavit of one K. M. Campbell, filed on the present motion on behalf of the Processors. Generally speaking, the latter purchase fish from

the fishermen on the basis of either written or oral agreements under which provision is made for the payment to the fishermen of a percentage of the proceeds from the purchase of each catch which is delivered to the agents or servants of the Processors, where it is purchased by one of the Processors. Each processor provides a settlement accounting service under which an accounting is made for each catch to the boat owner and crew of the fishing vessel.

From the gross proceeds of the sale of the catch, termed the "gross stock", certain agreed upon operating costs are first deducted. From the balance, a percentage share known as the "boat share" is credited to the owner of the boat. At times, the boat is owned by the captain or partly by the captain and the members of his crew or by other persons not members of the crew and including at times the Processors themselves. Although it is not mentioned in the affidavit in support of the motion, this fact was fully conceded by all parties and appears from the proceedings before the Board. In any event, the "boat share" goes to the owner or owners, whoever he or they may be.

From the remainder of the proceeds of the catch, known in the industry as the "net stock credit", certain other costs, such as the cost of food for the crew and other crew personnel expenses incurred on the trip are deducted. The remaining balance is divided among the crew including the captain in accordance with previously agreed-upon shares. Where the owner or part-owner is part of the crew as captain or otherwise he also gets a share as such, in addition to the "boat share".

Where the catch is poor, resulting in a loss on the trip (referred to as a "hole trip"), the loss is charged to the owner and crew in the same ratio as the "net stock credit" would have been shared. A full accounting of the above is made for each catch, to each member of the crew, by the processor, as purchaser.

The contracts, oral or written, covering the purchase of fish by the Processors from the fishermen, delineate the minimum prices to be paid for the fish and the manner and means of the division of the "gross stock proceeds". All purchases made by the Processors are made in the Province of British Columbia.

From the voluminous transcript of the proceedings before the respondent Board, which proceedings were as a matter of course forwarded by it to this Court as a result of the present application, only two additional facts appear to have

any bearing on the issue raised on this motion. These were the only additional facts referred to by counsel in argument and it will be more convenient to mention them when dealing with the specific arguments on which these facts have a bearing.

The applicants base their request for prohibition on two grounds, namely: that certain hereinafter referred to provisions of the *Canada Labour Code*, R.S.C. 1970, c. L-1 (Part V), as amended by 1972, c. 18, s. 1, are *ultra vires* the Parliament of Canada and, alternatively, if not *ultra vires*, that by the terms of the *Canada Labour Code* itself, they are not applicable to the Processors in the circumstances of the present case.

As to this Court's jurisdiction to hear the present application for a writ of prohibition, the basic jurisdiction is provided for in s. 18(*a*) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), and the respondent Board would be necessarily included in the expression "a federal board, commission or other tribunal" against whom relief may be claimed under s. 18(*b*) of the said Act.

Although specifically invited by me to do so, none of the respondents and none of the intervenors were willing to argue that s. 122(2) of the *Canada Labour Code* constituted in any way a bar to the general power of this Court to grant the relief requested by the applicants and all counsel seemed to agree, at least tacitly, that this Court did have jurisdiction. But since consent cannot grant jurisdiction and especially in view of the fact that, in a previous application for review under s. 28(1) of the *Federal Court Act* in this very case (refer Federal Court File A-198-73, *Re British Columbia Provincial Council United Fishermen & Allied Workers' Union and British Columbia Packers Ltd. et al.* (1974), 45 D.L.R. (3d) 372, [1973] F.C. 1194, 1 N.R. 201), the Court of Appeal specifically declared that it was refraining from expressing an opinion as to whether s. 122(2) would constitute such a bar, I feel that it is my duty in the present case to not only raise the problem but to deal with it, albeit in a summary fashion.

The Honourable Mr. Justice Thurlow in delivering the decision of the Court in the above-mentioned review under s. 28(1) of the *Federal Court Act*, on December 7, 1973, stated as follows [at p. 375]:

> We express no opinion as to whether s. 122(2) has any application to prevent proceedings in a case where the Board purports to exercise jurisdiction that has not been conferred on it.

The Court of Appeal, relying on its previous decision in the case of *Re A.-G. Can. and Cylien* (1974), 43 D.L.R. (3d) 590, [1973] F.C. 1166, decided that the ruling or decision of the Board to the effect that it had jurisdiction to hear the application for certification was not the type of decision or ruling which was reviewable under s. 122(1) at least until the Board had rendered the decision which it was specifically authorized to render, that is, whether the Union was to be certified or not. The Court of Appeal then suggested that the most expeditious way for the question to be raised before it was for the Board to refer the question directly to it pursuant to s. 28(4) of the *Federal Court Act*. The Board, for reasons unknown to me, did not see fit to so refer the matter and the present application was brought before me by the Processors by way of originating notice of motion.

Section 122(2) of the *Canada Labour Code* reads as follows:

> 122(2) Subject to subsection (1), no order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Board in any of its proceedings under this Part.

In my view, there is nothing extraordinary in this privative clause contained in the *Canada Labour Code*.

There are numerous decisions of common law Courts of the highest jurisdiction over many years which have held that Courts of superior jurisdiction possessing powers of prohibition and entrusted with the duty of supervising tribunals of inferior jurisdiction, have not only the jurisdiction but the duty to exercise those powers notwithstanding privative clauses of this nature where the application is based on a complete lack of jurisdiction on the part of the tribunal of inferior jurisdiction to deal with the matter with which it purports to deal. These decisions are based on the very logical assumption that where Parliament has set up a tribunal to deal with certain matters it would be completely illogical to assume that, by the mere fact of inserting a privative clause in the Act constituting the tribunal and outlining its jurisdiction, Parliament also intended to authorize the tribunal to deal with matters with which Parliament had not deemed fit to entrust it or to exercise jurisdiction over persons not covered by the Act of Parliament, or to engage in an illegal and unauthorized hearing.

A fortiorari, the principle would apply in cases where the tribunal was purporting to deal with matters over which

Parliament itself did not have the power to convey jurisdiction to the tribunal. The last-mentioned situation is precisely the one which the Processors, applicants, allege exists in the present case since they allege that the power to legislate in this matter in the circumstances of the present case has been exclusively reserved to the Provinces under s. 92(13) of the *British North America Act, 1867*. The alternative grounds of the motion, namely, that the Act itself does not purport to give the respondent Board jurisdiction over the applicants in the circumstances of the present case would, if upheld, necessarily lead to a finding that it was attempting to exercise jurisdiction in circumstances not authorized by Parliament in the *Canada Labour Code* and would, therefore, also give this Court the jurisdiction to intervene.

Finally, I would like to state that it matters not whether the power and duty of supervision is a general one, such as exists in the superior Courts of the Provinces, flowing from custom and the common law of England whereby Courts of superior jurisdiction have traditionally exercised the power or whether it is founded entirely on a specific statutory provision such as s. 18(*a*) of the *Federal Court Act* in the case of this Court.

I therefore find that I have jurisdiction to intervene on both grounds raised in the application before me.

At the opening of argument, counsel for all of the applicants and counsel for both respondents assured me that should I, or the Federal Court of Appeal in its turn, come to a decision adverse to their position in this matter, the definite instructions from their respective clients were to pursue the matter to the Supreme Court of Canada. Such an assertion of ultimate intention is not comforting to a trial Judge who is then inclined to feel that no matter what study or thought he might devote to or what pearls of legal wisdom he might by accident or design, contribute to the question in issue, he is not being called upon to dispense justice between the parties but merely to act as a first cog in the procedural machinery which will eventually bring the matter before the highest tribunal in the land for ultimate decision. His role is all the more limited and uninspiring when, in a case such as this, there is no dispute as to facts and all evidence is submitted in affidavit form and the Judge cannot even discharge his normal role of arriving at findings of fact or of determining matters of credibility. But, having regard to the importance of the issue, I will resist the temptation of merely deciding the matter by a toss of the coin as I threatened to

do when counsel solemnly announced their intention to pursue the matter further no matter what the outcome might be.

Section 107(1), being the interpretation section pertaining to Part V of the *Canada Labour Code*, defines "dependent contractor" in part as follows:

> 107(1) In this Part,
> "dependent contractor" means
>
> (*b*) a fisherman who is not employed by an employer but who is a party to a contract, oral or in writing, under the terms of which he is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons;

"Employee" is defined as including a dependent contractor. In other words, the fishermen are, by statute, created employees of the Processors.

One cannot logically deal with the first ground advanced by the applicants, Processors, namely, that the provisions of the *Canada Labour Code* are *ultra vires* without first assuming, for the purpose of considering the question raised, that the Act by its terms purports to be applicable to the present situation.

In other words, one must assume that s. 108 of the Act does by its terms purport to cover the present situation. Section 108, which is the only section under which the authority of the respondent Board can be extended to cover the applicants read as follows:

> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Based on a preliminary assumption that this section renders the Act applicable to the present situation, it is clear that the Board could not have been granted its jurisdiction by Parliament by virtue of the general residuary powers contained in s. 91 of the *British North America Act, 1867* since the question of labour relations generally speaking would normally be considered a matter of property and civil rights under the exclusive jurisdiction of the provincial Legislatures under head 13 of s. 92 of the *British North America Act, 1867*, namely: "Property and Civil Rights in the Province". The key words in this case are of course "in the Province".

There is no doubt that, on the evidence, all contracts took place in the Province of British Columbia, all of the Proces-

sors are situated there and all purchases of fish are made within the Province as well as the accounting for such purchases. Although there seems to be no direct evidence to that effect, it would also seem reasonable to conclude from all of the evidence that, on a balance of probabilities, all of the members of the crews of the fishing vessels, whom the respondent Union is seeking to represent, are residents of the Province of British Columbia or, in any event, one could certainly conclude that the very great majority of them are. This conclusion is corroborated to some extent at least by the fact that the respondent Union itself bears the name "*British Columbia Provincial Council* United Fishermen and Allied Workers' Union". (The italics are mine.)

The words "property and civil rights" are not to be given a narrow interpretation and these words in their fair and ordinary meaning, apply to contracts and to rights arising from them, although such rights are not specifically included in any of the enumerated classes of subjects in s. 92. Refer *Citizens Ins. Co. of Canada v. Parsons; Queen Ins. Co. v. Parsons* (1881), 7 App. Cas. 96 at p. 107.

In view of the concluding words of s. 91, which read as follows,

> And any Matter coming within any of the Classes and Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

one must consider whether other characteristics of the subject-matter would take it out of the jurisdiction of the Province and make it one which would constitutionally fall under the jurisdiction of the Parliament of Canada. This authority must be found in s. 91 and must be found among the specifically enumerated matters covered by that section and not merely in the general residuary powers contained in its opening paragraph.

Among the likely relevant areas of s. 91, which might be held to be applicable, one must consider head 2, namely, "The Regulation of Trade and Commerce". These words are not to be used in an unlimited sense. Sir Montague E. Smith in delivering the report of the Privy Council in the above-mentioned case of *Citizens v. Parsons*, stated at p. 112 of the report as follows:

> The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade rang-

> ing from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commence were in the mind of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

and at p. 113:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, *its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade,* such as the business of fire insurance *in a single province,* and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.

(The italics are mine.) The law, on this point, was recently reviewed by the Federal Court of Appeal in the recent case of *Vapor Canada Ltd. v. MacDonald et al.* (1973), 33 D.L.R. (3d) 434, 8 C.P.R. (2d) 15, [1972] F.C. 1156 (refer judgment of Jackett, C.J., at pp. 446-7 D.L.R., pp. 28-9 C.P.R., of the report).

The rights created by a labour contract governing fishermen, although a good part of the labour might well be performed outside of the Province, would be enforceable within the Province and the contract is in substance a method for securing rights within the Province. The situation is very similar to the rights arising out of the workmen's compensation legislation considered in the case of *Workmen's Compensation Board v. C.P.R. Co.* (1919), 48 D.L.R. 218, [1919] 3 W.W.R. 167, [1920] A.C. 184.

The statement of the law in the *Citizens v. Parsons* case, *supra*, has been subsequently approved and followed by the Supreme Court of Canada in a much more recent decision in

1936 in the reference to it of the question of the constitutionality of *Reference re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, [1936] S.C.R. 398, 66 C.C.C. 180 [affd [1937] 1 D.L.R. 691, 1 W.W.R. 328, 67 C.C.C. 337 (P.C.)]. Chief Justice Duff, in delivering the judgment of the Court after quoting the extracts from that case including the extracts to which I have referred and referring also to the decision in the case of *A.-G. Can. v. A.-G. Alta. and A.-G. B.C.* (1916), 26 D.L.R. 288, 10 W.W.R. 405, [1916] 1 A.C. 588, states at p. 629 D.L.R., p. 410 S.C.R., of the said report:

> It would appear to result from these decisions that the Regulation of Trade and Commerce does not comprise, in the sense in which it is used in s. 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the Provinces, *or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense*; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

(The italics are mine.)

The limitation to be imposed on the scope of these words "regulation of trade and commerce" is further illustrated in the above-mentioned case of *A.-G. Can. v. A.-G. Alta. and B.C.* where it was held that the Parliament of Canada does not by these words possess the right to regulate by a licensing system a particular trade in which Canadians would otherwise be free to engage in a Province and that such a limitation constitutes an invasion of property and civil rights reserved to provincial Legislatures.

In the case of *The King v. Eastern Terminal Elevator Co.*, [1925] 3 D.L.R. 1, [1925] S.C.R. 434, where the provisions of the *Canada Grain Act* passed in 1912 to regulate trade in grain were considered by the Supreme Court of Canada, these provisions were held *ultra vires* the Parliament of Canada. Duff, J., as he then was, stated at pp. 12-3 D.L.R., pp. 447-8 S.C.R.:

> There are two lurking fallacies in the argument advanced on behalf of the Crown: first, that, because in large part the grain trade is an export trade, you can regulate it locally in order to give effect to your policy in relation to the regulation of that part of it which is export. Obviously that is not a principle the application of which can be ruled by percentages. If it is operative when the export trade is 70% of the whole, it must be equally operative when that percentage is only 30; and such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and inter-

> provincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the Provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on. Precisely the same thing was attempted in the Insurance Act of 1910, unsuccessfully. The other fallacy is (the two are, perhaps, different forms of the same error) that the Dominion has such power because no single Province, nor, indeed, all the Provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in *Att'y-Gen'l of Can. v. Att'y-Gen'l of Alta.*, and, indeed, is the view which was unsuccessfully put forward in the *Montreal St. R.* case...

and Mignault, J., at p. 21 D.L.R., p. 457 S.C.R., of the same report, stated:

> It suffices to answer that the subject-matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products.

The subject-matter of the legislation in the present case is labour relations and the product affected is fish. This product is sold and traded within the Province, and the legislation would control the relationship existing between the parties for the sale of fish in the Province. Parliament cannot enact legislation affecting labour relations between fishermen and fish processors in a Province merely under the guise of its powers to regulate trade and commerce, nor does the mere fact that the legislation might possibly enure to the benefit of Canada as a whole displace the jurisdiction of provincial Legislatures in this field afforded them by the property and civil rights provisions under s. 92. There is, of course, no national emergency in this case which would authorize the federal Government to legislate under its peace, order and good government powers. These principles were specifically dealt with by the Privy Council in *Toronto Electric Com'rs v. Snider et al.*, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, [1925] A.C. 396. The object of the federal Act in issue was to enable industrial disputes between any employer in Canada and any one or more of his employees to be settled. The Act was held to be *ultra vires* although it might have been for the benefit of Canada as a whole and it was further held in that case that the peace, order and good government clause would be of no avail to Canada in that situation.

A further specific head of s. 92, which might perhaps be considered as affording jurisdiction to Parliament notwithstanding s. 92(13), is 91(10): "Navigation and Shipping".

The 1955 reference to the Supreme Court of Canada of the question of the validity of the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, is of considerable assistance in this regard. (See *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529.) The judgment on the reference held that federal legislation concerning labour relations of stevedores was *intra vires* the Parliament of Canada because the work of stevedores was so intimately connected with ships and shipping as to form an essential part thereof. The case is also interesting in that it approved the principle laid down in *Paquet v. Corp. of Pilots of Quebec Harbour* (1920), 54 D.L.R. 323, [1920] A.C. 1029, and *City of Montreal v. Montreal Harbour Com'rs*, [1926] 1 D.L.R. 840, [1926] 1 W.W.R. 398, 47 Que. K.B. 163, [1926] A.C. 299, to the effect that the class of subjects falling within navigation and shipping is to be widely construed. It is also interesting because, although the case determines that the legislation is *intra vires* the Canadian Parliament, there is the clear indication that it would not necessarily apply to all stevedores and that those engaged in strictly provincial undertakings or services locally organized would not be subject to it, and that the question as to whether it actually applied, in any particular case, would depend on the circumstances of that case.

In *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al.* (1960), 24 D.L.R. (2d) 673, [1960] O.R. 416 *sub nom. R. v. Ont. L.R. Bd., Ex p. Underwater Gas Dev. Ltd.*, the Court of Appeal of Ontario dealt with the problem of whether labour relations affecting underwater offshore drilling were to be subject to federal or to provincial jurisdiction. It was held that, although the boats were subject to the *Canada Shipping Act*, and the work itself had to be federally approved under the *Navigable Waters Protection Act*, the employees themselves were subject to the *Ontario Labour Relations Act* and not subject to federal labour legislation as the work was purely local and the navigation and shipping aspects were purely incidental thereto. In my view, notwithstanding that the power to control the class of subjects falling within navigation and shipping is to be widely construed, to hold that Parliament would have jurisdiction over the labour relations between the fishermen and the Processors by reason only of its jurisdiction over navigation and shipping would, as stated in the last-mentioned case, be attributing a tortured meaning to that head and to the provisions of the *British North America Act, 1867* regarding the

division of powers between Canada and the Provinces. I therefore conclude that the legislation cannot be supported under that head any more than under the head giving the power to control trade and commerce.

The next specific head under s. 91 of the *British North America Act, 1867*, where Canada might assume jurisdiction, is head 12 regarding "Sea Coast and Inland Fisheries". The limitation to be applied to the rights of Parliament over fisheries was laid down in 1882 in the leading case on fisheries of *The Queen v. Robertson* (1882), 6 S.C.R. 52, where the Supreme Court of Canada unanimously upheld a previous decision of the former Exchequer Court. Chief Justice Ritchie, at pp. 120-1 of the above-mentioned report, stated:

> Such being the state of matters at the time of confederation, I am of opinion that the legislation in regard to "Inland and Sea Fisheries" contemplated by the *British North America Act* was not in reference to "property and civil rights" — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, *or the rights of individuals* therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those with the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water.

(The italics are mine.) And at p. 123 he stated further:

> To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.

The case, in my view, lays down a fairly strict limitation to the jurisdiction of the Parliament of Canada under this head. It limits the competence of Parliament in this field to the regulation, protection and preservation of fisheries and excludes from its jurisdiction the rights of individuals in the

fisheries themselves. It would seem to follow *a fortiorari* that where the true nature of the subject-matter is the right of individuals to contract as to the proceeds of the catch, it must be excluded as being too remote to be necessarily incidental to or effectively required for the general policing or supervisory powers afforded the federal authority by s. 91(12) over fisheries. The principle in the *Robertson* case, *supra*, limiting federal power to the supervision and regulation of fisheries was subsequently followed by the Supreme Court of Canada in a reference entitled *Re Jurisdiction over Provincial Fisheries* (1895), 26 S.C.R. 444. Chief Justice Sir Henry Strong at p. 519 of this report stated:

> ...and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations. As this has already been decided by the case of *The Queen v. Robertson*, 6 Can. S.C.R. 52, which is binding upon me, *I consider the decision in that case as settling the existing law.*

(The italics are mine.)

The case of *A.-G. Can. v. A.-G. Ont., A.-G. Que. and A.-G. N.S.*, [1898] A.C. 700, makes it abundantly clear that, although s. 91(12) confers extensive powers to legislate concerning the control of fish, which powers might fundamentally affect to a considerable degree the exercise of proprietory rights in relation to fisheries or their products, it does not, in any way, confer any proprietory right to Canada in relation to fisheries. (Refer pp. 712-3 of the above-mentioned report of the case.)

The federal authorities have no power to require a licence as a condition of the operation of a cannery. This was dealt with also by the Privy Council when it upheld the unanimous decision of the Supreme Court of Canada in a reference to the latter by the Governor-General. The case before the Privy Council was entitled *Re Fisheries Act, 1914; A.-G. Can. v. A.G.-B.C.*, [1930] 1 D.L.R. 194, [1929] 3 W.W.R. 449, [1930] A.C. 111. At p. 199 D.L.R., p. 121 A.C., their Lordships in their report to His Majesty stated:

> Their Lordships are of opinion that the appellant's contention in this respect is not well founded. The fact that in earlier fishery legislation raising no question of legislative competence matters are dealt with not strictly within any ordinary definition of "fishery" affords no ground for putting an unnatural construction upon the words — Sea Coast and Inland Fisheries. In their Lordships' judgment, *trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought*

> *within the scope of the subject expressed by the words "Sea Coast and Inland Fisheries."*

(The italics are mine.)

From an analysis of these cases it seems clear that fish is property which falls within the property and civil rights jurisdiction of the Provinces and that any contract or arrangement between citizens for the disposal of the proceeds of the sale of that property is not, in any way, essential to, does not fundamentally relate to nor is it necessarily incidental to the policing or control of fisheries. Fish like grain in *The King v. Eastern Terminal Elevator Co., supra*, are the product of the grounds on which they are harvested and the fact that Canada may control the fishing grounds does not necessarily give it continuing control after harvesting over the product itself which is the article of trade or over the marketing of the product within any Province.

The fact that some of the operations and perhaps in some particular cases the greater part of the fishing operations may be carried on outside provincial territorial waters does not affect the situation. This point was specifically dealt with by the Court of Appeal of British Columbia in *Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers' Union et al.* (1972), 24 D.L.R. (3d) 585, [1972] 3 W.W.R. 641 [affirmed 38 D.L.R. (3d) 316*n*, [1973] S.C.R. vii, [1973] 3 W.W.R. 13]. In this case, on the question of legislative authority over the subject-matter, Chief Justice Davey stated at p. 592 D.L.R., p. 647 W.W.R.:

> ...I see no distinction between property rights in fisheries and the regulation of labour relations in the industry, because the legislative authority over both belongs to the Provinces under head 13 of s. 92, unless the right to regulate labour relations in the industry is an essential or vital part of the protection and preservation of the fisheries, a point I shall discuss later.

He then went on to state at p. 594 D.L.R., p. 649 W.W.R.:

> Since I am firmly of the opinion that head 12 does not by interpretation expressly extend to legislative control over labour relations between owners of fishing vessels and their crews, it becomes necessary to consider whether the power to regulate and control the fisheries in order to preserve and protect them must include the power to regulate the terms and conditions of employment of the fishing crews vis-à-vis their employers.

He then concluded that it had not been established in evidence that the power to regulate and control fisheries must include the power to regulate any terms or conditions of employment.

On this last-mentioned point, the evidence, in the present case before me, indicates that prolonged work stoppage in

the fishing industry might have an adverse effect on the reproduction of fish by reason of over-abundance of fish in the spawning grounds. One cannot help but conclude, however, that a stoppage of work in the canneries themselves, or perhaps over the transportation system from the canneries or in the supply of containers, etc., to the industry, would result in fish purchases being halted and, therefore, would be just as likely to lead to an interruption of fishing. No one could seriously argue that this would give Parliament the power to legislate regarding labour relations in these last-mentioned areas. In any event, the above-quoted case of *Mark Fishing Co. Ltd. et al. v. United Fishermen & Allied Workers' Union et al.* specifically dealt with the matter and, although that decision is not binding on me, I certainly consider it good law. It may be stated here also that one cannot suppose that work stoppage would be more likely to occur or be more prolonged where labour relations are provincially controlled as opposed to being federally controlled, and it follows that one cannot reasonably conclude that provincial control of labour relations in this situation would be likely to hinder Canada's right to police and supervise the fishing grounds. For the above reasons I cannot accept the argument that head 12 of s. 91 would, in the circumstances of the present case, override the jurisdiction afforded the Province in this matter under s. 92(13).

An argument was advanced at the hearing to the effect that, by reason of Canada's treaty-making powers regarding fisheries and the reciprocal protection of fisheries and Canada's obligation to implement such treaties, the Canadian Parliament possesses *ipso facto* jurisdiction over the labour relations of fishermen.

As to distribution of treaty-making powers, the subject was fully dealt with and settled by the Privy Council in *A.-G. Can. v. A.-G. Ont. et al.*, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299, [1937] A.C. 326. In that case, their Lordships, after clarifying certain doubts which had arisen by reason of some ambiguous wording in what is referred to as the *Aeronautics* case, *Re Aerial Navigation*, [1932] 1 D.L.R. 58, [1931] 3 W.W.R. 625, [1932] A.C. 54, and certain *obiter dicta* used in what is known as the *Radio* case, *Re Regulation & Control of Radio Communication*, [1932] 2 D.L.R. 81, [1932] 1 W.W.R. 563, [1932] A.C. 304, went on to state at pp. 681-2 D.L.R., p. 351 A.C., as follows:

> Their Lordships are satisfied that neither case affords a warrant

for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of ss. 91 and 92, *i.e.*, the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the B.N.A. Act gives effect.

And also at pp. 682-3 D.L.R., p. 352 A.C.:

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. *There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive.* If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed *ab origine*. In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.

(The italics are mine.)

In view of the above, it seems established law that the treaty-making powers of Canada existing by reason of its control over sea coast and inland fisheries cannot give the Canadian Parliament any more jurisdiction than it possesses by virtue of the very head in s. 91 which is the source of that treaty-making power on the subject, namely, in this case, head 12 pertaining to "Sea Coast and Inland Fisheries".

A very comprehensive argument was also made on behalf of the intervenors Native Brotherhood based on Canada's exclusive right to legislate regarding native Indians and their lands, to the effect that the federal authority for this reason did have jurisdiction in the present case. The jurisdiction of the federal over native Indians is found in head 24 of s. 91 which reads as follows: "Indians, and Lands reserved for the Indians".

At the same time, the argument was also made that by

reason of the *Royal Proclamation, 1763*, which it is alleged is in force in British Columbia, or alternatively, by reason of aboriginal rights to engage in fishing, which native Indians have enjoyed from time immemorial and which rights cannot be removed or regulated directly or indirectly by provincial legislation, the federal authority has exclusive right to legislate regarding labour relations between fishermen and the Processors since labour relations in this special area can intimately affect the rights of Indians and since fishing is one of their main occupations in British Columbia.

As to the aboriginal rights of Indians in British Columbia, or those existing by virtue of the *Royal Proclamation, 1763*, it seems that, in view of the split decision of the Supreme Court of Canada in the case of *Calder et al. v. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, the Courts of British Columiba (but not this Court) are now bound by the unanimous decision of the Court of Appeal of that Province in the *Calder* case reported in 1971, 13 D.L.R. (3d) 64 (1970), 74 W.W.R. 481. That Court upheld the decision of the trial Judge, who dismissed the action for a declaration that the aboriginal or Indian title to ancient tribal territories was never lawfully extinguished.

It would be useful under the circumstances to have the matter reconsidered by the Supreme Court of Canada, especially in view of the fact that it seems certain that the present case will ultimately reach that Court, but I for one, fail to see how the issue is relevant to the present case. The mere fact that the control of labour relations between fishermen and fish processors might affect the rights of many Indians by reason of the fact that there are a good many of them among the crews of fishing vessels is not, in my view, a factor which would give Canada jurisdiction. Even if it were ultimately decided that the Indians did possess certain territorial rights by virtue of either aboriginal rights or the *Royal Proclamation, 1763*, I fail to see how it would follow that they have any exclusive right to fishing, especially in the sea or the coastal areas. Notwithstanding that the native Indians might possibly possess ancient rights regarding fishing and hunting or certain territorial rights, they certainly do not possess an *exclusive* right over either the inland fisheries of British Columbia, the coastal fisheries or those on the high seas.

The legislation in issue does not purport to affect the rights of native Indians as such; it is not directed at them either expressly or implicitly. It is in substance as well as in form,

general legislation designed to regulate and control the relationship existing between fish processors and all fishermen who fall under the definition of employee as stated in s. 107(1)(*b*) above quoted. Since it is truly labour legislation affecting all citizens who fall under its terms, the mere fact that some native Indians who, as members of crews of fishing vessels chosing to contract with fish processors, are affected by it, cannot give Parliament jurisdiction to enact this type of legislation any more than the fact that they might form a substantial part of the people engaged in any other particular business, trade, calling or profession would clothe Parliament with jurisdiction over labour legislation in any such field. Furthermore, the fact that the particular trade or calling involved happens to be fishing, which is obviously a trade, or calling in which all Canadian citizens may participate without distinction as to race, cannot in any way alter this aspect of the situation. The enjoyment by native Indians of any ancient privileges or rights not enjoyed by others cannot change or override any Province's right to legislate generally as to property and civil rights for the general benefit of the residents of that Province. Should the native Indians indeed possess such ancient aboriginal or treaty rights and should any particular provisions of any such legislation infringe those rights, such provision would not be binding upon or operative against native Indians, but this certainly does not mean that the Province would lose its jurisdiction to pass the legislation in the first place and that jurisdiction in the matter would pass to Parliament by reason of any such native rights.

It is therefore unnecessary to decide whether aboriginal or treaty rights exist for the purpose of determining the question in issue and, for the reasons above mentioned the fact that the crews of fishing vessels comprise native Indians cannot affect jurisdiction in this case.

The second ground raised by the Processors for objecting to jurisdiction is that the Act by its very terms does not purport to apply to the present situation. As stated previously, the relevant section is 108 of the *Canada Labour Code*, *supra*. "Federal work, undertaking or business" is fully defined in s. 2 of the *Canada Labour Code* and means:

> ... any work, undertaking or business that is within the legislative authority of the Parliament of Canada ...

In other words the word "federal" is not limited to a work or undertaking in which the federal Government is actually en-

gaged as such, but a work or undertaking or business over which the federal has authority to legislate. Section 108 states that the provisions of that part of the *Canada Labour Code* applies when the employees (which include the fishermen in our case) are "employed upon or in connection with the operation of any such work, undertaking or business". The fishermen are certainly not employed "upon" the operation of any such work, etc. The question is therefore whether they might be considered as being employed "in connection with" the operation of same.

The meaning and application of the words "in connection with" were considered by almost all the Justices of the Supreme Court of Canada in a 1955 reference to that Court of the 1952 Act, *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, to which I have previously referred in these reasons. The words "in connection with" were used in s. 53 of that Act which was so similar to s. 108 of the *Canada Labour Code*, as to be almost identical to it. The relevant part of s. 53 reads as follows:

> 53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing ...

As to the words "in connection with" Taschereau, J. (as he then was), stated at pp. 736-7 of the report:

> The words *"in connection with"* found in s. 53, must not of course be given too wide an application. But, I think it quite impossible to say in the abstract, what is and what is not *"in connection with"*. It would be overweening to try and forsee all possible cases that may arise. I can imagine no general formula that could embrace all concrete eventualities, and I shall therefore not attempt to lay one down, and determine any rigid limit. Each case must be dealt with separately.

Kellock, J., had this to say about the expression at p. 748:

> Apart from Government employees, the application of Part I is provided for by s. 53, which it is not necessary to restate. In my view, the words "in connection with" in the second line of s. 53, as well as in para. (*a*), are not to be construed in a remote sense but as limited to persons actually engaged in the operation of the work, undertaking or business which may be in question. Just what are the proper limits in this connection of the word "employees" in the section must be left for determination in particular cases as they arise. For example, persons performing merely casual services upon or in connection with a Dominion "undertaking" would not necessarily fall within the ambit of that word as used in s. 92(10).

Rand, J., stated at pp. 741-2:

> The tests of the scope of Dominion powers as they touch incidentally upon civil rights are difficult of precise formulation. In *G.T.R. v. A.-G. Can.*, [1907] A.C. 65, Lord Dunedin asks whether the dealing with a civil right there was "truly ancillary to railway legislation". The fact that the prohibition would tend, as argued by the Company, to negligence on the part of employees, was taken, if true, to be conclusive that the prohibition was ancillary. Other expressions have been used: "necessary incidental" in the *Local Prohibition case* [*A.-G. Ont. v. A.-G. Can.*], [1896] A.C. 348 at p. 360; "incidentally": *Ladore v. Bennett*, [1939], 3 D.L.R. 1, A.C. 468. These phrases assume that legislation on a principal subject-matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter *is reasonably required for the purposes of the principal* or to prevent embarrassment to the legislation, its inclusion to that extent is legitimate. This may be no more than saying that the incidental has a special aspect related to the principal. Actual necessity need not appear as the contracting-out case [*G.T.R. v. A.-G. Can., supra*] shows; it is the appropriateness, on a balance of interests and convenience, to the main subject-matter or the legislation. *I do not construe the words "in connection with" in the opening paragraph of s. 53 as to local matter to go beyond what can be annexed to federal legislation within the meaning of these phrases.*

(The italics are mine.) Kerwin, C.J.C., stated at p. 730:

> . . . therefore, the Act before us should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business.

Estey, J., stated at pp. 757-8:

> Mr. Magone particularly emphasized the words "upon or in connection with" in the opening words of s. 53 and "on for or in connection with" as they appear in s. 53(*a*). He contended that these words are so wide and comprehensive as to include not only matters which may form an integral part or be necessarily incidental to a work, undertaking or business over which the Parliament of Canada has legislative jurisdiction, but would extend to any activity, however slightly or remotely it may be connected with a given work, undertaking or business. It may be conceded that in their widest import there is much in such a contention, but these words must be read and construed in association with the other language of the section and, indeed, with that of the Act as a whole. When so read I do not think they could be construed to include more than that which would form an integral part or be necessarily incidental to the work, undertaking or business that was within the legislative competence of Parliament.

Cartwright, J. (as he then was), stated at p. 771:

> With this in mind the words "in connection with" appearing in the second line of the section must be understood as meaning "connected

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> in such manner with the operation of the work, undertaking or business referred to that the legislation contained in Part I of the Act when applied to the employees so described is in substance legislation in relation to the operation of such work, undertaking or business or necessarily incidental (to use the words of Lord Watson in *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. at p. 360) or truly ancillary (to use the words for Lord Dunedin in *G.T.R. v. A.-G. Can.*, [1907] A.C. at p. 68) thereto." The words "in connection with" in the second line of cl. (*a*) must be similarly construed . . .

and Fauteux, J. (as he then was), stated at p. 776:

> . . . the employment therein referred to would then be employment upon such work, undertaking or business that is within the legislative authority of the Parliament of Canada or *employment as to part of or necessarily connected with the operation of such work, undertaking or business.* Hence the effectiveness of the limitation is unaffected by the words "in connection with" appearing in the governing provision of the section . . .

It seems clear from this case that if the words "in connection with" were not given the restrictive meaning of being "necessarily incidental to" then the statute, being labour legislation, would be *ultra vires* the Parliament of Canada in accordance with the previous decision of the Privy Council in the *Toronto Electric Com'rs v. Snider et al.* case, *supra*, as being general property and civil rights legislation.

In considering the words "in connection with" in the light of the particular circumstances of the case at bar, in order to decide whether the statute would be operative in the case of the Processors and the fishermen, one must determine whether there is a federal work, undertaking or business in connection with the operation of which the fishermen are employed.

NB.

According to the authorities previously quoted, the federal undertaking or business over which Parliament has legislative authority in this case is fisheries in the limited sense of the policing or the controlling of the exploitation of fisheries. Are fishermen employed in connection with the operation of that particular undertaking?

The decision would not be difficult if the federal authorities were legally engaged in the trade or business of fishing. The employment in which the fishermen are in fact engaged is undoubtedly fundamentally and directly affected by the controls or regulations which Canada might, from time to time, legally impose on the fisheries, but that is an entirely different matter from saying that they are employed in any way in connection with the undertaking of effectively imposing or carrying out the controls themselves. They are subject to policing and controlling activities imposed by the

Canadian statutes affecting fisheries but they are not employed in connection with the operation of those activities, namely, the policing and control of fisheries.

It might be otherwise also if Parliament had legislative jurisdiction over the business, trade or undertaking of *fishing*. It does not, in my view, possess any such jurisdiction. Its jurisdiction is limited to the policing of fisheries themselves and does not, as stated previously, even enjoy property rights over these fisheries. The fact that it could by its regulatory powers in some instances completely prevent any fishing whatsoever from taking place does not clothe it with the jurisdiction over fishing as a business. Any interference with actual fishing is merely a direct consequence on provincial property and civil rights, of the exercise by Canada of its jurisdiction in a field reserved to it and does not thereby extend the jurisdiction of Parliament over the provincial civil rights field which has been so affected by the federal legislation. Parliament would possess jurisdiction in this latter field only if such additional jurisdiction were essential to or reasonably required for the proper exercise of jurisdiction in the field reserved to it. I cannot find any such essential requirement, for Canada may continue as it has up to the present time, to effectively control the fisheries without controlling the labour relations of the fishermen. It follows that the fishermen cannot be considered as employed "in connection with" any federal work, undertaking or business.

I therefore conclude that the terms of s. 108 of the *Canada Labour Code* do not purport to render the Act applicable to labour relations between fishermen and the Processors in the circumstances of the case before me, but in any event if they do, then the Act is in that respect unconstitutional and *ultra vires* the Parliament of Canada in that it purports to deal with a matter specifically reserved to the Provinces under head 13 of s. 92 of the *British North America Act, 1867*.

The applicants in this motion will therefore be entitled to the relief claimed and a writ of prohibition will issue as requested.

The fact that, as stated previously, I have been assured by all of the applicants and both respondents that my decision, whatever it may be, will be appealed should not deter me from applying the generally accepted principle that costs normally follow the event. Accordingly, the applicants shall have their costs against the respondents.

Application granted.

DISTRICT DE MONTREAL.

Loi des Indiens — Acte de l'Amérique Britannique du Nord — Droits des provinces — Permis comme vendeur dans la cité de Montréal.

COUR DU RECORDER DE LA CITE DE MONTREAL.

MONTREAL, 17 janvier. 1933.

No. 22843 R. P.

LA CITE DE MONTREAL, demanderesse v. JOHN BLUEFEATHER, défendeur.

JUGÉ:—Le paragraphe 92 de l'acte de l'Amérique Britannique du Nord, sous-paragraphes 13 et 16, donne aux législatures provinciales le pouvoir de légiférer sur toute chose affectant la propriété et les droits civils dans la province et sur toute chose de nature locale ou privée dans la province.

En conséquence, la ville de Montréal, de par sa charte, a le droit de réclamer d'un indien un permis ou licence comme vendeur ambulant de ladite cité, la province ayant le droit de légiférer en ce qui concerne les choses locales ou privées.

L'accusé, John Bluefeather, un Indien, est poursuivi pour avoir, le 8 octobre, 1932, illégalement fait affaire comme vendeur ambulant dans la rue St-André, dans la cité de Montréal, sans avoir au préalable obtenu un permis (licence) de la dite cité.

Il offrait en vente des remèdes ou médicaments qu'il avait préparés lui-même. Ces faits sont admis de part et d'autre.

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L'accusé, par l'entremise de son savant procureur, prétend qu'il n'est pas obligé d'être possesseur d'un permis de la cité de Montréal, pour y vendre ses médicaments. A l'appui de ses prétentions, il nous réfère à l'acte de l'Amérique Britannique du Nord, à Bourinot (Constitution du Canada), à la loi concernant les Indiens, au rapport des commissaires spéciaux pour s'enquérir des affaires des sauvages du Canada (1856) et à certains jugements.

CANADA DEPT. JUSTICE

Il en vient à la conclusion que les Indiens ne sont pas soumis au contrôle de la Province, qu'ils sont sous la tutelle exclusive du Parlement du Canada, qui seul peut légiférer en ce qui les regarde.

Il m'est impossible de souscrire à cette opinion, qui est contraire aux règles posées par nos tribunaux, depuis la mise en vigueur de la loi concernant les Indiens. Sans disposer de la question de savoir si certains droits des Indiens ont été méconnus, nous ne pouvons aller à l'encontre des lois qui les régissent, encore moins créer pour eux des exceptions qui ne sont pas prévues par la loi.

Le paragraphe 91, sous-paragraphe 24, de l'Acte de l'Amérique Britannique du Nord, donne au parlement du Canada le pouvoir de légiférer en ce qui concerne les Indiens, ainsi que des réserves de terrains. Rien dans la loi concernant les Indiens indique qu'ils soient exempts de payer une licence pour vendre des produits ou médica-

ments fabriqués ou manufacturés par eux. Par contre le paragraphe 92 de l'Acte de l'Amérique Britannique du Nord, sous-paragraphes 13 et 16, donne aux législatures provinciales le pouvoir de légiférer sur toute chose affectant la propriété et les droits civils dans la province et sur toute chose de nature locale ou privée dans la province. Le champ est donc libre pour la province pour légiférer en ce qui concerne les choses locales ou privées dans la province.

Dans la cause de *The Canadian Pacific Railway Co.* v. *Corporation de la Paroisse de Notre-Dame de Bonsecours* (1899) A. C., il est dit:—

"The British North America Act, whilst it "gives the legislator control of the Indian de- "fendant, qua Indian, to the parliament of the "Dominion, does not declare that the defendant "shall cease to be a citizen of the province in "which he may be, or that he shall, in other res- "pects, be exempt from the jurisdiction of the "provincial legislatures..."

Les remarques du juge J. A. MacLaren, de la Cour d'Appel d'Ontario, dans une cause du *Roi* v. *Hill*, sont bien au point et très intéressantes. Cette cause est rapportée au volume 15 O. L. R., à la page 411.

En voici une partie:

"If the claim is well founded, not only will "Indians be relieved from all prohibitions and "restrictions imposed upon the people of this "Dominion by the legislation of the respective

"provinces, but they will not be able to claim any "of the benefits or advantages conferred by such "legislation and will be relegated, safe as to the "few matters legislated yet by the Dominion, and "any remnants of old legislation, to the condi "tions and rights of their ancestors when this "country was first discovered. They would also "be shut off even from a large part of the old "provincial legislation before consideration, for "it is well known that the Imperial Government "retained in its own hands all matters relating "to Indians and Indian bands long after it had "transferred other local matters to the provin- "cial authorities".

L'accusé a-t-il voulu invoquer les paragraphes 102, 103, 104 et 105 de la loi concernant les Indiens? Il n'y aurait que le paragraphe 102 qui pourrait se rapprocher du cas qui nous occupe.

L'accusé est poursuivi non pour une taxe, mais bien pour une licence ou permis.

Pour ces considérations je suis obligé de maintenir la plainte et de déclarer le défendeur coupable d'avoir illégalement fait affaire comme vendeur ambulant le 5ième jour d'octobre 1932, dans la rue St-André, dans la cité de Montréal, et de le condamner à une amende de $2.00 et les frais ou à défaut, à un mois de prison. La remise de l'amende lui sera faite s'il prend sa licence.

Mtres St-Pierre & Cie, procureurs de la demanderesse.

Mtre Edmond Courchesne, procureur du défendeur.

DION *v.* LA COMPAGNIE DE LA BAIE D'HUDSON.

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Loi de pêche de Québec—Sa constitutionnalité—Compagnie de la Baie d'Hudson—Ses privilèges—Loi de l'Amérique britannique du Nord, 1867, art. 92, sous-par. 5 et 16—S. ref., 1909, art. 2247 et suiv.—C. civ., art. 6, 17.

1. La loi de pêche de Québec est constitutionnelle, parce qu'elle n'a trait qu'à l'administration des terres publiques qui sont la propriété de la province et qu'elle ne touche qu'à des matières d'une nature purement locale, mentionnées aux sous-paragraphes 5 et 16 de l'article 92 de l'Acte de l'Amérique britannique du Nord.

2. Lorsque la législature de Québec édicte des lois dans les limites des pouvoirs qui lui sont conférés par l'Acte de l'Amérique britannique du Nord, elle peut décréter, comme sanction de telles lois, l'amende et l'emprisonnement, sans enfreindre les dispositions du même acte, qui donnent au parlement fédéral le pouvoir exclusif de légiférer en matières criminelles.

3. Les Sauvages qui habitent la province sont des sujets britanniques, et, comme tels, soumis à ses lois.

4. La Compagnie de la Baie d'Hudson, ayant cédé et vendu au gouvernement du Canada tous les droits et privilèges qu'elle possédait en vertu de sa charte, à l'exception de celui de faire la traite des fourrures, est soumise aux lois de cette province, en vertu des articles 6 et 17 du Code civil.

Question de droit constitutionnel, soulevée au cours de poursuites pénales. Les faits de la cause sont exposés aux remarques qui suivent:

M. le juge Langelier.

M. le juge LANGELIER. Deux actions ont été prises contre la défenderesse par le garde-chasse Jacques Dion: la première pour avoir eu en sa possession, illégalement, trois peaux de castor et douze peaux de rats musqués, le 29 juillet dernier; la seconde pour avoir eu en sa possession illégalement, le 21 juillet aussi dernier, trois peaux de castors et douze peaux de rats musqués.

M. le juge Langelier.—Cour des sessions de la paix.— No 1130.—Louis St-Laurent, C. R., avocat du demandeur.—Ferdinand Roy, C.R., avocat de la défenderesse.—A. R. Holden, C. R., conseil.

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Les parties ont consenti à ce que la preuve fût commune dans les deux causes.

1. La défenderesse prétend qu'en vertu des privilèges que la couronne lui a donnés dans sa charte, la loi de chasse de cette province est *ultra vires* et ne peut pas lui être appliquée.

Examinons les pouvoirs conférés aux provinces par l'Acte de l'Amérique britannique du Nord, et que nous trouvons formulés dans l'art. 92 qui dit:

Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

5. L'administration et la vente des terres publiques appartenant à la province et des bois et forêts qui s'y trouvent;

13. La propriété et les droits civils dans les provinces;

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

Personne ne contestera que la législature a le contrôle absolu des bois et forêts dans les limites de son territoire, qu'elle peut les vendre et en disposer comme elle l'entend, qu'elle peut faire toutes les lois et tous les règlements qu'elle juge à propos pour leur conservation et leur amélioration.

Les animaux qui habitent ces forêts sont également la propriété de la province, qui peut décréter la manière de les chasser ou de les détruire, s'ils sont dommageables; elle a aussi le droit de punir ceux qui enfreignent les lois qu'elle a passées à ce sujet. Jamais non plus, le parlement fédéral n'a songé pour un instant à légiférer sur ce sujet.

Le seul jugement que je connaisse sur cette matière est celui de la Cour du banc du roi, au Manitoba, dans la cause du *Roi* v. *Robertson*[1], qui se lit comme suit:

The provincial statute, 46 & 47 Vict., ch. 19, as amended by 49 Vict., ch. 10, sect. 25, sub-sect. (*g*), regulating the killing and possession of game at certain seasons of the year are *intra vires*, being within those clauses of the B. N. A. Act, relating to "Property and Civil rights" and matters of a merely local or private nature.

En préparant l'acte de la Confédération, lorsque l'on est arrivé à la distribution des pouvoirs législatifs, ses auteurs ont voulu donner le droit de légiférer en matières privées, en matière de propriété et de droits civils, qui jusque là avait été exercé par la Législature du Canada, soit au par-

1. 3 Man. L. R. 613.

lement fédéral ou aux législatures provinciales. Or, il n'y a rien dans cet acte qui démontre une intention de conférer ces droits au parlement central. Au contraire, il y est décrété explicitement que les lois du ressort du législateur se limiteront, dans la province au droit de propriété, au droit civil et aux choses d'un caractère privé; aucune limite n'est posée quant à l'étendue des pouvoirs des législatures, en ce qui concerne les droits privés relevant de leur compétence.

