



In the Privy Council.

No. 25 of 1896.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE ARBITRATION for settlement of all questions relating or incident to the accounts and for the settlement of matters of account between the Dominion of Canada and the Provinces of Ontario and Quebec and between the said two Provinces pursuant to 54 and 55 Vic. cap. 6 Canada, 54 Vic. cap. 2 Ontario, and 54 Vic. cap. 4 Quebec.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA - - - - Appellant,

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO - - - - Respondent.

Case of the Appellant.

1. This is an Appeal from the Judgment of the Supreme Court of Canada rendered on the 9th day of December 1895 upon an Appeal by the Province of Ontario to that Court from the Award of the Arbitrators hereinafter mentioned.

2. The questions involved turn upon the construction of two Indian Treaties and upon certain sections of the British North America Act 1867.

3. In 1850 the Government of the Province of Canada acting through the Honorable William Benjamin Robinson entered into two treaties with the principal men of the Ojibeway Indians inhabiting and claiming lands on the eastern and northern shores of Lake Huron and on the northern shore of Lake Superior, whereby the Indians for certain annuities and other considerations therein expressed surrendered