Comme le disait l'ancien juge en chef Strong de la Cour suprême[1]:

That the Legislature have that power in all cases where the property and rights sought to be affected are in the province to the same unlimited extent that the Imperial Parliament has in the United Kingdom, I have not the slightest doubt.

Les lois de chasse dans cette province n'empiètent en aucune manière sur le domaine fédéral en ce qui concerne la procédure criminelle. Car, comme nous venons de le voir, si la législature a le droit de faire des lois concernant la chasse en vertu de l'art. 92 de l'Acte A. B. N., le paragraphe 15 du même article lui donne le pouvoir de mettre une sanction à ces lois. C'est ce qui a été décidé par la Cour suprême dans une cause de *Poitras* v. *la Corporation de Québec*. On prétendait que la procédure criminelle étant de la compétence du parlement fédéral, les législatures n'avaient pas le droit, par leurs lois d'imposer l'amende et l'emprisonnement; cette prétention a été rejetée par les tribunaux. Je cite les paroles du juge en chef Richards.

It seems clear that they (the legislatures) had the right to impose punishment by fine, penalty, or imprisonment for enforcing any law properly passed by them, on matters within their exclusive jurisdiction.

. . . . We think we must come to the conclusion that when the Imperial Parliament used the words "The Criminal Law" and including "the procedure in criminal matters", they did not mean that the local legislature had not the power to legislate so as to punish by fine or imprisonment with the view of enforcing the laws, where such power is expressly given by that act[2].

C'est en d'autres termes l'application de la règle que l'on trouve dans Story[3]:

A grant of power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing.

1. 1 Pugsley, 300;—*The Queen* v. *Dox and others*.
2. Doutre, *Constitution du Canada*, p. 321.
3. *State & Const. Law*, No. 1067.

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La question qui se pose est donc celle-ci: Y a-t-il aucune législation fédérale sur le même sujet, *same operation on the same thing*? Non, il n'y en a pas.

Notre Cour d'appel a décidé dans le même sens, dans une cause de *Paige* v. *Griffith*[1].

Voici comment s'est exprimé le juge Sanborn:

The Provincial Legislature has the power to provide the procedure for enforcing the penalties incurred under the License Act, and to impose fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subject enumerated among their powers. Where power is given to impose a penalty, it implies power to inforce it.

Les tribunaux de l'Ontario ont décidé dans le même sens dans *Regina* v. *Toland*[2].

Notwithstanding the reservation of criminal procedure to the Dominion Parliament in sub-section 27 of sect. 91 of the B. N. A. Act, a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, even though such offences may be termed crimes; and therefore to regulate the giving of evidence by defendants in such cases.

Le fait qu'il y a dans notre province des réserves pour les Indiens n'a pas pour effet de rendre inconstitutionnelle la loi de chasse ; ils y sont soumis comme tous les autres:

Indians in Canada are British subjects and entitled to all the rights and privileges of such, except so far as those rights are restricted by statute, and notwithstanding sub-sect. 24 of sect. 91 of the B.N. A. Act, 1867, they are sub-sect to all provincial laws which the province has power to enact[3].

Une autre objection que l'on pourrait faire, c'est que cette loi affecte le commerce des fourrures, et que notre législature n'a pas le droit d'y imposer des restrictions, ce qui serait contraire à la sous-sect. 2 de l'art. 91 de l'acte «The regulation of trade and commerce».

La loi qui nous occupe ne met aucun empêchement, aucune restriction au commerce des fourrures; tout ce qu'elle fait, c'est de protéger le gibier et d'empêcher qu'on le détruise à certaines époques où la chasse en est prohibée, et cela est fait pour en assurer la conservation. Les lois qu'elle a passées ont simplement pour objet de protéger certains animaux dont la fourrure est précieuse.

1. [1873] 17 L. C. J. 302; 18 L. C. J. 119.
2. 22 O. R. 505.
3. *Sanderson v. Hedy*, K. B. Man. L. R. 22;—*Rex* v. *Hill*, 15 O. L. R. 106.

Mais, même en supposant que ces lois auraient pour effet de gêner ce commerce, le Conseil privé a décidé que les législatures avaient le droit de faire de semblables lois. On trouve cette décision dans Beauchamp, *Jurisprudence du Conseil privé:*

The words "regulation of trade and commerce", in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with the classes of subjects of national and general concern affords an indication that regulations referring to general trade and commerce were in the mind of the legislature. If the words had been intended to have the full scope of which in their liberal meaning, they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard of trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.

. . . . Its authority (the Dominion Parliament) to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

On sait que la constitution des États-Unis ressemble à la nôtre en ce qui concerne la distribution de pouvoirs législatifs entre le gouvernement de Washington et les différents États; avec cette différence qu'aux Etats-Unis tous les pouvoirs non spécialement attribués au gouvermement central par les différents États appartiennent à ceux-ci, tandis que chez nous, au contraire, les pouvoirs non spécialement concédés aux provinces par le Parlement impérial appartiennent au gouvernement fédéral, la source du pouvoir se trouvant ainsi renversée.

Or, voici ce que dit à ce sujet Story[1]:

The acknowledgement power of the states over certain subjects having connection with commerce are entirely different in their nature

1. *On the Constitution of the U. S.* (5e édition), p. 14.

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from that to regulate commerce; and though the same means may be restored to for the purpose of carrying each of these powers into effect, this, by no just reasoning furnishes any ground to assert that they are identical.

Je suis donc d'opinion que la loi de chasse de cette province est constitutionnelle.

II. Voyons maintenant quelle est la situation légale de la défenderesse en rapport avec cette loi de chasse.

Le 31 juillet 1868, le Parlement impérial passa une loi (31-32 Vict., ch. 105) intitulée:

An act for enabling Her Majesty to accept a surrender upon terms of the lands and privileges and rights of the Governor & Company of Adventurers of England, trading into Hudson Bay, and for admitting same into the Dominion of Canada.

En vertu de cette loi, sous la pression exercée sur la Compagnie de la Baie d'Hudson par le secrétaire des colonies, durant la guerre civile aux États-Unis, le Canada fit l'acquisition de tous les droits et privilèges de la compagnie sur une étendue de 1200 milles de longueur et 500 milles de largeur, moyennant la somme de £300,000 sterling.

On voit dans les statuts du Canada, 35 Vict., page 78, qu'en 1870 la Compagnie de la baie d'Hudson céda à la couronne:

Tous les droits de gouvernement et de propriété et tous les autres privilèges, immunités, franchises, pouvoirs, et autorités quelconques accordés ou censés avoir été accordés par lesdites lettres-patentes auxdits gouverneur et compagnie dans la terre de Rupert, et qui auront été ainsi cédés, cesseront absolument d'exister; pourvu, cependant, que rien dans ledit acte n'empêchera lesdits gouverneur et compagnie de continuer à faire la traite et le commerce dans la terre de Rupert, ou ailleurs.

Plus loin au paragraphe 11 de l'acte de cession, il est décrété:

La compagnie aura le droit de continuer son commerce sans obstacle, en sa capacité de corporation, et nulle taxe exceptionnelle ne sera imposée sur ses terres, son commerce, ses employés, ni aucun droit d'importation sur les marchandises importées par elle antérieurement à l'acceptation de la cession.

Cette compagnie comme on le voit, a abandonné tous les droits et privilèges qui lui étaient conférés par sa charte, sauf ceux spécialement réservés par l'acte de 1879, savoir: le droit de faire commerce et d'être exemptée de taxe exceptionnelle; mais il n'y a absolument rien qui comporte

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pour elle l'exemption d'être soumise aux lois civiles et pénales de notre province.

La législature de Québec ne veut en rien s'immiscer dans l'administration et l'organisation de cette compagnie; elle ne met aucune entrave à son commerce; elle ne lui impose aucune taxe exceptionnelle. Non, elle ne fait que lui appliquer une loi pénale et l'amende imposée par celle-ci en cas d'infraction. On ne prétendra pas assimiler une amende à une taxe.

Du reste, l'art. 6 de notre Code civil décrète que:

Les lois du Bas-Canada relatives aux personnes sont applicables à tous ceux qui s'y trouvent, même à ceux qui n'y sont pas domiciliés.

Et l'art. 17 du même code déclare que le mot personne comprend «les corps politiques et constitués en corporation».

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19 fév.

LES SYNDICS FORESTIERS DE LÉVIS *v.* MIGNAULT, et MIGNAULT, opposant.

Opposition à fin d'annuler une saisie immobilière— Donation rémunératoire — Insolvabilité — Intention de fraude—Contestation paulienne—Prescription de la demande—C. civ., art. 1032, 1034, 1035, 1038, 1040.

1. Une donation d'immeuble, consentie par un père à son fils pour l'indemniser d'avances qu'il lui a faites jusqu'à concurrence de la valeur approximative de l'immeuble, est un acte à titre onéreux. Le père fût-il insolvable au moment du contrat, l'acte n'est réputé fait avec intention de frauder, que si le donataire connaissait alors cette insolvabilité.

2. Les parties intéressées à demander la révocation d'un contrat par action paulienne sont présumées l'avoir connu du jour de son enregistrement; et la prescription de l'article 1040, C. civ., commence à courir de cette date.

Les faits de la cause sont relatés aux remarques qui suivent:

Sir François Lemieux, juge en chef.—Cour supérieure.—No 209.—Belleau, Baillargeon et Belleau, avocats des demandeurs contestants.—Cannon, Power et Roy, avocats de l'opposant.

I would, therefore, answer the questions posed in the stated case and addendum as follows:

[1] Did I err in law in the interpretation I put on reparation where the word is used in s. 663(2)(e)?

[Answer: Yes.]

[2] Did I err in law in ordering the accused to make reparation to Constable Michael Culligan in respect of his pain and suffering, by paying into court a sum to the credit of Constable Culligan?

[Answer: Yes.]

[3] Did I err in law in charging myself that s. 663(2)(e) of the *Criminal Code* R.S.C. 1970, c. 34 is *intra vires* the Parliament of Canada to enact when I applied the provisions of the said section in making the probation order?

[Answer: No.]

[4] Did I err in law in applying the provisions of the said s. 663(2)(e) to the probation order imposed upon the appellant to whom I granted a conditional discharge?

[Answer: No.]

Under the provisions of s. 768(1) of the *Criminal Code*, I would modify the probation order by deleting that portion which states that the appellant must make reparation to Constable Culligan in the sum of $500 in respect of the pain and suffering sustained by the officer.

There will be no order as to costs.

Appeal allowed.

RE FOUR B MANUFACTURING LTD. AND UNITED GARMENT WORKERS OF AMERICA

Ontario High Court of Justice, Divisional Court, Morden, Weatherston and Robins, JJ. June 20, 1977.

Constitutional law — Distribution of legislative authority — Labour relations — Indians — Employer carrying on manufacturing on Indian reserve under permit — Permit requiring employer to give preference to local labour — Employer receiving substantial sums of money from Department of Indian Affairs — Whether certification of respondent union by Ontario Labour Relations Board intra vires — Labour Relations Act, R.S.O. 1970, c. 232 — Indian Act, R.S.C. 1970, c. I-6.

Labour relations — Indians — Constitutionality of provincial legislation — Employer carrying on manufacturing on Indian reserve under permit — Permit requiring employer to give preference to local labour — Employer receiving substantial sums of money from Department of Indian Affairs — Whether certification of respondent union by Ontario Labour Relations Board valid — Labour Relations Act, R.S.O. 1970, c. 232 — Indian Act, R.S.C. 1970, c. I-6.

The applicant was incorporated under the *Business Corporations Act*, R.S.O. 1970, c. 53, in 1974. It was formed to carry on business as a manufacturer of shoes. The shares of the applicant were privately held. In 1974 the applicant received a permit to occupy a site on an Indian reserve for an initial period of three years. The permit required the applicant to give preference in employment to local people for

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work in the permit area. Since its incorporation the applicant had received substantial sums of money from the Department of Indian Affairs and Northern Development. In 1977 the Ontario Labour Relations Board certified the respondent as bargaining agent for the applicant's employees.

On an application for judicial review of the decision of the Ontario Labour Relations Board, *held*, Weatherston, J., dissenting, the application should be dismissed. The Ontario *Labour Relations Act*, R.S.O. 1970, c. 232, was not legislation in relation to "lands reserved to the Indians" which is reserved to the federal Government under the provisions of s. 91 of the *British North America Act, 1867*. Moreover, the provincial legislation did not deal with the subject-matter of "Indians" or touch Indians as other than ordinary persons, and there was nothing in the nature of the operations or activity of the applicant's business, as a business, that would bring it under any other federal head of power. The business of the applicant was not an operation that was a federal undertaking and therefore within the scope of the *Canada Labour Code*, R.S.C. 1970, c. L-1.

Per Weatherston, J., dissenting: The whole manufacturing business was Indian in character and therefore subject to federal legislation and not provincial legislation. The persons involved, primarily the employees, were Indian and that was the important factor, not the operation or function of the employer, and the *Canada Labour Code* therefore applied to the operation.

[*Cardinal v. A.-G. Alta.*, [1974] S.C.R. 695, 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, [1973] 6 W.W.R. 205, folld; *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 S.C.R. 751, 60 D.L.R. (3d) 148, [1976] 1 W.W.R. 699, 21 R.F.L. 267, 6 N.R. 491, consd; *A.-G. Can. v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, 11 R.F.L. 333, 23 C.R.N.S. 197; *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785; *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721; *C.P.R. Co. v. A.-G. B.C.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act (B.C.) etc.*, 64 C.R.T.C. 266; *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Act et al.*, [1956] O.R. 862, 5 D.L.R. (2d) 342; *R. v. Ont. L. R. Bd., Ex p. Underwater Gas Dev. Ltd.*, [1960] O.R. 416, 24 D.L.R. (2d) 673; *R. v. Ontario Labour Relations Board, Ex p. Dunn*, [1963] 2 O.R. 301, 39 D.L.R. (2d) 346; *Canada Labour Relations Board et al. v. City of Yellowknife* (1977), 76 D.L.R. (3d) 85, 14 N.R. 72, refd to]

APPLICATION for judicial review of a decision of the Ontario Labour Relations Board.

B. H. Kellock, Q.C., for applicant.

R. W. Cass, Q.C., for Chief William Brant representing the members of the Mohawks of the Bay of Quinte Band, Tyendinaga Indian Reserve.

P. J. J. Cavalluzzo, for United Garment Workers of America.

I. G. Scott, Q.C., for Ontario Labour Relations Board.

MORDEN, J.:—Four B Manufacturing Limited, the employer, applies for judicial review of:

> (a) The decision of The Ontario Labour Relations Board dated the 27th day of January, 1977, purporting to certify the United Garment Workers of America as the bargaining agent for all employees of Four B Manufacturing Limited at its plant on Airport Road, Tyendinaga Indian Reserve No. 38, save and except foremen, foreladies, those above the rank of foremen, foreladies, office staff and sales staff; and

(b) The decision of The Ontario Labour Relations Board dated the 3rd day of February, 1977 purporting to direct Four B Manufacturing Limited to reinstate Nancy Sparks, Karen Lewis, Shirley Lalonde and Carole Lewis,

and for an order:

(i) quashing or setting aside the said decisions;

(ii) declaring that The Ontario Labour Relations Board was without jurisdiction to make the said decisions, or to apply the provisions of The Labour Relations Act, R.S.O. 1970, c. 232, to the activities of the applicant, or its employees, upon the Tyendinaga Indian Reserve;

(iii) restraining or prohibiting the respondents, The Ontario Labour Relations Board, United Garment Workers of America, Nancy Sparks, Karen Lewis, Shirley Lalonde and Carole Lewis, from implementing or enforcing the decisions of The Ontario Labour Relations Board aforesaid, pending the final determination of this application.

The issue to be resolved in this application is clearly indicated in the foregoing claim and it relates to the constitutional applicability of the *Labour Relations Act*, R.S.O. 1970, c. 232, to the facts of this case. There is no other ground raised which, if it existed, would also have to be of a jurisdictional nature, in challenge of the two Board's decisions in question.

The Attorney-General of Canada and the Minister of Justice and Attorney-General for Ontario have each been served with notice of this application and have, we were advised by counsel for the applicant, stated that they did not intend to appear upon the return thereof.

Before setting forth the essential facts it may be helpful to state now the basic contentions asserted against the application of the *Labour Relations Act*. First, it is submitted that the Act does not apply to the activities of the applicant or its employees upon the Tyendinaga Indian Reserve by reason of the provisions of the *British North America Act, 1867*, ss. 91 and 92 thereof, with particular reference to s. 91(24) thereof which confers on Parliament the exclusive legislative authority to make laws in relation to all matters coming within the class of subjects:

24. Indians, and Lands reserved for the Indians.

Alternatively, it is submitted, if it is so applicable, by virtue of the paramountcy doctrine it is overborne by the *Canada Labour Code*, R.S.C. 1970, c. L-1. Related to this latter contention it is submitted that, if the *Labour Relations Act* is not applicable, by its own force, by reason of the constitutional effect of s. 91(24), s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, does not make it applicable because s. 88, by its opening clause, is subject to the terms of "any other Act of the Parliament of Canada", the other Act in this case being the *Canada Labour Code*. Section 88 reads:

88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to

the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

I turn now to the facts. The applicant was incorporated under the *Business Corporations Act*, R.S.O. 1970, c. 53, on June 28, 1974, under the name Tyendinaga Mohawk Limited. It was formed to carry on business as a manufacturer of shoes or parts of shoes on the Tyendinaga Indian Reserve No. 38, which is the reserve set apart for the band of Indians known as the Mohawks of the Bay of Quinte. The applicant has an authorized capital of 40,000 common shares without par value and has issued four common shares. Each of them is owned by one of four brothers named Brant (hence the name "Four B") all of whom are band members. Carl Brant, the person primarily responsible for the formation of the corporation, is president and general manager, and his brothers, Arnold, Willard and Daniel, are directors. The applicant's name was changed to Four B Manufacturing Limited on January 14, 1975, because the Band Council felt that the use of the former name would not be in the best interests of the reserve.

The present business, in fact, of the applicant consists entirely of the sewing of uppers for the Bata North Star Jogger.

The applicant is neither owned by, nor in any way controlled or directed by, the Band Council. Neither the Band Council nor the reserve itself will share in the profits of the applicant.

By permit dated September 26, 1974, and amended August 19, 1975, the applicant is entitled to occupy a site on the reserve for an initial period of three years from September 3, 1974, subject to the terms and conditions of the said permit and amendments thereto. The permit provides, in part:

> The permittee will give preference in employment to local people for work in the permit area, however, if there are not sufficient applications from the local area, the permittee shall have the right to request assistance from Canada Manpower to fill the staff requirements from the surrounding districts.

Since its incorporation the applicant has received from the Government of Canada, through the Department of Indian Affairs and Northern Development, substantial sums of money in order to commence and carry on its business. These amounts were advanced to the applicant pursuant to the policies of the Department, one of the requirements of which is that the applicant's operations contribute to the "economic development of Indians".

On September 27, 1976, United Garment Workers of America applied to the Ontario Labour Relations Board for certification as bargaining agent for the applicant's employees. On October 4, 1976, the applicant employed 68 persons, of whom 48 were band members, 10 were former band members and 10 were non-Indians.

By its decision dated January 27, 1977, the Board granted the application and certified the union as bargaining agent for the applicant's employees. It had earlier decided, in a preliminary ruling dated December 17, 1976, that it had constitutional jurisdiction to entertain the application. It delivered lengthy and, if I may say so, very careful and detailed reasons in support of this decision. On February 3, 1977, it determined, in favour of four employees, their complaint under s. 79 of the *Labour Relations Act* that they had been discharged for exercising rights under the Act.

Those are the basic facts relating to this application. Some further background facts are set forth in the Board's reasons:

> 5. The idea of an Indian-owned factory on the reserve came from the Department of Indian Affairs after the Bata Company had asked the Department for assistance in finding a suitable location for the proposed company. In 1973, the Economic Development Branch of the Department met with the Tyendinaga Band Council to determine whether the reserve would be interested in owning and operating a plant which would be on contract to Bata. In 1974, the matter was put to the people of the reserve for a vote. The majority was not in favour. Apparently, the results of the vote reflected a concern on the part of some of the reserve residents that a band-owned company would result in Indian lands becoming taxable.
>
> 6. It was at this point that Carl Brant, who had worked with the Band Council and the Department of Indian Affairs from the beginning of the negotiations, decided that he would own and operate the plant privately.
>
> . . . . .
>
> 11. The respondent has been operating for more than a year now and, although there are plans to expand the plant to accommodate a new line of machines designed for the production of the Bata moccasin, it has yet to show a profit. In his testimony before the Board, Mr. Brant made it clear that any future profits of the corporation would go to himself and his brothers and not to the Band Council or the Tyendinaga Reserve.

The Board referred to this as a "unique factual picture — a commercial enterprise located in the middle of an Indian reserve, owned and operated by Indians and employing for the most part Indian employees". The Board then went on to reason from the facts toward the conclusion at which it ultimately arrived:

> The respondent operates a small private business which is engaged exclusively in the process of sewing uppers for running shoes. As a commercial shoe manufacturing operation or part thereof, it is subject to the regulatory authority of the province of Ontario, the jurisdiction in which it was incorporated. Although owned and operated by Indians and located on an Indian reserve, the evidence establishes that there is nothing "Indian" about the kind of business which the respondent is operating. On the contrary, it is the kind of industrial enterprise which can and is being carried on throughout the Province by non-Indians. It is true that most of the respondent's employees are Indians and that Indians are granted a preference with respect to employment. But the fact is that non-Indians are being employed. We would point out as well that the employees of the respondent have organized themselves in the same fashion as have employees employed in enterprises having no connection whatever with Indians. The presence of the union here is simply the result of the economic development which has taken place on the Reserve.

I turn now to the first issue, the applicability of the *Labour Relations Act* to the facts of this case. The contention of the applicant is that s. 91(24) of the *British North America Act, 1867*, prevents the *Labour Relations Act* from having any application to activities taking place on an Indian reserve. In this regard reliance appears to be placed primarily on the second of the two subjects covered in s. 91(24) ". . . Lands reserved for the Indians". In my view this contention is answered by the following statement of Martland, J., for the majority of the Supreme Court of Canada, in *Cardinal v. A.-G. Alta.*, [1974] S.C.R. 695 at pp. 702-3, 40 D.L.R. (3d) 553 at pp. 559-60, 13 C.C.C. (2d) 1:

> As indicated earlier, the appellant starts from the proposition that, prior to the making of the Agreement, Indian Reserves were enclaves which were withdrawn from the application of Provincial legislation, save by way of reference by virtue of Federal legislation. On this premise it is contended that s. 12 should not be construed so as to make Provincial game legislation applicable within Indian Reserves.
>
> I am not prepared to accept this initial premise. Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Company v. Bryden*, [1899] A.C. 580, that a Province cannot legislate in relation to a subject matter exclusively assigned to the Federal Parliament by s. 91. But it is also well established that Provincial legislation enacted under a heading of s. 92 does not necessarily become invalid because it affects something which is subject to Federal legislation. A vivid illustration of this is to be found in the Privy Council decision a few years after the *Union Colliery* case in *Cunningham v. Tomey Homma*, [1903] A.C. 151, which sustained Provincial legislation, pursuant to s. 92(1), which prohibited Japanese, whether naturalized or not, from voting in Provincial elections in British Columbia.
>
> A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

Regardless of the conclusions which can possibly be derived from some earlier decisions, many of them referred to in *Cardinal*, I accept this statement as a clear repudiation of the enclave theory in so far as the constitutional effect of s. 91(24) is concerned. The

Labour Relations Act is intended to operate throughout the whole of Ontario, to quote from its preamble "to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". Clearly, it is within the authority of s. 92 (I shall deal with this at greater length later in these reasons in considering the scope of the federal power over labour relations) and, equally clearly, in my view, it cannot be considered to be legislation *in relation to* "Lands reserved to the Indians".

I have more difficulty with the issue as to whether the *Labour Relations Act* bears unconstitutionally, on the facts of this case, on the subject of "Indians" in s. 91(24). I do not think that it could reasonably be said that it touches "Indianness" or that it touches Indians as other than "ordinary persons", but I am not satisfied that it does not intrude on their "Indian identity and *relationship*" (emphasis added) — all the quoted language being taken from the judgment of Laskin, C.J.C., in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at pp. 760-4, 60 D.L.R. (3d) 148 at pp. 154-6, 1 W.W.R. 699, which held that notwithstanding that the *Adoption Act*, R.S.B.C. 1960, c. 4, was general in its operation, it embraced, on the facts of that case, a matter within exclusive federal competence — the adoption, by a non-Indian couple, of a male Indian child of registered members of a band under the *Indian Act*. According to the judgment, the provincial legislation struck at "a relationship integral to a matter outside of provincial competence". The applicability of the *Adoption Act* in that case was ultimately upheld by Laskin, C.J.C., and the three members of the Court who concurred with him by being incorporated by reference by s. 88 of the *Indian Act*, and, by the balance of the Court, directly of its own force.

While the details of the positive reach of s. 91(24) have by no means been settled reference has been made in *A.-G. Can. v. Lavell*, [1974] S.C.R. 1349 at pp. 1358-60, 38 D.L.R. (3d) 481 at pp. 489-90, 11 R.F.L. 333, to "Parliament's exclusive legislative authority over Indians, and in any event, the property and civil rights of members of Indian bands living on reserves". It seems to me that a case can be made for the contention that the application of compulsory collective bargaining legislation to Indian employers (overlooking the interposition of the corporate form of carrying on business in this case) and to Indian employees in their relationship with their employers, and among themselves, on a reserve, does intrude on s. 91(24).

While I think this is a difficult issue, I shall not detain myself over it because if it does so intrude on s. 91(24) it is, in my view, made constitutionally applicable to the facts of this case by s. 88 of

the *Indian Act*. If in the *Labour Relations Act*'s general application it does not intrude on s. 91(24) then no resort to s. 88 is required and it would apply of its own force. At the end of these reasons, I shall deal with the argument that s. 88, because of its opening language, "Subject to . . . any other Act of the Parliament of Canada", cannot apply.

Before considering the next general issue in the present case I note the division in judicial opinion on the effect of s. 88 indicated in *Natural Parents*, and at least one earlier decision. The question is whether the section referentially incorporates provincial laws of general application or whether the section is merely a statement of the extent to which provincial laws apply to Indians. The division in opinion was referred to by Dickson, J., whose judgment was that of the Supreme Court of Canada, in *Kruger et al. v. The Queen*, May 31, 1977 [reported 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300], but it was not necessary to resolve the question in that case. With respect, as indicated in the preceding paragraph, I subscribe to the view that s. 88 effects an incorporation by reference of those provincial laws of general application, which are within s. 92 of the *British North America Act, 1867*, but which, in their application to Indians, intrude on s. 91(24). Such an interpretation of s. 88 would leave open for application to Indians many provincial laws of general application which, because they do not intrude on s. 91(24), would apply of their own force without the necessity of resort to s. 88.

The next issue is whether the *Canada Labour Code* has occupied the field and, by virtue of the paramountcy doctrine, has rendered the *Labour Relations Act* inoperative. This issue is considered on the basis that, but for the paramountcy doctrine, the *Labour Relations Act* applies of its own force without the necessity of resort to s. 88 of the *Indian Act*. Part V of the *Canada Labour Code*, as reenacted by 1972, c. 18, s. 1, is concerned with substantially the same matters as the *Labour Relations Act*, as far as this application is concerned, such as the acquisition and termination of bargaining rights, collective bargaining and collective agreements, conciliation proceedings and unfair labour practices. Its application is provided for in s. 108 which reads:

> 108. This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Section 2 of the *Canada Labour Code* provides that:

> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:

(*a*) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

(*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other or others of the provinces, or extending beyond the limits of a province;

(*c*) a line of steam or other ships connecting a province with any other or others of the provinces, or extending beyond the limits of a province;

(*d*) a ferry between any province and any other province or between any province and any other country other than Canada;

(*e*) aerodromes, aircraft or a line of air transportation;

(*f*) a radio broadcasting station;

(*g*) a bank;

(*h*) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces, and

(*i*) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures;

Thus, the requirements which must be satisfied for the *Code* to be applicable are: (1) that there be a "federal work, undertaking or business" and (2) that the employees in question be "employed upon or in connection with the operation of" such federal work, undertaking or business. In order to determine the first requirement an inquiry has to be directed to whether the operations of the applicant constitute a work, undertaking or business within the constitutional authority of the Parliament of Canada.

Legislation relating to the employer and employee relationship is, *prima facie*, within the class of subject of "Property and civil rights within the province" and hence within the exclusive jurisdiction of the Provinces under s. 92(13) of the *British North America Act, 1867*: *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785.

The case law on the definition in s. 2 of the *Code*, and on virtually identical language in predecessor legislation, makes it clear that in determining whether a work, undertaking or business is within the legislative authority of the Parliament of Canada, the nature of such work, undertaking or business has to be examined to see if it is an integral part of an activity or operation which calls for federal legislative regulation or is necessarily incidental thereto. (Convenient examples are given in the first eight clauses of s. 2, quoted above, which reflect various heads of federal power and also the results of judicial decisions.)

In *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721, it was held that that Act, the precursor of the *Canada Labour Code*, was *intra vires* the

Parliament of Canada and that its application depended on the circumstances of any particular case. In that case it was held to be applicable to the relationship between employees and an employer which supplied stevedoring services for ships operating on regular schedules between ports in Canada and ports outside of Canada. At p. 564 S.C.R., pp. 755-6 D.L.R., Estey, J., said, after considering several authorities, including *Toronto Electric Com'rs v. Snider*:

> These authorities establish that there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations, even though these relations are classified under Property and Civil Rights within the meaning of s. 92(13) of the *B.N.A. Act* and, therefore, subject to provincial legislation. This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (*a*) an integral part of or necessarily incidental to the headings enumerated under s. 91; (*b*) in respect to Dominion Government employees; (*c*) in respect to works and undertakings under ss. 91(29) and 92(10); (*d*) in respect of works, undertakings or businesses in Canada but outside of any province.

At p. 568 S.C.R., pp. 759-60 D.L.R., he said:

> That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steam ships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the *Winner* case, supra. The loading would, therefore, be an integral part of the operation of these lines of steam ships and, therefore, subject to the legislative jurisdiction of Parliament.

Reference may be made to other cases concerned with legislative authority over aspects of labour relations. The list is by no means exhaustive: *C.P.R. Co. v. A.-G. B.C.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act (B.C.) etc.* (provincial hours of work legislation applicable to employees of railway company at hotel which was held not to be part of the company's work or undertaking); *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board et al.*, [1956] O.R. 862, 5 D.L.R. (2d) 342 (the production of raw materials for developing atomic energy was held to be a work, undertaking or business within the legislative authority of the Parliament of Canada, the relevant head of power being that over peace, order and good government, and hence the labour relations of employees engaged therein were governed by federal legislation); *R. v. Ont. L. R. Bd., Ex p. Underwater Gas Dev. Ltd.*, [1960] O.R. 416, 24 D.L.R. (2d) 673 (the employer's main object was the establishment and servicing of oil and gas drilling sites offshore in Lake Erie and it was not engaged in navigation and shipping — and hence the labour relations between it and its employees did not fall for federal regulation); *R. v. Ontario Labour Relations Board, Ex p. Dunn*, [1963] 2 O.R. 301, 39 D.L.R. (2d) 346 (the labour relations of an employer wholly owned by the Bell Telephone Company (whose labour relations were subject to federal authority) and who sold a

large part of its manufactured equipment to Bell for use in its telephone communications system were held not to be federal since on the facts the process of manufacture was not an integral part of Bell's operations); and *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers et al.*, [1975] 1 S.C.R. 178, 40 D.L.R. (3d) 105 (the labour relations of an employer, 90% of whose business involved the delivery and collection of mail, were held to be subject to federal legislative regulations).

It is my view there is nothing in the nature of the operations or activity of the applicant's business, as a business, that would bring it under any federal head of power, including, of course, s. 91(24). Specifically, I do not think that the presence of Indians in the work force and in management (ignoring any possible effect of the business being carried on in the corporate form) and the location of the operation on a reserve, results in a conclusion that, as a work, undertaking or business, it is of a nature that it falls for regulation under s. 91. In this respect it is instructive to note that no matter how intimately connected an employer may be, generally, with matters federal it is the nature of the operation with respect to which the employees are employed that governs the question of whether the labour relations aspect is federal or provincial. I refer to Pigeon, J., in *Canada Labour Relations Board et al. v. City of Yellowknife* (S.C.C., March 8, 1977), 76 D.L.R. (3d) 85 at p. 90, 14 N.R. 72:

> This leaves for consideration as the only question in this case whether, in the context of the *Canada Labour Code*, the definition of the expression "federal work, undertaking or business" embraces the operations of a municipal corporation.
>
> In considering this question, one has to bear in mind that it is well settled that jurisdiction over labour matters depends on legislative authority over the operation, not over the person of the employer. In *C.P.R. Co. v. Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 at p. 372, Lord Watson said:
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> > ". . . the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company . . ."
>
> In accordance with this view of the criterion for the division of legislative jurisdiction, it was decided that jurisdiction over hotel employees was provincial even in the case of hotels owned by a federal railway company:
>
> *C.P.R. Co. v. A.-G. B.C. et al.*, [1950] 1 D.L.R. 721, [1950] A.C. 122, [1950] 1 W.W.R. 220 *sub nom. Reference re Application of Hours of Work Act (B.C.), etc., Canada Labour Relations Board et al. v. C.N.R. Co.* (1974), 45 D.L.R. (3d) 1, [1975] 1 S.C.R. 786, [1974] W.W.R. 661.

Some reliance was placed in argument on behalf of the applicant on the final clause of s. 2 of the *Code* — "a work, undertaking or business outside the exclusive legislative authority of provincial legislatures". Whatever various meanings may be attributed to this clause (its equivalent clause is referred to in *Eastern Canada*

Stevedoring, *supra*, at pp. 534-5, 553, 558 and 565 S.C.R., pp. 729-30, 746, 750-1 and 756-7 D.L.R.) in its context it cannot extend the meaning of the opening words of the section, since it is *included* within their ambit. I do not think that there is any aspect of the applicant's operation, as an operation, which would take it outside of the scope of s. 92 of the *British North America Act, 1867*. A good example of this clause's potential is afforded by the *City of Yellowknife* case where the employer was located outside the Provinces — in a federal territory, and the clause was helpful in making it clear that its activities were such that it was subject to the *Code*.

Returning to the facts of the present case, and looking at the matter on a slightly different level — that the reserve itself is a federal work, undertaking or business (a dubious proposition, to put it mildly) I do not think it can be said that the applicant's operation is an integral part of, or necessarily incidental to, such undertaking. Lines of steamships cannot be operated without stevedoring services (*Eastern Canada Stevedoring*, *supra*) and a postal service cannot be operated without the delivery and collection of mail (*Letter Carriers Union*, *supra*) but a railway can be operated without a hotel (*C.P.R. v. A.-G. B.C.*, *supra*), and a reserve without a commercial or industrial undertaking thereon. Further, the fact that it might be of some advantage to the economy of the reserve is of no assistance on this issue: *C.P.R. v. A.-G. B.C.*, *supra*.

On the facts the Band Council decided not to get involved in this enterprise and also dissociated the name of the reserve from it. I should also mention, although it was referred to as background "colour" only, the fact of federal funding of the business cannot have any constitutional significance to bring the operation under federal legislative control.

In summary, I conclude that the applicant's operation is not a federal work, undertaking or business and therefore the first requirement for bringing it under the *Canada Labour Code* has not been met. Accordingly, there is no federal statute occupying the field and the *Labour Relations Act* of Ontario governs.

The foregoing reasoning is confined to interpreting the language of s. 108 of the *Canada Labour Code* to determine whether it extends to the facts of this case. I have interpreted "work, undertaking or business" in terms of the nature of the activity, operation or function in question. This, I think, best squares with the meaning of these terms in their context. Section 108 of the *Code*, by its language, is directed at federal activities, operations or functions and not at the position of individuals, or a class of individuals, who might be considered to be "federal" persons or at their relationships. The latter is not the subject-matter of the section. (Contrast the method of defining the application of the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, which is applicable to "all por-

tions of the Public Service" (s. 3), and, also, the provisions of s. 108(2) of the *Code* itself which, generally, make the *Code* applicable "in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of employees of any such corporation".)

I mention this to make it clear that I do not intend to imply that it is not open to Parliament, by suitable language, to enact labour relations legislation supportable under s. 91(24), among other heads of federal power. The view that it is so open to Parliament is adumbrated in the earlier part of these reasons. (The applicability of such legislation, having regard to constitutional factors, could give rise to difficult issues.) I do not consider that Parliament in the *Canada Labour Code* has made provision for the case at hand. The competing approach on this issue is to characterize "work, undertaking or business" (and in this case "business" would seem the most relevant term) in terms of the nature of the individuals involved in it rather than in terms of its function. While I do not consider the possible difficulties in answering questions of the nature hereinafter set forth to be determinative of the proper approach, they do incline me to the view that the functional one is to be preferred. What makes a "business" an Indian one? Would it be an Indian one if none of those involved on the employer side were Indian but all the employees were? (I ignore any possible problem relating to the business in question here being carried on in the corporate form.) Would it be Indian if none of the employees were but all of those on the employer side were? What changes in the composition of both the bargaining unit and of the employer would cause a business to cease, or to become, Indian? What part does the location of a business on, or off, the reserve play?

I return to s. 88 of the *Indian Act*. If it is necessary to resort to it then such resort is not prevented by the qualifications in its opening terms "Subject to . . . any other Act of the Parliament of Canada", since, for the reasons just given, there is no such Act which applies to this case.

I would dismiss the application with costs payable by the applicant to the respondent union and make no further order as to costs.

WEATHERSTON, J. (dissenting):—This application for judicial review of two decisions of the Ontario Labour Relations Board raises the hitherto unresolved question whether the *Labour Relations Act*, R.S.O. 1970, c. 232, governs labour relations of Indians on a reserve.

The general rule is that the provincial Legislatures have exclusive legislative competence in respect of labour relations, as that subject is in relation to the civil rights of both employers and employees: *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925]

A.C. 396, [1925] 1 W.W.R. 785. But Parliament is competent to legislate in respect of employees who are employed upon, or in connection with, the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada: *Reference re Industrial Relations and Disputes Investigation Act, etc.*, [1955] S.C.R. 529, [1955] 3 D.L.R. 721 (*Eastern Stevedoring* case). Many cases, including most recently *Canada Labour Relations Board et al. v. City of Yellowknife*, Supreme Court of Canada, March 8, 1977, 76 D.L.R. (3d) 85, 14 N.R. 72, have stated that jurisdiction over labour matters depends on legislative authority over the operation or function, not over the person of the employer. This is because almost all the subjects assigned to the Parliament of Canada by s. 91 of the *British North America Act, 1867*, relate to works, undertakings and businesses, and not to persons. It is, therefore, necessary first to look at the operation or function of the employer to see if it is within federal legislative authority. If it is, then the power to legislate in respect of the labour relations of the employer and its employees follows as ancillary to, or necessarily incidental to that operation or function. The civil rights of the employees are treated as subordinate to the principal object of the exercise of federal legislative power. But the competence of Parliament to legislate in respect of the civil rights of persons is not limited to cases where those civil rights are ancillary, or necessarily incidental, to some work, undertaking or business which has a federal operation or function. Parliament has exclusive legislative competence over the working conditions of its own employees, as such: *Re Hours of Labour*, [1925] S.C.R. 505, [1925] 3 D.L.R. 1114 *sub nom. Re Treaty of Versailles; Re Hours of Labour*; *Eastern Stevedoring*, *supra*, *per* Estey, J., at p. 564 S.C.R., pp. 755-6 D.L.R.

In Re Minimum Wage Act of Saskatchewan to an Employee of a Revenue Post Office, [1948] S.C.R. 248, [1948] 3 D.L.R. 801, 91 C.C.C. 366, a person employed in the business of the Post Office of Canada was held not to be subject to a provincial minimum wage Act. As I read the judgment of Rand, J., that was because his employment in the postal service made him a "federal person", not merely because he was employed in an undertaking which had a federal function.

And in *Nyorak v. A.-G. Can.*, [1962] S.C.R. 331, 33 D.L.R. (2d) 373, 37 W.W.R. 660, it was held that Parliament was competent to legislate as to the civil status of a member of the armed forces, as coming squarely under head 7 of s. 91, and not merely on the ground that the legislation was "necessarily incidental" to legislation in relation to an enumerated class of subject in s. 91.

In *Union Colliery Co. of B.C. Ltd. v. Bryden*, [1899] A.C. 580, the Privy Council found to be *ultra vires* a provincial statute which enacted that "no boy under the age of 12 years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be

for the purpose of employment in any mine to which the Act applies below ground." In one aspect, these provisions might be regarded as merely establishing a regulation applicable to the working of underground coal mines, and thus within provincial legislative competence. Lord Watson said, at p. 587:

> But the leading feature of the enactments consists in this — that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.
>
> Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada.

Indians are "federal persons". The cases I have cited show that a situation may be within exclusive federal legislative authority not only when employees are employed in a federal work, undertaking or business, but also when they are "federal persons" in their own right. In the latter case, the real inquiry must be whether the impugned legislation is in relation to the employees concerned, or whether their civil rights are merely incidentally affected. In the present case, the question is whether the *Labour Relations Act*, R.S.O. 1970, c. 232, in so far as it touches the civil rights of Indians, is, in pith and substance, about Indians, or about labour relations generally.

It is now settled that Indians, whether on or off a reserve, are subject to provincial laws of general application, provided those laws merely affect the Indians, and are not in relation to them: *Cardinal v. A.-G. Alta.*, [1974] S.C.R. 695, 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1. But, as pointed out by Laskin, C.J.C., in *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 S.C.R. 751 at p. 761, 60 D.L.R. (3d) 148 at p. 154, [1976] 1 W.W.R. 699, the phrase "provincial law of general application" is not self-fulfilling or self-revealing. Nothing accretes to provincial legislative power by the generalization of the language of provincial legislation if it does not constitutionally belong there. In the same way, it was held in *Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, [1925] A.C. 396, [1925] 1 W.W.R. 785, that Parliament could not, by merely calling something a crime, arrogate to itself power in a field which properly belonged under one of the heads of s. 92. In *Natural Parents*, *supra*, Laskin, C.J.C., said that a provincial Act could only embrace Indians if the operation of the Act did not deal with what was integral to that head of federal legislative power. He held that

for a provincial adoption Act to apply to the adoption of Indian children of registered Indians, who could be compelled thereunder to surrender them to adopting non-Indian parents, would be to touch "Indianness", to strike at a relationship integral to a matter outside of provincial competence. More generally, he said (at pp. 762-3 S.C.R., pp. 155-6 D.L.R.) that care should be taken in analysis of the issues and the provincial legislation

> . . . before subjecting Indians, coming as they do within a specific head of exclusive federal jurisdiction, to general provincial legislation, unless the inclusion of Indians within the scope of the provincial legislation touches them as ordinary persons and in a way that does not intrude on their Indian character or their Indian identity and relationship.

See also *Kruger et al. v. The Queen*, Supreme Court of Canada, 31 May, 1977 [reported 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300].

The Ontario *Labour Relations Act* does not directly touch "Indianness", but it does directly affect the civil rights of Indians, and their relationship one to another, and to their employer.

On the facts of this case, I am satisfied that the Act deals directly with Indians. The employer was incorporated under provincial laws, and was not Indian, but the shareholders were all Indians, and the business was carried on on an Indian reserve. It was financed by grants and loans made available under the Schedule, item L536, to the *Appropriation Act No. 1*, 1969-70 (Can.), c. 24, by which money was appropriated by Parliament "for the purposes of economic development of Indians, to Indians, groups of Indians or Indian bands, or to individuals, partnerships or corporations, the activities of which contribute or may contribute to such development . . .". That alone is sufficient to give the employer an Indian character. Almost, but not all, the employees are Indians. In sum, the whole manufacturing business is Indian in character. If the subject of labour relations belongs to the Legislatures because it is in relation to civil rights, then here we are talking about the civil rights of Indians, and that subject is surely within the exclusive competence of the Parliament of Canada. Therefore, the Ontario *Labour Relations Act* cannot extend, *ex proprio vigore* to these employees and this employer.

However, s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, provides as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

In *Natural Parents, supra*, it was held that the effect of this sec-

tion is to incorporate provincial legislation by reference, as long as it is not excluded by the section itself. The only relevant exclusion is "Subject to any other Act of the Parliament of Canada." The *Canada Labour Code*, R.S.C. 1970, c. L-1, applies to and in respect of employment upon or in connection with any federal work, undertaking or business, which latter is defined as meaning:

> 2. . . . any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including without restricting the generality of the foregoing:
>
> . . . . .
>
> (*i*) a work, undertaking or business outside the exclusive legislative authority of provincial legislatures.

(See ss. 4 and 2(*i*).)

In finding that the Ontario *Labour Relations Act* does not apply, I have looked at the persons involved, primarily the employees, not at the operation or function of the employer. The *Canada Labour Code* is directed to works, undertakings and businesses. Nevertheless, if the Ontario *Labour Relations Act* does not extend to the employees and their employer, it does not extend to the work, undertaking or business in which they are engaged, and the *Canada Labour Code* therefore applies.

For these reasons, I am of the opinion that the two decisions of the Ontario Labour Relations Board should be quashed, and it should be declared that the Ontario Labour Relations Board was without jurisdiction to make the said decisions, or apply the provisions of the *Labour Relations Act* to the activities of the applicant, or its employees, upon the Tyendinaga Indian Reserve.

The applicants are entitled to their costs.

ROBINS, J., concurs with MORDEN, J.

Order accordingly.

PUGLIESE et al. v. NATIONAL CAPITAL COMMISSION et al.; BEAVER UNDERGROUND STRUCTURES LTD. et al., Third Parties
DUNN et al. v. REGIONAL MUNICIPALITY OF OTTAWA-CARLETON et al.

Ontario Court of Appeal, Arnup, Houlden and Howland, JJ.A.
August 8, 1977.

Negligence — Duty of care — Abstraction of subsurface water — Loss of support of water causing damage — Whether duty to use reasonable care to avoid risk of such damage.

Torts — Nuisance — Abstraction of subsurface water — Loss of support causing damage — Whether action lies for unreasonable abstraction of subsurface water.

Actions — Right of action — Breach of statutory duty — Statutory permit allowing for abstraction of subsurface water — Amount of water taken in excess of

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offered was one that the trial judge might not find could not reasonably be accepted as true.

The appeal must be dismissed.

CANNON, J.—I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Gendron, Monette & Gauthier.*

Solicitor for the respondent: *Jacques Fournier.*

1938

* June 17, 20

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* April 5.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE TERM "INDIANS" IN HEAD 24 OF SECTION 91 OF THE BRITISH NORTH AMERICA ACT, 1867, INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Constitutional law—Statute—"Indians"—"Eskimo"—Whether Eskimo are Indians within head no. 24 of s. 91 of the B.N.A. Act.

Eskimo inhabitants of the province of Quebec are "Indians" within the contemplation of head no. 24 ("Indians and Lands Reserved for Indians") of section 91 of the *British North America Act.*

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 867, dated April 2, 1935) of the following question hereinafter set out to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35.

The order of reference recited:

The Committee of the Privy Council have had before them a report, dated April 1, 1935, from the Minister of Justice, representing that under the terms of the *British North America Act*, 1867, section 91 "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and that among these subjects is number "24. Indians, and Lands reserved for the Indians."

The Minister states that in parts of the province of Quebec there are Eskimo inhabitants, and

That a controversy has arisen between the Dominion Government and the Government of the province of Quebec in relation to the question whether the legislative and executive power of the Dominion Government under the above provision of the *British North America Act*, 1867, extends to the Eskimo inhabitants of the province of Quebec.

The Committee, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased, in the exercise of the powers

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

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conferred by section 55 of the *Supreme Court Act*, to refer to the Supreme Court of Canada for hearing and consideration the following question:

Does the term "Indians," as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the Province of Quebec?

The answer of the Court to the question was in the affirmative.

J. McGregor Stewart K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

Auguste Désilets K.C. and *C. A. Séguin K.C.* for the Attorney-General of Quebec.

The judgment of the Chief Justice and Davis and Hudson JJ. (Crocket J. concurring) was delivered by

THE CHIEF JUSTICE.—The reference with which we are concerned arises out of a controversy between the Dominion and the province of Quebec touching the question whether the Eskimo inhabitants of that province are "Indians" within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, "Indians and Lands Reserved for Indians"; and under the reference we are to pronounce upon that question.

Among the inhabitants of the three provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the *British North America Act*, became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the *British North America Act* contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by section 146 thereof.

The Eskimo population of Quebec inhabits (in the northern part of the province) a territory that in 1867 formed part of Rupert's Land and the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador

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coast, within the territories under the control of the Hudson's Bay Company, that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by section 146 of the *British North America Act*, were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory, there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland.

The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly ninety per cent. were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the use of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself.

It will be recalled that the Hudson's Bay Company, besides being a trading company, possessed considerable powers of government and administration. Some years before the passing of the *British North America Act*, complaints having been made as to the manner in which these responsibilities had been discharged, a committee of the House of Commons in 1856 and 1857 investigated the affairs of the Company. Among the matters which naturally engaged the attention of the Committee was the Company's relations with and conduct towards the aborigines; and for the information of the Committee a census was prepared and produced before it by the officers of the Company showing the Indian populations under its rule throughout the whole of the North American continent. This census was accompanied by a map showing the "locations" of the various tribes and was included in the Report of the Committee; and was made an appendix to the Committee's Report which was printed and published by the order of the House of Commons. It is indisputable that in the census and in the map

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the "esquimaux" fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines." The map bears this description:

An Aboriginal Map of North America denoting the boundaries and locations of various Indian Tribes.

Among these "Indian Tribes" the Eskimo are shown inhabiting the northern littoral of the continent from Labrador to Russian America. In the margin of the map are tables. Two are of great significance. The first of these is headed "Statement of the Indian Tribes of the Hudsons Bay Territories." The tribes "East of the Rocky Mountains" are given as "Blackfeet and Sioux groups comprising eight tribes, Algonquins comprising twelve tribes" and "Esquimaux."

The second is headed "Indian Nations once dwelling East of the Mississippi." The list is as follows:

Algonquin	
Dahcotah or Sioux	
Huron Iroquois	
Catawba	(extinct)
Cherokee	
Uchee	(extinct)
Natches	(extinct)
Mobilian	
Esquimaux	
Kolooch	
Athabascan	
Sioux	
Algonquin	
Iroquois	

The census concludes with a summary which is in these words:

The Indian Races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, etc.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North West Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

As already observed, the appointment of the Committee was due in part at all events to representations made to

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the Imperial Government respecting the conduct of the Hudson's Bay Company towards the Indians and the condition of the Indian population was one of the subjects with which the Committee was principally concerned. They were also concerned with representations made by the Government of Canada urging the desirability of transferring to Canada all the territories of the Company, at least as far west as the Rocky Mountains. Chief Justice Draper was present at the sittings of the Committee representing the Government of Canada. The Committee, as is well known, reported in favour of the cession to Canada of the districts of the Red River and the Saskatchewan River.

Seven years later, the scheme of Confederation, propounded in the Quebec Resolutions of October 10th, 1864, included a declaration that provision should be made

> for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

This declaration, was renewed in the Resolutions of the London Conference in December, 1866, and in the *British North America Act* specific provision was made, as we have seen, in section 146 for the acquisition of Rupert's Land as well as the North-West Territory and, in 1868, a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert's Land.

The *British North America Act* came into force on the 1st of July, 1867, and, in December of that year, a joint address to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of these regions and expressing the willingness of that Parliament to assume the duties and obligations of government and legislation as regards those territories. In the Resolution of the Senate expressing the willingness of that body to concur in the joint address is this paragraph:

> Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer.

By Order in Council of the 23rd of June, 1870, it was ordered that from and after the 15th of July, 1870, the North West Territory and Rupert's Land should be admitted into, and become part of, the Dominion of Canada and that, from that date, the Parliament of Canada should

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have full power and authority to legislate for the future welfare and good government of the territory. As regards Rupert's Land, such authority had already been conferred upon the Parliament of Canada by section 5 of the *Rupert's Land Act* of 1868.

The vast territories which by these transactions became part of the Dominion of Canada and were brought under the jurisdiction of the Parliament of Canada were inhabited largely, indeed almost entirely, by aborigines. 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* that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term "Indians" is evidenced in a most unequivocal way by documents prepared by those officials and produced before the Select Committee of the House of Commons which were included in the Report of that Committee which, again, as already mentioned, was printed and published by the order of the House. It is quite clear from the material before us that this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation.

I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the *British North America Act*, they were, by governors, commanders-in-chief of the navy and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians.

First, of the official documents. In 1762, General Murray, then Governor of Quebec, who afterwards became first Governor of Canada, in an official report of the state of the government of Quebec, deals under the sixth heading with "Indian nations residing within the government." He introduces discussion with this sentence:

> In order to discuss this point more clearly I shall first take notice of the Savages on the North shore of the River St. Laurence from the

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Ocean upwards, and then of such as inhabit the South side of the same River, as far as the present limits of the Government extend on either side of it.

In the first and second paragraphs he deals with "Savages" on the North Shore and he says: "The first to be met with on this side are the Esquimaux." In the second paragraph he deals with the Montagnais who inhabited a "vast tract" of country from Labrador to the Saguenay.

It is clear that here the Eskimo are classified under the generic term Indian. They are called "Savages," it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as "the wildest and most untamable of any" and mentions that they are "emphatically styled by the other Nations, Savages."

Then there are two reports to His Majesty by the Lords of Trade. The first, dated June 8th, 1763, discusses the trade carried on by the French on the coast of Labrador. It is said that they carried on

an extensive trade with the Esquimaux Indians in Oyl, Furs, & ca. (in which they allowed Your Majesty's Subjects no Share).

In the second, dated the 16th of April, 1765, in dealing with complaints on the part of the Court of France respecting the French fishery on the coast of Newfoundland and in the Gulf of St. Lawrence, their observations on these complaints are based upon information furnished by Commodore Palliser who had been entrusted with the superintendency of the Newfoundland fishery and the government of the island. In this report, this sentence occurs:

The sixth and last head of complaint contained in the French Ambassador's letter is, that a captain of a certain French vessel was forbid by your Majesty's Governor from having commerce with the Eskimaux Indians;

and upon that it is observed that the Governor "is to be commended for having forbid the subjects of France to trade or treat with these Indians." "These Indians" are spoken of as "inhabitants * * * who are under the protection of and dependent upon your Majesty."

Then there is a series of proclamations by successive Governors and Commanders-in-Chief in Newfoundland, the first of which was that of Sir Hugh Palliser of the 1st of July, 1764. The Proclamation recites,

* * * Advantages would arise to His Majesty's Trading Subjects if a Friendly Intercourse could be Established with the Esquemeaux

Indians, Inhabiting the Coast of Labrador * * *

and that the Government

has taken measures for bringing about a friendly communication between the said Indians and His Majesty's subjects.

All His Majesty's subjects are strictly enjoined "to treat them in the most civil and friendly manner."

The next is a Proclamation by the same Governor dated the 8th of April, 1765, which recites the desirability of

friendly intercourse with the Indians on the Coast of Labrador

and that

attempts hitherto made for that purpose have proved ineffectual, especially with the Esquimaux in the Northern Ports without the Straits of Belle Isle

and strictly enjoins and requires

all His Majesty's subjects who meet with any of the said Indians to treat them in a most civil and friendly manner.

On the 10th of April, 1772, Governor Shuldham in a Proclamation of that date requires

all His Majesty's subjects coming upon the coast of Labrador to act towards the Esquimaux Indians in a manner agreeable to the Proclamation issued at St. John's the 8th day of July 1769 respecting the savages inhabiting the coast of Labrador.

In this Proclamation it should be noted that "Esquimaux savages" and "Esquimaux Indians" are used as convertible expressions.

In 1774, the boundaries of Quebec were extended, and the northeastern coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809. Nevertheless, the Governor and Commander-in-Chief of Newfoundland, who at the date was Admiral Edwards, acting under the authority of that Order in Council of the 9th of March, 1774, took measures to protect the missionaries of the Unitas Fratrum and their settlements on the coast of Labrador from molestation or disturbance and, on May 14th, 1779, Admiral Edwards issued a Proclamation requiring

all His Majesty's subjects coming upon the Coast of Labrador to act towards the Esquimaux Indians justly, humanely and agreeably to these laws, by which His Majesty's subjects are bound.

Here again it is to be observed that the words "savages" and "Indians" are used as equivalents.

A further Proclamation by Admiral Edwards on January 30th, 1781, employs the same phrases, the Eskimo being described as "Esquimaux savages" and as "Esquimaux Indians."

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On May 15th, 1774, Governor Campbell, as Governor and Commander-in-Chief, issued a Proclamation in terms identical with that of 1781.

On the 3rd of December, 1821, a Proclamation was issued by Governor Hamilton as Governor and Commander-in-Chief of Newfoundland (now again including the Labrador coast) relating to a "fourth settlement" by the Moravian missionaries requiring all His Majesty's subjects "to act towards the missionaries and the Esquimaux Indians justly and humanely."

There are other official documents. In a report in 1798 by Captain Crofton, addressed to Admiral Waldegrave, Governor and Commander-in-Chief of Newfoundland, the phrase "Esquimaux Indians" occurs several times and the Eskimo are plainly treated as coming under the designation "Indians."

A report to Lord Dorchester, Governor and Commander-in-Chief of Quebec, Nova Scotia, New Brunswick and their dependencies, in 1788, upon an application by George Cartwright for a grant of land at Touktoke Bay on the coast of Labrador by a special Committee of the Council appointed to consider the same refers to the applicant's exertions in

> securing friendly intercourse with the Eskimaux Indians and his success in bringing about a friendly intercourse between that nation and the Mountaineers.

Evidence as to subsequent official usage is adduced in a letter of 1824 from the Advocate General of Canada to the Assistant Civil Secretary on some matter of a criminal prosecution in which "Esquimaux Indians" are concerned; and in a report of 1869 by Judge Pinsent of the Court of Labrador to the Governor of Newfoundland in which this sentence occurs:

> In this number about 300 Indians and half-breeds of the Esquimaux and Mountaineer races are included.

Reports from missionaries and clergymen are significant. I refer particularly to two. There is a communication in 1821 by the Unitas Fratrum sent to Admiral Hamilton, Governor and Commander-in-Chief of Newfoundland and Labrador, on a visit by H.M.S. *Clinker* to their settlements. In this the Eskimo are mentioned as "Esquimaux Indians" and "Esquimaux Tribes" and the report concludes with a table giving the numbers of "Esquimaux Indians who have embraced the Christian religion" at the various stations.

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In 1849, a report from the Bishop of Newfoundland was printed and published in London for the Society for the Propagation of the Gospel by the Bishop of London with a prefatory letter and seems to have been put into circulation through Rivingtons and other booksellers. Extracts from this report, which describes a visit to Labrador, are produced in the Quebec case, and as these passages exemplify in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there, it is right, I think, to reproduce them in full:

p.17.—At St. Francis Harbour, where we next stopped, we celebrated the Lord's Supper, as there were several members of the Church from Newfoundland fishing in the neighbourhood; and the agent and his lady also communicated, (Mr. and Mrs. Saunders). Several Esquimaux Indians were here admitted into the Church, and married. One of them afterwards accompanied us as pilot to Sandwich Bay.

I was obliged very reluctantly to leave the Church ship at St. Francis Harbour (the wind blowing in), and proceeded in a boat twenty-five miles to the Venison Islands, where I remained three days on shore, before the *Hank* could join us, and, with Mr. Hoyles, was very kindly entertained by Mr. Howe, Messrs. Slade's agent. Here all the females are either Esquimaux or mountaineer Indians, or descended from them. With the exception of Mrs. Saunders, there is not an Englishwoman on the coast, from Battle Harbour to Sandwich Bay; all, or nearly all, are Indians (Esquimaux or mountaineer), or half Indians, and of course the children are the same mixed race.

p. 40.—Wednesday, August 2.—The wind blew so strong last night, with heavy rain, that our captain, who was on shore, could not return to the ship. I had intended to proceed this morning, but, partly on account of the high sea, and partly because there was yet work to be done here, I was persuaded to delay my departure. I went on shore with my Chaplains after breakfast; and while I remained at the house of Mr. Ellis, the merchant of Newfoundland, they visited an Englishman, who was married, or united, to a poor Indian woman, an Esquimaux, and who we understood, had children to be baptized.

p. 49.—Mr. Bendle also informed us of the character &c., of the Indians who dwell in or resort to his neighbourhood. There are three distinct tribes—the Micmacs, Mountaineers and Esquimaux. The first two are generally Roman Catholics, but the Esquimaux owe their instruction and conversion to the Moravian Missionaries. These Missionaries (on the Labrador coast) have four stations and establishments, the nearest about 400 miles to the north of Battle Harbour, and the most distant nearly 400 miles farther, or 800 from this place. There are three families of the Moravians at each of their stations, who live together in a stone house, and have large trading concerns in fish, &c., with the Esquimaux.

p. 63.—Tuesday, August 15.—The wind came round again to the westward this morning, but was very light. We got under way at ten o'clock, and did not reach the Seal Islands till five. Mr. Howe kindly furnished a pilot. Here, as in every other harbour, are several vessels from Newfoundland. Messrs. Hunt also keep a small "crew" here;

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that is, a few men dwelling together to prosecute the fishery in the summer and kill seals in the winter. Five Englishmen remained together here last winter, who killed 500 seals. In the first three months of the year they are in the woods, to cut timber and firewood. Besides this crew, the only residents are Indians (Esquimaux) and half Indians, who live together, crowded in two huts, with an Englishman who has taken one of the half Indian women as his wife. Guided by the skipper of Mr. Hunt's crew, we visited these Indians. Nearly all (twenty out of twenty-three) crowded together in one small hut, with our two guides, Messrs. Harvey and Hoyles, and myself. A strange group, or crowd, we were. Indians will compress into the smallest possible compass; but still we were brought into painfully close proximity.

p. 68.—A few years ago the Esquimaux women, generaly wore a cloak, or cope, of seal-skin, with the hair outwards, the tail hanging down behind, and the flippers on their arms; but now all rejoice in European dresses, shawls and gowns of many colours. The only remains of Indian dress is the sealskin boot, which even the smallest children wear; it is of great use in the snow, being quite impervious to wet. In the race of mixed blood, or Anglo-Esquimaux, the Indian characteristics very much disappear, and the children are both lively and comely.

p. 69.—The afternoon service commenced soon after three o'clock, and was not concluded till seven o'clock, in consequence of the numbers to be christened and added to the Church. I admitted six adults myself, who were able to answer for themselves; three were Esquimaux. All made the proper answers correctly and seriously, and not the least so the poor Indians.

Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase "Esquimaux Indians" is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to "Esquimaux Indians" was prohibited by an Act of the Legislature of Newfoundland.

Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American colonies the union of which with Canada was contemplated by the *British North America Act*. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I

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repeat the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole.

As against this evidence, the Dominion appeals to the Royal Proclamation of 1763 as furnishing the clue to the true meaning and application of the term "Indians" in section 91. The Indians therein referred to are said to be the same type of aborigines as are described in that Proclamation as "the several nations or tribes of Indian with whom We are connected and who live under Our protection."

First, it is said that the terms "nation" and "tribe" are not employed in relation to the Eskimo. That is a proposition which finds no support in the documents produced dealing with the Labrador Eskimo; and, as regards the Eskimo inhabiting the Hudson's Bay Company's territories, they, as already pointed out, are (in the tables in the margin of the Hudson's Bay Company's aboriginal map) included in the statement of "Indian tribes" in those territories and they are in the list of "Indian nations" once dwelling east of the Mississippi.

Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. I cannot give my adherence to the principle of interpretation of the *British North America Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *British North America Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *British North America Act*. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as

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apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.

Another argument advanced by counsel for the Crown is based upon the supposed contrast between the language used in Articles 31 and 32 of the Instructions to Sir Guy Carleton and that used in relation to the Eskimo in Article 37. It has already been pointed out that, in the official documents relating to the Labrador Eskimo, the words "savages" and "Indians" are used convertibly; that in General Murray's Report in 1762 the Montagnais, the Hurons and the Eskimo are all spoken of as "savages"; and in Article 31 of Sir Guy Carleton's Instructions, the term "savages" is applied to the Indians of Illinois, the straits of Detroit, Michilimackinac and Gaspe; and, in Article 32, the term "savages" is applied to the Indians affected by the Royal Proclamation in 1763 and within the scope of the plan of 1764. I can find nothing in the language of these instructions which militates against the inference which, as already explained, seems to me to arise from the documents mentioned above having relation to the Labrador Eskimo.

Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *British North America Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Canada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.

Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems

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to afford no good reason for limiting the scope of the term "Indians" itself.

For these reasons I think the question referred to us should be answered in the affirmative.

CANNON, J. (Crocket J. concurring).—The question referred to us for hearing and consideration pursuant to section 55 of the *Supreme Court Act* is:

Does the term "Indians" as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the province of Quebec?

I answer the question in the affirmative.

In the evidence given by Sir George Simpson before the Select Committee of the Hudson Bay Company, it appears that in 1857, the Eskimos were included amongst the so-called Indian races classified in the census prepared by the Company and the report of the Committee must have been known to the legislature at Westminster in 1867.

The correspondence between Sir John Macdonald and Sir Hector Langevin with reference to the relief to be given to the Montagnais and Eskimo Indians of the Lower St. Lawrence would show that these two Fathers of the Confederation always understood that the English word "Indians" was to be construed and translated as "sauvages" which admittedly did include *all* the aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Company.

I do not insist on these two points which have been well treated by my brother Kerwin with whom I agree. I would like to add the following considerations.

As to the exact meaning of the word "Indians" at the time of Confederation, I believe that we have in the official documents "respecting the Proposed Union of the British North American Provinces" presented to both Houses of Parliament of the United Kingdom, on the 8th of February, 1867, all we need to form an opinion of the significance of this word and its scope.

In the English Text of the Report of the Resolutions adopted at a Conference of Delegates from the provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held

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at the City of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, Resolution 29 reads as follows:

The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

1.
2.
3
* * * *
29. Indians and Lands Reserved for the Indians.

The official French translation of this resolution, as I find it in "Débats Parlementaires sur la Question de la Confédération des Provinces de l'Amérique Britannique du Nord, imprimés par Ordre de la Législature par Hunter, Rose et Lemieux, Imprimeurs, Parlementaires, 1865," follows:

29. Le parlement général aura le pouvoir de faire des lois pour la paix, le bien-être et le bon gouvernement des provinces fédérées (sans toutefois, pouvoir porter atteinte à la souveraineté de l'Angleterre), et en particulier sur les sujets suivants:

1.
2.
3.
* * * *
29. Les *Sauvages* et les terres réservées pour les Sauvages.

The petition to the Queen passed on the 13th of March, 1865, by the Legislature reproduces, as to this sub-paragraph, word for word the Quebec resolutions, and the French translation also gives to the General Parliament under Section 29,—"Les Sauvages et les terres réservées pour les Sauvages."

This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.

The official French version of the *British North America Act* also translates "Indians" by "Sauvages." See Statut du Canada, 1er Parlement, 31 Victoria, 1867-1868, Imprimé

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par Malcolm Cameron, Imprimeur de Sa Très Excellente Majesté la Reine—Ottawa, 1867, page 24, section 91, sous-paragraphe 24.

CROCKET, J.—I am of opinion that the question referred to us should be answered in the affirmative for the reasons stated by my Lord the Chief Justice and my brothers Cannon and Kerwin.

KERWIN, J. (Cannon and Crocket JJ. concurring)—The question should be answered in the affirmative. In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians," the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation. The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Company. And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question.

From the date of the visit of Champlain to this country in 1625 when he discovered "une nation de sauvages qui habitent ces pays, qui s'appellent Exquimaux," and of Radisson who in an account of his travels and experiences refers to "Indians called Esquimos"; through the reports of the missionaries and the correspondence between France and New France, the Indians are referred to as "sauvages" and the Eskimos as "sauvages esquimaux." Later we find by referring to such books as might be expected to be known to the Fathers of Confederation and to the British Parliament statements indicating that the Eskimo was considered as one of the Indian tribes. The following is a partial list of such books:—

1855.—Webster's American Dictionary of the English language defines the Esquimaux: "A nation of Indians inhabiting the northwestern parts of North America."

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1855.—Adrien Guibert in his Geographical Dictionary, classifies the Eskimos among the Indians of America.

1856.—In "The Indian Races of North and South America," Charles de Wolf Brownell, an American author, speaks of the Esquimaux Indians and devotes a chapter to the study of their manners and personal appearance.

1857.—In the "Gazetteer of the world," published in London by A. Fullerton & Co., the Eskimos are dealt with as Indians, who are the aboriginal people of the New Continent; mentions are made of Eskimos in opposition to "common Indian" and to "other Indians."

1857.—In an Imperial Blue Book is a Report from the Select Committee on the Hudson's Bay Company in which the Eskimos are enumerated among the Indians, are classified with the Indian races and are shown on a map denoting the boundaries and locations of various Indian tribes.

1857.—In the evidence given before a Select Committee of the House of Commons (Imperial), appointed to consider the state of the British Possessions in North America, Sir George Simpson, Governor of the territories of the Hudson's Bay Company, includes the Eskimos in the Indian population.

1869.—In an "Esquisse sur le Nord-Ouest de l'Amérique" by Mgr. Taché, Bishop of St. Boniface, Manitoba, reference is made to the aboriginal tribes being called Indians (Sauvages) and the Esquimaux are dealt with at length as one of the five linguistic Indian families.

A word should be added as to Webster's Dictionary. Counsel for the Dominion pointed out that in the 1913 edition of Webster's New International Dictionary, as well as the 1923, 1925, and 1927 editions, "Indian" is defined as being "a member of any of the aboriginal American stocks excepting the Eskimauan." However, in the earlier 1855 edition, then known as The American Dictionary of the English Language, appears the following:—

"Indian", A. General name of any native of the Indies;; as an East Indian or West Indian. It is particularly applied to any native of the American continent.

In the 1865 edition of what had then become the Dictionary of the English Language, "Indians" were defined as

Indians are the aboriginal inhabitants of America so called originally from the idea on the part of Columbus and the early navigators of the identity of America with India.

It was only in the 1913, 1923 and 1927 editions that the earlier definition was departed from while in the 1934 edition of Webster's International Dictionary, "Indian" is defined as follows:—

Indian. 5. A member of the aboriginal American race; an American, or Red, Indian; an Amerind * * * About 75 linguistic families or stocks are recognized in North America, and about 75 more in South America and the West Indies. Some stocks comprise many tribes speaking distinct, but related, languages. The 16 stocks listed below occupied more than half the area of the continent and comprised a large majority of the Indians at the time of the discovery of North America, Algonquian, Athapascan, *Eskimauan*, Iroquoian, Mayan, Muskhegean, Siouian, and Uto-Aztocan.

It is true that in the New English (Oxford) Dictionary, volume 5, under the heading "Indian" appears the following:—

A. * * *

2. Belonging or relating to the race of original inhabitants of America and the West Indies.

B. * * *

2. A member of any of the aboriginal races of America or the West Indies; an American Indian.

The Eskimos, in the extreme north, are usually excluded from the term; as are sometimes the Patagonians and Fuegians in the extreme south.

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.

As pointed out in a memorandum of November 1st, 1918, by the Deputy Superintendent General of Indian Affairs to the Minister, the Eskimos had never been mentioned in any legislation up to that time but by chapter 47 of 14-15 George V, assented to July, 1924, section 4 of *The Indian Act*, Chapter 81, R.S.C., 1906, was amended by adding thereto the following subsection:—

(2) The Superintendent General of Indian Affairs shall have charge of Eskimo affairs.

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This was afterwards repealed and even if the repeal had never occurred perhaps no argument could be adduced from the provisions of the amending statute but it is significant that in 1879 a letter from the Very Reverend Edmond Langevin to the Postmaster General of Canada, referring to the necessitous condition of "the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence below the Saguenay" was sent by the addressee to Sir John A. Macdonald as Superintendent General of Indian Affairs with the following covering letter:—

Ottawa, 20 January, 1879.

My dear Sir John,

The enclosed letter from the Very Reverend Edmond Langevin, Vicar General of Rimouski, calls my attention to the position of the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence, below the Saguenay. He says that the amount that used to be given to these Indians was seventy eight cents a head, and that now it is only thirty eight cents. These poor people are starving they can't cultivate the land, which in that region is hardly cultivable, and have had no provision made for them by the Government, and he requires on their behalf that we should come to their help. Will you kindly see that they are treated as well as we treat the Indians of our new territories. Of course I leave the whole matter in yours hands.

Yours truly,
Hector L. Langevin.

Right Honble Sir John A. Macdonald, K.C.B., Ottawa.

The matter referred to was commented upon by the Deputy Superintendent General of Indian Affairs in the following report:—

To the Right Hon. Sir John A. Macdonald, K.C.B.
Supt. General of Indian Affairs

Ottawa, 24 jany, 1879.

With reference to the letter of the 20th Instant (placed herewith) from the Honourable Hector Langevin, enclosing a letter of the 13th Instant, from the Very Reverend Edmond Langevin, of Rimouski, in the province of Quebec, relative to the insufficient relief given to the Montagnais and Esquimaux Indians of the Lower St. Lawrence, the undersigned has the honor to report that frequent representations to the same effect have been made to the Department and that last year he endeavoured to induce the then Superintendent General of Indian Affairs to ask Parliament for a larger grant, but that when the proposed estimates for the year 1878-79 were submitted to Council for revision, the proposed increase of $2,000 to the Parliamentary Grant for these Indians was struck out.

The present Government has however sanctioned the Supplementary Estimates for 1878-9 which will be submitted to Parliament at the approaching Session being anticipated by granting the said sum of $2,000.00, and the undersigned has moreover increased the grant for those Indians by that amount in the proposed estimates for the year 1879-80,

with the hope that the Government will sanction and Parliament confirm the same.

All respectfully submitted,

L. Van Koughnet,
Deputy Supt. General of Indian Affairs.

That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *British North America Act*, at that time and shortly thereafter.

Special attention should also be paid to the report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland, presented in 1857. As appears from the Imperial Blue Books on Affairs Relating to Canada, the Committee reported:—

> It is a matter of great difficulty to obtain reliable information respecting the Indian population, their migratory habits, and the vast extent of country over which they are spread, misleading the calculations, and rendering it almost impracticable to prepare a satisfactory census. The following estimates have been compiled with great care, from a mass of documents and the actual personal knowledge of several of the Company's officers, tested by comparison with published statements, especially those presented to Government in 1846 by Messrs. Warre and Vavasour, and those of Colonel Lefroy, R.A., contained in a paper read before the Canadian Institute.

The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:

Add Whites and half breeds in Hudson's Bay Territory, not included	6,000
Add Esquimaux not enumerated	4,000
Total	158,960

The *Indian Races* shown in detail in the foregoing Census may be classified as follows:—

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the Northwest Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

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The Esquimaux, it will be seen, are included among the Indian races and this is based apparently upon the evidence of Sir George Simpson, which had been taken before the Committee. Questions 1062 and 1472, together with the answers, are as follows:—

1062. Mr. GREGSON: What mode have you of ascertaining of the population of the Indians? We have lists of the Indians belonging to various posts; we have compared and checked them with the report of the Government officers who went to Vancouver's Island some years ago, as regards the tribes to the west of the mountains, and with Colonel Lefroy's lists, as regards those on the east side, and we have arrived at this estimate of the population.

1472. Mr. ROEBUCK: Will you state the total?—The Indians, east of the mountains, 55,000; West of the mountains, 80,000; Esquimaux, 4,000.

While counsel for the Dominion sought to draw from the answer to Question 1472 the inference that Sir George Simpson had not treated the Esquimaux as one of the Indian tribes, I think the answer is not susceptible of that interpretation and it is certainly not the one that the Committee adopted.

After considering the reports of missionaries, explorers, agents, cartographers and geographers, included in the cases submitted on behalf of the Dominion and province of Quebec, I do not believe anything further may be usefully added. The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the *British North America Act* but the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act.

The question referred was answered in the affirmative.

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offered was one that the trial judge might not find could not reasonably be accepted as true.

The appeal must be dismissed.

CANNON, J.—I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Gendron, Monette & Gauthier.*

Solicitor for the respondent: *Jacques Fournier.*

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* June 17, 20

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* April 5.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE TERM "INDIANS" IN HEAD 24 OF SECTION 91 OF THE BRITISH NORTH AMERICA ACT, 1867, INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Constitutional law—Statute—"Indians"—"Eskimo"—Whether Eskimo are Indians within head no. 24 of s. 91 of the B.N.A. Act.

Eskimo inhabitants of the province of Quebec are "Indians" within the contemplation of head no. 24 ("Indians and Lands Reserved for Indians") of section 91 of the *British North America Act.*

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 867, dated April 2, 1935) of the following question hereinafter set out to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The order of reference recited:

The Committee of the Privy Council have had before them a report, dated April 1, 1935, from the Minister of Justice, representing that under the terms of the *British North America Act,* 1867, section 91 "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and that among these subjects is number "24. Indians, and Lands reserved for the Indians."

The Minister states that in parts of the province of Quebec there are Eskimo inhabitants, and

That a controversy has arisen between the Dominion Government and the Government of the province of Quebec in relation to the question whether the legislative and executive power of the Dominion Government under the above provision of the *British North America Act,* 1867, extends to the Eskimo inhabitants of the province of Quebec.

The Committee, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased, in the exercise of the powers

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

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conferred by section 55 of the *Supreme Court Act*, to refer to the Supreme Court of Canada for hearing and consideration the following question:

Does the term "Indians," as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the Province of Quebec?

The answer of the Court to the question was in the affirmative.

J. McGregor Stewart K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

Auguste Désilets K.C. and *C. A. Séguin K.C.* for the Attorney-General of Quebec.

The judgment of the Chief Justice and Davis and Hudson JJ. (Crocket J. concurring) was delivered by

THE CHIEF JUSTICE.—The reference with which we are concerned arises out of a controversy between the Dominion and the province of Quebec touching the question whether the Eskimo inhabitants of that province are "Indians" within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, "Indians and Lands Reserved for Indians"; and under the reference we are to pronounce upon that question.

Among the inhabitants of the three provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the *British North America Act*, became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the *British North America Act* contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by section 146 thereof.

The Eskimo population of Quebec inhabits (in the northern part of the province) a territory that in 1867 formed part of Rupert's Land and the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador

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coast, within the territories under the control of the Hudson's Bay Company, that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by section 146 of the *British North America Act*, were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory, there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland.

The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly ninety per cent. were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the use of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself.

It will be recalled that the Hudson's Bay Company, besides being a trading company, possessed considerable powers of government and administration. Some years before the passing of the *British North America Act*, complaints having been made as to the manner in which these responsibilities had been discharged, a committee of the House of Commons in 1856 and 1857 investigated the affairs of the Company. Among the matters which naturally engaged the attention of the Committee was the Company's relations with and conduct towards the aborigines; and for the information of the Committee a census was prepared and produced before it by the officers of the Company showing the Indian populations under its rule throughout the whole of the North American continent. This census was accompanied by a map showing the "locations" of the various tribes and was included in the Report of the Committee; and was made an appendix to the Committee's Report which was printed and published by the order of the House of Commons. 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." The map bears this description:

An Aboriginal Map of North America denoting the boundaries and locations of various Indian Tribes.

Among these "Indian Tribes" the Eskimo are shown inhabiting the northern littoral of the continent from Labrador to Russian America. In the margin of the map are tables. Two are of great significance. The first of these is headed "Statement of the Indian Tribes of the Hudsons Bay Territories." The tribes "East of the Rocky Mountains" are given as "Blackfeet and Sioux groups comprising eight tribes, Algonquins comprising twelve tribes" and "Esquimaux."

The second is headed "Indian Nations once dwelling East of the Mississippi." The list is as follows:

Algonquin	
Dahcotah or Sioux	
Huron Iroquois	
Catawba	(extinct)
Cherokee	
Uchee	(extinct)
Natches	(extinct)
Mobilian	
Esquimaux	
Kolooch	
Athabascan	
Sioux	
Algonquin	
Iroquois	

The census concludes with a summary which is in these words:

The Indian Races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, etc.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North West Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

As already observed, the appointment of the Committee was due in part at all events to representations made to

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the Imperial Government respecting the conduct of the Hudson's Bay Company towards the Indians and the condition of the Indian population was one of the subjects with which the Committee was principally concerned. They were also concerned with representations made by the Government of Canada urging the desirability of transferring to Canada all the territories of the Company, at least as far west as the Rocky Mountains. Chief Justice Draper was present at the sittings of the Committee representing the Government of Canada. The Committee, as is well known, reported in favour of the cession to Canada of the districts of the Red River and the Saskatchewan River.

Seven years later, the scheme of Confederation, propounded in the Quebec Resolutions of October 10th, 1864, included a declaration that provision should be made

> for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

This declaration, was renewed in the Resolutions of the London Conference in December, 1866, and in the *British North America Act* specific provision was made, as we have seen, in section 146 for the acquisition of Rupert's Land as well as the North-West Territory and, in 1868, a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert's Land.

The *British North America Act* came into force on the 1st of July, 1867, and, in December of that year, a joint address to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of these regions and expressing the willingness of that Parliament to assume the duties and obligations of government and legislation as regards those territories. In the Resolution of the Senate expressing the willingness of that body to concur in the joint address is this paragraph:

> Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer.

By Order in Council of the 23rd of June, 1870, it was ordered that from and after the 15th of July, 1870, the North West Territory and Rupert's Land should be admitted into, and become part of, the Dominion of Canada and that, from that date, the Parliament of Canada should

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have full power and authority to legislate for the future welfare and good government of the territory. As regards Rupert's Land, such authority had already been conferred upon the Parliament of Canada by section 5 of the *Rupert's Land Act* of 1868.

The vast territories which by these transactions became part of the Dominion of Canada and were brought under the jurisdiction of the Parliament of Canada were inhabited largely, indeed almost entirely, by aborigines. 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* that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term "Indians" is evidenced in a most unequivocal way by documents prepared by those officials and produced before the Select Committee of the House of Commons which were included in the Report of that Committee which, again, as already mentioned, was printed and published by the order of the House. It is quite clear from the material before us that this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation.

I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the *British North America Act*, they were, by governors, commanders-in-chief of the navy and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians.

First, of the official documents. In 1762, General Murray, then Governor of Quebec, who afterwards became first Governor of Canada, in an official report of the state of the government of Quebec, deals under the sixth heading with "Indian nations residing within the government." He introduces discussion with this sentence:

> In order to discuss this point more clearly I shall first take notice of the Savages on the North shore of the River St. Laurence from the

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Ocean upwards, and then of such as inhabit the South side of the same River, as far as the present limits of the Government extend on either side of it.

In the first and second paragraphs he deals with "Savages" on the North Shore and he says: "The first to be met with on this side are the Esquimaux." In the second paragraph he deals with the Montagnais who inhabited a "vast tract" of country from Labrador to the Saguenay.

It is clear that here the Eskimo are classified under the generic term Indian. They are called "Savages," it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as "the wildest and most untamable of any" and mentions that they are "emphatically styled by the other Nations, Savages."

Then there are two reports to His Majesty by the Lords of Trade. The first, dated June 8th, 1763, discusses the trade carried on by the French on the coast of Labrador. It is said that they carried on

an extensive trade with the Esquimaux Indians in Oyl, Furs, & ca. (in which they allowed Your Majesty's Subjects no Share).

In the second, dated the 16th of April, 1765, in dealing with complaints on the part of the Court of France respecting the French fishery on the coast of Newfoundland and in the Gulf of St. Lawrence, their observations on these complaints are based upon information furnished by Commodore Palliser who had been entrusted with the superintendency of the Newfoundland fishery and the government of the island. In this report, this sentence occurs:

The sixth and last head of complaint contained in the French Ambassador's letter is, that a captain of a certain French vessel was forbid by your Majesty's Governor from having commerce with the Eskimaux Indians;

and upon that it is observed that the Governor "is to be commended for having forbid the subjects of France to trade or treat with these Indians." "These Indians" are spoken of as "inhabitants * * * who are under the protection of and dependent upon your Majesty."

Then there is a series of proclamations by successive Governors and Commanders-in-Chief in Newfoundland, the first of which was that of Sir Hugh Palliser of the 1st of July, 1764. The Proclamation recites.

* * * Advantages would arise to His Majesty's Trading Subjects if a Friendly Intercourse could be Established with the Esquemeaux

Indians, Inhabiting the Coast of Labrador * * *

and that the Government

has taken measures for bringing about a friendly communication between the said Indians and His Majesty's subjects.

All His Majesty's subjects are strictly enjoined "to treat them in the most civil and friendly manner."

The next is a Proclamation by the same Governor dated the 8th of April, 1765, which recites the desirability of

friendly intercourse with the Indians on the Coast of Labrador

and that

attempts hitherto made for that purpose have proved ineffectual, especially with the Esquimaux in the Northern Ports without the Straits of Belle Isle

and strictly enjoins and requires

all His Majesty's subjects who meet with any of the said Indians to treat them in a most civil and friendly manner.

On the 10th of April, 1772, Governor Shuldham in a Proclamation of that date requires

all His Majesty's subjects coming upon the coast of Labrador to act towards the Esquimaux Indians in a manner agreeable to the Proclamation issued at St. John's the 8th day of July 1769 respecting the savages inhabiting the coast of Labrador.

In this Proclamation it should be noted that "Esquimaux savages" and "Esquimaux Indians" are used as convertible expressions.

In 1774, the boundaries of Quebec were extended, and the northeastern coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809. Nevertheless, the Governor and Commander-in-Chief of Newfoundland, who at the date was Admiral Edwards, acting under the authority of that Order in Council of the 9th of March, 1774, took measures to protect the missionaries of the Unitas Fratrum and their settlements on the coast of Labrador from molestation or disturbance and, on May 14th, 1779, Admiral Edwards issued a Proclamation requiring

all His Majesty's subjects coming upon the Coast of Labrador to act towards the Esquimaux Indians justly, humanely and agreeably to these laws, by which His Majesty's subjects are bound.

Here again it is to be observed that the words "savages" and "Indians" are used as equivalents.

A further Proclamation by Admiral Edwards on January 30th, 1781, employs the same phrases, the Eskimo being described as "Esquimaux savages" and as "Esquimaux Indians."

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On May 15th, 1774, Governor Campbell, as Governor and Commander-in-Chief, issued a Proclamation in terms identical with that of 1781.

On the 3rd of December, 1821, a Proclamation was issued by Governor Hamilton as Governor and Commander-in-Chief of Newfoundland (now again including the Labrador coast) relating to a "fourth settlement" by the Moravian missionaries requiring all His Majesty's subjects "to act towards the missionaries and the Esquimaux Indians justly and humanely."

There are other official documents. In a report in 1798 by Captain Crofton, addressed to Admiral Waldegrave, Governor and Commander-in-Chief of Newfoundland, the phrase "Esquimaux Indians" occurs several times and the Eskimo are plainly treated as coming under the designation "Indians."

A report to Lord Dorchester, Governor and Commander-in-Chief of Quebec, Nova Scotia, New Brunswick and their dependencies, in 1788, upon an application by George Cartwright for a grant of land at Touktoke Bay on the coast of Labrador by a special Committee of the Council appointed to consider the same refers to the applicant's exertions in

> securing friendly intercourse with the Eskimaux Indians and his success in bringing about a friendly intercourse between that nation and the Mountaineers.

Evidence as to subsequent official usage is adduced in a letter of 1824 from the Advocate General of Canada to the Assistant Civil Secretary on some matter of a criminal prosecution in which "Esquimaux Indians" are concerned; and in a report of 1869 by Judge Pinsent of the Court of Labrador to the Governor of Newfoundland in which this sentence occurs:

> In this number about 300 Indians and half-breeds of the Esquimaux and Mountaineer races are included.

Reports from missionaries and clergymen are significant. I refer particularly to two. There is a communication in 1821 by the Unitas Fratrum sent to Admiral Hamilton, Governor and Commander-in-Chief of Newfoundland and Labrador, on a visit by H.M.S. *Clinker* to their settlements. In this the Eskimo are mentioned as "Esquimaux Indians" and "Esquimaux Tribes" and the report concludes with a table giving the numbers of "Esquimaux Indians who have embraced the Christian religion" at the various stations.

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In 1849, a report from the Bishop of Newfoundland was printed and published in London for the Society for the Propagation of the Gospel by the Bishop of London with a prefatory letter and seems to have been put into circulation through Rivingtons and other booksellers. Extracts from this report, which describes a visit to Labrador, are produced in the Quebec case, and as these passages exemplify in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there, it is right, I think, to reproduce them in full:

p.17.—At St. Francis Harbour, where we next stopped, we celebrated the Lord's Supper, as there were several members of the Church from Newfoundland fishing in the neighbourhood; and the agent and his lady also communicated, (Mr. and Mrs. Saunders). Several Esquimaux Indians were here admitted into the Church, and married. One of them afterwards accompanied us as pilot to Sandwich Bay.

I was obliged very reluctantly to leave the Church ship at St. Francis Harbour (the wind blowing in), and proceeded in a boat twenty-five miles to the Venison Islands, where I remained three days on shore, before the *Hank* could join us, and, with Mr. Hoyles, was very kindly entertained by Mr. Howe, Messrs. Slade's agent. Here all the females are either Esquimaux or mountaineer Indians, or descended from them. With the exception of Mrs. Saunders, there is not an Englishwoman on the coast, from Battle Harbour to Sandwich Bay; all, or nearly all, are Indians (Esquimaux or mountaineer), or half Indians, and of course the children are the same mixed race.

p. 40.—Wednesday, August 2.—The wind blew so strong last night, with heavy rain, that our captain, who was on shore, could not return to the ship. I had intended to proceed this morning, but, partly on account of the high sea, and partly because there was yet work to be done here, I was persuaded to delay my departure. I went on shore with my Chaplains after breakfast; and while I remained at the house of Mr. Ellis, the merchant of Newfoundland, they visited an Englishman, who was married, or united, to a poor Indian woman, an Esquimaux, and who we understood, had children to be baptized.

p. 49.—Mr. Bendle also informed us of the character &c., of the Indians who dwell in or resort to his neighbourhood. There are three distinct tribes—the Micmacs, Mountaineers and Esquimaux. The first two are generally Roman Catholics, but the Esquimaux owe their instruction and conversion to the Moravian Missionaries. These Missionaries (on the Labrador coast) have four stations and establishments, the nearest about 400 miles to the north of Battle Harbour, and the most distant nearly 400 miles farther, or 800 from this place. There are three families of the Moravians at each of their stations, who live together in a stone house, and have large trading concerns in fish, &c., with the Esquimaux.

p. 63.—Tuesday, August 15.—The wind came round again to the westward this morning, but was very light. We got under way at ten o'clock, and did not reach the Seal Islands till five. Mr. Howe kindly furnished a pilot. Here, as in every other harbour, are several vessels from Newfoundland. Messrs. Hunt also keep a small "crew" here;

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that is, a few men dwelling together to prosecute the fishery in the summer and kill seals in the winter. Five Englishmen remained together here last winter, who killed 500 seals. In the first three months of the year they are in the woods, to cut timber and firewood. Besides this crew, the only residents are Indians (Esquimaux) and half Indians, who live together, crowded in two huts, with an Englishman who has taken one of the half Indian women as his wife. Guided by the skipper of Mr. Hunt's crew, we visited these Indians. Nearly all (twenty out of twenty-three) crowded together in one small hut, with our two guides, Messrs. Harvey and Hoyles, and myself. A strange group, or crowd, we were. Indians will compress into the smallest possible compass; but still we were brought into painfully close proximity.

p. 68.—A few years ago the Esquimaux women, generaly wore a cloak, or cope, of seal-skin, with the hair outwards, the tail hanging down behind, and the flippers on their arms; but now all rejoice in European dresses, shawls and gowns of many colours. The only remains of Indian dress is the sealskin boot, which even the smallest children wear; it is of great use in the snow, being quite impervious to wet. In the race of mixed blood, or Anglo-Esquimaux, the Indian characteristics very much disappear, and the children are both lively and comely.

p. 69.—The afternoon service commenced soon after three o'clock, and was not concluded till seven o'clock, in consequence of the numbers to be christened and added to the Church. I admitted six adults myself, who were able to answer for themselves; three were Esquimaux. All made the proper answers correctly and seriously, and not the least so the poor Indians.

Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase "Esquimaux Indians" is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to "Esquimaux Indians" was prohibited by an Act of the Legislature of Newfoundland.

Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American colonies the union of which with Canada was contemplated by the *British North America Act*. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I

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repeat the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole.

As against this evidence, the Dominion appeals to the Royal Proclamation of 1763 as furnishing the clue to the true meaning and application of the term "Indians" in section 91. The Indians therein referred to are said to be

> the same type of aborigines as are described in that Proclamation as "the several nations or tribes of Indian with whom We are connected and who live under Our protection."

First, it is said that the terms "nation" and "tribe" are not employed in relation to the Eskimo. That is a proposition which finds no support in the documents produced dealing with the Labrador Eskimo; and, as regards the Eskimo inhabiting the Hudson's Bay Company's territories, they, as already pointed out, are (in the tables in the margin of the Hudson's Bay Company's aboriginal map) included in the statement of "Indian tribes" in those territories and they are in the list of "Indian nations" once dwelling east of the Mississippi.

Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. I cannot give my adherence to the principle of interpretation of the *British North America Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *British North America Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *British North America Act*. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as

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apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.

Another argument advanced by counsel for the Crown is based upon the supposed contrast between the language used in Articles 31 and 32 of the Instructions to Sir Guy Carleton and that used in relation to the Eskimo in Article 37. It has already been pointed out that, in the official documents relating to the Labrador Eskimo, the words "savages" and "Indians" are used convertibly; that in General Murray's Report in 1762 the Montagnais, the Hurons and the Eskimo are all spoken of as "savages"; and in Article 31 of Sir Guy Carleton's Instructions, the term "savages" is applied to the Indians of Illinois, the straits of Detroit, Michilimackinac and Gaspe; and, in Article 32, the term "savages" is applied to the Indians affected by the Royal Proclamation in 1763 and within the scope of the plan of 1764. I can find nothing in the language of these instructions which militates against the inference which, as already explained, seems to me to arise from the documents mentioned above having relation to the Labrador Eskimo.

Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *British North America Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Canada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.

Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems

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to afford no good reason for limiting the scope of the term "Indians" itself.

For these reasons I think the question referred to us should be answered in the affirmative.

CANNON, J. (Crocket J. concurring).—The question referred to us for hearing and consideration pursuant to section 55 of the *Supreme Court Act* is:

Does the term "Indians" as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the province of Quebec?

I answer the question in the affirmative.

In the evidence given by Sir George Simpson before the Select Committee of the Hudson Bay Company, it appears that in 1857, the Eskimos were included amongst the so-called Indian races classified in the census prepared by the Company and the report of the Committee must have been known to the legislature at Westminster in 1867.

The correspondence between Sir John Macdonald and Sir Hector Langevin with reference to the relief to be given to the Montagnais and Eskimo Indians of the Lower St. Lawrence would show that these two Fathers of the Confederation always understood that the English word "Indians" was to be construed and translated as "sauvages" which admittedly did include *all* the aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Company.

I do not insist on these two points which have been well treated by my brother Kerwin with whom I agree. I would like to add the following considerations.

As to the exact meaning of the word "Indians" at the time of Confederation, I believe that we have in the official documents "respecting the Proposed Union of the British North American Provinces" presented to both Houses of Parliament of the United Kingdom, on the 8th of February, 1867, all we need to form an opinion of the significance of this word and its scope.

In the English Text of the Report of the Resolutions adopted at a Conference of Delegates from the provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held

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at the City of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, Resolution 29 reads as follows:

The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

1.
2
3
* * * *

29. Indians and Lands Reserved for the Indians.

The official French translation of this resolution, as I find it in "Débats Parlementaires sur la Question de la Confédération des Provinces de l'Amérique Britannique du Nord, imprimés par Ordre de la Législature par Hunter, Rose et Lemieux, Imprimeurs, Parlementaires, 1865," follows:

29. Le parlement général aura le pouvoir de faire des lois pour la paix, le bien-être et le bon gouvernement des provinces fédérées (sans toutefois, pouvoir porter atteinte à la souveraineté de l'Angleterre), et en particulier sur les sujets suivants:

1.
2.
3.
* * * *

29. Les *Sauvages* et les terres réservées pour les Sauvages.

The petition to the Queen passed on the 13th of March, 1865, by the Legislature reproduces, as to this sub-paragraph, word for word the Quebec resolutions, and the French translation also gives to the General Parliament under Section 29,—"Les Sauvages et les terres réservées pour les Sauvages."

This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.

The official French version of the *British North America Act* also translates "Indians" by "Sauvages." See Statut du Canada, 1er Parlement, 31 Victoria, 1867-1868, Imprimé

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par Malcolm Cameron, Imprimeur de Sa Très Excellente Majesté la Reine—Ottawa, 1867, page 24, section 91, sous-paragraphe 24.

CROCKET, J.—I am of opinion that the question referred to us should be answered in the affirmative for the reasons stated by my Lord the Chief Justice and my brothers Cannon and Kerwin.

KERWIN, J. (Cannon and Crocket JJ. concurring)—The question should be answered in the affirmative. In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians," the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation. The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Company. And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question.

From the date of the visit of Champlain to this country in 1625 when he discovered "une nation de sauvages qui habitent ces pays, qui s'appellent Exquimaux," and of Radisson who in an account of his travels and experiences refers to "Indians called Esquimos"; through the reports of the missionaries and the correspondence between France and New France, the Indians are referred to as "sauvages" and the Eskimos as "sauvages esquimaux." Later we find by referring to such books as might be expected to be known to the Fathers of Confederation and to the British Parliament statements indicating that the Eskimo was considered as one of the Indian tribes. The following is a partial list of such books:—

1855.—Webster's American Dictionary of the English language defines the Esquimaux: "A nation of Indians inhabiting the northwestern parts of North America."

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1855.—Adrien Guibert in his Geographical Dictionary, classifies the Eskimos among the Indians of America.

1856.—In "The Indian Races of North and South America," Charles de Wolf Brownell, an American author, speaks of the Esquimaux Indians and devotes a chapter to the study of their manners and personal appearance.

1857.—In the "Gazetteer of the world," published in London by A. Fullerton & Co., the Eskimos are dealt with as Indians, who are the aboriginal people of the New Continent; mentions are made of Eskimos in opposition to "common Indian" and to "other Indians."

1857.—In an Imperial Blue Book is a Report from the Select Committee on the Hudson's Bay Company in which the Eskimos are enumerated among the Indians, are classified with the Indian races and are shown on a map denoting the boundaries and locations of various Indian tribes.

1857.—In the evidence given before a Select Committee of the House of Commons (Imperial), appointed to consider the state of the British Possessions in North America, Sir George Simpson, Governor of the territories of the Hudson's Bay Company, includes the Eskimos in the Indian population.

1869.—In an "Esquisse sur le Nord-Ouest de l'Amérique" by Mgr. Taché, Bishop of St. Boniface, Manitoba, reference is made to the aboriginal tribes being called Indians (Sauvages) and the Esquimaux are dealt with at length as one of the five linguistic Indian families.

A word should be added as to Webster's Dictionary. Counsel for the Dominion pointed out that in the 1913 edition of Webster's New International Dictionary, as well as the 1923, 1925, and 1927 editions, "Indian" is defined as being "a member of any of the aboriginal American stocks excepting the Eskimauan." However, in the earlier 1855 edition, then known as The American Dictionary of the English Language, appears the following:—

"Indian", A. General name of any native of the Indies;; as an East Indian or West Indian. It is particularly applied to any native of the American continent.

In the 1865 edition of what had then become the Dictionary of the English Language, "Indians" were defined as

Indians are the aboriginal inhabitants of America so called originally from the idea on the part of Columbus and the early navigators of the identity of America with India.

It was only in the 1913, 1923 and 1927 editions that the earlier definition was departed from while in the 1934 edition of Webster's International Dictionary, "Indian" is defined as follows:—

Indian. 5. A member of the aboriginal American race; an American, or Red, Indian; an Amerind * * * About 75 linguistic families or stocks are recognized in North America, and about 75 more in South America and the West Indies. Some stocks comprise many tribes speaking distinct, but related, languages. The 16 stocks listed below occupied more than half the area of the continent and comprised a large majority of the Indians at the time of the discovery of North America, Algonquian, Athapascan, *Eskimauan,* Iroquoian, Mayan, Muskhegean, Siouian, and Uto-Aztocan.

It is true that in the New English (Oxford) Dictionary, volume 5, under the heading "Indian" appears the following:—

A. * * *

2. Belonging or relating to the race of original inhabitants of America and the West Indies.

B. * * *

2. A member of any of the aboriginal races of America or the West Indies; an American Indian.

The Eskimos, in the extreme north, are usually excluded from the term; as are sometimes the Patagonians and Fuegians in the extreme south.

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.

As pointed out in a memorandum of November 1st, 1918, by the Deputy Superintendent General of Indian Affairs to the Minister, the Eskimos had never been mentioned in any legislation up to that time but by chapter 47 of 14-15 George V, assented to July, 1924, section 4 of *The Indian Act,* Chapter 81, R.S.C., 1906, was amended by adding thereto the following subsection:—

(2) The Superintendent General of Indian Affairs shall have charge of Eskimo affairs.

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This was afterwards repealed and even if the repeal had never occurred perhaps no argument could be adduced from the provisions of the amending statute but it is significant that in 1879 a letter from the Very Reverend Edmond Langevin to the Postmaster General of Canada, referring to the necessitous condition of "the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence below the Saguenay" was sent by the addressee to Sir John A. Macdonald as Superintendent General of Indian Affairs with the following covering letter:—

Ottawa, 20 January, 1879.

My dear Sir John,

The enclosed letter from the Very Reverend Edmond Langevin, Vicar General of Rimouski, calls my attention to the position of the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence, below the Saguenay. He says that the amount that used to be given to these Indians was seventy eight cents a head, and that now it is only thirty eight cents. These poor people are starving they can't cultivate the land, which in that region is hardly cultivable, and have had no provision made for them by the Government, and he requires on their behalf that we should come to their help. Will you kindly see that they are treated as well as we treat the Indians of our new territories. Of course I leave the whole matter in yours hands.

Yours truly,
Hector L. Langevin.

Right Honble Sir John A. Macdonald, K.C.B., Ottawa.

The matter referred to was commented upon by the Deputy Superintendent General of Indian Affairs in the following report:—

To the Right Hon. Sir John A. Macdonald, K.C.B.
Supt. General of Indian Affairs

Ottawa, 24 jany, 1879.

With reference to the letter of the 20th Instant (placed herewith) from the Honourable Hector Langevin, enclosing a letter of the 13th Instant, from the Very Reverend Edmond Langevin, of Rimouski, in the province of Quebec, relative to the insufficient relief given to the Montagnais and Esquimaux Indians of the Lower St. Lawrence, the undersigned has the honor to report that frequent representations to the same effect have been made to the Department and that last year he endeavoured to induce the then Superintendent General of Indian Affairs to ask Parliament for a larger grant, but that when the proposed estimates for the year 1878-79 were submitted to Council for revision. the proposed increase of $2,000 to the Parliamentary Grant for these Indians was struck out.

The present Government has however sanctioned the Supplementary Estimates for 1878-9 which will be submitted to Parliament at the approaching Session being anticipated by granting the said sum of $2,000.00. and the undersigned has moreover increased the grant for those Indians by that amount in the proposed estimates for the year 1879-80,

with the hope that the Government will sanction and Parliament confirm the same.

All respectfully submitted,

L. Van Koughnet,
Deputy Supt. General of Indian Affairs.

That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *British North America Act*, at that time and shortly thereafter.

Special attention should also be paid to the report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland, presented in 1857. As appears from the Imperial Blue Books on Affairs Relating to Canada, the Committee reported:—

> It is a matter of great difficulty to obtain reliable information respecting the Indian population, their migratory habits, and the vast extent of country over which they are spread, misleading the calculations, and rendering it almost impracticable to prepare a satisfactory census. The following estimates have been compiled with great care, from a mass of documents and the actual personal knowledge of several of the Company's officers, tested by comparison with published statements, especially those presented to Government in 1846 by Messrs. Warre and Vavasour, and those of Colonel Lefroy, R.A., contained in a paper read before the Canadian Institute.

The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:

Add Whites and half breeds in Hudson's Bay Territory, not included	6,000
Add Esquimaux not enumerated	4,000
Total	158,960

The *Indian Races* shown in detail in the foregoing Census may be classified as follows:—

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the Northwest Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

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The Esquimaux, it will be seen, are included among the Indian races and this is based apparently upon the evidence of Sir George Simpson, which had been taken before the Committee. Questions 1062 and 1472, together with the answers, are as follows:—

1062. Mr. GREGSON: What mode have you of ascertaining of the population of the Indians? We have lists of the Indians belonging to various posts; we have compared and checked them with the report of the Government officers who went to Vancouver's Island some years ago, as regards the tribes to the west of the mountains, and with Colonel Lefroy's lists, as regards those on the east side, and we have arrived at this estimate of the population.

1472. Mr. ROEBUCK: Will you state the total?—The Indians, east of the mountains, 55,000; West of the mountains, 80,000; Esquimaux, 4,000.

While counsel for the Dominion sought to draw from the answer to Question 1472 the inference that Sir George Simpson had not treated the Esquimaux as one of the Indian tribes, I think the answer is not susceptible of that interpretation and it is certainly not the one that the Committee adopted.

After considering the reports of missionaries, explorers, agents, cartographers and geographers, included in the cases submitted on behalf of the Dominion and province of Quebec, I do not believe anything further may be usefully added. The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the *British North America Act* but the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act.

The question referred was answered in the affirmative.

Section 4 of the *Lord's Day Act* is as follows: "It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour."

I find that—

(a) the ordinary calling of the plaintiff company was as a real estate broker;

(b) the contract made on Sunday was made in the ordinary course of the plaintiff's real estate business;

(c) there is no exception as provided in s. 4 in any provincial Act or in any other section of the *Lord's Day Act* referred to above;

(d) there is no conflict with the *Sunday Observance Act*, R.S.B.C. 1936, c. 272 [now R.S.B.C. 1948, c. 318].

I have considered amongst others the following: *Bethune* v. *Hamilton* (1840), 6 U.C.Q.B. (O.S.) 105; *Simpson* v. *Proestler* (1913), 13 D.L.R. 191, 21 Can. C.C. 415; *Cote* v. *Friesen* (1921), 31 Man. R. 334; *R.* v. *Laity* (1913), 13 D.L.R. 532, 21 Can. C.C. 417, 18 B.C.R. 443; 7 Hals, 2nd ed., p. 155.

Action dismissed with costs.

Action dismissed.

JOHANNESSON et al. v. RURAL MUNICIPALITY OF WEST ST. PAUL et al.

Supreme Court of Canada, Rinfret C.J.C., Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ. October 12, 1951.

Constitutional Law II, III A—Exclusive federal authority in relation to aeronautics—Licensing and location of aerodromes included — Matter transcending provincial powers — Within federal residuary power as matter of national dimensions and general Dominion concern—Aeronautics Act (Can.)—

Aeronautics or aerial navigation is a matter falling within the exclusive legislative authority of the Dominion Parliament to make laws for the peace, order and good government of Canada and it includes within its scope the power to license, regulate and locate aerodromes. Consequently, provincial authorizing legislation, and a municipal by-law passed thereunder, dealing with licensing and prohibiting of aerodromes are *ultra vires*. Moreover, the field has been occupied by the *Aeronautics Act*, R.S.C. 1927, c. 3.

While the *Aeroncutics* case, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, was rested specifically on s. 132 of the *B.N.A. Act* in that the *Aeronautics Act* there in question was enacted pursuant to a "British Empire" Treaty, nevertheless the renunciation of

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the Treaty by Canada and its adherence, in its own right, to the Chicago Convention on International Civil Aviation, which became effective on April 4, 1947, did not abrogate its legislative authority in relation to aeronautics. This is a matter transcending those coming within the classes of subjects in s. 92 of the *B.N.A. Act*. It was the concern of the Dominion as a whole, having attained such dimensions as to fall within the opening words of s. 91.

Cases Judicially Noted: *Re Aerial Navigation*, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, [1931] 3 W.W.R. 625; *Re Regulation & Control of Radio Communication*, [1932], 2 D.L.R. 81, A.C. 304, 1 W.W.R. 563, 39 C.R.C. 49; *A.-G. Ont.* v. *Canada Temperance Federation*, [1946], 2 D.L.R. 1, A.C. 193, 2 W.W.R. 1, 85 Can. C.C. 225, 1 C.R. 229, apld; *Reference re Weekly Rest in Industrial Undertakings Act*, [1937], 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299, refd to.

Statutes Considered: *Aeronautics Act*, R.S.C. 1927, c. 3; *Municipal Act*, R.S.M. 1940, c. 141, s. 921; *B.N.A. Act*, ss. 91, 92, 132.

APPEAL from a judgment of the Manitoba Court of Appeal, [1950] 3 D.L.R. 101, affirming a judgment of Campbell J., [1949] 3 D.L.R. 694, dismissing an application to declare *ultra vires* s. 921 of the *Municipal Act* (Man.) and a by-law passed thereunder. Reversed.

C. I. Keith, K.C., for appellants; *W. P. Fillmore*, K.C., for respondent; *F. P. Varcoe*, K.C. and *D. W. Mundell*, K.C. and *A. G. Eggertson*, K.C., for A.-G. Can.; *W. J. Johnston*, for A.-G. Man.

RINFRET C.J.C.:—Notwithstanding that the International Convention under consideration in the *Aeronautics* case [*Re Aerial Navigation*], [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, was denounced by the Government of Canada as of April 4th, 1947, I entertain no doubt that the decision of the Judicial Committee is in its pith and substance that the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament. In the language of their Lordships at p. 70 D.L.R., p. 121 C.R.C., p. 77 A.C.: "Aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

In those circumstances it would not matter that Parliament may not have occupied the field. But, moreover, the convention on International Civil Aviation, signed at Chicago on December 7, 1944, has since become effective; and no doubt what was said in the *Radio* reference by Viscount Dunedin [*Re Regulation & Control of Radio Communication*], [1932], 2 D.L.R. 81 at pp. 84-5, A.C. 304 at 313, 39 C.R.C. 49 at pp. 83-4, applies here. Although the Convention might not be looked upon as a Treaty under s. 132 of the *B.N.A. Act*, it comes to the same thing.

I fail to see how it can be argued that the Dominion Parliament has not occupied the field. The *Aeronautics Act*, R.S.C. 1927, c. 3, as amended by 1944-45, c. 28, 1945, c. 9, and 1950, c. 23, makes it the duty of the Minister "to supervise all matters connected with aeronautics . . . . to prescribe aerial routes . . . . to prepare such regulations as may be considered necessary for the control or operation of aeronautics in Canada . . . . and for the control or operation of aircraft registered in Canada wherever such aircraft may be . . . . for the licensing of navigation and the regulation of all aerodromes and air-stations, etcetra."

Such Regulations have been passed under the authority of the *Aeronautics Act* by P.C. 2129 [[1948] S.O.R. 1348], part of which deals with the subject-matter of airports and provides for the issuing of licences by the Minister. In the circumstances, the Dominion legislation occupies the field, or at least so much of it as would eliminate any provincial legislation, and more particularly, that here in question.

I think, therefore, that the provincial legislation under discussion is *ultra vires* and the by-law adopted by the respondent, the Rural Municipality of West St. Paul, falls with it.

The appeal, therefore, should be allowed with costs in this Court against the respondent, but without costs to either intervenant. As the parties had agreed that there would be no costs awarded in the Courts below, this agreement, of course, should stand.

KERWIN J.:—This is an appeal by Mr. and Mrs. Johannesson against a judgment of the Court of Appeal for Manitoba [[1950] 3 D.L.R. 101, 66 C.R.T.C. 59], affirming an order of Campbell J. [[1949] 3 D.L.R. 694] dismissing their application for an order declaring that s. 921 of the *Municipal Act*, R.S.M. 1940, c. 141, was *ultra vires* as not being within the legislative competence of the Legislature, and that By-law 292 of the Rural Municipality of West St. Paul, passed May 27, 1948, in pursuance of such section, was, therefore, null and void.

Section 921 of the *Municipal Act* appears in Division II "Public Safety and Amenity" under the subhead "Aerodromes" and reads as follows:

"921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain."

This section first appeared in 1920, being enacted by s. 18 of c. 82 of the statutes of that year as para. (*y*) of s. 612 of

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the *Municipal Act*, R.S.M. 1913, c. 133. That s. 612 was one of a group of sections appearing in Part IX of the Act "Legislative Powers of Councils", under the subhead "Various Trades and Occupations". It next appeared in s. 97 of the Consolidated Amendments to the Municipal Act, 1924, [c. 133] and then, in 1933, as s. 910 in Division II of the *Municipal Act*, 1933, c. 57, "Public Safety and Amenity" under the subhead "Aerodromes"—the same relevant position that the present s. 921 now occupies.

The enacting parts of By-law 292 of the Rural Municipality of West St. Paul provide:

"1. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued within that part of The Rural Municipality of West St. Paul, in Manitoba, bounded as follows:

"All those portions of River Lots One (1) to Thirty-three (33) both inclusive, of the Parish of Saint Paul, in Manitoba, according to a plan of same registered in the Winnipeg Land Titles Office as No. 3992, which lie to the East of the Eastern Limit of the Main Highway as said Highway is shewn on said Plan No. 3992.

"2. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued in any other part of the said Rural Municipality of West St. Paul, unless and until a license therefor shall first have been obtained from the said Municipality.

"3. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in that part of The Rural Municipality of West St. Paul in Manitoba described in paragraph One (1) hereof.

"4. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in any other part of the said Municipality unless and until a license therefor shall first have been obtained from the said Municipality."

Section 921 of the *Municipal Act* does not confer powers to provide generally for zoning, or for building restrictions; the powers are specifically allotted with reference to "aerodromes or places where aeroplanes are kept for hire or gain". The by-law follows the section so that, if the latter is *ultra vires* the provincial Legislature, the former cannot be upheld.

The circumstances which give rise to the present dispute are important as showing the far-reaching effect of the pro-

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visions of the section. The appellant Johannesson had been engaged in commercial aviation since 1928 and held an air transport licence, issued by the Air Transport Board of Canada, to operate an air service at Winnipeg and Flin Flon. The charter service which he operated under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and had substantially increased in volume over the years. This service was operated with light and medium weight planes, which in the main were equipped in summer with floats and in winter with skis in order to permit landing on the numerous lakes and rivers in this territory, and these planes had to be repaired and serviced in Winnipeg, which was the only place within the territory where the necessary supplies and any facilities were available for that purpose. The use by small planes of a large airfield, such as Stevenson Airport near Winnipeg which was maintained for the use of large transcontinental airplanes, was impractical and would eventually be prohibited. No facilities existed on the Red River in Winnipeg for the repairing and servicing of planes equipped with floats, and repairs could only be made to such planes by dismantling them at some private dock and transporting them, by truck, through Winnipeg to Stevenson Airport. After a long search by Johannesson in the suburbs of Winnipeg for a site that would combine an area of level land of sufficient area and dimensions and location to comply with the Regulations of the Civil Aviation Branch of the Canadian Department of Transport relating to a licensed air-strip with access to a straight stretch of the Red River of sufficient length to be suitable for the landing of airplanes equipped with floats, he found such a location (but one only) in the Rural Municipality of West St. Paul and acquired an option to purchase it but, before the transaction was completed By-law 292 was passed. Title to the land was subsequently taken in the name of both appellants and these proceedings ensued. The Attorney-General of Canada and the Attorney-General of Manitoba were notified but only the latter was represented before the Judge of first instance and the Court of Appeal. Leave to appeal to this Court was granted by the latter.

On behalf of the appellants and the Attorney-General of Canada, reliance is placed upon the decision of the Judicial Committee in the *Aeronautics* case, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108. Irrespective of later judicial comments upon this case, in my view it is a decision based entirely upon the fact that the Dominion *Aeronautics Act* there in question had

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been enacted pursuant to an International Convention of 1919 to which the British Empire was a party and, therefore, within s. 132 of the *B.N.A. Act*:

"132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

However, in the subsequent decision in the *Labour Conventions* case (*Reference re Weekly Rest in Industrial Undertakings Act*), [1937], 1 D.L.R. 673, A.C. 326, Lord Atkin, who had been a member of the Board in the *Aeronautics* case, said with reference to the judgment therein [p. 681]: "The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132 therefore clearly applied: and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly *obiter*, the case could not be said to be an authority on the matter now under discussion."

The remarks of Viscount Simon L.C. in *A.-G. Ont.* v. *Canada Temperance Federation*, [1946], 2 D.L.R. 1, A.C. 193, 85 Can. C.C. 225, must be read when considering the words of Lord Sankey L.C. in the *Aeronautics* case in another connection. At the moment all I am concerned with emphasizing is that the *Aeronautics* case decided one thing, and one thing only, and that is that the matter there discussed fell within the ambit of s. 132 of the *B.N.A. Act*.

At this stage it is necessary to refer to a matter that was not explained to the Courts below. According to a certificate from the Under-Secretary of State for Foreign Affairs, the Convention of 1919 was denounced by Canada, which denunciation became effective in 1947. This was done because on February 13, 1947, Canada had deposited its Instrument of Ratification of the Convention on International Civil Aviation signed at Chicago December 8, 1944, and which Convention came into force on April 4, 1947. With the exception of certain amendments that are not relevant to the present discussion, the *Aeronautics Act* remains on the statute books of Canada in the same terms as those considered by the Judicial Committee in the *Aeronautics* case. Section 132 of the *B.N.A. Act*, therefore ceased to have any efficacy to permit Parliament to legislate upon the subject of aeronautics.

Nevertheless the fact remains that the Convention of 1919 was a Treaty between the Empire and foreign countries and

that pursuant thereto the *Aeronautics Act* was enacted. It continues as c. 3 of the Revised Statutes of Canada, 1927, as amended. Under s. 4 of that Act, as it stood when these proceedings were commenced, the Minister, with the approval of the Governor in Council, had power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular but not to restrict the generality of the foregoing, he might make regulations with respect to "(*c*) the licensing, inspection and regulation of all aerodromes and air-stations". Pursuant thereto Regulations have been promulgated dealing with many of the matters mentioned in the section, including provisions for the licensing of air ports. If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada, it falls under the "Peace, Order and good Government" clause of s. 91 of the *B.N.A. Act* since aeronautics is not a subject-matter confined to the Provinces by s. 92. It does not fall within head (8), "Municipal Institutions", as that head "simply gives provincial legislatures the right to create a legal body for the management of municipal affairs . . . The extent and nature of the functions" the provincial Legislature "can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8": *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348 at p. 364. Nor, on the authority of the same decision is it within head (9): "Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes." Once it is held that the subject-matter transcends "Property and Civil Rights in the Province" (head (13)) or "Generally all Matters of a merely local or private Nature in the Province" (head (16)), these two heads of s. 92 have no relevancy.

Now, even at the date of the *Aeronautics* case, the Judicial Committee was influenced (*i.e.*, in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions. That that is so at the present time is shown by the terms of the Chicago Convention of 1944 and the provisions of the Dominion *Aeronautics Act* and the Regulations thereunder referred to above. The affidavit of the appellant Johannesson, from which the statement of facts was culled, also shows the importance that the subject of air navigation has attained in Canada. To all of which

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may be added those matters of everyday knowledge of which the Court must be taken to be aware.

It is with reference to this phase of the matter that Viscount Simon's remarks in *A.-G. Ont.* v. *Canada Temperance Federation*, [1946], 2 D.L.R. at p. 5, A.C. at p. 205, 85 Can. C.C. at pp. 229-30, must be read. What was there under consideration was the *Canada Temperance Act*, originally enacted in 1878, and Viscount Simon stated: "In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case* . . . . and the *Radio Case* . . .), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures." This statement is significant because, while not stating that the *Aeronautics* case was a decision on the point, it is a confirmation of the fact that the Board in the *Aeronautics* case considered that the subject of aeronautics transcended provincial legislative boundaries.

The appeal should be allowed, the orders below set aside, and judgment should be entered declaring s. 921 of the Act *ultra vires* and By-law 292 of the Rural Municipality of West St. Paul null and void. By agreement there are to be no costs in the Courts below but the appellants are entitled to their costs in this Court against the municipality. There should be no order as to costs for or against either intervenant.

The judgment of TASCHEREAU and ESTEY JJ. was delivered by

ESTEY J.:—The appellants submit that s. 921 of the *Municipal Act* (R.S.M. 1940, c. 141) is legislation in relation to aeronautics and, therefore, beyond the competency of the Legislature of Manitoba to enact.

"921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain."

The facts out of which this issue arises are as follows:

The appellant, Konrad Johannesson, has been engaged in commercial aviation in northern Manitoba and Saskatchewan since 1928. He desired an airport at Winnipeg and on September 27, 1947, obtained an option upon, and on April 20, 1948, purchased a portion of River Lot 33 Pl. 3992 in the

respondent municipality for the purpose of equipping and maintaining it as an aerodrome.

The respondent municipality, under date of May 27, 1948, passed By-law No. 292, by virtue of the foregoing s. 921. The effect of this by-law may be briefly expressed: (a) As to Lots 1 to 33, Pl. 3992, in the respondent municipality, the erection or maintenance of any aerodrome or machine shop for testing or repairing aircraft is entirely prohibited; (b) in the remaining portion neither of the foregoing may be erected or maintained without a licence from the respondent municipality.

The appellants, on October 22, 1948, asked the Court to declare s. 921 *ultra vires* of the Legislature of Manitoba and the enactment of By-law 292 by the respondent municipality a nullity.

Campbell J. [[1949] 3 D.L.R. 694] held that the provincial Legislature had jurisdiction to enact s. 921 and that the by-law was valid. His judgment was affirmed by a majority of the Court of Appeal in Manitoba, Coyne J.A. dissenting. [[1950] 3 D.L.R. 101, 66 C.R.T.C. 59]

The Attorneys-General for Manitoba and the Dominion (the latter for the first time in this Court) have intervened and contended respectively that the Province has and has not competent authority to enact s. 921.

The judgments in the Court below proceed upon the basis that the Aeronautics Convention in Paris, ratified on behalf of the British Empire on June 1, 1922, was still in effect. Mr. Varcoe, on behalf of the Attorney-General of Canada, however, informed the Court that this Convention had been abrogated by the Civil Aviation Convention in Chicago in 1944, which became binding on Canada on April 4, 1947. This is important as the Chicago Convention, unlike the Paris Convention, is signed by Canada in her own right and, therefore, s. 132 of the *B.N.A. Act* has no application in determining the jurisdiction of the Parliament of Canada and the provincial Legislatures in relation thereto: *Radio* case, [1932], 2 D.L.R. 81, A.C. 304, 39 C.R.C. 49; *Labour Conventions* case, [1937], 1 D.L.R. 673, A.C. 326. This does not, however, mean that the *Aeronautics* case, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, is of no importance in a consideration of the present issue. In that case the Judicial Committee considered three questions:

"(1) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the

Convention entitled 'Convention relating to the Regulation of Aerial Navigation'?

"(3) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the Aeronautics Act, R.S.C. 1927, c. 3?

"(4) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting:— . . . .

"(c) the licensing, inspection and regulation of all aerodromes and air stations?"

The Paris Convention, drawn up at the Peace Conference in Paris and dated October, 1919, was ratified by His Majesty on behalf of the British Empire June 1, 1922. Canada already had enacted in 1919 the *Air Board Act*, (1919 (Can.), c. 11), amended it in 1922 (1922 (Can.), c. 6), and styled it the *Aeronautics Act* (R.S.C. 1927, c. 3). It will be observed that the *Air Board Act* was enacted in the same year that the Paris Convention was drawn up, no doubt with the Convention in mind, but the latter is not mentioned and the comprehensive language of the statute deals with aeronautics in all its phases. This is evident from the following provisions:

"3. It shall be the duty of the Air Board,—

"(a) to supervise all matters connected with aeronautics;

"(f) to prescribe aerial routes;

"(k) to investigate, examine and report on all proposals for the institution of commercial air services within or partly within Canada or the limits of the territorial waters of Canada;

"(l) to consider, draft, and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada; and,

"(m) to perform such other duties as the Governor in Council may from time to time impose."

It was this legislation that the Privy Council had before it in the *Aeronautics* case. Moreover, it should be noted that while Q. (1), as submitted by the Governor in Council, dealt with the legislative jurisdiction of Canada in relation to the Paris Convention, Qq. (3) and (4) concerned the legislative jurisdiction of the Parliament of Canada to enact s. 4 of the *Aeronautics Act* and the Regulations thereunder without regard to the Convention.

In the course of the judgment itself their Lordships stated at p. 60 D.L.R., p. 111 C.R.C.: "The determination of these

questions depends upon the true construction of ss. 91, 92 and 132 of the B.N.A. Act."

Their Lordships suggest that it may come under s. 91(2), (5) and (9), but expressly state that it does not come under s-s. (10) (Navigation and Shipping). They also point out that it does not come under Property and Civil Rights (s. 92(13)) and then state [p. 67 D.L.R., p. 118 C.R.C.]: "Transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics."

Then, after discussing s. 132, they conclude [p. 70 D.L.R., p. 121 C.R.C.]: "To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91 (2), (5) and (7), it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

Their Lordships, apart from s. 132, and in support of their answers to Qq. (3) and (4), were of the opinion that legislation in relation to aeronautics was within the competence of the Parliament of Canada. The remark of Viscount Dunedin, in the *Radio* case, [[1932] 2 D.L.R. at p. 82, 39 C.R.C. at p. 82], that "the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the B.N.A. Act", and that of Lord Atkin in the *Labour Conventions* case [[1937]1 D.L.R. at p. 681] that "The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries", particularly when read in relation to their context, do not detract from the foregoing, while the observations of Viscount Simon L.C. in the *Canada Temperance Federation*

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case, [1946], 2 D.L.R. 1, A.C. 193, 85 Can. C.C. 225, would appear to support the foregoing view when, at p. 5 D.L.R., p. 230 Can. C.C., p. 205 A.C., he states: "In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case* and the *Radio Case*), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures."

The Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive jurisdiction of the Dominion, it follows that the Province cannot legislate in relation thereto, whether the precise subject-matter of the provincial legislation has, or has not already been covered by the Dominion legislation.

It is then submitted that if aeronautics is within the legislative competence of the Parliament of Canada, including the power to license and regulate aerodromes, it would not include the location and continuation of aerodromes, which would be a provincial matter under Property and Civil Rights. With great respect, it would appear that such a view attributes a narrower and more technical meaning to the word "aeronautics" than that which has been attributed to it generally in law and by those interested in the subject. Indeed, the definition adopted by Dysart J.A. [[1950] 3 D.L.R. at p. 123, 66 C.R.T.C. at p. 82], as he found it in 2 Corpus Juris Secundum, pp. 900-1, "The flight and a period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely upon the ground", contemplates the operation of the aeroplane from the moment it leaves the earth until it again returns thereto. This, it seems, in itself makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation. This view finds support in the fact that legislation in relation to aeronautics and aerial navigation, not only in Canada, but also in Great Britain and the United States, deals with aerodromes, as well as the Conventions above mentioned. Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when consider-

ing the matter of jurisdiction, to treat them as independent one from the other.

The submission that in the granting of the licence the sufficiency of the location will always be considered and might even be the controlling factor in the granting or refusing of a licence, in so far as it may be of assistance, emphasizes the importance of the location of the aerodrome and of the essential part the aerodrome plays in any scheme of aeronautics. Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the provincial Legislatures.

It is submitted that s. 921 is zoning legislation, as that term is now understood in municipal legislation. The general provisions for the enactment of zoning by-laws are contained in ss. 904, 905 and 906 of this statute. As notwithstanding this general provision such legislation may be enacted under other sections, it is necessary to determine the nature and character of the provisions of s. 921. The foregoing ss. 904, 905 and 906 are typical of legislation authorizing zoning by-laws. The end and purpose of zoning legislation, as the name indicates, is to authorize the municipality to pass by-laws in respect of certain areas and make those areas subject to prohibitions and restrictions designed to provide uniformity within those particular areas. The Legislature, in enacting s. 921, provided that, without regard to the nature and character or the use and purpose made of the area, the municipality may prohibit entirely, or permit only under a licence issued by it, an aerodrome within certain areas. Such legislation is in pith and substance in relation to aerodromes and, therefore, in relation to aeronautics rather than to zoning.

The appeal should be allowed with costs to the appellants, Konrad Johannesson and Holmfridur M. E. Johannesson, against the respondent municipality.

The judgment of KELLOCK and CARTWRIGHT JJ. was delivered by

KELLOCK J.:—The question in this appeal is as to the constitutional validity of the following section of the *Municipal Act*, namely:

"921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain."

Purporting to act under this legislation, the respondent

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municipality enacted a by-law prohibiting aerodromes in a defined area in the municipality and permitting aerodromes elsewhere in the municipality only upon licence. The appellant, who holds an air transport licence issued by the Air Transport Board of Canada to operate an air service at both the City of Winnipeg and the Town of Flin Flon, has been operating a charter aeroplane service in Manitoba and Saskatchewan for some years, using mainly float and ski planes. For the purposes of his business, the appellant acquired an area in the respondent municipality having access to a stretch of the Red River. These premises were acquired having in view the requirements of the Department of Transport with respect to aerodromes, and it was subsequent to the appellant's acquisition that the by-law in question was passed. The appellant's motion for an order declaring the above legislation and by-law *ultra vires* was dismissed by the Judge of first instance, [[1949] 3 D.L.R. 694], and this order was affirmed by the Court of Appeal [[1950] 3 D.L.R. 101, 66 C.R.T.C. 59], Coyne J.A. dissenting.

In this Court, we were informed on behalf of the Attorney-General of Canada that the Convention under consideration in the *Aeronautics* case, [1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, was denounced by the Government of Canada as of April 4, 1947, on which date also the Convention on International Civil Aviation, signed at Chicago on December 7, 1944, became effective. Insofar, therefore, as the above decision depends for efficacy upon s. 132 of the *B.N.A. Act*, that foundation has ceased to exist.

In the *Aeronautics* case, the Privy Council held that the "whole field of legislation in regard to aerial navigation belongs to the Dominion" by virtue of s. 132, s. 91 (2), (5) and (7), and the residuary power in s. 91 to make laws for the peace, order and good government of Canada. Their Lordships expressed the view also, at p. 67 D.L.R., p. 118 C.R.C., that aeronautics was not a class of subject within property and civil rights, and at p. 70 D.L.R., p. 121 C.R.C., that it was not a subject vested by specific words in the Provinces. On the latter page, their Lordships went on to say: "Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

It is true, as the judgment itself shows, and as later pronouncements of the Judicial Committee have repeated, that s. 132 was the leading consideration in the judgment. In the *Radio Reference*, [1932], 2 D.L.R. 81, A.C. 304, 39 C.R.C. 49, the Convention there in question was not one to which s. 132 was applicable, but, as pointed out by Lord Atkin in [1937], 1 D.L.R. at p. 681, A.C. at p. 351, that Convention dealt with classes of matters which did not fall within s. 92 but entirely within subject-matters of Dominion jurisdiction under s. 91. In these circumstances, their Lordships said in the *Radio* case that, although the convention there in question was not such a treaty as fell within s. 132, it came to the same thing. At p. 84 D.L.R., p. 83 C.R.C., Viscount Dunedin said: "The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention: and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada."

To the extent, therefore, to which the subject-matter of the Chicago Convention of 1944 falls within s. 91, the language of Viscount Dunedin is equally apt. In my opinion, that subject-matter is exclusively within Dominion jurisdiction.

In my opinion, the subject of aerial navigation in Canada is a matter of national interest and importance, and was so held in 1932. In the *Canada Temperance Federation* case, [1946], 2 D.L.R. at p. 5, A.C. at p. 205, 85 Can. C.C. at p. 230, Viscount Simon said: "In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures."

This statement is a recognition of the situation which is well known and understood in this country. It was quite frankly and quite properly admitted by Mr. Fillmore for the respondent, whose argument was merely that the Dominion had not in fact legislated in the field of s. 921 of the provincial statute.

It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of

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the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject-matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the Province that Parliament may not have occupied the field.

Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the Provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the Provinces. I think, therefore, that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject-matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.

The *Aeronautics Act*, R.S.C. 1927, c. 3, as amended by 1944-45, c. 28, 1945, c. 9, and 1950, c. 23, provides in part as follows:

"3. It shall be the duty of the Minister

"(*a*) to supervise all matters connected with aeronautics;

"(*f*) to prescribe aerial routes;

"(*l*) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada and for the control or operation of aircraft registered in Canada wherever such aircraft may be. [re-enacted 1950, c. 23, s. 2(4)]

"4(1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to [re-enacted 1950, c. 23, s. 3(1)]

"(c) the licensing, inspection and regulation of all aerodromes and air-stations;

"(d) the conditions under which aircraft may be used or operated; [re-enacted 1950, c. 23, s. 3(2)]

"(e) the conditions under which goods, mails and passengers may be transported in aircraft and under which any act may be performed in or from aircraft or under which aircraft may be employed; [re-enacted 1950, c. 23, s. 3(3)]

"(f) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified;

"(g) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;

"(h) aerial routes, their use and control;

"(i) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada and of aircraft registered in Canada wherever such aircraft may be; [re-enacted 1950, c. 23 s. 3(4)]

"(3) Every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year or to both fine and imprisonment. [enacted 1950, c. 23, s. 3(7)]

"(4) Every person who violates an order or direction of the Minister made under a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both fine and imprisonment. [enacted 1950, c. 23, s. 3(7)]

"12(1) Subject to the approval of the Minister, the Board may issue to any person applying therefor a licence to operate a commercial air service. [enacted 1944-45, c. 28, s. 6]

"(5) In issuing any licence, the Board may prescribe the routes which may be followed or the areas to be served and may attach to the licence such conditions as the Board may consider necessary or desirable in the public interest, and, without limiting the generality of the foregoing, the Board may impose conditions respecting schedules, places of call, carriage of passengers and freight, insurance, and, subject to

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the *Post Office Act*, the carriage of mail. [re-enacted 1950, c. 23, s. 7(3)]

"15(1) No person shall operate a commercial air service unless he holds a valid and subsisting licence issued under section twelve." [re-enacted 1950, c. 23, s. 9]

Regulations were passed under the authority of the above statute by P.C. 2129 of May 11, 1948. Part III deals with the subject-matter of "Airports". The following paragraphs are pertinent:

"1. No area of land or water shall be used as an airport unless it has been licensed as herein provided.

"2. Licences to airports may be issued by the Minister and may be made subject to such conditions respecting the aircraft which may make use of the airport, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Minister may direct.

"4. The licence of an airport may be suspended or cancelled by the Minister at any time for cause and shall cease to be valid two weeks after any change in the ownership of the airport, unless sooner renewed to the new owner.

"5. Every licensed airport shall be marked by day and by night as may be from time to time directed by the Minister.

"7(1) No person shall without authority of the Minister—

"(a) mark any unlicensed surface or place with any mark or display any signal calculated or likely to induce any person to believe that such surface or place is a licensed airport;

"(b) knowingly use or permit the use of an airport for any purposes other than those for which it has been licensed.

"(2) The onus of proving the existence of any authority or licence shall be upon the person charged.

"8. No water-craft shall cross or go upon that part of the water area forming part of any airport which it is necessary to keep clear of obstruction in order that aircraft may take off and alight in safety, having regard to the wind and weather conditions at the time, and every person in charge of a water-craft is guilty of a breach of these regulations if such craft crosses or goes upon such area after reasonable warning by signal or otherwise.

"9. There shall be kept at every licensed airport a register in which there shall be entered immediately after the alighting or taking off of an aircraft a record showing the nationality and registration marks of such aircraft, the name of the pilot, the hour of such alighting or taking off, the last point of call

before such alighting and the intended destination of the aircraft.

"10(1) Every licensed airport, and all aircraft and the goods therein shall be open to the inspection of any customs officer, immigration officer, officer or person holding or named in any Writ of Assistance or any officer of or other person authorized by the Minister, but no building used exclusively for purposes relating to the construction of aircraft or aircraft equipment shall be subject to inspection except upon the written order of the Minister.

"(2) All state aircraft shall have at all reasonable times, the right of access to any licensed airport, subject to the conditions of the licence."

In my opinion, just as it is impossible to separate intra-provincial flying from interprovincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole. The provincial legislation here in question must be held, therefore, to be *ultra vires,* and the by-law falls with it.

The appeal should therefore be allowed. By agreement, no costs were asked or awarded in the Courts below. I think, however, that the appellant should have his costs in this Court as against the respondent, but that there should be no other costs.

LOCKE J.:—The proceedings in this matter were initiated by notice of a motion to be made in the Court of King's Bench for an order declaring s. 921 of the *Municipal Act* to be *ultra vires* and the respondent municipality's By-law 292, enacted in part under the authority of that section, to be of no effect. On the hearing before Campbell J. [[1949] 3 D.L.R. 694], the Attorney-General for Manitoba appeared and supported the position for the municipality and the application was dismissed.

Section 921 provides that any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuation of aerodromes or places where airplanes are kept for hire or gain. The terms of the by-law are quoted verbatim in other judgments delivered in this matter and need not be repeated.

On the appeal [[1950] 3 D.L.R. 101, 66 C.R.T.C. 59] Dysart J.A. considered that s. 921 in so far as it authorizes a municipal corporation to prohibit the erection, within a described area, of an aerodrome intended for other than Dominion Government use, was *intra vires* and that the by-law was valid to that extent. He decided also that the requirement that a licence

(in the sense of a building permit) should be obtained was within provincial powers and the by-law, accordingly, effective to this further extent. As to the remainder of the by-law, he considered it to be *ultra vires.*

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Adamson J.A. was of the opinion that s. 921 of the *Municipal Act* would be within provincial powers if the words "licensing" and "regulating" and the words "maintenance and continuance" were deleted. With these amendments, the section would read: "Any municipal corporation may pass by-laws within certain defined areas preventing the erection of aerodromes or places where airplanes are kept for hire or gain."

As to the by-law, he considered paras. 1 and 3 to be *intra vires* if the words "and continued" were eliminated but that paras. 2 and 4 in their present form, were *ultra vires* as requiring a licence from the municipality to operate an aerodrome after location. He expressed the further view that if these paragraphs were amended to require merely a building permit prior to licensing by the Minister under the *Aeronautics Act,* they would be valid. Coyne J.A. dissented, considering s. 921 to be *ultra vires* the Province. The formal certificate of the Registrar of the Court of Appeal says that the Chief Justice of Manitoba and the late Mr. Justice Richards concurred in the result. While two members of the Court thus considered both the section and the by-law to be in part *ultra vires,* since neither the learned Chief Justice nor the late Richards J.A. expressed their views on these matters, the appeal was dismissed *in toto.* In the result, both the section and the by-law have been found *intra vires* the Province and the municipality respectively.

The material filed by the appellants on the motion shows that Konrad Johannesson, described as a flying service operator, has been engaged in commercial aviation since 1928 and holds a licence issued by the Air Transport Board of Canada to operate an air service at Winnipeg and Flin Flon: that the service which he operates under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and is conducted with light and medium planes mainly equipped in summer with floats and, in the winter with skis in order to permit landing on the numerous lakes and rivers in this territory and that these planes have to be repaired and serviced at Winnipeg, the only place within the territory where the necessary supplies and facilities are available for that purpose. It is said that there are no existing facilities on the Red River in Winnipeg for the repairing and servicing of

planes equipped with floats and that repairs can only be made for such planes by dismantling them at some private dock and transporting them by trucks to the Stephenson Airport. According to Johannesson's affidavit, he searched the areas surrounding Winnipeg for an area of level land having access to a straight stretch of the Red River of a sufficient length for the landing of airplanes equipped with floats, which would comply with the Regulations of the Civil Aviation Branch of the Department of Transport relating to a licensed air-strip, and the only portion of land which he had found was that purchased by him and his wife in the Rural Municipality of West St. Paul. The material does not state, and it was apparently assumed that the Court would take judicial notice of the fact that there is no body of water in the area between Emerson on the south and Selkirk on the north, other than the Red River, on which planes equipped for alighting on water could land or take-off. The material further discloses that, due to the lack of suitable facilities for their servicing and repair, float-equipped planes from the United States and other Provinces of Canada are by-passing Winnipeg.

The question to be determined is one of far-reaching importance. Johannesson apparently contemplated the establishment of an aerodrome, within the meaning of that term as defined by the Air Regulations hereinafter referred to, where light and medium-weight planes not equipped with radio but with suitable equipment for alighting either upon land or water, could land and take off and where they could be repaired and otherwise furnished with service.

The control of aeronautics in Canada was first dealt with by statute by Parliament by c. 11 of the Statutes of 1919. During the Sittings of the Peace Conference in Paris at the close of the Great War, a Convention relating to the regulation of aerial navigation was drawn up which was subsequently ratified by His Majesty on behalf of the British Empire and it was with a view to performing the obligations of Canada as part of the Empire under this Convention, then in course of preparation, that the *Air Board Act* of 1919 was passed. That statute set up a Board whose duties included that of supervising all matters connected with aeronautics, constructing and maintaining all Government aerodromes and air-stations, prescribing aerial routes, licensing and regulating all aerodromes and air-stations and prescribing the areas within which aircraft coming from any places outside of Canada were to land. By c. 34 of the Statutes of Canada 1922 the Act of 1919 was repealed and

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all the powers and functions vested by it in the Board were directed to be exercised by or under the direction of the Minister of National Defence. The duties and powers of the Minister were further defined by R.S.C. 1927, c. 3, and include duties similar to those of the Air Board under the Act of 1919. Under powers contained in the statute as originally enacted, Air Regulations dealing in detail with the control of aerial navigation were enacted, and the right of Parliament to sanction the making of certain of these Regulations and the matter of the exclusive legislative and executive authority of Parliament to perform the obligations of Canada or of any Province thereof under the Convention and the matter of its legislative authority to enact, in whole or in part, the provisions of s. 4 of the *Aeronautics Act*, R.S.C. 1927, c. 3, were referred to this Court [[1931], 1 D.L.R. 13, [1930] S.C.R. 663] by the Governor-General in Council under s. 55 of the *Supreme Court Act*, R.S.C. 1927, s. 35. An appeal was taken to the Judicial Committee from the answers made in this Court to the questions submitted. The judgment of the Board allowing the appeal found that exclusive legislative and executive authority for performing the obligations of Canada or of any Province under the Convention was in the Parliament of Canada, that section 4 of the Act was *intra vires* and that it was within the power of Parliament to sanction the making and enforcement of the said Air Regulations ([1932], 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108).

We were informed upon the argument of this matter that the Convention, the terms of which were considered on the appeal to the Privy Council, had been denounced by Canada and a new International Convention entered into by this country with other states in the year 1944, by which substantially similar international obligations were assumed. This fact was not drawn to the attention of the Court of Appeal but, in my opinion, it does not affect the questions to be determined here. Apart from the fact that, as I understand the arguments addressed to us, it is not contended on behalf of any of the respondents that the *Aeronautics Act* is *ultra vires* the Parliament of Canada or that it was without authority to sanction the Air Regulations in force at the time of the commencement of this litigation, if, as was found by the Judicial Committee, it was within the legislative competence of Parliament to enact R.S.C. 1927, c. 3, it would not become invalid by this circumstance: *A.-G. Ont.* v. *Canada Temperance Federation*, [1946], 2 D.L.R. at pp. 6-7, A.C. at p. 207, 85 Can. C.C. at pp. 231-2.

Parliament had thus dealt generally with the matter of aeronautics when in the years following the Great War the Manitoba Legislature, by s. 18 of 1920 (Man.), c. 82, passed an amendment to s. 612 of the *Municipal Act*, R.S.M. 1913, c. 133, assuming to empower municipal councils to make by-laws "for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerdromes or places where aeroplanes are kept for hire or gain".

With a slight change in the phraseology which does not affect the present matter, the present s. 921 of c. 141, R.S.M. 1940, is to this effect. Neither the word "aerdromes", as it was spelled in the Statute of 1920, or the word "aerodromes" as it appears in the present statute, were defined. Neither word appears in the Oxford English Dictionary, but in the Shorter Oxford Dictionary the word "aerodrome" is defined as: "A course for the use of flying machines; a tract of level ground from which aeroplanes or airships can start."

In the Supplement to Murray's New English Dictionary issued in 1933 the word is defined as: "A course for practice or contests with flying machines; a tract of level ground from which flying-machines (aeroplanes or air-ships) can start."

The area within which the prohibition of the erection, or maintenance, or continuation of an aerodrome is contained in the by-law is the portions of River Lots 1 to 33 lying to the east of the main highway running to the west of the Red River and includes property such as Johannesson's fronting upon the River. Whether in view of the decision in *Patton* v. *Pioneer Nav. & Sand Co.* (1908), 21 Man. R. 405, dealing with the rights of the owners of lands fronting upon the Assiniboia River, also a navigable non-tidal stream, it was intended by the by-law to prevent planes equipped with floats from alighting upon and taking off from the waters of the Red River adjoining Johannesson's property, does not appear. Since, however, the right to alight and take off without the right to maintain facilities upon the shore where the planes might be serviced and repaired would be presumably valueless, the prohibition in the by-law against the building or installation of any machine-shop for the testing or repairing of aircraft in the defined area is effective in preventing the operation by Johannesson of a commercial airport or aerodrome for planes designed to alight upon the water.

In my opinion, the position taken by the Province and by the municipality in this matter cannot be maintained. Whether the control and direction of aeronautics in all its branches be

one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which provincial and Dominion legislation may overlap, I think the result must be the same. It has been said on behalf of the respondents that the by-law is merely a zoning regulation passed in exercise of the powers vested in the municipality elsewhere in the *Municipal Act* and I understand the section referred to is that portion of s. 896 which, under the heading "Zoning Trades", empowers a municipal corporation to pass by-laws for preventing the erection of certain specified buildings and the carrying on of certain occupations within defined areas, these including the erection, establishment or maintenance of machine-shops which would presumably cover those designed for the repair of aircraft. The by-law, in so far as it prohibits the erection, maintenance or continuation of aerodromes, must depend for its validity upon s. 921: s. 3 is apparently based upon cl. (*h*) of s. 896. The inclusion of the prohibition of the erection or maintenance of a machine-shop, however, is obviously for the purpose of preventing the use either of the strip of land fronting upon the river or the surface of the river adjoining to the east as an effective aerodrome. Section 921 was undoubtedly passed for the purpose of enabling municipal corporations to prohibit or to license or regulate the activity of aeronautics in and upon the lands and the waters within their boundaries, and not merely as an addition to the powers of zoning trades assumed to be given by s. 896. Had this been intended and irrespective of any question as to its validity, no doubt it would have been done by amendment to cl. (*f*) or cl. (*h*) of s. 896. The powers sought to be conferred upon the municipal council appear to me to be in direct conflict with those vested in the Minister of National Defence by the *Aeronautics Act*. Section 3(*a*) of that statute imposes upon the Minister the duty of supervising all matters connected with aeronautics and prescribing aerial routes and by s. 4 he is authorized, with the approval of the Governor in Council, to make regulations with respect to, *inter alia*, the areas within which aircraft coming from any place outside of Canada are to land and as to aerial routes, their use and control. The power to prescribe the aerial routes must include the right to designate where the terminus of any such route is to be maintained, and the power to designate the area within which foreign aircraft may land, of necessity includes the power to designate such area, whether of land or water,

within any municipality in any Province of Canada deemed suitable for such purpose.

If the validity of the *Aeronautics Act* and the Air Regulations be conceded, it appears to me that this matter must be determined contrary to the contentions of the respondent. It is, however, desirable, in my opinion, that some of the reasons for the conclusion that the field of aeronautics is one exclusively within federal jurisdiction should be stated. There has been since the First World War an immense development in the use of aircraft flying between the various Provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the Provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a Government-controlled company, private companies carry on large operations, particularly between the settled parts of the country and the north and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the north, is essential to the opening up of the country and the development of the resources of the nation. It requires merely a statement of these well-recognized facts to demonstrate that the field of aeronautics is one which concerns the country as a whole. It is an activity, which to adopt the language of Viscount Simon in *A.-G. Ont.* v. *Canada Temperance Federation,* [1946] 2 D.L.R. at p. 5, A.C. at p. 205, 85 Can. C.C. at pp. 229-30, must from its inherent nature be a concern of the Dominion as a whole. The field of legislation is not, in my opinion, capable of division in any practical way. If, by way of illustration, it should be decided that it was in the interests of the inhabitants of some northerly part of the country to have airmail service with centres of population to the south and that for that purpose some private line, prepared to undertake such carriage should be licensed to do so and to establish the southern terminus for their route at some suitable place in the Municipality of West St. Paul where, apparently, there is an available and suitable field and area of water where planes equipped in a manner enabling them to use the facilities of such an airport might land, it would be intolerable that such a national purpose might be defeated by a rural municipality, the council

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of which decided that the noise attendant on the operation of airplanes was objectionable. Indeed, if the argument of the respondents be carried to its logical conclusion the rural municipalities of Manitoba through which the Red River passes between Emerson and Selkirk, and the City of Winnipeg and the Town of Selkirk might prevent the operation of any planes equipped for landing upon water by denying them the right to use the river for that purpose.

It is true that the decision in the *Aeronautics Reference,* [1932] 1 D.L.R. 58, A.C. 54, 39 C.R.C. 108, really turned upon the point that by virtue of s. 132 of the *B.N.A. Act* it was within the power of Parliament to enact s. 4 of the *Aeronautics Act*, and to authorize the adoption of the Air Regulations referred to in the questions submitted to the Court. There were, however, expressions of opinion on other aspects of the matter in the judgment delivered by Lord Sankey L.C. which are of assistance. At p. 65 D.L.R., p. 116 C.R.C., p. 70 A.C., his Lordship, in referring to the respective field assigned to Parliament and the Legislatures, said in part: "While the Courts should be jealous in upholding the Charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole."

Again, in the conclusions of the judgment, it is stated that their Lordships were influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion. In *A.-G. Ont.* v. *A.-G. Can.,* [1896] A.C. 348 at p. 360, Lord Watson, referring to the authority given to Parliament by the introductory enactment of s. 91 to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the Legislatures of the Provinces, said that the exercise of these powers ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance. This passage from Lord Watson's judgment is incorporated in the second of the four propositions stated by Lord Tomlin in *Re Fisheries Act, 1914,* [1930], 1 D.L.R. 194 at pp. 196-7, A.C. 111 at p. 118. The passage from the judgment of Viscount

Simon in *A.-G. Ont.* v. *Canada Temperance Federation*, [1946] 2 D.L.R. at p. 5, A.C. at p. 205, 85 Can. C.C. at p. 230, reads: "In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example in the *Aeronautics Case*, and the *Radio Case*), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincal Legislatures."

While the statement of Lord Sankey in the *Aeronautics Reference* that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion as a whole, and that of Viscount Simon in the *Canada Temperance* case in referring to that case and the *Radio* case, were perhaps unnecessary to the decision of those matters, they support what I consider to be the true view of this matter that the whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of Canada. Section 921 of the *Municipal Act* of Manitoba clearly trespasses upon that field and must be declared *ultra vires* the Province. As to the by-law I am unable, with respect, to agree with the contention that it is a mere zoning regulation or that, even if it were, it could be sustained. On the contrary, I consider it to be a clear attempt to prevent the carrying on of the operation of commercial aerodromes within the municipality. As the right to do this must depend upon s. 921, the by-law must also be declared *ultra vires*.

If this matter were to be considered as dealing with a legislative field where the powers of Parliament and of the provincial Legislature overlap, I think the result would necessarily be the same since for the reasons above stated it appears to me that the *Aeronautics Act*, and in particular s. 4, is legislation in this field with which s. 921 of the *Municipal Act* clearly conflicts.

The appeal should be allowed with costs and a declaration made that s. 921 of the *Municipal Act* and the municipal by-law are each *ultra vires*. There should be no order as to costs in the proceedings before Campbell J. and the Court of Appeal.

Appeal allowed.

tivity which might make it inapplicable to this case but because of the view I take of the section it will not be necessary for me to go into that aspect. I was asked to do so but I see no purpose. If a different view of the other questions is taken elsewhere retroactive application may be considered then. The language of the section is unusual and should not be interpreted as meaning more than it clearly says. I note it makes no reference to intention or belief but is limited to acts authorized by the statute. Whether the actions of the university complained of here were authorized by the statute is one of the very matters the law suit is designed to try. I cannot dismiss the action on the strength of this section at this stage of the proceedings.

The answer to Qq. 1 and 3 is "not at this stage of the proceedings". The answer to Q. 2 is "she is". Costs were not spoken to but may be if the matter is not agreed.

Judgment accordingly.

MILLBROOK INDIAN BAND v. NORTHERN COUNTIES RESIDENTIAL TENANCIES BOARD et al.

Nova Scotia Supreme Court, Trial Division, Morrison, J. January 19, 1978.

Constitutional law — Distribution of legislative authority — Indian reserves — Provincial legislation dealing with residential tenancies — Whether applicable to Indian reserves — Residential Tenancies Act, 1970 (N.S.), c. 13 — British North America Act, 1867, s. 91(24).

Constitutional law — Incorporation by reference — Section 88 of Indian Act making provincial laws of general application "applicable to and in respect of Indians in the province" — Whether provincial legislation dealing with residential tenancies incorporated — Residential Tenancies Act, 1970 (N.S.), c. 13 — Indian Act, R.S.C. 1970, c. I-6.

Indians — Reserves — Provincial legislation dealing with residential tenancies — Whether applicable to Indian reserves — Whether incorporated referentially by s. 88 of Indian Act, R.S.C. 1970, c. I-6 — Residential Tenancies Act, 1970 (N.S.), c. 13 — British North America Act, 1867, s. 91(24).

The *Residential Tenancies Act*, 1970 (N.S.), c. 13, on its face applies to all persons and all places in Nova Scotia, and is clearly within the legislative power of the Province to enact under the provisions of s. 92(13) of the *British North America Act, 1867*. The relationship of landlord and tenant is fundamentally a proprietary one and, as a consequence, is based on real property or land rights. As a result, the *Residential Tenancies Act* has no application to Indian reserves. The exclusive power to legislate on "Indians, and Lands reserved for the Indians" is granted by s. 91(24) of the *British North America Act, 1867* to the federal Parliament. Nor does s. 88 of the *Indian Act*, R.S.C. 1970, c. I-6, referentially incorporate the *Residential Tenancies Act* into the body of laws applying to Indians. That section makes provincial laws of general application "applicable to and in respect of Indians in the province", but it does not make them applicable to "Lands reserved for the Indians". The exclusive power to legislate with respect to residential tenancies upon Indian reserves resides with the federal Parliament.

[*R. v. Isaac* (1975), 13 N.S.R. (2d) 460, apld; *Kruger and Manuel v. The Queen* (1977), 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300, 15 N.R. 495, distd; *Cardinal v. A.-G. Alta.* (1973), 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, [1974] 1 S.C.R. 695, [1973] 6 W.W.R. 205; *Corp. of Surrey et al. v. Peace Arch Enterprises Ltd. et al.* (1970), 74 W.W.R. 380; *R. v. Johns* (1962), 133 C.C.C. 43, 38 C.R. 148, 39 W.W.R. 49, refd to]

APPLICATION for an order in the nature of *certiorari* to quash a decision and certain orders of the Northern Counties Residential Tenancies Board made under the authority of the *Residential Tenancies Act* (N.S.).

Stephen J. Aronson, for plaintiff.

Donald G. Gibson and *Douglas Quackenbush*, for Attorney-General of Nova Scotia and Northern Counties Residential Tenancies Board.

MORRISON, J.:—This is an application for an order in the nature of *certiorari* to quash a decision and certain orders of the Northern Counties Residential Tenancies Board dated March 4, 1977, resulting from application No. 355, on the grounds that the Northern Counties Residential Tenancies Board erred in law and exceeded its jurisdiction with respect to making a decision relating to Indian reserve lands.

The plaintiff also seeks a declaratory order stating that the *Residential Tenancies Act*, 1970 (N.S.), c. 13, as amended, being legislation passed by the Legislative Assembly of the Province of Nova Scotia, has no application to lands situated in the said Province which are reserved to Indians pursuant to the *Indian Act*, R.S.C. 1970, c. I-6.

The following statement of facts was agreed to by both counsel:

AGREED STATEMENT OF FACTS

In addition to the return of the Northern Counties Residential Tenancies Board, the following facts have been agreed upon by the parties.

1. That at all relevant times, Ruth Rushton was a tenant of the Millbrook Trailer City Mobile Home Park and resided thereon and was not an Indian as defined by the Indian Act, R.S.C. 1970, c. I-6.

2. That at all relevant times, Millbrook Trailer City Mobile Home Park was entirely situated on and formed a part of Millbrook Indian Reserve No. 27.

3. That at all relevant times, Millbrook Indian Reserve was an Indian Reserve within the meaning of the Indian Act, aforesaid.

4. That at all relevant times, Millbrook Indian Reserve had been set aside for the use and benefit of the Millbrook Indian Band and the members thereof, as provided for by the Indian Act, aforesaid.

5. That at all relevant times, Millbrook Trailer City Mobile Home Park was a wholly owned business of the Millbrook Indian Band and was not a legal entity.

6. That at all relevant times, Keith Julien was an Indian as defined by the Indian Act and was a member of the Millbrook Indian Band.

7. That at all relevant times, Keith Julien was employed by the Millbrook Indian Band in the capacity of manager of the Millbrook Trailer City Mobile Home Park.

8. That at all relevant times, Indians as defined by the Indian Act aforesaid and persons who were not Indians were tenants of Millbrook Trailer City Mobile Home Park and resided thereon.

9. That at all relevant times, no regulations under Section 73(1)(i), (j), (k) or by-laws under Section 81(d), (g), (h), (i) and (q) of the Indian Act, aforesaid had been passed or were in effect.

The return of the Northern Counties Residential Tenancies Board contains the decision of the Board. The decision opens with a summary of the application, which reads as follows:

> Ms. Ruth Rushton, tenant has applied to the Board for relief in the matter of her landlord's non-provision of either a driveway or a proper parking facility in connection with her mobile home located at 271 James Street, Truro, N. S. Ms. Rushton has further complained of dogs barking in the trailer park and that this interferes with her quiet enjoyment of the premises.

The Northern Counties Residential Tenancies Board assumed jurisdiction and dealt with the complaint of Miss Rushton and made certain orders as a result of its deliberations.

The sole ground of this application is that the Northern Counties Residential Tenancies Board erred in law and thereby exceeded its jurisdiction in holding that the provisions of the *Residential Tenancies Act*, as amended, applied to an Indian reserve as defined by the *Indian Act*, as amended.

Counsel for the applicant-plaintiff advanced three arguments to support the application:

1(a) That in construing the *Residential Tenancies Act*, as being applicable upon an Indian reserve there would be an interference with the exclusive federal power to legislate in relation to lands reserved for Indians.

(b) That if the provincial *Residential Tenancies Act* did apply to the Indian reserve it could only do so by referential incorporation through appropriate federal legislation. Counsel submitted that the effect of the *Indian Act*, as amended, and in particular s. 88 thereof, is not to incorporate provincial residential tenancies laws into that body of law applying to reserves.

2. That Indian reserves located within the Province of Nova Scotia are the property of the federal Government of Canada and are no more subject to provincial laws than any other federal Crown property.

3. That if the provisions of the Nova Scotia *Residential Tenancies Act*, are held applicable to an Indian reserve then there is a manifest conflict between the powers enumerated under the federal *Indian Act* and the provisions of the *Residential Tenancies Act*. In such a case the conflict between federal powers of regulation and provincial regulation must be resolved by holding the fed-

eral powers paramount and the provincial powers inoperative to the extent of the conflict.

Counsel for the Northern Counties Residential Tenancies Board advanced three arguments to oppose the application:

1. That the Nova Scotia *Residential Tenancies Act* is provincial legislation of general application and is not legislation in relation to Indians as Indians. Such legislation is applicable anywhere in the Province, including Indian reserves, even though Indians or Indian reserves might be affected by it. In this respect the respondent relied mainly upon the majority opinion of the Supreme Court of Canada as expressed by Mr. Justice Martland in the case of *Cardinal v. A.-G. Alta.* (1973), 40 D.L.R. (3d) 553, 13 C.C.C. (2d) 1, [1974] 1 S.C.R. 695.

2. That even if the applicant's submission is accepted that provincial legislation purporting to affect the rental rights of Indians interferes with Parliament's exclusive power under s. 91(24) of the *British North America Act, 1867* to legislate in respect of Indians, then s. 88 of the *Indian Act* referentially incorporates provincial landlord-tenant laws into the body of laws applying to Indians and that there is no conflict with any existing provisions of the *Indian Act* or Regulations.

3. That if the *Residential Tenancies Act* does apply to Indians it cannot be argued under the "paramountcy" doctrine that there is a manifest conflict between the provisions of the federal *Indian Act* and the provisions of the *Residential Tenancies Act* with the Dominion legislation prevailing. As no Regulations or by-laws were or are operative under ss. 73(1)(*i*), (*j*), (*k*) or 81(*d*), (*g*), (*h*), (*i*), (*q*) of the *Indian Act*, the respondent argued that there was no operating incompatibility which would warrant a finding that provincial powers must give way to paramount federal powers. The mere potentiality of occupation of the field by the making of by-laws or Regulations pursuant to the *Indian Act* does not warrant the application of the paramountcy doctrine.

Section 91(24) of the *British North America Act*, 1867 (U.K.), c. 3 [see R.S.C. 1970, App. II, p. 191], reads as follows:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—
>
> . . . . . .
>
> 24. Indians, and Lands reserved for the Indians.

. . . . . .

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The *Residential Tenancies Act*, s. 3, reads as follows:

LANDLORD AND TENANT

3(1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act shall apply when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.

(2) For the purposes of subsection (1), the relation of landlord and tenant shall be deemed to exist in respect of residential premises between an individual and a person when an individual

(a) possesses or occupies residential premises and has paid or agreed to pay rent to the person;

(b) makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent;

(c) has possessed or occupied residential premises and has paid or agreed to pay rent to the person.

The *Residential Tenancies Act*, on its face, applies to all persons and all places in Nova Scotia, and is clearly within the Province's legislative power to enact under the provisions of s. 92(13) of the *British North America Act, 1867*. The first issue to be determined is whether Parliament's exclusive authority, as described in s. 91(24), over "Indians, and Lands reserved for the Indians" exclude the Nova Scotia *Residential Tenancies Act* from applying to an Indian reserve.

The respondent relies mainly upon the decision of the Supreme Court of Canada in the case of *Cardinal v. A.-G. Alta., supra*. In that case the issue was whether or not the Alberta *Wildlife Act* applied to Indians and Indian reserves. The majority of the Supreme Court of Canada held that this game legislation did apply. Mr. Justice Martland, speaking for the majority of the Court, rendered the decision, which was dissented in by Laskin (as he then was), Hall and Spence, JJ. The decision was based on the interpretation of an agreement entered into between Canada and the Province of Alberta in 1930.

In rendering his decision Mr. Justice Martland (*obiter dicta*) made the following comments as to his interpretation of s. 91(24) of the *British North America Act, 1867*. Mr. Justice Martland said as follows at pp. 559-60 of the decision:

I am not prepared to accept this initial premise. Section 91(24) of the *British North America Act, 1867*, gave exclusive legislative authority to the Canadian Parliament in respect of Indians and over lands reserved for the Indians. Section 92 gave to each Province, in such Province, exclusive legislative power over the subjects therein defined. It is well established, as illustrated in *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580, that a Province cannot legislate

exclusively assigned to the federal Parliament
lished that provincial legislation enacted under
ssarily become invalid because it affects some-
l legislation. A vivid illustration of this is to be
sion a few years after the *Union Colliery* case
Homma, [1903] A.C. 151, which sustained pro-
s. 92(1), which prohibited Japanese, whether
n provincial elections in British Columbia.

d not enact legislation in relation to Indians, or
out this is far from saying that the effect of s.
erica Act, 1867, was to create enclaves within a
s of which provincial legislation could have no
test as to the application of provincial legisla-
ne as with respect to its application within the
st be within the authority of s. 92 and must not
er assigned exclusively to the Canadian Parlia-
subjects are Indians and Indian reserves, but if
e limits of s. 92 is not construed as being legisla-
of subjects (or any other subject under s. 91) it
rovince, including Indian reserves, even though
it be affected by it. My point is that s. 91(24) en-
er which the federal Parliament has the exclu-
does not purport to define areas within a Prov-
of a Province to enact legislation, otherwise
ded.

tland goes on in his decision to discuss
t al. v. Peace Arch Enterprises Ltd. et
C.C.A.). At p. 561 Mr. Justice Martland
that case: "Once it was determined
ds reserved for the Indians, provincial
se was not applicable."

then was, in his dissenting opinion in
way of dicta said as follows, at p. 569:

hich, so long as they exist as reserves, are with-
ory power. If provincial legislation is applicable
l incorporation through adoption by the Parlia-

1975), 13 N.S.R. (2d) 460, a case dealing
Nova Scotia *Lands and Forests Act* on
, C.J.N.S., of the Nova Scotia Supreme
(in commenting on the *Cardinal* case,
-8:

ed (p. 703, supra) that valid provincial legislation
the Province, including Indian Reserves, even
serves might be affected by it", *if* the particular
is being legislation in relation to those classes of
nds reserved for the Indians". I take it that, con-
cial law, in this case a game law, is construed as
he use of Indian reserve land, then such legisla-
reserves, or, as Mr. Justice Martland said (p. 705)
, *supra*:

d that the lands remained lands reserved for the
ation relating to their use was not applicable."

> This parallels the dicta of Mr. Justice Laskin just quoted and emphasizes that provincial legislation cannot validly regulate the reserves as land, cannot regulate the use of that land and cannot control the resources on that land. Accordingly, if, as I contend, a provincial game law is clearly a land use law, it cannot apply on a reserve.
>
> Two principles appear: (1) a provincial law may be precluded from operation if it is supervened by a federal law, or a valid pre-1867 law, dealing with Indians as to the same subject-matter, either on a reserve (e.g., motor vehicle offences covered by the *Indian Reserve Traffic Regulations — Regina v. Johns*, 133 C.C.C. 43 (Sask. C. A.)), or off a reserve (e.g., Yukon liquor law not applicable to Indians because of *Indian Act* provisions re intoxicants — *Regina v. Peters*, 57 W.W.R. 727 (Y. Terr. C.A.)); (2) a provincial law is *excluded* from operation if it deals with an Indian *qua* Indian, or with Indian reserve land *qua* land, or perhaps, more accurately, if it is "legislation in relation to Indian status or Indian land rights" (Ritchie, J., in *The Natural Parents v. The Superintendent of Child Welfare et al.*, October 1, 1975, unreported). [now reported 6 N.R. 491].

If I should find that the Nova Scotia *Residential Tenancies Act* is in its application to an Indian reserve regulating the use of the Indian reserve land, then it would be consistent with the comments of MacKeigan, C.J.N.S. (above), to find that such regulation of the use of the land could not apply on an Indian reserve.

The applicability of provincial laws to Indian reserves was discussed in *Corp. of Surrey et al. v. Peace Arch Enterprises Ltd. et al.*, *supra*. This case was referred to by Martland, J., in his decision in the *Cardinal* case, *supra*. In the *Peace Arch* case it was held that municipal by-laws or Regulations made under the provincial *Health Act* did not apply to developers who had leased lands that were part of a reserve. The developers in that case were not Indians. Maclean, J.A., said as follows at p. 383 of that case:

> It follows, I think, that if these lands are "lands reserved for the Indians" within the meaning of that expression as found in sec. 91(24) of the *B.N.A. Act, 1867*, that provincial or municipal legislation purporting to regulate the use of these "lands reserved for the Indians" is an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

Maclean, J.A., went on to say, after making a finding that the lands in question were "Lands reserved for the Indians", at p. 387 of the same decision:

> My conclusion is that the exclusive legislative jurisdiction over the land in question remains in the Parliament of Canada, and that provincial legislation (including municipal by-laws) which lays down rules as to how these lands shall be used, is inapplicable.

It is admitted in the agreed statement of facts that the relationship of landlord and tenant with which we are concerned herein was created on the Indian reserve owned by the Millbrook Indian Band at Truro, Nova Scotia. It seems to me that the relationship of landlord and tenant is fundamentally a proprietary relationship and, as a consequence, is based on real property or land rights. The

Indian land on the Millbrook reserve was being actually rented or leased to parties who would live on this land in their mobile homes.

Counsel for the respondent has argued that the *Residential Tenancies Act* does not deal with the use of land but rather with a relationship which arose out of a particular land use. I find it difficult to accept this argument as it seems to me that the *Residential Tenancies Act* basically is legislation dealing with the management, use and control of land by both landlords and tenants. Indeed, s. 6 [am. 1970-71, c. 74, s. 2; 1975, c. 64, s. 3] of the *Residential Tenancies Act*, provides for compliance with laws respecting health, safety and housing standards.

There is no question but that the Province does have the right to enact legislation of this type pursuant to the property and civil rights clause, s. 92(13) of the *British North America Act, 1867*. However, when this legislation which in its application to Indian reserves does relate to the control and the regulation of tenancies on an Indian reserve, then it becomes legislation in relation to the use of the lands reserved for Indians. Consequently, it would therefore appear to be in conflict with s. 91(24) of the *British North America Act, 1867* and would have no application to Indian reserves. The exclusive power to legislate on "Indians, and Lands reserved for the Indians" is granted by s. 91(24) of the *British North America Act, 1867* to the Canadian Parliament.

I am of the opinion that the Nova Scotia *Residential Tenancies Act* does have the effect of regulating the use of the Indian reserve land and, consequently, this legislation does not apply to the Millbrook Indian Band reserve.

In this respect the respondent has argued that if the Court should find that the provincial legislation interfered with Parliament's exclusive power under s. 91(24) of the *British North America Act, 1867* to legislate in respect of Indians, then s. 88 of the *Indian Act* referentially incorporates provincial landlord-tenant laws into the body of laws applying to Indians (and, furthermore, that there is no conflict with any existing provision of the *Indian Act* or Regulations).

Some comment on referential incorporation is made by Laskin, J. (as he then was), in his dissenting opinion in the *Cardinal* case, *supra*. At p. 569 D.L.R., p. 16 C.C.C. of that decision, Mr. Justice Laskin by way of dicta said as follows:

> Indian reserves are enclaves which, so long as they exist as reserves, are withdrawn from provincial regulatory power. If provincial legislation is applicable at all, it is only by referential incorporation through adoption by the Parliament of Canada.

Section 88 of the *Indian Act*, reads as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any

> province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

It would appear that this section would make all provincial laws of general application in any Province applicable to and in respect of Indians in the Province. However, does this also apply to Indian lands or Indian reserves? The section makes no mention of lands reserved for Indians. It seems to me that in the problem with which this Court is faced we are dealing with "Lands reserved for the Indians" rather than with Indians.

Lysyk in his article "The Unique Constitutional Position of the Canadian Indian", 45 *Can. Bar Rev.* 513 (1967), stated at p. 552:

> Provincial legislation may not, of course, relate to Indian lands, and section 87 [now s. 88] of the Indian Act does not touch upon the distribution of legislative authority in this respect.

Dealing with s. 88 the Saskatchewan Court of Appeal in *R. v. Johns* (1962), 133 C.C.C. 43 at p. 47, 38 C.R. 148, 39 W.W.R. 49, stated as follows: "This section relates to Indians and not to Reserves ...".

Also Laskin, J., in his dissenting opinion in the *Cardinal* case, at p. 576 D.L.R., p. 24 C.C.C., refers to the effect of s. 88 of the *Indian Act*. He says as follows: "This section deals only with Indians, not with reserves ...".

It would appear that s. 88 of the *Indian Act* makes provincial laws of general application "applicable to and in respect of Indians in the province", but it does not make them applicable to "Lands reserved for the Indians".

In the case of *Kruger and Manuel v. The Queen* (1977), 75 D.L.R. (3d) 434, 34 C.C.C. (2d) 377, [1977] 4 W.W.R. 300, a decision of the Supreme Court of Canada, the Court was dealing with a violation of a provincial Act which occurred on occupied Crown lands off the reserve. They were not Indian reserve lands. In that case Dickson, J., speaking for the Court, said as follows, at p. 439 D.L.R., p. 382 C.C.C.:

> The Chief Justice of this Court, then Laskin, J., wrote in dissent in *Cardinal*, but on the point of concern in the present inquiry, namely, the applicability of provincial game laws to Indians off reserves, his views seem to accord with those of Mr. Justice Martland.

In my opinion this case does not deal with the central question of the use of Indian lands.

In the case of *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 at p. 474, MacKeigan, C.J.N.S., of the Appeal Division of the Supreme Court of Nova Scotia, in considering s. 88 of the *Indian Act* said as follows:

Section 88 merely declares that valid provincial laws of general application to residents of a province apply also to Indians in the province. It does not make applicable to Indian reserve land a provincial game law which would have the effect of regulating use of that land by Indians. It does not enlarge the constitutional scope of the provincial law which is limited by the federal exclusivity of power respecting such land.

Applying the foregoing comments to our present case I conclude that the effect of s. 88 of the *Indian Act*, is not to incorporate provincial residential tenancies laws into that body of law applying to Indian reserves. The Nova Scotia *Residential Tenancies Act* cannot apply to the Millbrook Indian Band reserve by way of referential incorporation through appropriate federal legislation. The exclusive power to legislate with respect to residential tenancies upon Indian reserves resides with the federal Parliament.

I have found that the Nova Scotia *Residential Tenancies Act* does not apply to the Millbrook Indian Band reserve *ex proprio vigore* and does not apply by referential incorporation through s. 88 of the *Indian Act*. I therefore direct that an order in the nature of *certiorari* will issue quashing the decision and orders of the Northern Counties Residential Tenancies Board resulting from application No. 355, dated March 4, 1977, the subject-matter of these proceedings.

It is my opinion that the *Residential Tenancies Act*, as amended, has no application to lands situate in the Province of Nova Scotia which are reserved to Indians pursuant to the *Indian Act*, but I do not find it necessary to issue a declaratory order to that effect.

The applicant-plaintiff shall have its costs of action to be taxed.

Application granted.

RE KLEIFGES

Federal Court, Trial Division, Walsh, J. *January 31, 1978.*

Statutes — Retroactivity — Preservation of rights — Person entitled under former legislation to count period employed outside Canada in public service of Canada or of Province otherwise than as locally engaged person towards residence requirement in qualification for citizenship — Provision omitted in subsequent legislation — Whether accruing rights preserved — Canadian Citizenship Act, R.S.C. 1970, c. C-19, s. 10(1), (6)(b) — Citizenship Act, 1974-75-76 (Can.), c. 108, s. 5(1)(b)(ii), (4) — Interpretation Act, R.S.C. 1970, c. I-23, s. 35(b), (c).

Citizenship — Qualifications — Residence — Person entitled under former legislation to count period employed outside Canada in public service of Canada or of Province otherwise than as locally engaged person towards residence requirement in qualification for citizenship — Provision omitted in subsequent legislation — Whether accruing rights preserved — Canadian Citizenship Act, R.S.C. 1970, c. C-19, s. 10(1), (6)(b) — Citizenship Act, 1974-75-76 (Can.), c. 108, s. 5(1)(b)-(ii), (4) — Interpretation Act, R.S.C. 1970, c. I-23, s. 35(b), (c).

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REX v. PALING.

Manitoba Court of Appeal, McPherson C.J.M., Dennistoun, Trueman, Richards and Bergman JJ.A. April 23, 1946.

Constitutional Law III A—Game Laws—Provincial game protection law — Hunting of game on Sunday prohibited — Whether Sunday observance legislation — Migratory Birds Convention Act (Can.)—

The *Game and Fisheries Act*, R.S.M. 1940, c. 81 is primarily an enactment for the protection of game and game birds, and hence s. 64(3), which makes it unlawful for any person to hunt game between sunset on Saturday night and sunrise on Monday morning following is *intra vires*. It is not Sunday observance legislation nor is it at variance with s. 9 of the *Lord's Day Act*, R.S.C. 1927, c. 123. Moreover, it does not conflict with the *Migratory Birds Convention Act*, R.S.C. 1927, c. 18 and regulations thereunder, since it gives further protection to game than does the Dominion legislation, being more restrictive than the Dominion prohibitions relative to the shooting of game birds.

Cases Judicially Noted: *The Queen* v. *Robertson*, 3 Man. R. 613, folld; *R.* v. *Morley*, [1932], 4 D.L.R. 483, 2 W.W.R. 193, 58 Can. C.C. 166, 46 B.C.R. 28; *R.* v. *Stuart*, [1925] 1 D.L.R. 12, 43 Can. C.C. 108, 34 Man. R. 509, [1924] 3 W.W.R. 648, refd to.

Criminal Law II F—Appeal I C²—Content and form.

Statutes Considered: *Game and Fisheries Act*, R.S.M. 1940, c. 81, s. 64(3) (am. 1943, c. 19, s. 9; 1944, c. 13, s. 3); *Migratory Birds Convention Act*, R.S.C. 1927, c. 130; *Lord's Day Act*, R.S.C. 1927, c. 123, s. 9.

APPEAL by way of stated case from a conviction on a charge of hunting game illegally in violation of s. 64(3) of the *Game and Fisheries Act*, R.S.M. 1940, c. 81. Affirmed.

J. K. Morton, K.C., for appellant; *E. G. Trick*, for respondent (informant); *C. V. McArthur*, K.C. and *E. J. Kirby*, for Dominion Government.

MCPHERSON C.J.M.:—The appellant was convicted by D. G. Potter, K.C., Police Magistrate, on January 30, 1946, for that he (the appellant), between sunset on Saturday night, October 20, 1945, and sunrise on the Monday morning following, in the Eastern Judicial District of the Province of Manitoba, unlawfully hunted game, namely, wild ducks. He was fined the sum of $25 and costs, or, in the alternative, to serve 10 days in gaol.

He now appeals to have the said conviction quashed by way of a stated case submitted to this Court by the said Magistrate as follows: "Was I right in finding the accused guilty of the offence as charged, having regard to the admitted facts and the law submitted by counsel herein?"

The facts agreed upon at the hearing of the accused may be briefly quoted as follows:

That the accused killed four wild ducks in the Province of Manitoba on Sunday, October 21, 1945, which ducks were migratory game birds included in art. 1, s. 1(a) of the Migratory Birds Treaty; that the regulations governing the hunting of wild ducks are made annually under the provisions of the *Migratory Birds Convention Act*, R.S.C. 1927, c. 130; that the practice is for the Province to make recommendations to the Minister of Mines and Resources at Ottawa, which may be considered but are not always adopted; that the spot where the killing of the ducks took place is 1½ or 2 miles from the closest residence and several miles distant from any place of worship; and that the accused was the holder of a game bird licence for the year 1945 issued by the Game and Fisheries Branch of the Province of Manitoba.

Counsel for the accused based his appeal against the said conviction on the ground that s. 64(3) of the *Game and Fisheries Act*, R.S.M. 1940, c. 81, which reads as follows:

"64(3) It shall be unlawful for any person to hunt game between sunset on Saturday night and sunrise on Monday morning following." [am. 1943, c. 19, s. 9; 1944, c. 13, s. 3]

was *ultra vires* of the Legislature of the Province of Manitoba, in that it purported—either directly or indirectly—to legislate respecting the Lord's Day.

The *Lord's Day Act*, R.S.C. 1927, c. 123, deals with Sunday observance and, among other prohibitions, contains the following section:

"9. It shall not be lawful for any person on the Lord's Day to shoot with or use any gun, rifle or other similar engine, either for gain, or in such a manner or in such places as to disturb other persons in attendance at public worship or in the observance of that day."

It will be noted that this section does not refer to hunting any game or birds, but that it prohibits shooting under certain specified conditions likely to disturb other persons.

Under s. 91 of the *B.N.A. Act*, 1867, the Dominion was empowered to deal with criminal law, which includes Sunday observance; and under s. 92, provincial Legislatures were empowered, by s-s. (13), to make laws as to matters dealing with "Property and Civil Rights in the Province", and, by s-s. (16), "Generally all Matters of a merely local or private Nature in the Province".

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If the foregoing section of the provincial Act is for the purpose of legislating in reference to Sunday observance, it invades the legislative field of the Dominion Parliament and is *ultra vires*: *Gt. West Saddlery Co.* v. *The King*, 58 D.L.R. 1, [1921] 2 A.C. 91; *A.-G. Ont.* v. *Hamilton Street R. Co.*, [1903] A.C. 524.

It therefore becomes necessary to ascertain, if possible, if there is such an invasion.

In *Citizens Ins. Co.* v. *Parsons* (1881), 7 App. Cas. 96, in giving the judgment of the Court, Sir Montague Smith at pp. 108-9 refers to the difficulty of distinguishing under which clause the legislation may come, and states: "In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."

And in *Gt. West Saddlery Co.* v. *The King*, above mentioned, Viscount Haldane at p. 21, commenting upon the same difficulty, states: "It is obvious that the question of construction may sometimes prove difficult. The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinised in its entirety in order to determine its true character."

This is followed by reference to *Madden* v. *Nelson R. Co.*, [1899] A.C. 629, and *C.P.R.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367. In the first of these cases he pointed out that the provincial Legislature endeavoured to make a Dominion railway liable for injury to cattle under certain conditions, and it was held that the Province had no power to do so; and in the second case, while Dominion railway legislation prevailed,—if the Province attempted to compel the company to alter the construction of drains on its railway it would be *ultra vires*, but that the company was not exempt from the obligation of a provincial law applicable to all landowners, without distinction, that they should clean out their ditches to prevent nuisance.

The Legislature of the Province of Manitoba passed an Act called the *Game Protection Act*, R.S.M. 1913, c. 75, which dealt with the protection of certain animals and birds. There are no definitions contained in that Act as to what is "game" or what is "game bird"; but under the provisions of the Act, subject to certain conditions, the shooting of certain named animals and birds is prohibited by ss. 3 and 8 thereof. And s. 9 refers to these animals and birds as "game animals" and "game birds."

In passing this legislation for the protection of said animals and birds, s. 2 reads as follows:

"2. No person shall on the Lord's Day, commonly known as Sunday, hunt, trap, take, shoot at, wound, kill or capture any of the animals or birds mentioned in this Act."

Counsel for the appellant admitted that this Act was for the purpose of protecting game but contended that the present Act, known as the *Game and Fisheries Act*, R.S.M. 1940, c. 81, was not a protective Act, and that the change in title indicated it was not meant to be so. Consideration of the changes in the statutes does not lead me to give any weight to such a contention.

In the year 1930 the Province of Manitoba received its natural resources from the Dominion of Canada, and the agreement made between the Government of the Dominion of Canada and the Government of the Province of Manitoba was confirmed by 1930 (Man.), c. 30. In this transfer of resources all rights of fishery became the property of the Province and were to be administered by the Province. This made it necessary for the Province to pass legislation in respect of same.

By 1930 (Man.), c. 15, a new Act was passed called the *Game and Fisheries Act*. Owing to developments in the Province new problems had to be considered, such as regulations on fur farming and protection of the game and bird preserves transferred by the Dominion to the Province; but in general terms, Part I of said Act dealt with matters pertaining to fur-bearing animals and game birds. The provisions of the Act were on the whole similar to those contained in the *Game Protection Act*, 1913. The 2nd Part of said Act dealt with fish and fisheries and the administration of same.

In *The Queen* v. *Robertson* (1886), 3 Man. R. 613, Killam J. in a masterly and extensive consideration of the rights of the Province in reference to game laws, delivered the judgment of the Court confirming the conviction under the game protection clauses of the *Agricultural Statistics and Health Act*, 1883, of

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the Manitoba Legislature, and held that the right to protect game within the Province was *intra vires*, being within the clauses of the *B.N.A. Act* relating to property and civil rights and matters of a merely local or private nature. His judgment was followed in *R.* v. *Morley*, [1932] 4 D.L.R. 483, 58 Can. C.C. 166, 46 B.C.R. 28. In that case the point involved was the prosecution of a white man shooting game out of season on an Indian Reserve, and it was contended by the defence that it was an invasion of the rights of the Dominion under the *Indian Act*, R.S.C. 1927, c. 98 passed by the Dominion, by virtue of s. 91 (24), of the *B.N.A. Act*, 1867; but the Court held that the Act was for the purpose of protecting game generally and did not conflict with Dominion legislation.

Under the present statute, c. 81, s. 2, being the interpretation clause, the following definitions are given:

"(*h*) 'fur-bearing animals' means such animals, dead or alive, as produce fur of a marketable value and includes the parts of such animals;

"(*i*) 'game' means and includes all fur-bearing animals and all animals and birds protected by this Act and the regulations . . . ;

"(*j*) 'game birds' means any bird or part thereof mentioned in section 11 of this Act;

"(*l*) 'hunt' and 'hunting' means and includes any chasing, pursuing, worrying, following after or on the trail of, or any searching for, *trapping*, attempting to trap, *shooting at*, stalking, lying in wait for any game, whether or not such game is then or subsequently captured, killed or injured . . . ."

Counsel for the appellant argued vigorously that the *Game and Fisheries Act* above referred to is not a protective Act. I have previously commented upon the reason for the change in the name; but in addition to that, the protective sections of the previous Act have practically all been re-enacted in the present legislation and, in numerous sections of the Act, game is referred to as requiring "protection" or being "protected" by the Act. It would take a mental contortionist to twist the meaning of these sections to arrive at any different conclusion than that, primarily, the Act is passed for the protection of game. Surely s. 17(3), which prohibits a motor boat at any time (including Sundays) being used in any marshes where game feed, frequent, or are found, was not passed to prohibit boating on Sundays!

I quote the foregoing definitions because counsel for the appellant argued very strongly that s. 64(3) prohibits the hunting

of wolves on Sundays while other statutory provisions encourage their destruction, and it was therefore illogical to have such a statutory prohibition unless it was for the purpose of introducing Sunday observance law. I would point out that the other predatory animals, such as mink, marten, sable, fox and lynx are also protected on Sunday; but on the other hand, under s. 12(1), hawks, owls, crows, and similar birds, are not brought within the prohibition and it is lawful to shoot them at any time, including Sundays.

Taking the whole Act under consideration I can come to no other conclusion than that it is primarily an Act for the protection of game and game birds; that the limitation placed on Sunday shooting in said Act is definitely restricted to giving additional protection under the Act and is not, either directly or indirectly, an attempt to extend the limitations of the *Lord's Day Act*.

I would therefore, following the judgment of Killam J. in *The Queen* v. *Robertson*, above quoted, hold that the Act is *intra vires*.

The second ground raised by the appellant was that the Act deals with migratory game birds and is in conflict with the Dominion legislation enacted in 1917 (Can.), c. 18.

In 1916 a treaty was entered into between His Majesty the King of the United Kingdom of Great Britain and Ireland and the United States of America for the purpose of "saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless", and the Government of the Dominion of Canada, under power conferred upon it by s. 132 of the *B.N.A. Act*, passed the *Migratory Birds Convention Act*, 1917 (Can.), c. 18, confirming and ratifying the said treaty. The Dominion became responsible to see that the terms of the treaty were duly enforced. The recommendations which are made by the Province may not be adopted by the Dominion Government, but the regulations which are finally adopted and passed are published each year in the Canada Gazette and take effect from the date of publication.

By P.C. 871 passed in May 1918, which was the first regulation issued under the terms of the treaty, the Dominion only prohibited the killing of game birds throughout Canada between December 1st and September 14th and did not make the extensive regulations which are now in force. It will be noted that this legislation states the time within which the birds *shall not be* killed. During the following years the Dominion

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regulations were extended and changed from year to year as deemed advisable in the interests of the preservation of game; and from time to time amendments were made in the provincial statutes to conform with those regulations,—such as the repeal of s. 13(*b*) [1940 (2nd Sess. Man.), c. 17, s. 5], which allowed more ducks to be shot each year than could be had under the Dominion regulations.

The *Migratory Birds Convention Act* was passed for the purpose of protecting game, and I have held that the *Game and Fisheries Act* was passed for the same purpose. If it were not for the Dominion legislation, the Province would have sole control and power to regulate the shooting of game in any manner it deemed advisable. The effect of s. 64(3), is that it gives further protection to game than is contained in the Dominion regulations but does not extend the time when same may be shot beyond the prohibitions of Dominion legislation,—on the contrary, it reduces the time; and I would hold that it does not conflict with the Dominion legislation.

During the argument mention was made as to the right of the Dominion to pass the *Migratory Birds Convention Act*, but the point was not expressed nor argued before the Court and I am not expressing any opinion on it.

The question submitted herein should be answered in the affirmative and the appeal dismissed and the conviction confirmed.

DENNISTOUN J.A.:—I agree with the reasons for judgment of the Chief Justice and rely on the authorities which he has quoted.

Mr. Morton, in his able argument for the appeal, advanced two main points which I will deal with briefly.

The defendant was convicted of shooting ducks on Sunday contrary to the provisions of the Manitoba *Game and Fisheries Act*, R.S.M. 1940, c. 81, s. 64(3), which provides:

"64(3) It shall be unlawful for any person to hunt game between one hour after sunset on Saturday night and one hour before sunrise on Monday morning following (Standard time)."

Mr. Morton's argument is that this is an attempt by Manitoba to amend the *Lord's Day Act* of the Dominion, which has been declared to be criminal law, and that the Manitoba statute is *ultra vires*.

The provisions of the Dominion *Lord's Day Act*, R.S.C. 1927, c. 123, with respect to Sunday shooting, are as follows (s. 9):

"9. It shall not be lawful for any person on the Lord's Day to shoot with or use any gun, rifle, or other similar engine,

either for gain, or in such a manner or in such places as to disturb other persons in attendance at public worship or in the observance of that day."

Clearly this is a provision to protect the sanctity of the Lord's Day for the benefit of persons who wish to observe it in quiet, free from noise or disturbance. It is concerned with the protection of people, and not of ducks. Under this Dominion Act it is lawful to shoot ducks on Sunday in the marshes of Manitoba when no annoyance is caused to one's neighbours.

The question may now be asked: Is the Manitoba Act which prohibits Sunday shooting passed to protect the religious feelings of the public, or is it passed for the protection of the ducks?

Wild ducks are the property of Manitoba and their preservation is a matter of provincial concern. For their protection the Legislature might enact that no ducks should be shot on Mondays, Wednesdays and Fridays, and no objection could be raised. In certain years the Legislature might declare a close season when no ducks could be shot at all.

The prohibition of shooting on Sunday—which is a popular holiday, when sportsmen are able to go out in throngs to the marshes—is in my opinion one of the best protective measures for the conservation and preservation of the duck population that could be devised.

The Act is one for the restriction of the slaughter of ducks, and if it fits in with the sabbatarian ideas of some of the people, so much the better.

I would therefore reject Mr. Morton's first point, that the Manitoba Act is an attempt to enact a criminal law by an amendment of the *Lord's Day Act*.

The second point is that the fixing of close seasons has become the exclusive prerogative of the Dominion Government by reason of the *Migratory Birds Convention Act* and the regulations made thereunder,—R.S.C. 1927, c. 130, and amendments.

This point was dealt with by this Court in *R.* v. *Stuart*, [1925] 1 D.L.R. 12, 43 Can. C.C. 108, 34 Man. R. 509, in a case which was the converse of the case now at Bar. In that case Manitoba permitted the possession of ducks until March 31st. This was contrary to the provisions of the Dominion Act and was *ultra vires* of Manitoba. It was held that the protection of ducks given by the Dominion in support of the Migratory Birds Treaty is a *minimum*—the Province cannot go below it; but as owners of the ducks, as part of the natural resources of the Province, they can *exceed it*, even to the point of the total prohibition of

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shooting. I had occasion in that case to discuss the Treaty and the legislation in support of it, and refer to what I then said.

I am of the opinion that the prohibition by the Legislature of Sunday shooting implements the Dominion law and in no way derogates from it, and is within the competence of the Province to enact.

The conviction was right, and I so answer the stated case.

TRUEMAN J.A.:—On information laid by John Handley, game guardian for the Province of Manitoba, C. S. Paling was convicted by Police Magistrate Potter at Winnipeg, for that he the said Paling between sunset on Saturday night, October 20, 1945, and sunrise on Monday morning following, in the Eastern Judicial District of the Province, unlawfully hunted game, and killed four wild ducks near Lake Brereton in the Province on Sunday, October 21, 1945, between the hours of 10 a.m. and 2 p.m.

The wild ducks so killed were migratory game birds included in Article I, s. 1(*a*) of the *Migratory Birds Convention Act*, R.S.C. 1927, c. 130 and the *Game and Fisheries Act*, R.S.M. 1940, c. 81. (Mr. Paling was the holder of a game bird licence for the year 1945). The appeal is upon a stated case.

In *The Queen* v. *Robertson* (1886), 3 Man. R. 613, it was held by the Court of Appeal, *per* Killam J., that the provincial statute, 46 & 47 Vict., c. 19, as amended by 47 Vict., c. 10, s. 25(*g*), regulating the killing and possession of game at certain seasons of the year, is *intra vires*, being within those clauses of the *B.N.A. Act* relating to "Property and Civil Rights", and "Matters of a merely local or private Nature".

Killam J. said (p. 616): "Two circumstances appear to call for notice in entering upon the discussion of this constitutional question. One is that the Provincial Legislatures have, from the very inception of the union, assumed to enact laws of the nature of the game protection clauses in question, while the Dominion Parliament has never attempted to do so, and the right of the Legislatures to do so has never been questioned by the officers of the Crown for the Dominion, either by exercise of the veto power or otherwise; the other is that the somewhat analogous subject of 'Sea coast and inland fisheries' is, by s-s. 12 of the 91st section of The British North America Act, placed among the subjects upon which the Dominion Parliament has exclusive authority to legislate."

Section 64(3) of the *Game and Fisheries Act*, R.S.M. 1940, c. 81, is as follows:

"64(3) It shall be unlawful for any person to hunt game between one hour after sunset on Saturday night and one hour before sunrise on Monday morning following (Standard time)."

Mr. Morton deems that the section is within the ambit of the Lord's Day and therefore is outside the field of provincial legislation. I do not so regard it. Its purpose is to protect birds in the Province. It is therefore legislation within "Property and Civil Rights" in the Province, and "Generally all matters of a local or private Nature". See ss. 92(13) and (16) of the *B.N.A. Act.*

Section 126(1) of the *Game and Fisheries Act*, R.S.M. 1940, c. 81, provides that "All prosecutions for offences against or for the recoveries of penalties imposed under the authority of this Act and the regulations hereunder and all proceedings for the imposition of punishment by fine, penalty or imprisonment for the infraction of any of the provisions of this Act or the regulations hereunder shall be brought for hearing and determination before a justice of the peace or police magistrate for this province under the provisions and procedure of 'The Manitoba Summary Convictions Act' and the provisions and procedure shall apply to all prosecutions and proceedings under this Act so far as they are consistent with this Act."

I would dismiss the appeal, with costs.

RICHARDS J.A.:—I agree with the reasons for judgment of the Chief Justice and my brother Dennistoun and am very glad to be able to come to that decision. I can only add the statement that I have observed game conservation and hunting in Manitoba for more than 50 years and have seen a number of times the decrease caused, in part at least, by heavy shooting, and, after greater protection, the increase in numbers of game birds. There is little realization of the limits of water fowl feeding grounds and of the fact that a greatly increased killing or frightening of ducks would destroy them or drive them out of the Province. The barrage on a Sunday shooting would be many times as great as on a week day. One has only to bear in mind the disappearance of a teeming duck population of a large slough or small lake after the opening day of the shooting season or what has happened in the great marsh at the south end of Lake Manitoba as the result of the opening of two commercial shooting lodges.

It has been stated as an argument that in the Province of British Columbia shooting on Sunday is permitted. The result there has been far from encouraging. The flights of ducks along the Coast and in the vicinity of Vancouver are at the lowest in

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history. They are now almost non-existent. Baiting of feeding grounds has been made illegal in that Province but there is at present an agitation to permit it on the privately owned properties in the hope of inducing the water fowl to return to their former lines of travel.

The argument that the *Game and Fisheries Act* is a revenue Act and not for the protection of game is well answered by the Chief Justice. I would like to add that Manitoba, to its credit, has provided under its Act what are perhaps the greatest water fowl sanctuaries and game preserves in the world.

BERGMAN J.A.:—I have had the privilege of reading the judgment of the Chief Justice; and, while concurring therein, I desire to add a few observations of my own.

On January 30, 1946, the accused was convicted before Police Magistrate D. G. Potter at Winnipeg on a charge laid under s. 64(3) of the *Game and Fisheries Act*, R.S.M. 1940, c. 81, as amended by 1943, c. 19, s. 9, and 1944, c. 13, s. 3. As so amended this section reads:

"64(3) It shall be unlawful for any person to hunt game between sunset on Saturday night and sunrise on Monday morning following."

This is an appeal by the accused by way of stated case from the conviction.

Before dealing with the point of substance involved in this appeal, I shall deal with two matters of practice.

Style of cause. The proper heading for this case is *The King* v. *E. S. Paling.* In his notice of appeal the solicitor for the accused has reversed the style of cause, making it to read *E. S. Paling* v. *The King.* This is incorrect. In this Province the style of cause is never reversed on appeal, either in civil or criminal appeals.

Contents of stated case. In *R.* v. *Moroz,* [1945] 2 D.L.R. 753, 83 Can. C.C. 239, 53 Man. R. 1, speaking for the majority of this Court, I outlined the practice to be followed in an appeal by way of stated case. It is evident that no attention was paid to that judgment in the preparation of the stated case in the case at bar.

In the *Moroz* case I point out, at p. 770 D.L.R., p. 263 Can. C.C., p. 19 Man. R., that s. 761 of the *Criminal Code* requires that the stated case shall set forth (1) the facts of the case and (2) the grounds on which the proceeding is questioned. Rule 2 of this Court, which I there quote, contains more detailed requirements.

This case was tried on an agreed statement of facts and no *viva voce* evidence was taken. The Magistrate, therefore, made no findings of fact. In these circumstances the statement of the facts of the case called for by s. 761, of the *Cr. Code* and by Rule 2, is met by setting out the agreed statement of facts, or the relevant part thereof.

In the stated case submitted to us the Magistrate sets out the substance of the information, the names of the complainant and the defendant, and the date of the proceeding questioned, as called for by Rule 2. He next sets out in full the agreed statement of facts, which is in order. From then on he, however, seems to have completely lost sight of the fact that he is stating a case for the opinion of this Court on a specific point of law on which the conviction was questioned, and all that follows the statement of facts is wrong.

The Magistrate follows up the statement of facts by informing this Court that, the facts having been admitted, the onus was on the accused to establish his defence. Apart from the fact that in stating a case a Magistrate is not supposed to instruct this Court as to what the law is, it is open to the further objection that up to that point the Magistrate has not indicated in any way what the defence referred to is. Moreover, I am startled by the suggestion that any question of burden of proof arises where, as here, all the facts are admitted. I am even more startled by the suggestion that the constitutionality of a statute, which is the only issue in this appeal, turns in any way on the question of onus.

Next follows a summary of the arguments of counsel. This, of course, has no place in a stated case. We are not interested in what counsel argued before the conviction, but only in the grounds on which the accused questioned the conviction and which the Magistrate submits for our opinion in the stated case.

At the end of the summary of the arguments of counsel the Magistrate says that he found "the accused guilty of the offence as charged for the reasons set forth in my judgment". The only reason there given is that the Magistrate upheld the validity of the legislation which was attacked, and this should have been stated without any circumlocution.

Next there are set out, without any introduction or explanation, and without quotation marks, two paragraphs, which I assume are taken from the information, because of their similarity to the summary of the information set out in paragraph numbered 1 of the stated case. No useful purpose is served by

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this repetition, and it is, in any event, not intelligible in the context in which it appears.

These two paragraphs are in turn followed by five paragraphs bearing the heading, "Facts". A comparison shows that this is a verbatim copy of the agreed statement of facts already set out, except that it omits paragraph numbered 6 thereof. This is pure repetition, and is not only useless, but is also senseless, because the Magistrate made no findings of fact.

These so-called "Facts" are followed by a lengthy written judgment of the Magistrate. Then follows a summary of the application for the stated case, which the Magistrate, as a matter of fact, completely ignored. The stated case concludes with the following paragraph: "5. I submit for the judgment of the Court of Appeal of the Province of Manitoba, the following question: Was I right in finding the Accused guilty of the offence as charged having regard to the admitted facts and the law submitted by counsel herein?"

In the result we have a stated case of 17 pages, which could very easily have been stated in 3 pages. The following material was improperly included therein: (1) the statement that the onus was on the accused; (2) the summary of the arguments of counsel; (3) the unidentified quotation from the information; (4) the second statement of facts; (5) the Magistrate's written reasons for judgment; and (6) the summary of the application for the stated case.

I hope that the day will come when solicitors and Magistrates will realize that a stated case is not an appeal book, in which all material used in the Magistrate's Court may, as a matter of course, be included, but that it is a formal document which strips the case of everything but what is necessary to enable this Court to understand the point or points of law which it is asked to decide.

A question framed as is the question submitted to us in this case, is improper. It proceeds on the assumption that an appeal by way of stated case is an appeal as to the case generally, which it most certainly is not. It asks this Court to review the whole case and to say what decision the Magistrate should have made, not even having regard to the law properly applicable thereto, but *"having regard to . . . the law submitted by counsel herein"*. We are not here to appraise the arguments made by counsel before the Magistrate, but to deal with a specific point of law submitted by the Magistrate for our opinion, on which we will have the benefit of arguments of counsel in this Court. In substance, the Magistrate should have told us that

he held that s. 64(3) of the *Game and Fisheries Act* was *intra vires* the Manitoba Legislature, and should have asked whether he was right in so holding. That would have limited and defined the issue we were called on to decide, instead of throwing at us the case generally and asking: "Was I right?"

In the *Moroz* case I say, at p. 769 D.L.R., p. 261 Can. C.C., p. 17 Man. R.: "The right of appeal by way of stated case which is given by s. 761 of the *Criminal Code*, is limited to cases where the person aggrieved desires to question the adjudication of the Magistrate 'on the ground that it is erroneous in point of law, or is in excess of jurisdiction.' Where the contention is merely that the Justice came to a wrong conclusion on the facts, the proper remedy is by appeal under s. 749, and not by stated case."

In the *Moroz* case I say further, at p. 773 D.L.R., p. 265 Can. C.C., p. 21 Man. R.: "An appeal under s. 761 of the *Criminal Code* can only be taken by a person 'aggrieved,' and it is confined to the grounds on which the proceeding is questioned by him."

The Magistrate has not submitted for the opinion of this Court any of the grounds on which the accused questioned the conviction. The accused and the Magistrate are both limited to these grounds. The Magistrate was not asked to submit the only question which he has submitted, and the question which he has submitted is, as already pointed out, not a proper question to submit to this Court. Then, to make the absurdity of these proceedings complete, the solicitor for the accused served a notice of appeal which completely ignores the stated case and is based on the grounds set out in his application for the stated case.

On the admitted facts it is not even disputed that the accused is guilty of the offence charged, if s. 64(3) of the *Game and Fisheries Act* is *intra vires* the Manitoba Legislature. The only point of law involved in this case is the constitutional validity of s. 64(3), and that is the only question which should have been submitted to this Court by way of stated case.

The contents of the stated case and the question submitted are so hopelessly bad that this Court should have rejected the stated case filed and remitted it to the Magistrate to have it put in proper form. However, as there is obviously only one point of law involved in this case, and as it has been fully argued, I am going to deal with it as if it were properly before us. I, however, want to make it clear that in doing this I am not condoning the loose practice followed in this case. It is wholly in-

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excusable in view of the decision of this Court in the *Moroz* case.

In this connection I would call the attention of the profession to the judgment of Manson J. in *R.* v. *Arthur* (1946), 85 Can. C.C. 369, which is a very valuable contribution to the learning on this subject, and which deals very ably and comprehensively with the law and practice relating to stated cases.

The constitutional issue. The point of substance raised by the appellant is that s. 64(3) of the *Game and Fisheries Act* is *ultra vires* the Manitoba Legislature on the ground that it is legislation to compel Sunday observance and, therefore, criminal law, and as such within the sole jurisdiction of the Dominion Parliament.

In his factum counsel for the appellant states his contentions under two general headings. He says:

"The Appellant raises two defences. Firstly: That sec. 64(3), cap. 175 (this should read ch. 81), R.S.M. 1940 (which replaces sec. 2, cap. 75, C.S.M. 1924 and purports to the same extent to prohibit the 'hunting of game' on Sunday during the period of open season fixed by the Province or Dominion, as the case may be,) is *ultra vires* in so far as it prohibits hunting on Sunday between sunrise and sunset . . .

"Secondly: This point deals with migratory game birds.

"Sec. 64(3) is *ultra vires* in so far as it purports to prohibit the hunting of migratory game birds (ducks *inter alia*) between the hours of one half hour after sunrise on Sunday morning and one half hour after sunset on Sunday night during the open season fixed by regulations passed by the Governor-in-Council for the hunting of such birds in Manitoba."

I agree with the proposition that legislation passed for the purpose of compelling Sunday observance, is criminal law and beyond the powers of provincial Legislatures to enact. That is, I think, conclusively settled by the decision of the Privy Council in *A.-G. Ont.* v. *Hamilton Street Ry.*, 7 Can. C.C. 326, [1903] A.C. 524. This is, however, the only part of the appellant's argument which I am able to accept.

In his factum Mr. Morton argues that the *Lord's Day Act*, R.S.C. 1927, c. 123, "is a code, intended obviously to deal completely with the subject of Sunday observance". He points out that s. 9 of that Act contains the only provision therein relating to Sunday shooting. It reads as follows:

"9. It shall not be lawful for any person on the Lord's Day to shoot with or use any gun, rifle or other similar engine, either for gain, or in such a manner or in such places as to disturb

other persons in attendance at public worship or in the observance of that day."

Mr. Morton refers to this as permitting shooting on Sunday, except in cases where it disturbs public worship. On this point he says in his factum, referring to s. 64(3): "The section in question, on the face of it, achieves only one result, namely: the prohibition of *hunting on Sunday, which is permitted by the Lord's Day Act*, therefore, the legislation is in the nature of criminal law."

The fallacy of this argument is that the *Lord's Day Act* does not *permit* hunting on Sunday. The *Lord's Day Act* comes within the category of criminal law. Criminal law is never permissive in character. It is always and invariably prohibitive. Like most of the ten commandments it says, "thou shalt not". It prohibits the doing of something, sometimes unqualifiedly and sometimes subject to certain exceptions, and it fixes the penalty for doing that which is prohibited. If there are exceptions in the statute creating the crime, it simply means that the things excepted do not amount to a crime. To speak of criminal law as permitting something to be done, is to me an illogical and impossible concept. Section 9 of the *Lord's Day Act* does not *permit* Sunday shooting. It merely *fails to prohibit* it, except to the extent that it interferes with public worship. Failure to prohibit Sunday shooting is a very different thing from permitting it. Parliament has not attempted to permit it. The legislation that is impugned in this case, therefore, does not conflict with, or derogate from, the *Lord's Day Act*, or any other Dominion statute.

Our attention was called to the *Migratory Birds Convention Act*, R.S.C. 1927, c. 130. That statute was passed in 1917 to implement a treaty made in 1916 between the United Kingdom and the United States, which is appended to the Act. The treaty recites that the migratory birds covered by the treaty are "in danger of extermination through lack of adequate protection *during the nesting season or while on their way to and from their breeding grounds*". It goes on to recite that the contracting parties, "being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless", have entered into the treaty for that purpose. The fact that Sundays are included in the close season is not for the purpose of compelling Sunday observance, but because the exclusion of Sundays would defeat the object sought to be attained, that is to say, the pre-

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servation of migratory birds. Mr. Morton argues that the *Migratory Birds Convention Act* fixes a short close season, but permits hunting during the rest of the year, which he refers to as the open season. As a matter of fact, no open season in that sense is fixed by the treaty, by the Act, or by the regulations made under the Act. It is a confusion of thought to say that the *Migratory Birds Convention Act* permits hunting during any portion of the year. All that can be accurately said is that the prohibition is limited to the close season, but it is quite inaccurate to say that the Act permits hunting during the remainder of the year. Section 64(3) of the *Game and Fisheries Act* is, therefore, not in conflict with the *Migratory Birds Convention Act* or with the regulations made thereunder. It supplements and strengthens them by providing additional protection to game.

As is pointed out by the Chief Justice, the validity of the *Migratory Birds Convention Act* and of the regulations made thereunder was not questioned before us. I agree that we are, therefore, not required to express any opinion on that question. I would, however, go a step farther and say that that question could not have been raised on this appeal. That question was not adjudicated on by the Magistrate; the application for the stated case did not ask to have it submitted for the opinion of this Court; and it was not submitted for our opinion. This further illustrates what utter nonsense it is to throw the whole case at us and ask us how it should have been decided.

After a careful perusal of the provisions of the *Game and Fisheries Act* I am satisfied that it is legislation *bona fide* passed for the purpose of game protection and preservation. I am also satisfied that s. 64(3) was passed for this same purpose and not for the purpose of compelling Sunday observance. Sunday is the one day in the week which is a general holiday, and I have no doubt that experience has demonstrated that the maximum slaughter of game birds takes place on that day, where Sunday shooting is permitted. I am also satisfied that s. 64(3) was not designed to compel Sunday observance, and that it does not even have that effect. Potential Sunday hunters are not going to be driven to go to Church simply because Sunday shooting is prohibited.

I, therefore, hold that the *Game and Fisheries Act* is legislation relating to property and civil rights in the Province and, therefore, within the competence of the Manitoba Legislature to enact. I cannot usefully add anything on this point to what

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is said by Killam J., speaking for the Full Court, in *The Queen* v. *Robertson* (1886), 3 Man. R. 613, and by the Chief Justice in his judgment in this case.

I decline to answer the question submitted by the Magistrate, as it is not a proper question to ask on a stated case. The question submitted should have been directed to the only point of law argued before us. Treating it as so framed, I hold that s. 64(3) of the *Game and Fisheries Act* is *intra vires* the Manitoba Legislature and that the accused was properly convicted thereunder.

I would accordingly affirm the conviction and dismiss this appeal.

Conviction affirmed.

PFISTER v. TORONTO TRANSPORTATION COM'N.

Ontario Court of Appeal, Robertson C.J.O., Laidlaw and Hogg JJ.A. March 29, 1946.

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Negligence I C—Street Railways II B—Jury IV—Duty to passenger using terminal where cars turn — Necessity of passenger using reasonable care for own safety—Passenger struck by overswing of car on curve—Absence of warning signs—

The duty of a street railway towards persons resorting to its terminal in the ordinary course of business is to take reasonable care that its premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. Where a person goes on a street-car terminal, with which he is familiar, into which cars enter and turn about, and he observes a car entering but continues to walk close to the curve with his back to the car, with the result that on the overswing of the back of the car on the curve he is injured, in the absence of any evidence of negligence on the part of the operator of the car the street-railway is not liable. Such person is not using the premises with reasonable care for his own safety. The fact that there was merely a line of bricks set in the pavement marking the area of overswing and there were no warning signs *held*, in the circumstances, not to constitute negligence on the part of the railway, and a finding of a jury based thereon could not be supported.

Cases Judicially Noted: *Andreas* v. *C.P.R.*, 5 C.R.C. 450, 37 S.C.R. 1; *Norman* v. *G.W.R.*, [1915] 1 K.B. 584; *Indermaur* v. *Dames*, L.R. 1 C.P. 274; *C.N.R.* v. *Lepage*, [1927], 3 D.L.R. 1030, S.C.R. 575, 34 C.R.C. 300; *Anderson* v. *C.N.R.*, [1944], 2 D.L.R. 209, O.R. 169, 56 C.R.T.C. 379; *Fairman* v. *Perpetual Inv. Bldg. Soc.*, [1923] A.C. 74; *Westenfelder* v. *Hobbs Mfg. Co.*, 57 O.L.R. 31; *Kester* v. *Hamilton*, [1937], 2 D.L.R. 330, O.R. 420; *Cavalier* v. *Pope*, [1906] A.C. 428, refd to.

Negligence I C, II A—Negligence Act (Ont.)—Rule in Indermaur v. Dames not modified by—

The *Negligence Act*, R.S.O. 1937, c. 115, has no application where the defendant is solely responsible for an accident. Before it can

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Before Viscount Dunedin, Lords Hanworth, Atkin, Russell of Killowen and Macmillan.

Reference Re Saskatchewan Natural Resources

Attorney-General for Saskatchewan et al (Appellants)
v. **Attorney-General for Canada** (Respondent)

Constitutional Law—Proprietary Rights as Between Dominion and Saskatchewan to Crown Lands in Rupert's Land and N.W. Territory at Time of Their Admission to Dominion—Saskatchewan Natural Resources Act, 1930—B.N.A. Act, SS. 146, 109.

The Dominion of Canada is not under any obligation to account to the province of Saskatchewan for any lands within the boundaries of the province which were alienated by the Dominion prior to September 1, 1905.

When Rupert's Land and the North-Western Territory were admitted into the Dominion the lands then vested in the Crown and now lying within the boundaries of the province of Saskatchewan became vested in the Crown in the right of the Dominion, and not in the right of any province or provinces to be established within that area; and said lands were not to be administered for any such province or provinces, or for the benefit exclusively of the inhabitants from time to time of said area.

Sec. 109 of the *B.N.A. Act* dealt only with the original provinces united by the Act.

"The provisions of this Act" referred to in sec. 146 of the *B.N.A. Act*, (which section provided the power to admit Rupert's Land, etc. 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") are the general provisions governing the structure of the Union into which new provinces were to be admitted, as, e.g., the sections distributing legislative and other functions between the Dominion and the provinces.

[Note up with 2 C.E.D., *Constitutional Law*, secs. 11, 65.]

Appeal from the judgment of the Supreme Court of Canada ([1931] S.C.R. 263). Appeal dismissed with costs.

Hon. M. A. MacPherson, K.C., A. E. Bence, K.C., G. H. Barr, K.C., and *F. Gahan*, for appellants.

Hon. Geoffrey Lawrence, K.C., and *C. P. Plaxton, K.C.*, for respondent.

October 20, 1931.

The judgment of their Lordships was delivered by

Lord Atkin

LORD ATKIN—This appeal from the Supreme Court of Canada ([1931] S.C.R. 263) arises upon an order of reference pursuant to sec. 55 of the *Supreme Court Act*, R.S.C., 1927,

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ch. 35, made by the Governor-General in Council, dated May 3, 1930, to determine questions that had arisen between the Dominion and the province of Saskatchewan. The questions to be answered are to be found in the following formal submission agreed between the Dominion and the province and annexed to the order of reference:

Whereas under an agreement made between the Government of the Dominion of Canada, of the one part, and the Government of the Province of Saskatchewan of the other part, provision is made for the submission to the Supreme Court of Canada, for its consideration, of certain questions agreed upon:

And whereas it is admitted for the purpose of this submission that

(*a*) The area now lying within the boundaries of the Province of Saskatchewan formed a part of Rupert's Land and the North-Western Territory, which were admitted into and became a part of the Dominion of Canada under Order in Council of June 23rd, 1870.

(*b*) From the coming into force of the said Order in Council until September 1st, 1905, portions of the said area were from time to time alienated by the Dominion of Canada.

(*c*) Throughout the following questions the term "lands" means and includes "lands, mines, minerals and royalties incident thereto."

The following questions are submitted for the consideration of the Supreme Court pursuant to Section 55 of the *Supreme Court Act*:—

1. Upon Rupert's Land and the North-Western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23rd, 1870, were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown:—

(*a*) In the right of the Dominion of Canada; or

(*b*) In the right of any province or provinces to be established within such area; or

(*c*) To be administered for any province or provinces to be established within such area; or

(*d*) To be administered for the benefit of the inhabitants from time to time of such area?

2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1st, 1905?

The Supreme Court answered all the questions in favour of the Dominion, and the province of Saskatchewan and the province of Alberta (which is equally concerned with the decision) appeal. To appreciate the practical relevance of the questions it is necessary to go back to Canadian constitutional history at the time of the creation of the Dominion. The original provinces federally united by the *British North America Act, 1867*, ch. 3, were Canada, Nova Scotia and New Brunswick. Lying to the west and north of the new Dominion were the vast tracts of country known as Rupert's Land

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and the North-Western Territory. Over this territory the Hudson's Bay Company exercised control more or less defined. Their charter, granted in 22 Charles II, had granted them large powers and a vast extent of land which was not well defined, but which was assumed to cover the whole of what was later known as Rupert's Land. They had extended their jurisdiction into the North-Western Territory, and were in practice the sole authority responsible for the maintenance of law and order in both districts. The existence of a trading company with vast obligations and necessarily limited resources had been recognized before 1867 by Canadian statesmen as an obstacle to the development of Canada, and communications had later taken place between the Government of the then province of Canada, the British Government and the company as to the surrender of the company's charter rights. By sec. 146 of the *B.N.A. Act* provision was made for power to admit *inter alia* Rupert's Land and the North-Western Territory into the Union. Eventually, on November 19, 1869, in pursuance of an Imperial Act, 31 & 32 Vict., ch. 105, the Hudson's Bay Company surrendered to the Crown all their rights granted by charter and all their lands within Rupert's Land. A Dominion Act was passed in the same year providing for the government of the territories after admission to the Union. On June 23, 1870, an order in council was made admitting Rupert's Land and the North-Western Territory into the Dominion. In 1870, in anticipation of the order in council, the *Manitoba Act* was passed [ch. 3] creating Manitoba a separate province, carving its territory out of the new district so to be admitted. Thereafter, under appropriate legislation, Imperial and Dominion, the Dominion of Canada governed the rest of Rupert's Land and the North-Western Territory as part of the Dominion, dealing with the land in pursuance of the *Dominion Lands Act* of 1872, ch. 23. In 1905 it created out of the district two new provinces, Saskatchewan and Alberta. Both the *Saskatchewan Act* [ch. 42] and the *Alberta Act* [ch. 3] contained provisions by which all Crown lands should continue to be vested in the Crown and administered by the Dominion for the purposes of Canada. In lieu of the land revenue each province received an annual payment from the Dominion, varying with the population. It would appear that both the new provinces found these provisions irksome, and objected to being put in a different position from the original provinces as to land revenue, which under sec. 109 of the *B.N.A. Act* belonged to the province. Ques-

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tions were raised as to the validity of the legislation, and eventually in 1930 the Dominion entered into agreements with both provinces whereby the interest of the Dominion in the public lands in each province was transferred to the province. The agreements were made on the express footing that the provinces should be placed in a position of equality with the other provinces as to their "natural resources" (which would include the land) as from their entry into Confederation in 1905.

In this respect the agreement with Saskatchewan appears to put the Saskatchewan claim higher than that of Alberta; but as by the Acts adopting the agreements Alberta is to have no less rights against the Dominion than Saskatchewan, it is unnecessary to go beyond the agreement with the latter. The agreement is made March 20, 1930. The recitals are as follows [*The Saskatchewan Natural Resources Act*, 1930, ch. 41]:

Whereas section twenty-one of the *Saskatchewan Act*, being chapter forty-two of the four and five Edward the Seventh, it was provided that "All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the Province under the *North-West Irrigation Act, 1898*, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said Province with the substitution therein of the said Province for the North-West Territories;"

And whereas the Government of Canada desires that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entry into Confederation in 1905:

And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada:

And whereas it has been agreed between Canada and the said Province that the said section of the *Saskatchewan Act* should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Province as herein set out.

After providing for the transfer of the land from the Dominion to the province and setting out other terms, the agree-

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ment contains two clauses which give rise to this reference, viz.:

23. Provision will be made pursuant to section fifty-five of the *Supreme Court Act*, being chapter thirty-five of the *Revised Statutes of Canada, 1927*, to submit for the consideration of the Supreme Court of Canada questions agreed upon between the parties hereto as being appropriate to obtain the judgment of the said Court, subject to appeal to His Majesty in Council in accordance with the usual practice, as to the rights of Canada and the Province respectively, before the first day of September, 1905, in or to the lands, mines or minerals (precious or base), now lying within the boundaries of the Province, and as to any alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto.

24. As soon as the final answers to the questions submitted under the last preceding paragraph have been given, the Government of Canada will appoint three persons to be agreed upon to be Commissioners under Part I of the *Inquiries Act* [R.S.C., 1927, ch. 99] to inquire and report whether any and, if any, what consideration, in addition to the sums provided in paragraph twenty-one hereof, shall be paid to the Province in order that the Province may be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources either as from the first day of September, 1905, or as from such earlier date, if any, as may appear to be proper, having regard to the answers to the questions submitted as aforesaid; such commissioners to be empowered to decide what financial or other considerations are relevant to the inquiry and the report to be submitted to the Parliament of Canada and to the Legislature of Saskatchewan, if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments of Canada and of the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such agreement.

It will be seen that it is only in order that Saskatchewan may support a claim under sec. 24 of the agreement to be placed in a position of equality with other provinces with respect to the administration of its natural resources as from an earlier date than September, 1905 (the date of its creation as a province) that the questions arise at all. The position after 1905 is admittedly to be adjusted. Their Lordships feel bound to remark that it is difficult to see how Saskatchewan passes over the threshold of this claim. It had no separate existence at all before 1905, except as part of the North-Western Territories. Its predecessor, if a unit newly created and defined can have a predecessor, was the Dominion or, on the extreme view, the North-Western Territories, which also included the present province of Alberta and other territory as well. It would appear to be difficult to correlate such a position to that of the other provinces of the Union or to speak of "its" natural resources before it took any shape. However, the questions have been formulated and should be answered. The argument of the Attorney-General for the province may be summarized as follows: There was a well-established Im-

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perial policy as to colonies that they should enjoy, for the benefit of the inhabitants, the revenues of lands in the colony vested in the Crown. This did not depend upon the colony being self-governing. This area was a colony before 1867, and though as to a large part of it the land was vested in the Hudson's Bay Company, yet on the surrender by that company of its charter the colony was restored to its appropriate position of enjoying proprietary rights in the land. It therefore was in the same position as the original colonies, whose rights to the land were maintained as a fundamental principle of the *B.N.A. Act*. On the true construction of the order in council and the legislation giving effect to the admission of the area into the Confederacy, the Dominion Government and Dominion Legislature were intended to administer the land revenues for the beneficial use of the inhabitants only of the area in question. Upon the establishment of the province it must be taken to have attained its majority, and was entitled to go back to 1870 and have an account of the use of its resources during that time.

For the purposes of this case it is not necessary to discuss the accuracy of the earlier propositions in this argument. It may well be doubted whether there has ever been an invariable rule that a colony enjoyed its own land revenue. It would appear to be a question of fact in each case whether the Crown had placed its beneficial interest in land at the disposal of the particular colony. In the present case it is known that the Crown had parted with all its interest in the land to the Hudson's Bay Company so far as Rupert's Land is concerned. As to the North-Western Territory, it is at least doubtful whether before 1867 the beneficial interest in the land had been entrusted by the Crown to any authority, or whether there was in respect of that part of the area any colony at all within the meaning of the Attorney-General's argument. But even assuming that the propositions in question were established, their Lordships have no doubt whatever that the effect of the surrender of the charter rights and the relevant legislation was on the admission of the area in question into the Dominion to give to the Dominion full control of the land to be administered for the purposes of the Dominion as a whole, and not merely for the inhabitants of the area. It is only necessary to read the addresses of the Dominion Parliament dealing with the admission of the new areas to be satisfied that the control of the whole area by the Dominion was treated as an important factor in Canadian policy, and was advocated in the words of the first address "to promote the prosperity of the Canadian

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people and conduce to the advantage of the whole Empire." It is not merely improbable, but it is incredible, that at that stage of the development of Canada the resources of the immense area added to the Dominion were to be administered solely for the advantage of the sparse population scattered over its thousands of square miles. Even contemporaneously when Manitoba was created a province it was not given control of its lands; and it would certainly be remarkable if after 1870 the Dominion administered Manitoba's land for the purposes of the Dominion, but administered the larger areas of Rupert's Land and North-Western Territory for the purposes only of their few inhabitants. The provisions of the order in council and of sec. 5 of the Imperial Act of 1868, *Rupert's Land Act*, make it clear that the Dominion was to govern the new area when admitted as part of the Dominion for the purposes of the Dominion. An argument was based on the terms of sec. 146 of the *B.N.A. Act*, which provides the power to admit Rupert's Land, etc. 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.

It was said that the reference to the provisions of this Act incorporated the proviso made in sec. 109 that all the lands belonging to the several provinces of Canada, Nova Scotia and New Brunswick should continue to belong to the provinces, and that no powers could be given to the Dominion inconsistent with this. The answer is that sec. 109 dealt only with the provinces thus admitted, and the provisions of the Act referred to in sec. 146 are plainly the general provisions covering the structure of the Union into which new provinces were to be admitted, as, for instance, the sections distributing legislative and other functions between the Dominion and the constituent provinces. It is to be noted that the argument for the province necessarily disputed the validity not only of sec. 21 of the *Alberta* and *Saskatchewan Acts* of 1905, but also of the *Dominion Lands Act* of 1872. As to the Act of 1905, the validity of sec. 21 appears to their Lordships to have been specifically upheld in the judgment of this Board in *In re Wudrond, Maleshko and Stevenson Estates; Atty.-Gen for Alta. v. Atty.-Gen. for Canada* [1928] 3 W.W.R. 97, [1928] A.C. 475, 97 L.J. P.C. 106, where it was decided that lands in Alberta granted by the Crown before or after September, 1905, in the absence of heirs, escheat to the Crown in right of the Dominion. There was adduced before their Lordships no ground for attacking the *Dominion Lands Act* of 1872, other than the gen-

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eral considerations mentioned above, which, as stated, have not the effect claimed. It follows that the answers to the respective sub-heads of question 1 must be in favour of the Dominion.

Their Lordships entirely agree with the reasoning of the judgment of Newcombe, J. in the Supreme Court. It does not seem necessary to determine the slight difference of opinion between the Chief Justice and the other members of the Court as to the exact answer to question 1 (*d*). Treating the question as the Chief Justice seems to have done, as meaning "to be administered exclusively for the benefit of the inhabitants from time to time of the area," the answer admits of a simple negative; but the qualified answer given by the majority of the Court cannot in any way be said to be wrong. The second question seems to be intended to ask as to the existence of a legal obligation to account to the province of Saskatchewan for something done before the province came into existence, without any statutory provision for the province inheriting, or in some way having transferred to it, the rights, whatever they were, which before 1905 were invaded. As no rights were invaded, it is obvious that the question is correctly answered, No; and it becomes unnecessary to consider how, on a different hypothesis, an obligation to account could have been enforced by the province.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and in accordance with the usual practice in such cases without costs.

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visions of the Act relating to either case (b) or case (c) are *ultra vires*, it remains to consider whether this legislation is severable, so that the legislation covering case (a) if *intra vires* may stand.

It is submitted that it is not severable. The Legislature as pointed out above made those provisions of ss. 15 and 36 which declare a marriage without consent to be void, expressly subject to "the other provisions of sections 36 and 37" perhaps so that those evils referred to by Lord Tenterden in *Rex* v. *Birmingham, supra,* might not be brought back. Whatever the intention it is submitted that the legislation covering the three cases referred to as (a), (b) and (c) is inextricably interwoven and all or none of it must stand. The conclusion submitted with deference is that it is all beyond the powers of the Provincial Legislature.

In conclusion, the writer asks permission to point out that he has assumed the functions not of Judge but of advocate, and has merely endeavoured to suggest the argument the absence of which was deprecated by the trial Judge.

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Manitoba Court of Appeal, Perdue, C.J.M., Fullerton, Dennistoun, Prendergast and Trueman, JJ.A. November 17, 1924.

Constitutional law IE—Dominion powers—Implementing treaties—B.N.A. Act, s. 132—Incidental effect on Provincial jurisdiction—Dominion legislation paramount.

The object of the Migratory Birds Convention Act, 1917 (Can.), c. 18, being to implement a treaty in accordance with s. 132, B.N.A. Act, the Act is *intra vires* of the Dominion although it incidentally trenches on the provincial jurisdiction over property and civil rights. Therefore in so far as it conflicts with the Game Protection Act, 1916 (Man.), c. 44, the Dominion Act is paramount.

APPEAL by way of stated case from a conviction of a Magistrate. Affirmed.

J. F. Wallar, for accused.

John Allen, K.C., for Att'y-Gen'l of Manitoba.

Mildred B. McMurray, for Minister of Justice.

PERDUE, C.J.M., concurs in the result.

FULLERTON, J.A.:— The defendant was convicted of having, without lawful excuse, unlawfully in his possession, migratory game birds, to wit: two teal ducks, during the time when the capturing and killing or taking of such birds is prohibited by law. A case has been stated by the convicting Magistrate under s. 761 of the Cr. Code, 1906 (Can.), c. 146, and in it are set

forth a number of questions concerning the validity of certain statutes of both the Dominion of Canada and the Province of Manitoba dealing with the subject of migratory birds.

The only question with which we have any concern is one which was not asked, namely: Was the defendant properly convicted? The answer to this question turns wholly on the question of whether or not s. 6 of the Migratory Birds Convention Act, 1917 (Can.), c. 18, in so far as it provides that "No one without lawful excuse, the proof whereof shall lie on him, shall . . . have in his possession, any bird . . . during the time when the capturing, killing or taking of such bird . . . is prohibited by law" is *intra vires* of the Parliament of Canada.

On August 16, 1916, a Convention respecting the protection of certain migratory birds was made between Great Britain and the United States. Article II of that Convention, in so far as it is material, reads:—"The High Contracting Powers agree that, as an effective means of preserving migratory birds, there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.

"1. The close season on migratory game birds shall be between the 10th March and 1st September . . . The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation."

"Article VIII. The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention."

Section 132 of the B.N.A. Act 1867, gives the Parliament and Government of Canada "all Powers necessary and proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

To carry out the obligations of Canada under the Migratory Birds Treaty, Parliament, in 1917, passed the Migratory Birds Convention Act.

Section 6 of this Act, under which the present prosecution was laid, is quoted above. It is argued that the right to buy, sell or have in one's possession is a civil right in respect of which the Province has exclusive jurisdiction and that as the Convention does not in terms cover buying, selling or having

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in possession, s. 132 cannot be called in aid of Dominion jurisdiction. While it is true that the Convention does not in terms deal with buying, selling or having in possession, it seems to me that the power to prohibit the having in possession is ancillary to legislation dealing with the killing of migratory game birds, and is within the power of the Dominion.

The purpose of the Convention as set forth in the recital to it is the saving from indiscriminate slaughter and insuring the preservation of game birds. I know of no more effective way of bringing about this object than the prohibition against having birds in possession during the close season.

In my opinion the defendant was properly convicted.

DENNISTOUN, J.A.:—This is a case stated for the opinion of the Court by a Police Magistrate who convicted the defendant for that he "On Thursday, March 6, A.D. 1924, did without lawful excuse have in his possession, migratory game birds, to wit, two teal ducks, during the time when the capturing, killing, or taking of such birds is prohibited by law, and contrary to the form of the statute in such cases made and provided".

The statute under which the prosecution took place is the Migratory Birds Convention Act.

Section 6 of the Act provides, *inter alia,* that no one, without lawful excuse, the proof whereof shall lie on him, shall have in his possession, any bird during the time when the killing of such bird is prohibited by law.

By Regulation No. 2, made by the Governor-in-Council under s. 4 of the Act, as amended by 1919 (Can.), c. 29, s. 1, it is provided that no person shall kill, hunt, capture, injure, take, molest, sell, or offer for sale any migratory game birds in the Province of Manitoba, except during the period between September 15 and November 30, both dates inclusive.

The defendant justified his possession of the birds under the Game Protection Act, 1916 (Man.), c. 44, which, by s. 11 (b) as re-enacted by 1920 (Man.), c. 44, makes the possession of wild ducks lawful during the first 4 months of the close season, that is until March 31, for the open seasons run under both Provincial and Dominion Acts, from September 15 to November 30, inclusive.

There is here a direct conflict of legislative authority. If the Dominion law prevail, the defendant was properly convicted, if the provincial law govern, the conviction is bad and should be quashed.

The Migratory Birds Convention Act was passed pursuant to an undertaking given on behalf of His Majesty in the treaty

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in these words, found in Article VIII of the Schedule to the Act.

In the United States appropriate legislation has been passed by Congress under the title of Migratory Bird Treaty Act, 1918, 40 U.S. Stat. at Large, c. 128.

The making of a treaty for "saving from indiscriminate slaughter and insuring the preservation of such migratory birds as are either useful to man or are harmless" in the year 1916, was hailed with the deepest satisfaction by all bird lovers. naturalists, and true sportsmen. The Province of Manitoba is particularly interested in maintaining and supporting the uniform system of protection which has been devised internationally, for the migratory birds reside here for 6 months of the year, breed, and rear their young.

It is admitted by Miss McMurray, who very ably argued the case for the Minister of Justice, that without special legislative powers the Dominion Government cannot legislate in respect to property and civil rights within a Province, but she relies on s. 132 of the B.N.A. Act 1867, quoted *ante* p. 13.

This section has not as yet been construed by the Courts upon the points which arise in this case. In certain broad aspects it was under examination in *Re Oriental Orders in Council Validation Act* (1922), 65 D.L.R. 577, 63 S.C.R. 293; [1923] 4 D.L.R. 698, [1924] A.C. 203.

Mr. Allen, for the Attorney-General of Manitoba, in his carefully prepared argument submitted that the most that is given to the Dominion is power to enact such legislation *as is necessary* to give effect to a treaty duly entered into. The Dominion, he says, cannot under the pretence of legislation under s. 132, deal with matters over which legislative authority has been given to the Provinces under s. 92 of the B.N.A. Act. *Re Reciprocal Insurance Legislation*, [1924] 1 D.L.R. 789, 41 Can. C.C. 336, [1924] A.C. 328. He argues that so long as the Dominion Legislature deals with the protection of the live bird it is within the scope of the treaty, but, when it attempts to deal with the possession or sale of a dead bird, it trenches upon the exclusive jurisdiction of the Province.

I do not intend to consider the question of the right to sell, for the case at Bar turns upon possession, and not upon sale. The right of the Dominion to regulate sale may stand for future consideration when it arises.

Section 132 must be construed as conferring powers which will enable the Dominion to keep full faith with the United States of America and to take all necessary measures to prevent the indiscriminate slaughter of migratory birds. This is a na-

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tional question, not a provincial one, and a liberal construction should be given to the enabling legislation.

All persons who are familiar with the operation and enforcement of the Game Laws know that the best way to protect the live bird is to place careful restrictions on the right to possess a dead one.

In the great marshes of Manitoba it is in practice found impossible for game wardens to supervise the bag limit, or even the shooting of game out of season, but the possession of dead birds is something which cannot be effectively concealed. When brought into the cities and towns detection is often easy and prosecution effective.

Spring shooting, when the birds are on their way to the breeding grounds has for many years been universally condemned. It can be and is, in my opinion, only prevented by making it unlawful to have birds in one's possession during that season. If it is necessary for the enforcement of the objects of the treaty that there should be any curtailment whatsoever of the right to have in possession, then, the length of time such restriction should be operative is a question of degree only. If Parliament, may lawfully legislate to prevent indiscriminate slaughter in the spring season, it may do so for the whole season.

In my view s. 6 of the Dominion Act when it provides that no one without lawful excuse, shall have a bird in his possession during the close season, is clearly within the scope of the powers necessary to make the treaty effective, and therefore within the jurisdiction of Parliament under s. 132, B.N.A. Act.

There are three special classes of persons who are affected by this enactment. There is first the pot-hunter who believes in indiscriminate slaughter for gain. We need not be concerned with the stringency of the section so far as he is concerned. Next, there is the sportsman who shoots more for recreation and enjoyment than for the size of the bag. A reasonable time to get rid of his birds might well be given him. Lastly, there is the settler who shoots his limit to provide food for his family in the winter. Every consideration should be given to him, and the law which compels him to dispose of his birds during the open season is a real hardship. If permitted to keep his birds until shortly before the return of the migrants in the spring, every purpose of the treaty would be satisfied. There are no ducks in this Province during the winter and a right to keep dead birds as under provincial law, seems reasonable and sufficient. Under the federal law of the United

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States one may keep game during the first 10 days of the close season. In a more southern climate that may be all that it is prudent to give; in this climate the time might well be extended as indicated. That is, however, a matter for adjustment by the Governor-in-Council. It in no way affects the validity of the prohibition now in force.

Section 6, under which this conviction was made, indicates there may be lawful excuses, the proof of which lies upon the accused.

In my view such lawful excuses are to be found in the Act and the regulations themselves. Permits may be obtained to enable one to have birds in possession for scientific purposes, for propagating purposes, for the protection of crops, and for taxidermy.

It has been suggested that a bird shot in the open season may be lawfully had in possession during the close season. If this be a lawful excuse there is no limit of time when possession becomes unlawful under Dominion law, and the cold storage warehouses may keep frozen birds at all seasons of the year. This would render the law against shooting out of season liable to defeat on the part of persons who are unscrupulous enough to commit perjury. Such an excuse would, for the reasons I have given, render the Act a futile measure, and the purpose which Parliament and the treaty-makers had in view would be thwarted.

The words "possess" and "possession" are to be found in three places only in the Act, so far as I have been able to discover.

By s. 6 possession is prohibited without lawful excuse.

By Regulation 11 (See prefix to 1922 (Can.), pp. xxxvi-vii) birds may be possessed for scientific purposes under permit. By Regulation 12 birds may be possessed for propagating purposes under permit.

Such permits are the only lawful excuses which the Act itself recognizes. There may be others which a Court will recognize in order to prevent injustice being done to an innocent person, similar to that advanced in *Rex* v. *Cappan* (1920), 51 D.L.R. 672, 32 Can. C.C. 267, 30 Man. L.R. 316, under the Inland Revenue Act, R.S.C. 1906, c. 51, where it was shown that possession was without the knowledge or consent of the accused. Other excuses may be thought of, but in all cases the excuse must not be inconsistent with the very spirit and purpose of the Act itself.

The permission given under the Manitoba Act to have wild ducks in one's possession until March 31, is so diametrically

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opposed to the letter of the Dominion Act that it must be construed as an attempt to override the Dominion Act, and not an excuse within the contemplation of that Act.

There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear. And secondly, if the field is not clear and in such a domain the two legislations meet, then the Dominion legislation must prevail. *G.T.R. Co.* v. *Att'y-Gen'l of Canada*, [1907] A.C. 65.

A perusal of the whole Act and particularly of Regulations 11 and 12, negatives the suggestion that birds legally shot in the open season may be kept or sold in the close season, except under special license, as by those regulations provided.

The Magistrate has stated a number of broad constitutional questions which have no direct bearing upon the conviction under consideration. I propose to answer them only in so far as is necessary to protect the liberty of the subject in respect to the conviction which has been made. Abstract questions as to the invasion of the provincial domain in respect to property and civil rights, must wait for an answer until they arise in concrete form, or under a properly constituted submission for the opinion of the Court.

It is sufficient to say, in answer to Q. 6, that the defendant disclosed no lawful excuse for having teal duck in his possession on March 6, and was properly convicted under the provisions of the Migratory Birds Convention Act.

PRENDERGAST, J.A., concurs in the result.

TRUEMAN, J.A.:—The Convention known as the Migratory Birds Treaty concluded between His Majesty the King and the United States of America for the purpose of "saving from indiscriminate slaughter and of insuring the preservation of such migratory birds (meaning birds which in their annual migration traverse certain parts of the Dominion of Canada and the United States) as are either useful to man or are harmless", by means of "some uniform system of protection which shall effectively accomplish such objects", provides in Article II of the Schedule to the Migratory Birds Convention Act, as quoted *ante* p. 13.

Clauses 2 and 3 of the article define the close season on migratory insectivorous birds and migratory non-game birds.

Article V prohibits the taking of nests or eggs of migratory game or insectivorous or non-game birds.

By Article VIII the High Contracting Powers agree themselves to take, or propose to their respective appropriate law-

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making bodies, the necessary measures for insuring the execution of the Convention.

To sanction the Convention and provide legislation required by Article VIII, the Dominion Parliament passed the Migratory Birds Convention Act.

Section 4 (1) empowers the Governor-in-Council to make such regulations as are deemed expedient to protect the migratory game, migratory insectivorous, and migratory non-game birds which inhabit Canada during the whole or any part of the year. By s-s. (2) it is enacted that subject to the provisions of the Convention such regulations may provide, *inter alia*:—

"(*a*) the periods in each year or the number of years during which any such migratory game, migratory insectivorous or migratory non-game birds shall not be killed, captured, injured, taken, molested or sold, or their nests or eggs injured, destroyed, taken or molested," and

"(*c*) for any other purpose which may be deemed expedient for carrying out the intentions of this Act and the said Convention," etc.

Section 6 of the Act, under which the conviction herein was made, is quoted *ante* p. 13.

The appellant was convicted for that on March 6, 1924, he, without lawful excuse unlawfully had in his possession at the Rural Municipality of East St. Paul, in the Province of Manitoba, migratory game birds, to wit: two teal ducks. The accused gave evidence that the ducks had been given to him.

By the Game Protection Act the possession of ducks of all kinds between December 1 and March 31, is lawful.

A stated case was granted by the Magistrate to enable the appellant to question the conviction on the ground that it is erroneous in law. The questions of law involved being deemed by the Attorney-General to be of concern to the Province, he intervened in the appeal.

Under s. 132 of the B.N.A. Act, 1867, the Dominion Parliament has the powers quoted *ante* p. 13.

The Province takes the position that the treaty being limited to establishing close seasons "during which no hunting shall be done", s. 6 is not authorized by said s. 132, as it relates not to hunting but to the buying, selling or having possession of any bird, etc., during the time when the capturing, killing or taking of such bird, etc., is prohibited by law. That s. 6 is outside the scope of the treaty is said to find convincing demonstration in the circumstance that it extends to birds captured, killed or taken during the open season. I do not agree that the words "without lawful excuse" in the section do not enable a de-

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fendant to negative guilt by proving that a bird in his possession was killed in open season. See *Dickins* v. *Gill*, [1896] 2 Q.B. 310. In my opinion, the purpose of s. 6, while in its terms a substantive provision, is to dispense with proof by the Crown that a bird in the possession of a defendant was captured, killed or taken during the time when its capture, etc., was prohibited by the regulations. The offence aimed at by the section is the capturing, killing or taking of a bird, nest or egg during the close season. This offence is not provided for in the Act but in the regulations made thereunder, No. 2 of which provides, *inter alia*, that no person shall kill, hunt, capture, injure, take, molest, sell or offer for sale any migratory game birds . . . in Manitoba except during September 15 to November 10, save, etc. Other provisions of the regulations prohibit the taking, injuring, or molesting of eggs and nests. Regulation 8 (see prefix to 1922 (Can.), p. xxxv), though directed to what would appear to be a praiseworthy object, is inconsistent by implication with No. 2. It provides that notwithstanding any provision of No. 2, no person shall sell, expose for sale, offer for sale, buy, trade or traffic in any migratory game bird, killed or taken during the open season. While Regulation 2 permits selling in the open season, the effect of Regulation 8 is to prohibit selling in the open as well as the close season. It is noteworthy that though the provisions of s. 6 with respect to buying and selling implement Regulations 2 and 8, neither of these regulations deals with possession.

The limits within which buying or selling may be lawfully excused under s. 6, since these transactions are prohibited by the combined effect of Regulations 2 and 8 in both open and close seasons, must apparently be found, if at all, within the four corners of the remainder of the regulations. Possession, on the other hand is on a different footing. For instance, there is no provision in the regulations forbidding a person after the close of the open season from having in his possession birds lawfully shot by him or acquired by him otherwise than by buying. If he is able to discharge the onus of proof resting upon him under s. 6, I do not see why the benefit of the section should not be open to him.

The construction to which I think s. 6 is open, namely, that evidence is admissible to show that a bird in the possession of a person during a close season was killed in open season, while mitigating Mr. Allen's criticism, does not dispose of his contention that the section does not deal with the act of hunting but with dead birds, and is therefore not necessary in order to carry out the treaty read in the literal and rigid sense Mr.

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Allen ascribes to it. The birds being dead, his argument proceeds, dealings with respect to them, such as their purchase or sale or possession, relate to property and civil rights, and come within the exclusive jurisdiction of the Province. The contention is in my opinion, with respect, unsound for reasons which I cannot but regard as obvious. A situation amounting to a travesty of common sense would exist if during the time the hunting of migratory game birds is prohibited their sale is lawful. Its effect could not fail to be to render the provisions to enforce the treaty in large measure illusory, and the treaty itself a dead letter. Again, what possible force can there be, for instance, in the view that while possession of a bird may properly be made evidence, together with other circumstances, that it was shot by the accused, possession without such circumstances should be lawful? The test of what is properly or necessarily incidental or ancillary in order to carry out the treaty cannot be made to depend upon whether or not a provision of the Act or of the regulations has an immediate relation to the act of hunting. It is sufficient that the provision, though the consequences from it are indirect, is necessary if anything like a proper execution of the treaty is to be secured. See *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l of Canada*, [1894] A.C. 189, at p. 200; *G.T.R. Co.* v. *Att'y-Gen'l of Canada*, [1907] A.C. 65. The provisions of s. 6 and Regulations 2 and 8 have their general counterpart in the Migratory Bird Treaty Act, enacted by the Congress of the United States to give effect to the Convention. Section 2 thereof provides "that unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase . . . at any time or in any manner, any migratory bird, included in the terms of the Convention . . . or any part, nest, or egg of any such bird".

The conviction in my opinion was lawful.

Appeal dismissed.

Re DOBROVITCH BROS.; Ex parte DOBROVITCH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, McKay and Martin, JJ.A. November 12, 1924.

Bankruptcy IIIB—Vesting of estate — Partnership property — Exemptions.

Partnership property can not be claimed as an exemption under s. 25 of the Bankruptcy Act, so as to prevent the vesting of the same in the trustee upon an authorized assignment of the partnership.

[PRIVY COUNCIL.]

J. C.* 1899 July 7, 11, 28.

UNION COLLIERY COMPANY OF BRITISH COLUMBIA, LIMITED, AND OTHERS . . . . . } DEFENDANTS;

AND

BRYDEN . . . . . PLAINTIFF.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . } INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of Canada—Legislative Power—British North America Act, 1867, *s.* 91, *sub-s.* 25, *and s.* 92, *sub-ss.* 10, 13—*British Columbia "Coal Mines Regulation Act*, 1890," *s.* 4—*Naturalization and Aliens—Chinamen.*

Held, that s. 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect ultra vires of the provincial legislature.

Regarded merely as a coal-working regulation, it would come within s. 92, sub-s. 10, or s. 92, sub-s. 13, of the British North America Act. But its exclusive application to Chinamen who are alieus or naturalized subjects establishes a statutory prohibition which is within tho exclusive authority of the Dominion Parliament conferred by s. 91, sub-s. 25, in regard to "naturalization and aliens."

APPEAL from a decree of the Full Court (July 13, 1898) dismissing an appeal from a decree of Drake J. (May 14, 1898).

The question decided in this appeal was whether or not s. 4 (set out in their Lordships' judgment) of the local Coal Mines Regulation Act, 1890, now s. 4 of the Revised Statute No. 138 of 1897, was intra vires of the provincial legislature. The Courts below upheld its validity, and granted the injunction prayed for against the appellants.

Blake, Q.C., and *Cassidy*, for the appellants, contended that the enactment in question was not within the competence of

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and SIR EDWARD FRY.

the provincial legislature. It dealt with the subject of "aliens" within the meaning of British North America Act, 1867, s. 91, sub-s. 25. It disabled Chinamen for the exercise of the ordinary right, preserved to all others, to earn their bread by their labour, for no other reason than that of their origin. By s. 91, sub-s. 25, the Dominion Parliament has exclusive legislative authority over aliens; and by s. 132 it has all powers necessary for performing the treaty obligations of Canada to foreign countries. By art. 1 of the treaty between Her Majesty and the Emperor of China, dated August 29, 1842, confirmed by the treaty of 1858, and art. 5 of the convention between the same Powers made on October 24, 1860, Chinamen have the right to take service in the Colonies, and regulations were to be made for their protection when emigrating. The British Columbia legislature has been endeavouring for years to prevent and restrict the settlement of Chinese aliens in the province in order to prevent competition with the whites. Several of such attempts have proved abortive, some because the Acts when passed were declared ultra vires, others because they were disallowed by the Canadian executive. Reference was made to the Chinese Tax Act, 1878, c. 35, which was held to be ultra vires; Acts of 1884, cc. 2, 3, 4; Acts of 1885, c. 13; of 1886, cc. 25, 26, 27, 29, 30, 31, 33, 35; Acts of 1890, c. 50; of 1891, cc. 48 and 69; of 1895, cc. 5, 59; Acts of 1896, cc. 38, 51, 56; of 1897, cc. 1 and 2; of 1898, cc. 4, 28, 46. The Dominion Parliament dealt with the subject of Chinese immigration by 48 & 49 Vict. c. 67, R. S. C. 1886, whereby it regulated the immigration of Chinese into Canada, imposed a tax or duty on every Chinese immigrant, and prohibited the organization of private tribunals by the Chinese. It was contended that the enactment in question violated the spirit of the treaties referred to, was opposed to the comity of nations, and was calculated to create complications between the British and Chinese Governments, and conflicted with the exclusive authority of the Dominion Parliament. Even if there be some aspect of the question of aliens in which aliens may be touched incidentally by the province, this

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is not such a case. The Dominion Parliament had dealt with the subject as completely as it saw fit, and it was not competent to the provincial legislature to impose further special restrictions and disabilities upon the Chinese alien immigrants into British Columbia. Reference was made to *Musgrove* v. *Chun Teeong Toy*. (1)

Haldane, Q.C., and *C. Russell, Q.C.*, for the intervenant, contended that the enactment in question was intra vires of the provincial legislative authority. The case had two aspects: one as relating to aliens, and the other as to restricting the employment generally in mines below ground of particular kinds of labour. As regards the former, that would be within the exclusive competence of Dominion legislation. But Chinamen are not necessarily aliens. The term Chinese or Chinamen is one which is perfectly well understood in Canadian legislation, and means persons of Chinese habits and origin. It may include aliens within its meaning; but most of the Chinese who are affected by this legislation have been naturalized. Of the statutes cited on the other side as being in pari materiâ, three contain definitions of Chinese: (1.) the Act of 1898, c. 28, s. 4. [SIR E. FRY. The date of that is after the enactment in question.] (2.) Crown Lands Act, 1888, c. 66, s. 2: see Revised Statutes, 1897; (3.) Alien Labour Act, 1897, c. 2, s. 4. Assuming the case of alien Chinese, there is still the other aspect of the question. The restricting of employment generally in the manner enacted is a matter included in the class of subjects, "property and civil rights in the province," within the meaning of s. 92, sub-s. 13, of the Imperial Act of 1867. In that aspect it is within the exclusive competence of the provincial legislatures. Reference was made to *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (2); *Attorney-General for Ontario* v. *Attorney-General for the Dominion*. (3)

Taylor, Q.C., for the other respondent.

Blake, Q.C., replied.

(1) [1891] A. C. 272. (2) [1894] A. C. 189.
(3) [1896] A. C. 348.

1899. July 28. The judgment of their Lordships was delivered by

LORD WATSON. The appellant company carries on the business of mining coal by means of underground mines, in lands belonging to the company, situated near to the town of Union in British Columbia. The company have hitherto employed, and still continue to employ, Chinamen in the working of these underground mines.

By s. 4 of the Coal Mines Regulation Act, 1890, it is expressly enacted that, "no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground."

By the Act of 1890, the words "and no Chinaman" were added to the 4th section of the then existing Coal Mines Regulation Act, which was chapter 84 of the Consolidated Statutes of 1888, and now, as amended, is chapter 138 of the Revised Statutes of British Columbia, 1897. It is sufficiently plain, and it is not matter of dispute, that the provisions of the Act of 1890 were made to apply, and so far as competently enacted do apply, to the underground workings carried on by the appellant company.

The present action was instituted, in the Supreme Court of British Columbia, by the respondent, John Bryden, against the appellant company, of which he is a shareholder. It concludes (1.) for a declaration that the company had and has no right to employ Chinamen in certain positions of trust and responsibility, or as labourers in their mines below ground, and that such employment was and is unlawful, and (2.) for an injunction restraining the company from employing Chinamen in any such position of trust and responsibility, or as labourers below ground, and from using the funds of the company in paying the wages of the said Chinamen. The respondent averred in his statement of claim that the employment of Chinamen in positions of trust and responsibility, and as labourers underground, was a source of danger and injury to other persons working in the mines, which involved the liability of the company for damages, and was also injurious and destructive

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to the mines. He also pleaded that the employment of Chinamen in these capacities was contrary to the statute law of the province.

The appellant company, by their statement of defence, denied that there was any risk of injury arising either to other workmen in their mines, or to the mines, from the employment of Chinamen as underground miners. They pleaded that, in so far as they related to adult Chinamen, the enactments of s. 4 of the Coal Mines Regulation Act were void as being ultra vires of the legislature of the Province of British Columbia.

The case was tried in the Superior Court before Drake J. without a jury. In the course of the trial the respondent, the Attorney-General for the Province of British Columbia, who appears to have suspected that this suit was collusive, appeared by counsel, and he has since, in the character of intervenant, been a party to the litigation. It appeared from the evidence that the appellant company, in working some of their underground seams of coal, employed no workmen except Chinamen who were of full age, and that, in those parts of their workings where miners other than Chinamen were employed, no Chinamen occupied a position of trust or responsibility, such as were alleged in the statement of claim. The consequence was that, in the subsequent conduct of the litigation, the Courts below, and their Lordships in this appeal, have only been invited to consider the conclusions of the action in so far as these bear upon the legality of employing Chinese labour in violation of the express enactments of s. 4 of the Revised Statute No. 138 of 1897. In other words, the controversy has been limited to the single question—whether the enactments of s. 4, in regard to which the appellant company has stated the plea of ultra vires, were within the competency of the British Columbian Legislature.

In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company. But the question raised directly concerns the legislative authority

of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the Courts below which, in the opinion of their Lordships, have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded.

There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject-matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces "Property and Civil Rights in the Province."

But s. 91, sub-s. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." Sect. 91 concludes with a proviso to the effect that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

Sec. 4 of the Provincial Act prohibits Chinamen who are

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of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems primâ facie to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression "aliens" occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.

Drake J., before whom the case was tried, and on appeal the learned judges of the Full Court, were of opinion that the enactments of s. 4 of the Mines Regulation Act, so far as challenged, were within the legislative jurisdiction of the parliament of the province. They accordingly gave the plaintiff a declaration to the effect that the appellant company has no power to employ Chinamen, or to allow Chinamen to be, for the purpose of employment, in any mine of the company in British Columbia below ground, and that the employment by the company of Chinamen in their coal mines below ground at Union was unlawful, as being contrary to s. 4 of the Coal Mines Regulation Act. They also, in terms of that declaration, granted an injunction restraining the appellant company, its contractors, servants, workmen, and agents, from employing Chinamen, or allowing Chinamen to be for the purpose of

employment, in the coal mines of the company at Union, contrary to the provisions of s. 4.

The provisions of which the validity has been thus affirmed by the Courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by s. 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91, sub-s. 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, sub-s. 10, or s. 92, sub-s. 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the Full Court noticed the fact that the Dominion legislature had passed a "Naturalization Act, No. 113 of the Revised Statutes of Canada, 1886," by which a partial control was exercised over the rights of aliens. Walkem J. appears to regard that fact as favourable to the right of the provincial parliament to legislate for the exclusion of aliens being

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Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from; to find and declare that the provisions of s. 4 of the British Columbia Coal Mines Regulation Act, 1890, which are now embodied in chapter 138 of the Revised Statutes of British Columbia, 1897, were, in so far as they relate to Chinamen, ultra vires of the provincial legislature, and therefore illegal; and to order that the plaintiffs do pay to the defendant company the costs incurred by them in both Courts below as the same shall be taxed. The respondents, other than the intervenant, must pay to the appellant company their costs of this appeal.

Solicitors for appellants: *Longbourne, Stevens & Co.*
Solicitors for intervenant: *Gard, Hall & Rook.*
Solicitors for other respondent: *Andrew Wood & Purves.*

DOMINION LAW REPORTS

WALTER et al. v. ATTORNEY-GENERAL OF ALBERTA

FLETCHER et al. v. ATTORNEY-GENERAL OF ALBERTA

Supreme Court of Canada, Cartwright, C.J.C., Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon, JJ.
January 28, 1969.

Constitutional law — Validity of legislation — Communal Property Act (Alta.) — Provincial jurisdiction over property and civil rights — Act controlling communal ownership of land by religious colonies — Whether intra vires the Province — B.N.A. Act, s. 92(13).

The *Communal Property Act*, R.S.A. 1955, c. 52, is an Act relating to the ownership of land within the Province and is *intra vires* under s. 92(13) of the *B.N.A. Act*. The purpose of the legislation is to control the use of land as "communal property" by "colonies", religious or otherwise. It limits the territorial area of communal land to be held by existing colonies and controls the acquisition of land by new colonies but it does not forbid the existence of such colonies nor prohibit the holding of land by them. The fact that the legislation was prompted by the large scale holding of communal land by colonies of Hutterites and that Hutterian religious tenets lead to the economic view that land should be held communally does not make it legislation in relation to religion. Even if freedom of religion is beyond the power of the provincial Legislature, it involves only freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. It does not mean freedom from compliance with provincial legislation in relation to property holding.

[*Saumur v. City of Que. and A.-G. Que.*, [1953] 4 D.L.R. 641, 106 C.C.C. 289, [1953] 2 S.C.R. 299, discd & distd; *Henry Birks & Sons (Montreal) Ltd. et al. v. City of Montreal*, [1955] 5 D.L.R. 321, 113 C.C.C. 135, [1955] S.C.R. 279; *Switzman v. Elbling*, 7 D.L.R. (2d) 337, 117 C.C.C. 129, [1957] S.C.R. 285, refd to]

Constitutional law — Applicability of pre-Confederation statutes — Statute of Province of Canada relating to freedom of religion — Preserved by B.N.A. Act, s. 129 — Applicable only in Ontario and Quebec.

[*R. v. Gingrich* (1959), 122 C.C.C. 279, 31 C.R. 306, 29 W.W.R. 471, overd]

APPEALS from a judgment of the Alberta Supreme Court, Appellate Division, 60 D.L.R. (2d) 253, 58 W.W.R. 385, affirm-

ing a judgment of Milvain, J., 54 D.L.R. (2d) 750, 54 W.W.R. 385, declaring the *Communal Property Act* (Alta.) *intra vires*.

Max E. Moscovich, Q.C., *William B. Gill*, Q.C., and *I. Michael Robison*, for appellants.

S. A. Friedman, Q.C., and *W. Henkel*, Q.C., for respondents.

C. R. O. Munro, Q.C., and *David Kilgour*, for intervenant, Attorney-General of Canada.

The judgment of the Court was delivered by

MARTLAND, J.:—The question in issue in both these appeals is as to the constitutional validity of the *Communal Property Act*, R.S.A. 1955, c. 52, as amended, hereinafter referred to as "the Act". In each of the two actions the real purpose was to obtain a declaration that this statute was *ultra vires* of the Legislature of the Province of Alberta and they were consolidated for trial.

The facts are not in issue. The appellants, other than the Fletchers, are Hutterians. The Fletchers are owners of land in Alberta which their fellow plaintiffs sought to purchase. The plaintiffs in the other action also sought to purchase Alberta lands. It is conceded that the lands in each case sought to be acquired would be held in common as defined in sub-cl. (i) of cl. (*b*) [rep. & sub. 1960, c. 16, s. 2] of s. 2 of the Act and that the operation of the Act prevents the acquisition of the lands. The appellants, other than the Fletchers, in each case formed part of a religious community which based its community life and its holding of property on religious principles.

As of December 31, 1963, Hutterite colonies held approximately 480,000 acres of land in Alberta and over 10,000 acres had been added in 1964. The approximate population of Hutterites in Alberta as of December 31, 1963, was 6,000.

The Act is described as "An Act respecting Lands in the Province Held as Communal Property". Communal property is defined in s. 2 of the Act, which states:

> 2. In this Act,
>
> (*a*) "colony"
>
> (i) means a number of persons who hold land or any interest therein as communal property, whether as owners, lessees or otherwise, and whether in the name of trustees or as a corporation or otherwise,
>
> (ii) includes a number of persons who propose to acquire land to be held in such manner, and
>
> (iii) includes Hutterites or Hutterian Brethren and Doukhobors;

(*b*) "communal property" means

(i) land held by a colony in such a manner that no member of the colony has any individual or personal ownership or right of ownership in the land, and each member shares in the distribution of profits or benefits according to his needs or in equal measure with his fellow members, and

(ii) land held by a member of the colony by personal ownership or right of ownership or under a lease, if the land is used in conjunction with and as part of other land held in the manner described in subclause (i);

(*c*) "Board" means the Communal Property Control Board established pursuant to this Act. [rep. & sub. 1960, c. 16, s. 2]

The general scheme of the Act for controlling the holding of land as communal property is as follows:

Unless otherwise authorized by the Lieutenant-Governor in Council in the public interest (s. 5(2)), no colony existing on May 1, 1947, may increase the holdings of its land beyond its holdings on March 1, 1944 (s. 4(1)), or, if on that date the holdings were less than 6,400 acres, they may be extended thereto (s. 4(5)). The significance of the dates May 1, 1947, and March 1, 1944, referred to in the statute is as follows: The first Alberta legislation in relation to acquisition of land by Hutterites to come into force was the *Land Sales Prohibition Act*, 1944 (Alta.), c. 15, which came into force on March 1, 1944. In general that statute prohibited the selling of land to and the purchase of land by Hutterites. That Act, as amended, remained the law until it expired on May 1, 1947, and on that date the *Communal Property Act*, 1947 (Alta.), c. 16, came into force. So that between March 1, 1944, and May 1, 1947, no Hutterite could acquire any land in Alberta, but by virtue of the provisions of the *Communal Property Act* which came into force on the latter date the restrictions on the acquisition of land were lessened somewhat in relation to Hutterites and the new provisions were made applicable to all "colonies", whether Hutterite or otherwise.

The general scheme of the Act goes on to provide as follows:

No "colony" which exists or existed outside the Province may acquire land without the consent of the Lieutenant-Governor in Council (s. 6).

No land may be acquired for the purpose of establishing a new "colony" without the consent of the Lieutenant-Governor in Council (s. 7 [rep. & sub. 1960, c. 16, s. 5]).

By an amendment to the statute which came into force on May 1, 1951, the Lieutenant-Governor in Council was authorized to divide the Province into zones and to designate the number of acres a "colony" established after that date may acquire in any zone or class of zones (s. 5(1)). By virtue of an amendment made in 1960, "colonies" established after May 1, 1947, were also limited to the number of acres designated by the Lieutenant-Governor in Council for each zone (s. 9 [am. 1960, c. 16, s. 6]).

The Lieutenant-Governor in Council is authorized to establish a Communal Property Control Board (s. 3*a*(1) [enacted 1960, c. 16, s. 3]), which is to hear applications by "colonies" for leave to acquire land. Where the application is for leave to acquire additional lands for a "colony" already holding lands, the Board may grant or refuse the application, subject to an appeal to a Judge of a District Court by "A person or colony not satisfied with the decision of the Board . . ." (s. 13(1) to (6) [am. 1960, c. 16, s. 9(*a*); 1962, c. 8, s. 4]).

Where the granting of the application would result in the establishment of a new "colony", the Board is to give public notice of the application, and hold such hearings and make such inquiries as it deems necessary to determine whether the granting of the application would be in the public interest, giving consideration to the location of the lands applied for, the location of existing "colonies", the geographical location of the lands intended for communal use in relation to the lands not so used, and any other factors which the Board may deem relevant.

Following its investigation the Board is to submit a report to the Minister of Municipal Affairs as to its recommendations in the matter. After consideration of the report the Lieutenant-Governor in Council may consent or withhold consent as he deems proper in the public interest, irrespective of the Board's recommendation (s. 14 [enacted 1960, c. 16, s. 10]).

Dispositions of land to "colonies" which would result in contravention of the provisions of the statute are prohibited (s. 11).

The submission of the appellants is that the Act is legislation in respect of religion and, in consequence, is beyond the legislative powers of a provincial Legislature. The respondent contends that the Act is legislation in respect of property in Alberta, controlling the way in which land is to be held, by regulating the acquisition and disposition of land to be acquired by colonies to be held as communal land.

The learned trial Judge, Milvain, J. (as he then was) [54 D.L.R. (2d) 750, 54 W.W.R. 385], held that, in pith and substance, the Act relates to land tenure in the Province and is, therefore, *intra vires* of the Legislature of the Province of Alberta under s. 92(13) of the *B.N.A. Act*.

This judgment was sustained on appeal [60 D.L.R. (2d) 253, 58 W.W.R. 385]. Johnson, J.A., with whom Kane, J.A., concurred, while holding that the Act was aimed at controlling the expansion of Hutterite colonies in Alberta, and that living in colonies and holding land communally were tenets of the Hutterite faith, decided that, even though the Act, therefore, related to religion, it was valid because the Province, under s. 92(13), had legislative jurisdiction in relation to religion.

McDermid, J.A., with whom the Chief Justice concurred, decided that the Act related to land tenure, and that the fact that it might restrict the religious practices of the Hutterites did not render it invalid, even if provincial Legislatures cannot legislate in relation to religion.

Porter, J.A., said that he agreed with Johnson, J.A., and McDermid, J.A., that the legislation was valid, but expressed doubts as to the adequacy of the material submitted.

In my opinion, the Act was enacted in relation to the ownership of land in Alberta and the Legislature had jurisdiction, under s. 92(13) of the *B.N.A. Act*, because it deals with property in the Province. The scheme of the legislation indicates that the Legislature considered the use of large areas of land in Alberta for the purposes of communal living was something which, in the public interest, required to be regulated and controlled. The Act restricts, but does not prohibit, the use of land for such purposes.

It would seem to me to be clear that a provincial Legislature can enact laws governing the ownership of land within the Province and that legislation enacted in relation to that subject must fall within s. 92(13), and must be valid unless it can be said to be in relation to a class of subject specifically enumerated in s. 91 of the *B.N.A. Act* or otherwise within exclusive federal jurisdiction.

There is no suggestion in the present case that the Act relates to any class of subject specifically enumerated in s. 91.

It was on the basis that the legislation in question in the cases of *Henry Birks & Sons (Montreal) Ltd. et al. v. City of Montreal*, [1955] 5 D.L.R. 321, 113 C.C.C. 135, [1955]

S.C.R. 279, and *Switzman v. Elbling*, 7 D.L.R. (2d) 337, 117 C.C.C. 129, [1957] S.C.R. 285, related to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27) of the *B.N.A. Act*, that the statutes were held to be *ultra vires* of the Legislature of the Province of Quebec.

The *Birks* case involved the validity of a statute which empowered municipal councils of cities and towns to pass by-laws to compel the closing of stores on New Year's Day, the festival of Epiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day. The legislation was supported in argument on the basis that it related to the control of merchandising and the well-being of employees. It was held to be *ultra vires* of the Legislature of Quebec because it authorized the compulsion of Feast Day observance, and such legislation in England, as in the case of Sunday observance legislation, had been assigned to the domain of criminal law. Legislation in this field was held to relate to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27).

Rand, J., went on to add that the legislation was in relation to religion, and beyond provincial competence, and he referred to *Saumur v. City of Que. and A.-G. Que.*, [1953] 4 D.L.R. 641, 106 C.C.C. 289, [1953] 2 S.C.R. 299. Kellock and Locke, JJ., said that, even if it were not properly "criminal law", it was beyond the competence of the Legislature as being legislation with respect to freedom of religion, a matter dealt with in the statute of the Province of Canada of 1851, c. 175, the relevant portion of which is quoted later in these reasons.

Switzman v. Elbling involved the validity of the *Act Respecting Communistic Propaganda*, R.S.Q. 1941, c. 52, which, *inter alia*, made it illegal for any person who possessed or occupied a house in the Province to use it or to allow any person to make use of it to propagate communism or bolshevism by any means whatsoever. It was attempted to support the legislation on the ground that it dealt with property in the Province.

The majority of the Court was of the opinion that the legislation was in respect of criminal law which, under s. 91(27), was within the exclusive competence of the Parliament of Canada.

It was submitted by the appellants that the Act is aimed at preventing the spread of Hutterite colonies in Alberta, that, because the maintenance of such colonies is a cardinal tenet of the Hutterite religion, the Act seeks to deal with religion,

and that the subject of religion is within the exclusive jurisdiction of the Parliament of Canada. Their position is stated in the reasons of Johnson, J.A., in the Court below, as follows [60 D.L.R. (2d) at p. 264]:

> This Act then in its pith and substance is legislation restricting the acquisition by Hutterites of more land in the Province. If a by-law which prevents the distribution of religious tracts (the *Saumur* case) was an interference with religion, I find it difficult to say that legislation which is aimed at the restriction of new and existing colonies and the holding of land in common as practised by these colonies, when living in such colonies and holding lands in that manner are the principal tenets of Hutterian faith, does not also deal with religion.

With respect, I do not share this view. I do not think that the *Saumur* case is analogous to the present one. The law, the validity of which was in issue there, was a by-law which forbade the distribution in the streets of the City of Quebec of any book, pamphlet, circular or tract unless the written permission of the Chief of Police to do so had been obtained. The granting of permission depended upon the content of the document proposed to be distributed. The by-law restricted, at the will of the Chief of Police, the dissemination, on the streets, of tracts dealing with religious, political or other views.

Of the nine Judges who heard the appeal, four (Rand, Kellock, Estey and Locke, JJ.) held that the by-law was invalid, because it was legislation in relation to religion and free speech and not in relation to the administration of the streets, and was, therefore, not within s. 92(13). Two Judges (Rinfret, C.J.C., and Taschereau, J. (as he then was)) held that in pith and substance the by-law was to control and regulate the usage of streets. They also held that freedom of worship is a civil right within the Provinces. Two Judges (Cartwright, J. (as he then was), and Fauteux, J.) held that it was within provincial competence to authorize the enactment of this by-law, and that provincial legislation in relation to matters assigned to the Provinces is not rendered invalid because, to a limited extent, it interferes with freedom of the press or freedom of religion. Kerwin, J. (as he then was), while holding that freedom of religion was a civil right within the Province, held that to the extent that the by-law interfered with the profession of religion it was not applicable because of its conflict, to that extent, with the provisions of a pre-Confederation statute of 1851 of the old Province of Canada, c. 175, which provided [p. 669 D.L.R., p. 320 C.C.C., p. 328 S.C.R.]:

"That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same."

This provision continued to operate in the Province of Quebec by virtue of s. 129 of the *B.N.A. Act*, which provides:

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The four Judges who were of the opinion that the by-law was invalid reached that conclusion because they felt that it was not enacted in relation to the administration of streets but rather to provide a means of censorship of published material distributed on the streets. It restricted, *inter alia*, the dissemination of religious views.

The purpose of the legislation in question here is to control the use of Alberta lands as communal property. While it is apparent that the legislation was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it does not forbid the existence of Hutterite colonies. What it does is to limit the territorial area of communal land to be held by existing colonies and to control the acquisition of land to be acquired by new colonies which would be held as communal property. The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. The fact that Hutterites engage in that practice was the circumstance which gave rise to the necessity for the Legislature's dealing generally with the holding of land as communal property, but that does not mean that legislation controlling the holding of land in that way is not in relation to property in the Province of Alberta.

It is a function of a provincial Legislature to enact those laws which govern the holding of land within the boundaries of that Province. It determines the manner in which land is held. It regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that Province, it controls the extent of the land holdings of a person or group of persons. The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial Legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.

Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding. There has been no suggestion that mortmain legislation by a provincial Legislature is incompetent as interfering with freedom of religion.

In *Carnation Co. Ltd. v. Quebec Agricultural Marketing Board*, 67 D.L.R. (2d) 1 at p. 14, [1968] S.C.R. 238 at p. 252, reference was made to the distinction between legislation "affecting" the appellant's interprovincial trade and legislation "in relation to" the regulation of trade and commerce. In my opinion, the legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to the matter of religion. The Act is in relation to the right to acquire land in Alberta, if it is to be used as communal property, and, in consequence, it is within provincial jurisdiction under s. 92(13).

Having reached this conclusion, it is unnecessary for me to express any opinion in respect of the submission of the respondent that legislation in relation to religious freedom falls within the exclusive jurisdiction of provincial Legislatures, a view which was supported by three of the Judges in the *Saumur* case.

The appellants also contended that the Act was in conflict with the statute of the Province of Canada of 1852, to which reference has already been made, it being contended that this statute was in force in Alberta by virtue of s. 129 of the

B.N.A. Act and ss. 3 and 16 of the *Alberta Act*, 1905 (Can.), c. 3. The Appellate Division of the Supreme Court of Alberta had held that this Act was in force in Alberta, in *R. v. Gingrich* (1959), 122 C.C.C. 279 at p. 282, 31 C.R. 306, 29 W.W.R. 471. I agree with the view expressed by Johnson, J.A., and by McDermid, J.A., that the effect of s. 129 of the *B.N.A. Act*, which continued laws in force in Canada, Nova Scotia and New Brunswick in Ontario, Quebec, Nova Scotia and New Brunswick *respectively*, was only to continue that Act in effect in the Provinces of Ontario and Quebec, and not to make it a part of the law of any other Province.

In any event, it may be noted that that statute protected the free exercise and enjoyment of "Religious Profession and Worship". The Act does not interfere with the profession of the Hutterite faith or with religious worship in that faith. It controls the land holdings of colonies of people of that faith.

I would dismiss the appeals with costs. No costs should be paid by or to the intervenant.

Appeals dismissed.

CANADIAN SUPERIOR OIL LTD. et al. v. PADDON-HUGHES DEVELOPMENT CO. LTD. et al.

Alberta Supreme Court, Appellate Division, Cairns, Johnson and Allen, JJ.A. January 23, 1969.

Oil and gas — Exploration and development lease — Term of years certain extendable if production established — "Production" to include shut-in royalty — Shut-in royalty not paid until seven days after "completion of drilling" begun in last week of term — Whether royalty payment preserved and extended term.

Estoppel — Silence, words and conduct — Whether silence by one in ignorance of legal rights is acquiescence in erroneous conduct of another sufficient to change contractual relationships between them — Whether words and conduct not relied upon by other may be basis of estoppel.

Having previously done no work under its 10-year oil and natural gas lease of a certain section of defendant's lands, plaintiff commenced drilling in the last week of the term and continued for about two months to drill, set production casing and otherwise prepare the well for production. However, as there was no available market for the gas from the well, the permission of the Oil and Gas Conservation Board was obtained to suspend production of the well; the site was cleaned, the rig dismissed and the Christmas tree chained and locked. Plaintiff's cheque was then sent to defendant for the amount of the first (of eight succeeding annual) shut-in royalty payments. Upon defendant's later executing a new lease in favour of third parties, proceedings were

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Smith J.

dence being necessary, it had been taken in the manner suggested, or otherwise, and a finding based on it without disclosure of it to the company and an opportunity to answer it, I would regard such a proceeding as contrary to elementary principles of justice, and as affording, under the statute, a ground for setting the award as to this item aside and referring it back for reconsideration. It does not, however, appear that any evidence was taken, and as stated, I have concluded that there was power to make the change without evidence.

I therefore concur with my brother Lamont in the disposal of this appeal.

Appeals dismissed with costs.

Solicitors for Northwestern Utilities, Limited: *Milner, Carr, Dafoe & Poirier.*

Solicitor for the City of Edmonton: *John C. F. Bown.*

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*Oct. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15.

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*Feb. 5.

IN THE MATTER OF A REFERENCE AS TO THE RELATIVE RIGHTS OF THE DOMINION AND PROVINCES IN RELATION TO THE PROPRIETARY INTEREST IN AND LEGISLATIVE CONTROL OVER WATERS WITH RESPECT TO NAVIGATION AND WATER-POWERS CREATED OR MADE AVAILABLE BY OR IN CONNECTION WITH WORKS FOR THE IMPROVEMENT OF NAVIGATION.

Constitutional law—Water-powers—Navigable river—Public right of navigation—Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property—Relative rights of the Dominion and provinces over water-power created by works done by the Dominion—Boundary waters—Interprovincial and provincial rivers—B.N.A. Act, ss. 91, 92, 102 to 126.

The questions referred to this court by the Governor General in Council were answered as follows: (1)

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) *Reporter's Note.*—In view of the difficulties which the court found in dealing with the questions before it and of the impossibility of giving precise and categorical answers, it was thought best in order to avoid misleading as to what was decided, to put as a head-note the text of the formal judgment.

Question 1 (*a*). Where the bed of a navigable river is vested in the Crown in the right of the province, is the title subordinate to the public right of navigation?

Question 1 (*b*). If not, has the Dominion the legislative power to declare that such title is subordinate to such right?

Answer: The questions as framed postulate the existence of a public right of navigation in the rivers to which they refer, as well as their navigability.

The title to the bed of the river is subject to that public right, except in so far as, at the date of the Union, the Crown possessed by law or has since acquired, under Dominion legislation, a superior right to use or to grant the use of the waters of the river for other purposes, such for example, as mining, irrigation or industry.

Question 2. Where the bed of a navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, or change the flow over such bed (*a*) without the consent of the province; (*b*) without compensation?

Question 3. Has the Parliament of Canada the power, by appropriate legislative enactment, to authorize the Dominion Government to expropriate the lands of the Crown in the right of the province for the purposes of navigation with provision or without provision for compensation?

Answer: These questions cannot be answered categorically either in the affirmative or in the negative.

The conditions controlling the exercise of Dominion legislative powers for purposes embraced within the comprehensive phrase, "navigation purposes," depend in part upon the nature of the "purpose," in part upon the nature of the means proposed for accomplishing it, and in part upon the character of the particular power called into play. Reference is respectfully made to the observations in the accompanying reasons, as indicating the governing principles with as much definiteness as is safe or practicable.

Question 4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely "Canals with lands and water-power connected therewith."

Has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purpose of navigation?

Question 5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation?

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Answer: Whatever subjects are comprehended under the phrase "Water-Power" in the 1st item of the third schedule, by section 106 passed to the Dominion, there was left to the provinces neither proprietary interest in, nor beneficial ownership of such subjects; and under section 91 (1) legislative control over them is exclusively committed to the Dominion.

As to water-powers (and these of course, are not comprised within that item) "created or made available by reason of extensions, enlargements or replacements made by the Dominion since Confederation" or "by works for the improvement of navigation constructed * * * in whole or in part since Confederation," it is impossible to ascertain the respective powers or rights of the Dominion and the provinces in relation thereto, in the absence of a more precise statement as to the character of the works, as to the legislative authority under which the works were executed, and as to the circumstances pertinent to the question whether or not the conditions of such authority were duly observed.

Question 6 (*a*). Has the Dominion exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (1) the improvement of navigation in such waters, or (2) for the development of power, or (3) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

Question 6 (*b*). If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

Answer: The nature and extent of the respective powers, rights and interests of the Dominion and the provinces in, and in respect of such water-powers, would depend upon a variety of facts, including, *inter alia*, the terms of the Treaty, and the respective rights of the Dominion and the provinces in, and in relation to, the waters affected. In the absence of information as to such facts, it is impracticable to give an intelligible answer to the questions propounded.

Question 7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in inter-provincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

Answer: As to both "provincial rivers" and "interprovincial rivers," Parliament has jurisdiction in respect of such works, if they fall within the ambit of sec. 92 (10*a*). With reference to the expropriation of provincial

Crown lands "for the purposes of such works," the answer to the question would, to some extent, depend upon the particular purpose for which such lands were required. In answering this question, sec. 92 (10c) is not taken into account. Reference is respectfully made to what has been said upon that subject in the accompanying reasons.

Question 8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

Question 9. Has a province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

Answer: These two questions mutually overlap, and it is convenient to deal with them together. If there is no valid conflicting legislation by the Dominion under an overriding power—the power for example bestowed upon the Dominion by sec. 92 (10a)—the several provinces have the rights which are the subject of interrogatory number 9.

As to the first branch of the eighth question. The authority of the provinces to "control, regulate and use" such waters, in the circumstances mentioned, is subject to the condition that, in the exercise thereof, the provinces do not interfere in matters the control of which is reserved exclusively for the Dominion, and that all valid enactments of the Dominion, in relation to the navigation works, or in relation to navigable waters, be duly observed.

This condition is not necessarily identical with the condition expressed in the question by the words "so long as such control, regulation and use does not interfere with navigation." The question therefore, in the form in which it is put, cannot be answered in the affirmative; and, as the exercise of legislative jurisdiction, in the comprehensive terms of the question, might encroach upon the exclusive jurisdiction of the Dominion, the proper answer seems to be in the negative.

As to the second branch, considering the variety of meanings which might attach to the phrase "jointly control, regulate and use," no precise or useful answer is possible.

The answers to these questions, conformably to the views adverted to above, also proceed upon the assumption that the questions have no reference to any jurisdiction which might be acquired by the procedure laid down in sec. 92 (10c).

Question 10. (a) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(b) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(c) If the answers to both questions 6 (a) and 6 (b) are in the negative, what are the respective rights and interests of the Dominion and the provinces in relation to such water-powers?

Answer: In view of what has already been stated in response to the 4th, 5th and 6th interrogatories, no answer to this question is called for.

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REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act*, of certain questions for hearing and consideration as to the relative rights of the Dominion and Provinces in relation to the proprietary interest in and legislative control over waters with respect to navigation and water-powers created or made available by or in connection with works for the improvement of navigation.

The first Order in Council providing for the reference, dated 14th April, 1928 (P.C. 592), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 13th April, 1928, from the Minister of Justice, submitting that at the conference of representatives of the Dominion and Provincial Governments held at Ottawa in the month of November, 1927, the Premiers of certain of the Provinces questioned the right of the Dominion to water-powers created or made available by the erection of Dominion works for the improvement of navigation and asserted a right on the part of the Provinces to such water-powers within the limits of the Province.

"The Minister observes that in the discussion which followed with regard to this claim and also with regard to the whole question of the division of legislative control over and proprietary interest in water-powers it was found impossible to reach any general agreement as between the Dominion and the Provinces, and in the result a request was made by the Premiers of Ontario and Quebec that the Dominion undertake to submit a case to the Supreme Court of Canada for hearing and consideration.

"In pursuance of this request, Your Excellency was pleased, by Order in Council of the 18th January, 1928, (P.C. 115), passed on the recommendation of the Minister of Justice, to refer certain questions to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act.

"The Minister states that the statistics show that the inland water-borne commerce of the Dominion has attained to great dimensions and with the growth and settlement of the country will involve large future expenditures

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for improvements of the extensive waterways comprising the inland navigation of the Dominion.

"The Minister submits that owing to the great importance of the questions in controversy, it was considered advisable to consult with representatives of the Provinces with respect to the questions to be submitted, and such conference having been held it was deemed advisable to revise the said questions and to submit additional questions, viz., Nos. 8 and 9 hereinafter set out, at the request of representatives of the Province of Ontario.

"The Minister accordingly recommends that Order in Council of the 18th January, 1928 (P.C. 115) be rescinded, and that, pursuant to the powers in that behalf conferred by section 60 of the Supreme Court Act, Your Excellency may be pleased to refer to the Supreme Court of Canada for hearing and consideration the following questions:—

1. (*a*) Where the bed of a navigable river is vested in the Crown in the right of the Province, is the title subordinate to the public right of navigation?
   (*b*) If not, has the Dominion the legislative power to declare that such title is subordinate to such right?
2. Where the bed of a navigable river is vested in the Crown in the right of the Province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, change the flow over such bed (*a*) without the consent of the Province; (*b*) without compensation?
3. Has the Parliament of Canada the power, by appropriate legislative enactment to authorize the Dominion Government to expropriate the lands of the Crown in the right of the Province for the purposes of navigation with provision or without provision for compensation?
4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely, "Canals with lands and water-power conected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over

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the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest or ownership or control?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works of the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest, ownership or control?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

(*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

(*c*) If neither the Dominion nor the Province has the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-

powers, what are their respective rights and interests in relation to such water-powers?

7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in interprovincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

9. Has a Province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

"The Committee concur in the foregoing and advise that Your Excellency may be pleased to refer the said questions to the Supreme Court of Canada for hearing and consideration, accordingly."

A second Order in Council, rearranging questions, dated 31st May, 1928 (P.C. 921), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 29th May, 1928, from the Minister of Justice, stating that by Order in Council dated 14th April, 1928 (P.C. 592), certain questions touching the rights of the Dominion and the Provinces, respectively, in relation to the proprietary interest in, and legislative control over, waters with respect to navigation and water-powers created or

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made available by or in connection with works for the improvement of navigation, were referred to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act;

"The Minister observes that the said Court have suggested to counsel for the Attorney-General of Canada that it would be more convenient in considering and answering the questions if the concluding sentence of questions Nos. 4 and 5 and paragraph (*c*) of question No. 6 were transposed from their present position and consolidated in a new question, to be added as question No. 10.

"The Committee, on the recommendation of the Minister of Justice, advise that the questions set forth in Order in Council of the 14th April, 1928 (P.C. 592), be rearranged in accordance with the suggestion of the Supreme Court of Canada, and that the said questions, so rearranged, be as follows:—

1. (No change.)

2. (No change.)

3. (No change.)

4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province amongst others, shall be the property of Canada, namely, "Canals with lands and water-power connected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since

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Confederation which is not required from time to time for the purposes of navigation?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

6. (*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

7. (No change.)

8. (No change.)

9. (No change.)

10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the Provinces in relation to such water-powers?

Pursuant to an order of the Court, notification of the hearing of the reference was sent to the Attorneys General of all the provinces and was published in the *Canada Gazette*. The Attorneys General of the Provinces of

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Ontario, Quebec, British Columbia, Manitoba and Saskatchewan were represented by counsel at the hearing.

N. W. Rowell K.C., C. Laurendeau K.C., H. J. Symington K.C., C. P. Plaxton K.C., and *V. C. Macdonald* for the Attorney General of Canada.

W. N. Tilley K.C., S. Johnston, K.C., and *C. F. H. Carson* for the province of Ontario.

E. Lafleur K.C., C. Lanctot K.C., and *A. Geoffrion K.C.* for the province of Quebec.

E. B. Ryckman K.C., I. F. Strachan and *J. E. Lane* for the province of British Columbia.

F. H. Chrysler K.C. for the province of Manitoba.

H. Fisher K.C. for the province of Saskatchewan.

The judgment of the Court (1) was delivered by

DUFF J.—Certain interrogatories have been referred to us by the Governor General in Council concerning chiefly the distribution of public assets and legislative powers under the B.N.A. Act. They particularly relate to the scope of the legislative authority of the Dominion under certain of the enumerated heads of section 91, considered in connection with the authority of the provincial legislatures under section 92, and under the group of sections beginning with section 102 and ending with section 126, dealing with assets, revenue and sources of revenue. By the last mentioned group of sections, the assets, duties and revenues, including the sources of revenue over which the legislatures of the confederated provinces possessed the power of appropriation at the date of the Union, were distributed, and assigned in part to the control of the Dominion Parliament, and in part to that of the provincial legislatures. *Attorney-General of Ontario* v. Mercer (2). The sources of revenue assigned to the provinces as well as the revenues derived from them, and the revenues raised under the special powers conferred by the Act, were to remain vested in the Crown, as the Sovereign Head of the several provinces, but were to be "subject to the administration and control" of the

(1) *Reporter's Note.*—Mr. Justice Smith, while concurring with Duff J., wrote a separate judgment.

(2) (1883) 8 App. Cas. 767, at pp. 774 to 779.

legislatures of those provinces. *St. Catherines Milling and Lumber Company* v. *The Queen* (1), and *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (2). By the same series of sections, provision was made for the assumption by Canada of the burden of the public debts of the several provinces, within limits designated by the Act for each province, and for the payment, by the Dominion, according to a prescribed scale, of an annual grant to each of the provinces; which grants were to be "in full settlement of all future demands on Canada." By section 91, the Dominion was given power to raise money, by any mode or system of taxation, and by section 92, each of the provinces was given the power to raise a revenue for provincial purposes by direct taxation, and by means of licenses.

It has never been suggested that either the Dominion alone or a province alone is entitled to alter the terms of this arrangement for the distribution of assets, liabilities and sources of revenue.

In the *Ontario Mining Co.* v. *Seybold* (3), the Judicial Committee of the Privy Council had to consider whether the Dominion Parliament, without the concurrence of Ontario, in the exercise of its legislative authority over Indians and lands reserved for Indians, could, after the surrender of the Indian title by the North West Anglo Treaty of 31st October, 1873, for the purposes of an Indian reserve, for which provision was made by that treaty, set out and appropriate portions of the land surrendered as reserves for the use of the Indians. Their Lordships negatived any such power in express terms (page 82), and held that such an appropriation could only be effected by the joint action of the two governments; a conclusion in which the Dominion and Ontario had, by legislative agreement, already concurred. Their Lordships declared (page 79) that the right of disposing of Crown lands

> can only be exercised by the Crown under the advise of the Ministers of the Dominion or the province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

(1) (1888) 14 App. Cas. 46, at p. 57.

(2) [1892] A.C. 437, at pp. 443, 444.

(3) [1903] A.C. 73.

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This decision of 1902 proceeded upon the principle of earlier judgments delivered in 1898, in the first *Fisheries* case, *Atty. Gen. for Canada* v. *Atty. Gen. for Ontario* (1), and in the *St. Catherine Milling and Lumber Company's* case (2) already mentioned, which was decided in 1888. In the first *Fisheries case* (1), their Lordships had to pass upon the validity of an enactment of the Parliament of Canada (R.S.C., c. 95, s. 4) empowering the Governor in Council to grant fishery leases. Their Lordships decided that "in so far as" it empowered

> the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it.

The legislative authority in respect to "Fisheries," conferred upon the Dominion Parliament by section 91, does not, it was held, involve the power to deal with the property of a province as if the administration of that property had been entrusted by the B.N.A. Act, to the control of the Dominion Parliament; for, as Lord Herschell, who delivered the judgment of the Board, said, such a ruling would enable the Dominion to

> transfer to itself property which had by the B.N.A. Act been left to the provinces and not vested in it. (p. 713).

The effect of the decisions seems to be, that neither the Dominion nor a province can take possession of a source of revenue which has been assigned to the other, and as a source of revenue, appropriate it to itself, nor, as owner, transfer it to another.

This, of course, is not to say that the Dominion in exercising its legislative authority under section 91, may not legislate in such a way as to affect the proprietary rights of a province. It is plain that in consequence of legislation on the subject, for example, of Fisheries, the provinces may be very greatly restricted in the exercise of their proprietary rights; but so long as the Dominion legislation truly concerns the subject of "Fisheries," as that subject is envisaged by section 91, such legislation has the force of law, however harmful, or even foolish, it may appear to be. Within the limits of the subject matters assigned to it, the authority of the Dominion is supreme, and no court of justice has jurisdiction to take cognizance of any complaint that such authority has been abused.

(1) [1898] A.C. 700. (2) 14 App. Cas. 46.

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The extent to which the provincial legislatures may be restricted in, or excluded from, the control of provincial property by the enactment of Dominion laws operative under section 91 cannot be defined in the abstract. That depends primarily upon the character of the particular authority which the Dominion is exercising. On the present Reference, the discussion has been largely concerned with the legislative authority of the Dominion Parliament in relation to the permanent occupation of Provincial Crown lands, and the permanent diversion and alteration of the flow of rivers and streams in derogation of the rights of a province, as proprietor of the beds of such rivers and streams, for purposes which have been compendiously styled, in the interrogatories, "navigation purposes."

Before proceeding to a consideration of some of the points debated, it is necessary to notice the distinction, now well settled, between those matters, which, according to the true construction of the words designating the subject or subjects falling under a "specially enumerated" head of s. 91, are strictly and necessarily within the limits of those subjects, so that legislation in relation to such matters, by a province, is in no circumstances competent; and other matters, which, though not necessarily or strictly falling within such subjects, may be dealt with by Dominion legislation under some power arising by implication, because such implied power is requisite to enable the Dominion fully to perform the legislative functions devolving upon it in relation to the designated subject or subjects. With regard to such last mentioned matters, provincial legislation, dealing with them in their provincial aspects, may be competent and operative, until superseded or overborne by some valid enactment passed by the Dominion, having relation to their Dominion aspects.

There is one subject in relation to which it has been expressly held that the exclusive authority of the Dominion, within the strict limits traced by the language of s. 91 involves the power to legislate for the taking and using of provincial Crown lands for the purposes for which the authority was bestowed. In legislating for railways extending beyond provincial limits, it has been held, that it is of the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course, without

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regard to the ownership of the lands through which it may pass (*Attorney General for Quebec* v. *Nipissing Central Ry. Co.* (1)) " railway legislation, strictly so called " (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, *inter alia* (*Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2)), regulations for the construction, the repair and the alteration of the railway and for its management. In the circumstances of this country, a provincial right of interdiction upon the occupation of provincial Crown property lying upon the route of the railway is incompatible with either a plenary or an exclusive Dominion authority over the construction or working of such railways; and this would have been even more strikingly evident, in 1867. On the other hand, the authority granted by section 91, head 4, "Indians and lands reserved for Indians," while it enables the Dominion to legislate fully and exclusively, upon matters falling strictly within the subject " Indians," including, *inter alia,* the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown land for the purposes of an Indian reserve, without the consent of the province, (*Seybold's* case (3)).

So also under head 12 of section 91, which invests the Dominion with jurisdiction to make laws in relation to all matters pertaining to the subjects, " Seacoast and Inland Fisheries," it has been decided that the Dominion has no right to authorize, for the purposes of fishing in waters where there is a public right of fishing, the affixing of fishing apparatus to the *solum*, where that is the property of a province. The exclusive power to license such use of the *solum* is, according to this decision, committed to the province. *Atty. Gen. for Quebec* v. *Atty. Gen. of Canada* (4).

Again, there is judicial sanction for the view that the authority given to the Dominion under s. 91 (10), " Navigation and shipping," does not, in its essence, include the power to authorize the permanent occupation of provin-

(1) [1926] A.C. 715.
(2) [1899] A.C. 367, at p. 372.
(3) [1903] A.C. 73.
(4) [1921] 1 A.C. 401, at pp. 428, 431, 432.

cial lands for harbour works, or to vest the bed of a river belonging to a province in a Board of Harbour Commissioners for harbour purposes; that such a power, if it exists, is in the nature of an ancillary power, and can only be exercised upon the condition of paying compensation to the province. *City of Montreal* v. *Harbour Commissioners of Montreal* (1); *Reference re s. 189, Railway Act* (2); *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3).

Counsel for the Dominion claim, under section 91, a much more sweeping jurisdiction. Legislative authority, under the enumerated heads of that section, being plenary, carries with it, it is argued, in virtue of that authority, the widest discretion touching the means to be employed for the advancement of any legislative scheme or purpose within the purview of any such enumerated head. To the extent to which it is considered advisable to do so, in order to proceed effectually in pursuit of its objects, Parliament, it is said, is clothed with the power to legislate, for affecting such proprietary rights, and indeed, where it is conceived to be necessary, for the transfer of such rights to the Dominion, or to others. In support of this view, the initial words of section 91 are invoked.

It is hereby declared that notwithstanding * * * anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the subjects next hereinafter enumerated.

From these words, coupled with the concluding paragraph of s. 91, the deduction is drawn that in construing and giving effect to the language of section 91, defining the powers of Parliament, you may disregard the provisions of the Act, already discussed, by which certain assets and sources of revenue are exclusively vested in the control of the provincial legislatures; in the sense that you may treat the rights of the provinces under those sections as upon the same plane as the proprietary rights of private individuals.

It was argued that, to deny to the Dominion Parliament an unrestricted discretion in disposing of provincial property for purposes within the enumerated heads of s. 91 is equivalent to denying the plenary character of the Do-

(1) [1926] A.C. 299, at pp. 312, 313.
(2) [1926] S.C.R. 163, at pp. 175, 176.
(3) [1926] A.C. 715.

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minion legislative authority; that the provincial contention in the opposite sense has no other basis than the possibility that legislative powers of the Dominion, as interpreted by the Dominion, in argument, might be abused to the injury of the provinces; a consideration inadmissible in a court of law.

There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole. It was recognized at an early stage in the judicial elucidation of the Act that any other principle of construction might have the effect of frustrating the intention of its authors who

> could not have intended that the powers assigned exclusively to the provincial legislatures should be absorbed in those given to the Dominion Parliament.

The Citizens Ins. Co. of Canada v. *Parsons* (1); *Great West Saddlery Co.* v. *The King* (2); *Atty. Gen. for Ontario* v. *Reciprocal Insurers* (3). The argument presented on behalf of the Dominion hardly does justice to this principle. The authority of the Dominion Parliament in relation to railways under section 92-10 (*a*) is a plenary authority, which *prima facie* would enable the Dominion to legislate fully in respect of such enterprises as the Intercolonial Railway, and the railway stipulated for in the Terms of Union with British Columbia. But it could hardly be argued, as the Dominion contention, carried to its logical conclusion, seemed to suggest, that the arrangement embodied in the B.N.A. Act as to the Intercolonial Railway, might, as to date of completion, for example, be amended at will by the Dominion in exercise of its authority to legislate in respect of interprovincial railways. Similar observations might be made with regard to the terms of Union with Prince Edward Island, dealing with steamboat services. Then there are the provisions in sections 102-126 and the corresponding stipulations contained in the Terms of Union with British Columbia and with Prince Edward Island, touching the apportionment of the burden of the debts of the provinces.

(1) (1881) 7 App. Cas. 96, at p. 108.

(2) [1921] 2 A.C. 91, at pp. 100, 101.

(3) [1924] A.C. 328, at pp. 340, 341.

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The Dominion has, under section 91 (1), complete authority to legislate on the subject of the public debt, but it could hardly be contended that this authority would enable the Dominion to legislate in such a manner as to prejudice its obligations so constituted.

Then it seems proper to call attention to s. 91 (3) of the Act, and to contrast the unrestricted language of that head with section 125.

It is perhaps not superfluous to observe that the provisions of the Order in Council, setting forth the terms of the agreement, in pursuance of which British Columbia entered the Union, in so far as they concern the subjects of revenue and assets, were treated by the Judicial Committee of the Privy Council in the *Precious Metals* case, *The Atty. Gen. of British Columbia* v. *The Atty. Gen. of Canada* (1), as constituting a modification of the provisions of the principal statute, in sections 102-126, dealing with the same subjects, and as having, in virtue of s. 146 of the B.N.A. Act, precisely the same force as those provisions.

The view cannot be accepted that, by the enactments of s. 91, the Dominion, in execution of its legislative powers under that section, is empowered to rewrite the terms of the agreements under which British Columbia and Prince Edward Island entered the Union; and that being so, it cannot be maintained that it is competent to the Dominion in exercise of such powers to legislate in disregard of the provisions of sections 102-126.

In considering the effect of the phrase "notwithstanding anything in this Act" one must not overlook the fact that it is only the "exclusive authority" of the Dominion under the enumerated heads of s. 91 which is accorded the primacy intended to be declared by those words. In themselves they have not the effect of giving pre-eminence to the incidental or ancillary power; which are not strictly exclusive. As already observed, in recent pronouncements touching the appropriation of Provincial Crown property in professed exercise of such powers, support is given to the view that, if such appropriation be permissible in exercise of them, then the payment of compensation may be a condition of that exercise; and there appears to be, it may be added, no decision, and, except in the observations in the

(1) (1888) 14 App. Cas. 295.

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judgments referred to, no dictum, giving any support to the view that in virtue of an ancillary or incidental power the Dominion Parliament is entitled to authorize the permanent occupation of Provincial Crown property.

The task of reconciling the various sections of the Act is one of great difficulty. You must give full effect to the exclusive powers of the Dominion under section 91; yet in ascertaining the scope of those powers you must have regard to the other provisions of the Act. The character of the exclusive power may be such, on the true construction of section 91, as to involve the right to take, or to give to others, possession of Provincial Crown property, for the purpose of executing the power. The decisions already cited seem to show that such a conclusion must be founded on solid, not to say demonstrative, considerations; but, where the right is unmistakably involved in the authority given, then, of course, to that right effect must be given. But although the Dominion may, by legislation enacted in exercise of its exclusive powers relating to railways and canals, authorize the construction through the property of a province of a railway or canal, to which its jurisdiction extends, this does not involve the right to appropriate the whole beneficial interest of the site of the work (including the minerals, for example), for the purpose of making it available as an asset or source of revenue for the benefit of the Dominion or of the Dominion's grantees, where that site is vested in His Majesty and is, by the B.N.A. Act, subject to the administration and control of the Provincial legislature.

Apart from the fact that such legislation would not be legislation exclusively competent to the Dominion, it would transcend the ambit of Dominion authority touching railways or canals, which was not intended to enable the Dominion to take possession of sources of revenue assigned to the provinces, and by assuming the administration of them, to appropriate to itself a field of jurisdiction belonging exclusively to the provinces. Similar considerations apply to the exploitation and disposition of water-powers appropriated by the Dominion in exercise of its legislative authority in relation to canals. Assuming such an appropriation by the Dominion to be competent without payment of compensation, the Dominion could not constitutionally assume the administration or control of water-powers so acquired for purposes not connected with the canal.

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We must, as best we can, reconcile the control by the provinces of their own assets as assets, with the exercise by the Dominion of its exclusive powers for the purposes which those powers were intended to subserve. This can only be accomplished by recognizing that the proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91. On the other hand, in giving effect to the provisions of the British North America Act, we must rigorously adhere to the radical distinction between these two classes of enactment: legislation in execution of the Dominion's legislative powers under section 91, which may, in greater or less degree, according to the circumstances and the nature of the power, affect the proprietary rights of the provinces, and even exclude them from any effective control of their property; and, in contradistinction, legislation conceived with the purpose of intervening in the control and disposition of provincial assets, in a manner, which, under the enactments of that Act touching the distribution of assets, revenues and liabilities, is exclusively competent to the provinces.

Before proceeding to an examination of the interrogatories submitted, a few words of comment are required upon a point of more or less general application.

During the argument there was much discussion touching the effect of s. 92 (10c). In the construction and application of that enactment, questions must emerge of far-reaching significance and importance. But such questions do not appear to be presented by the interrogatories before us. True, it cannot admit of much doubt that, as regards many of the kinds of works within the scope of them, the Dominion might acquire legislative jurisdiction by following the procedure prescribed by s. 92 (10c); but the interrogatories, which are expressed in general terms, are naturally read as concerning a jurisdiction given directly by the *British North America Act* itself, rather than mediately through the instrumentality of declarations by the Parliament of Canada under s. 92 (10c). Questions 2 and 3 illustrate this. At bar, the discussion of this sub-head 92 (10c) was chiefly directed to an investigation of its bearing upon the answer to interrogatory no. 7. But it does

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not appear that this interrogatory ought to be read as requiring an opinion upon the points discussed.

The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction—exclusive jurisdiction—in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

Had the intention been to address to us interrogatories touching the conditions under which this abnormal responsibility may devolve upon Parliament, it seems probable that such intention would have been explicitly manifested.

The language of the 7th interrogatory does not suggest an intention to elicit a response concerning a hypothetical jurisdiction, which may never come into existence; but rather concerning the extent and conditions of an existing jurisdiction, arising directly and immediately from the enactments of the Act itself.

The 2nd and 3rd questions are broadly expressed. "Navigation purposes" is a sweeping phrase. It has been employed to denote not only regulation and control of ships and shipping, but the control of navigable waters in the interests of shipping, including the improvement of navigability, the execution of works for facilitating navigation, the provision of such aids to navigation as beacons, buoys, and lighthouses; the establishment of harbours and harbour works, such as those considered in the *Montreal Harbour* case (1), which included an embankment and railway on

(1) [1926] A.C. 299.

the shore of the harbour, quays, a dry-dock, and a ship-repairing plant. And it was argued on behalf of the Dominion that "navigation and shipping" within the intendment of s. 91 (10), would embrace all such matters as those just mentioned, as well as the construction, maintenance and operation of canals and incidental works, and generally all matters relating to transport by water.

It is, at least, doubtful whether the exclusive jurisdiction contemplated by item 10, s. 91, extends to many of the matters, which are above indicated as falling within the scope of the phrase "navigation purposes," when that phrase is given an interpretation so wide as that which counsel for the Dominion ascribe to it. By the 9th head of the same section, exclusive jurisdiction is entrusted to the Dominion in respect of matters falling within the subjects described by the words "beacons, buoys and lighthouses," and, under no. 13 in respect of matters included within the subject "Ferries" between a province and other countries or between two provinces. Exclusive jurisdiction with regard to canals, and to other works of like character, extending beyond the limits of a province, is confided to the Dominion under s. 92 (10a); and by sub-heads (*a*) and (*b*) of s. 92 (10) the subjects of that exclusive jurisdiction comprise all matters falling within the descriptions "Lines of steam or other ships connecting the province with any other or others of the provinces," and "Lines of steamships between the province and any British or foreign country." Further, there is much to be said for the view that, subject to the power bestowed upon the Dominion by sub-head (*c*) of s. 92 (10) exclusive authority is committed to the provinces with respect to canals and other similar works (which, according to the contention of the Dominion, would fall within the tenor of the phrase "navigation purposes"), when such works are wholly situated within a province. It is not necessary to decide the point, but it is, at all events, quite open to argument that sub-heads (*a*) and (*b*) are intended to define exceptions to the principal clause of head 10, s. 92; and that, consequently, "works and undertakings," under the principal clause, include works and undertakings of the nature of those specified in these sub-heads so long as they are wholly within the boundaries of a province.

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If the subjects included under head 10, s. 91, embrace those falling within head 13, as well as "beacons, buoys, lighthouses" designated in head 9, and "works and undertakings" connected with "navigation and shipping" and within the field of sub-heads (*a*) and (*b*) of s. 92 (10), then, to borrow the phrase used by Lord Haldane speaking for the Privy Council in *John Deere Plow Co.* v. *Wharton* (1), the enactment in no. 13 and the designation of "beacons, buoys, lighthouses" in item 9 and of the subjects, as well, connected with navigation and shipping in sub-heads (*a*) and (*b*) of s. 92 (10) are nugatory; on the other hand, if the principle be applied which has controlled the operation of the second head of s. 91 "Regulation of Trade and Commerce" (*Toronto Electric Commissioners* v. *Snider* (2)), and of head 13 of s. 92, "Property and Civil Rights," as respects matters connected with the subject (head 11), "Incorporations and Companies" (*John Deere Plow Co.* v. *Wharton* (3)), then the matters explicitly dealt with in heads 9 and 13 of s. 91 and 10a and 10b of s. 92, which ordinarily might be embraced within the general language of no. 10 of s. 91, must be treated as outside the scope of that head.

Nevertheless, it has been said that the language of ss. 91 and 92

> and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this Board after the Australian Commonwealth Act in a recent case *Attorney General for Commonwealth* v. *Colonial Refining Co.* (4), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty as to general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms over-lapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out an interpretation of these provisions to practice and to judicial decision. *John Deere Plow Co.* v. *Wharton* (5).

It is notorious that for many years, probably ever since the formation of the Union, the Dominion Parliament and

(1) [1915] A.C. 3 30, at p. 339, 340.
(2) [1925] A.C. 396.
(3) [1915] A.C. 330.
(4) [1914] A.C. 254.
(5) [1915] A.C. 330, at p. 338.

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Government have assumed, and acted on the assumption, that the authority derived from head no. 10 of s. 91 was sufficient to enable Parliament to legislate, in respect of most, if not all, the classes of matters it is now contended fall within the scope of the phrase "navigation purposes"; and in support of that view it may be noticed that the majority of the members of this court took the view in *Booth* v. *Lowery* (1), that river improvements, consisting of storage dams and basins, intended to improve the navigability of the river Ottawa and one of its tributaries, were subject to the legislative control of the Dominion under that head. Further, as already observed, the recent pronouncements in the judgments in the Privy Council and this court in the three cases cited above, beginning with the *Montreal Harbour* case (2), give countenance to the view that the Dominion may have an implied authority incidental or ancillary to its exclusive authority under head 10 of s. 91, to legislate in respect of some of the purposes intended to be described as "navigation purposes" in these two questions; although the judgment in the *Montreal Harbour* case (2) seems to say that the exercise of this ancillary or incidental authority is, or may be, conditioned upon the payment of compensation.

The principle of the decision in *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3) would apply to the authority given by 92 (10a) in respect to canals extending beyond a province, which must, for reasons similar to those governing the scope of the authority given by the same sub-head in relation to railways, be held to include the power to determine the route of the canal and make effectual provision for the construction and operation of it on the route determined. Such powers are of the essence of the exclusive authority vested in the Dominion in relation to railways and canals. Obviously, therefore, the 2nd and 3rd questions cannot be answered in the negative. Answers in that sense might convey the impression that the authority of the Dominion, in relation to such a purpose as the construction of a canal, would not in any circumstances involve the power to make use of Provincial Crown property without the consent of the province.

(1) (1916) 54 Can. S.C.R. 421. (2) [1926] A.C. 299.
(3) [1926] A.C. 715.

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On the other hand, it is impossible to affirm, in respect of every "navigation purpose," within the purport of these questions that the authority in relation thereto, whether derived from s. 92 (10) and s. 91 (29) or from one of the other heads of s. 91—whether within the exclusive sphere of the Dominion Parliament, or only referable to its incidental or ancillary powers—invests the Dominion with the right to override by its legislation the proprietary rights of the provinces.

There is no general formula for deciding whether or not, in respect of any such given purpose, the nature of the Dominion authority imports the existence of such a right. That can only be determined after an examination of the nature of the purpose, the character of the power invoked and the character of the means proposed to be employed in order to effectuate the purpose.

The word "expropriate" in the 3rd question, moreover, would seem to include the act of transferring compulsorily to the Dominion itself, or to the others, the absolute beneficial title of the Crown to lands committed to the control of the provincial legislatures. As already explained, that is an authority which the Dominion did not expressly receive under any of the relevant clauses of s. 91.

Question 4. This interrogatory is also general in form. Moreover, the works, which are the subject of it, although indicated by a general phrase, are existing works. The facts affecting each of them are capable of ascertainment. These facts are not before us; yet a categorical answer to the question would involve an expression of opinion as to powers and rights of the provinces in respect of each of them. Such an opinion could, of course, only proceed upon some general legal rule necessarily governing every case to which the interrogatory, as framed, applies. We have nothing before us to show whether in any given case the water-power has been acquired through private treaty from a provincial government, or from a subject, or, if it has been appropriated without the consent of the owner, or under what authority the officials of the Dominion have acted or professed to act, whether, for example, the Dominion has legislated under the authority of s. 91 (10), or under the authority of s. 92 (10a) or, after the necessary declaration, under s. 92 (10c). Nor have we the facts necessary to enable us to judge whether any authority to

take the particular water-power in question did, in point of law, exist, in the circumstances in which it was taken; or, if so, whether the conditions of such authority were duly fulfilled.

Question 5. This, once more, is a general question embracing a group of concrete cases in respect of which the facts are capable of ascertainment. We have before us neither the relevant physical facts nor the character of the authority under which the construction of the particular works involved in the inquiry purported to proceed. For the reasons indicated in discussing the 4th question, it is not practicable to give a general answer to this question.

Question 6. Broadly speaking, the Dominion has under s. 132 full authority to legislate for the execution of obligations imposed upon Canada, or upon a province, in virtue of an Imperial Treaty. But the rights and jurisdiction of the Dominion and of a province, respectively, in relation to water-powers, created or made available by joint works, such as those referred to in this question, could only be determined after disclosure of the facts touching the terms of the Treaty, and the nature of the works, as well as the rights of the Dominion and of the province, in respect of the waters to be affected by the execution of the treaty.

For the reasons above stated, the assumption of jurisdiction under s. 92 (10c) is not discussed.

As to works constructed either in "provincial" or in "inter-provincial" rivers, the Dominion would appear to have jurisdiction respecting such works, if, within the meaning of s. 92 (10a) they extend beyond the boundaries of one of the provinces or connect two provinces. It does not seem practicable to lay down any general test for determining the application of s. 92 (10a), other than that furnished by the language of the enactment itself.

As to that branch of the interrogatory which relates to the taking of provincial lands and property for "the purpose of such works," works being described as "works wholly for power purposes," it does not seem possible to give any useful answer. "Acquisition by expropriation" points to the taking absolutely of the property "required." Reasons have been adduced suggesting that this is not permissible. And, moreover, it is not practicable, in the ab-

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sence of some more specific description of the nature of the purpose, to state whether, "for the purposes of such works," assuming the works themselves to be within the control of the Dominion, the proprietary rights of the province may be overborne or, if so, on what conditions, if any.

Question 8. The second branch of this question is too vaguely expressed to permit of any answer not equally vague and indefinite. As to the first branch, it seems unnecessary to say that a province would be exceeding its powers if it attempted to intervene in matters committed exclusively to Dominion control, by attempting, for example, to interfere with the structure or management of a work withdrawn entirely from provincial jurisdiction, such as a work authorized by the Dominion by legislation in execution of its powers under s. 92 (10a). A province is, moreover, bound, of course, in dealing with rivers in respect of which it has powers of control, to observe any regulation validly enacted by the Dominion in relation to navigation works or in exercise of its authority over navigable waters.

It would not be a sufficient recognition of the jurisdiction of the Dominion to affirm that, in the circumstances mentioned in the question, a province is entitled to regulate and control the waters of the river so long as navigation is not interfered with. The obligation of the province in such circumstances is much more definite and precise, as has just been stated. The exercise of jurisdiction by a province, in a manner permitted by the terms of the question, might constitute a substantial encroachment upon the exclusive authority of the Dominion.

As to question 9, it was not seriously disputed that, under the conditions mentioned, the provinces have the rights which are the subject of the question. This, of course, is on the assumption that there is no conflicting legislation by the Dominion under an over riding power, a power, for example, conferred by the combined operation of section 91 (29) and 92 (10a).

Sufficient has been said to call attention to the difficulty, indeed the impracticability, of giving precise and categorical answers to some of the questions submitted. As regards most of them, the limit of practicability seems to be reached,

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when the principles to which reference must be made for the determination of particular cases have been indicated. The authority of the Governor in Council to submit these questions under the statute, and the validity of the statute itself are no longer open to question; and it is the duty of the judges of this court to endeavour, to the utmost of their powers, to return to His Excellency answers as precise and as useful as the questions admit of. Nevertheless the Privy Council has recognized, more than once, that, in the exercise of the statutory authority, interrogatories may through inadvertence be presented, to which it is not possible to give accurate or exhaustive answers, or indeed any answers which are not so encumbered by qualifications and reservations as to deprive them of all practical value. In *Attorney General for British Columbia* v. *Attorney General for Canada* (1), Lord Haldane said:

> under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question (*sic*) of future litigants be prejudiced by the court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.

Again in *John Deere Plow Co.* v. *Wharton* (2), Lord Haldane, speaking for the Judicial Committee used these words:

> The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.

And, in the same judgment, at pp. 341 and 342, speaking with reference to the answers given by the judges of this court to certain questions submitted by the Governor in Council:

> In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada.

(1) [1914] A.C. 153, at p. 162.

(2) [1915] A.C. 330, at pp. 338 and 339.

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Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various subheads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to.

In *Attorney General for Ontario* v. *Attorney General for Canada* (1), the Lord Chancellor, Lord Loreburn, pointed out that when such considerations as these come properly into operation, it is permissible for the judges of this court to make any necessary representations to the Governor in Council, by calling attention to them in their answers.

It is important, also, since the opinions evoked by such questions, "are of course," as Lord Loreburn states in the same passage, "only advisory, and will have no more effect than opinions of the law officers," to observe that, when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed.

SMITH J.—I concur with my brother Duff, but I think it may be of advantage to refer to certain circumstances which will indicate more precisely some of the difficulties that stand in the way of giving complete and definite answers to a number of the questions.

It is common knowledge that negotiations have been going on for some time between the Government of the Dominion and the Government of the United States in connection with a proposed scheme for improving navigation on the St. Lawrence river so as to provide passage for large vessels of 25 or 30 foot draft from the ocean to the head of the Great Lakes. A Joint International Commission of Canadian and United States engineers was formed

(1) [1912] A.C. 571, at p. 589.

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to investigate and report on this project, and a report by this Commission has been made, setting out plans for such improvements. The Canadian members of the Commission were appointed by the Dominion Government, by Order in Council and the Board acted on instructions agreed to by the two governments by an exchange of notes. The part of international waters where large water powers would be involved in carrying out the scheme proposed is the St. Lawrence river where its centre line forms the boundary between the United States and the province of Ontario from the westerly boundary of the province of Quebec on the south shore, westerly some 48 miles to a point beyond the head of the Galop Rapids at Cardinal. In this part of the river there is a succession of rapids, namely, the Galop at Cardinal, the Rapide Plat at Morrisburg, a small rapid at Farran's Point, and finally, the Long Sault, which is much greater than any of the others, having a drop of about 42 feet. Along the Canadian shore at each of these rapids there is a canal owned by the Dominion Government.

Two alternative schemes for providing the deep waterway are set out in the report of the Commission. It is sufficient for my purpose to refer to one of these. It provides for a dam across the whole river, extending from the Cornwall Canal, on the Canadian main shore, to the head of Barnhart's Island, which is United States territory, and then from the foot of this island to the United States main shore, by which the water level at this latter point would be raised to nearly the level of the river at the head of the swift water above the Galop Rapids, thus wiping out all the rapids, and making the whole of the river where the series of rapids occurs navigable for large vessels. This would provide a water head at the dam of about 85 feet, and make available there water-power of over 2,000,000 horse-power, by passing the flow of the river through water wheels, instead of allowing it to waste over the dam. Navigation from the level above the dam to the level below would be by a side canal, and locks connecting these two levels.

The international negotiations referred to and the questions that arise as to the respective powers and rights of the Dominion and the province of Ontario in reference to these proposed works and the water-power that would be made

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available by their construction have given rise to this reference. The questions, of course, are not confined to these particular waters, but it is particularly as to these waters that there is immediate need for clearing up the difficult questions that the proposed works give rise to, because the continuance of the negotiations awaits the result of this reference, as has been officially stated. Question 1 (*a*) is limited to "where the bed of a navigable river is vested in the Crown in right of the province," and it may be noted in passing that a question may be raised as to whether the bed of these rapids is in the province or the Dominion. Under the British North America Act, the canal and canal lands became the property of the Dominion, so that the Dominion became riparian owner of the lands bordering on the stream opposite these rapids for nearly their whole length. It has been held by the Ontario Court of Appeal that the common law presumption that the riparian proprietor owns to the middle of the bed applies in Ontario, and although the Ontario Legislature promptly nullified the effect of that decision by an Act (1 Geo. V, c. 6) declaring that the presumption shall be the other way, as to grants, both before and after the passing of the Act, that Act could not affect the Dominion title, if it had any. It may be, as intimated in later Ontario decisions, that the presumption would not in any case apply to the St. Lawrence river. I am merely pointing out the possibility of the question being raised in a higher court. We have, of course, nothing to do with it here.

Much more complicated questions than this, however, arise, and in order to indicate their character it is necessary to look at the geography of the river. It will be sufficient to consider the situation at the Long Sault Rapids. At their head, the river is divided into two channels by Long Sault Island, which is United States territory. Much the larger volume of water passes down the international channel between this island and the Canadian shore, the bulk of it at this point being in Canadian territory. About two miles below the head of the rapids is a Canadian island near the Canadian shore, known as Sheik's Island, the head of which is nearly opposite the foot of Long Sault Island. Below the foot of Long Sault Island is the head of Barnhart's Island, already referred to as United States territory.

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The main body of water of the Long Sault Rapids coming down the international channel crosses southerly through the channel between the foot of Long Sault Island and the head of Barnhart's Island, and joins with the waters of the United States South Sault Channel, together comprising about 96 per cent of all the water of the river, which continues in one stream down the channel between Barnhart's Island and the United States main shore, entirely in United States territory, for nearly four miles to the foot of Barnhart's Island, which is about the foot of the rapids, where, as stated, the proposed dam is to be built.

The fall in these rapids to the foot of Long Sault Island is some 12½ feet, and the rest of the total fall of about 42 feet, where, as stated, about 96 per cent of all the water runs, is entirely in the United States. Assuming that the province owns the bed at these rapids to the boundary at the middle of the stream, and that the course of the water is about as I have stated it, and that ownership of the bed gives some right of property in the power that may be made available from water running over this sloping bed, it would be a difficult matter to define the respective rights of the province and the Dominion in the water-power, even on an agreed upon statement of the facts. We have here, however, no statement of facts at all in the record in reference to the situation I have outlined, and it would probably have been impossible to get an agreed upon statement of facts in reference to it. There is a treaty with the United States dealing with the apportionment of water-power of international streams, but it may be that the province of Ontario would have to rely entirely on its own right, independently of this treaty, and that its claim to power would be limited to what the province could develop from these waters by its own unaided powers, situated as these rapids are. It is difficult to see how the province could develop any water-power from these rapids solely by virtue of its own rights and powers. To develop power from a rapid, the practical method employed is to transform the flow from down a slope into a perpendicular fall. This may be done by diverting the flow at or above the head of the slope into an artificial channel on the land, which would carry the flow below the foot of the rapids at about the level above the head, and there discharge it through water-wheels to the lower level. The other

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method would be by a dam at the foot to raise the level at the upper side of the dam to the level above the head of the rapids, thus providing a perpendicular fall from the upper side of the dam to the lower. If the province were to divert a large part of the water of the international channel referred to, it would be obliged to return it in such a way as to permit it to flow into the entirely United States channel to the extent that it flows there naturally; otherwise the United States would have the same cause to complain that Canada has to complain of the Chicago diversion. The water would therefore have to be returned so that nearly all of it would flow through its natural channel between Long Sault Island and Barnhart's Island, and could only be brought there by bringing it across the Cornwall Canal. Once diverted into an artificial channel on the Canadian shore, the water could not be returned to the river without crossing the canal till carried below its foot at Cornwall, 12 miles down, which would be a complete and permanent diversion from its natural course through the United States channel. To make any diversion to the Canadian shore at the head would, moreover, require a dam in the natural channel to turn the water from that channel to the artificial one, and such a dam would close the navigation of the natural channel, which is now used daily, in the summer months, for a line of large passenger steamers. To get a head of water opposite the foot of Long Sault Island would require a dam from that island to Sheik's Island, which would again completely stop navigation, and of course would require co-operation on the part of the United States and assent of the Dominion Government under the *Navigable Waters Protection Act*. Sheik's Island, too, is part of the Indian Reservation, rented and administered by the Dominion Government for the Indians.

It would appear, therefore, that water-power from these rapids could only be developed by Ontario with the co-operation of the United States and the Dominion Government, and that whatever right the province might have to power might, at most, be a part of what could be developed from the 12½-foot fall to the foot of Long Sault Island. The four per cent flow in Canadian territory north of Barnhart's Island would be too small for practical development.

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There may be a still further limitation to the right of the province as owner of the bed, because the ordinary development of water-power requires the use of not only the bed. but also of the bank. Here the Dominion Government. as stated, is riparian proprietor of the bank opposite these rapids. and as such would have rights that would put in question the rights of the province to develop water-power by virtue of ownership of the bed only. The situation at this point, as I have outlined it, does not, of course. appear in the record. We might, perhaps, take judicial notice of some of the facts. and might gather others from statutory enactments. A glance at a map of the locality, and particularly at the maps annexed to the report referred to, would show the geographical situation and flow of the main body of water in the river, but we would still fall short of such a full knowledge of facts as would be necessary for the basis of a decision. I have gone beyond the record, not to obtain material as a basis for answering the questions, but merely to emphasize what my brother Duff has said as to the impracticability of giving full and definite answers to all the questions that would have general application, regardless of particular circumstances capable of proof but not established or admitted in the record.

What I have said in reference to the Long Sault Rapids would apply in some, but not all, respects to the other rapids. There are probably localities throughout Canada where the situation would be entirely different, so that the difficulty of giving general answers to a number of the questions applicable to every possible variation of facts and circumstances becomes, I think, apparent.

Questions referred answered accordingly.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitors for the Attorney General of Ontario: *Tilley, Johnston, Thomson & Parmenter.*

Solicitor for the Attorney General of Quebec: *Charles Lanctot.*

Solicitor for the Attorney General of British Columbia: *William D. Carter.*

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Solicitor for the Attorney General of Manitoba: *F. H. Chrysler.*

Solicitor for the Attorney General of Saskatchewan: *A. Z. Geddes.*

1927

*Oct. 1.
*Dec. 16.

1928

**Nov. 14, 15.

1929

**Feb. 5.

DAME M. A. L. VALOIS (PLAINTIFF).....APPELLANT;

AND

J. B. DE BOUCHERVILLE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Will—Action to annul—Residuary legacy—Whether vague, uncertain and not susceptible of enforcement—Legacy for charitable purposes—Validity—Fiduciary legatee—Discharge releasing him from rendering account—Jurisdiction of the Superior Court to supervise execution of will—Power of the Attorney General to intervene in the interest of undefined beneficiaries—Arts. 831, 840, 869, 916, 921 C.C.—Art. 60 C.C.P.—R.S.Q. [1925], c. 16, s. 5 (1).

Dame Philomène Valois, widow of the late Paul Lussier, died at Montreal on September 26, 1920, without issue, leaving an estate amounting to $925,825.55. According to the terms of her last will, dated May 8, 1913, she devised that part of her property derived from the estate of her father among the members of the Valois family. As for the residue of her property, estimated at $197,436.79, the testatrix, under clause 15 of her will, directed that it be liquidated by the testamentary executors and the proceeds handed over by them to the respondent de Boucherville, whom she named fiduciary legatee for the purpose of distributing the same as he may deem advisable, "pour être par lui seul employés et distribués comme il le jugera opportun en oeuvres de charité, en oeuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres." The testatrix also stipulated in the same clause that the fiduciary legatee would be accountable to his own conscience only in the fulfilment of his trust, "sans qu'aucune personne puisse lui en demander compte ou explication." The appellant, a next of kin of the testatrix, brought an action attacking the validity of the residuary legacy made to the respondent de Boucherville as being null, illegal and irregular because it was too vague, uncertain and not susceptible of enforcement, and also because the real legatees were not designated.

Held, that since the coming into force of the Civil Code, as well as under the old law anterior to the Code, the law of the province of Quebec has always been that public charitable bequests should not be set

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

**PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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A.G. of B.C. v. A.G. of Can. (1889) 14 App. Cas. 295 1116

Law of Canada - British North America Act, 1867, s.109 - Rights of the Province to the Precious Metals - Conveyance of "Public Lands" - Construction.

A.G. for Canada v. A.G. for Que. (1921) 1 App. Cas. 413 1128

Canada (Quebec) - Tidal Water Fisheries - Power of Province to grant exclusive Licences - Right of Public - Regulative Power of Dominion.

A.G. for Can. v. A.G. for Ont., Que. & N.S. (1898) AC 700 1148

Distribution of Legislative Power - Construction - Rivers and Lake Improvements - "Public Harbours " - Fisheries and Fishing Rights.

A.G. for Ont. v. A.G. for the Dominion and The Distillers and Brewers Association of Ont. (1896) App. Cas. 348 1166

Distribution of Legislative Powers - Liquor Laws - Power of Prohibition.

A.G. of Ont. v. Canada Temperance Federation (1946) 2 D.L.R. 1 1189

Constitutional Law II - Validity of Canada Temperance Act - Laws for peace, order and good government of Canada - Not dependent on emergency - Aspect doctrine - Legislation for prevention as well as for cure - Courts IV - Privy Council not bound by own decisions - Position in constitutional matters.

Re Bell and Bell (1977) 78 D.L.R. (3d) 227 (Ont. Supreme Crt.) 1197

Constitutional law - Validity of legislation - Indians - Act not ultra vires provincial legislature.

Re British Columbia Packers Ltd. v. British Columbia Council United Fishermen & Allied Workers' Union, 50 D.L.R. (3d) 602 1203

Constitutional law - Distribution of legislative authority - Parliament purporting to legislate regarding labour relations of fishermen - Whether legislation in relation to trade and commerce, navigation and shipping, sea coast and inland fisheries, treaty-making powers, Indians, or property and civil rights.

Cité de Montreal v. Bluefeather (1933) 39 R. de J. 100 1229

Loi des Indiens - Droits des provinces - Permis comme vendeur dans la cité de Montreal.

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Dion v. La Compagnie de la Baie d'Hudson (1917) 51 Que. S.C. 413 1233

Loi de peche de Quebec - Sa constitutionnalite - Compagnie de la Baie d'Hudson - Ses privileges.

Re Four B Manufacturing Ltd. (1977) 79 D.L.R. (3d) 576 1240

Constitutional law - Distribution of legislative authority - Labour relations - Indians - Employer carrying on manufacturing on Indian reserve under permit - Permit requiring employer to give preference to local labour - Employer receiving substantial sums of money from Department of Indian Affairs - Whether certification of respondent union by Ontario Labour Relations Board intra vires.
Labour relations - Indians - Constitutionality of provincial legislation - Employer carrying on manufacturing on Indian reserve under permit - Whether certification of respondent union by Ontario Labour Relations Board valid.

Re Indians (1939) S.C.R. 104 1257

Constitutional law - Statue - "Indians" - "Eskimo" - Whether Eskimos are Indians within head no. 24 of s.91 of the B.N.A. Act.

Johannesson et al v. Rural Municipality of West St. Paul (1951) 4 D.L.R. 609 1299

Constitutional Law II, III A - Exclusive federal authority in relation to aeronautics - Licensing and location of aerodromes included - Matter transcending provincial powers - Within federal residuary power as matter of national dimensions and general Dominion concern.

Millbrook Indian Band v. Northern Countries Residential Tenancies Board et al, 84 D.L.R. (3d) Part 2, 174 1324

Constitutional law - Distribution of legislative authority - Indian reserves - Provincial legislation dealing with residential tenancies - Whether applicable to Indian reserves - Incorporation by reference - Section 88 of Indian Act making provincial laws of general application "applicable to and in respect of Indians in the province" - Whether provincial legislation dealing with residential tenancies incorporated - Indians - Reserves.

R. v. Paling (1946), 3 D.L.R. 54 1336

Constitutional law III A - Game Laws - Provincial game protection law - Hunting of game on Sunday prohibited - Whether Sunday observance legislation.

Reference re Saskatchewan Natural Resources
A.G. for Sask. v. A.G. for Can. (1931) 3 WWR 488 1354

Constitutional law - Proprietary Rights as Between Dominion and Saskatchewan to Crown lands in Rupert's Land and N.W.T. at Time of Their Admission to Dominion.

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R. v. Stuart (1925) 1 D.L.R. 12 — 1362

Constitutional law IE - Dominion powers - Implementing treaties - BNA Act, s.132 - Incidental effect on Provincial jurisdiction - Dominion legislation paramount.

Union Colliery Co. of B.C. Ltd. v. Bryden (1899) A.C. 580 — 1371

Law of Canada - Legislative Power - Naturalization and Aliens - Chinamen.

Walter & Fletcher v. A.G. of Alta. (1969) 3 D.L.R. (3d) 1 - appealed from 60 D.L.R. (2d) 253 and 54 D.L.R. (2d) 750 — 1380

Constitutional law - Validity of legislation - Communal Property Act (Alta.) - Provincial jurisdiction over property and civil rights - Act controlling communal ownership of land by religious colonies - Whether intra vires the Province - Applicability of pre-Confederation statutes - Statute of Province of Canada relating to freedom of religion - Applicable only in Ontario and Quebec.

Re Waters and Water Powers (1929), S.C.R. 200 — 139(

Constitutional law - Water-powers - Navigable river - Public right of navigation - Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property - Relative rights of the Dominion and provinces over water-power created by works done by the Dominion-Boundary waters - Interprovincial and provincial rivers.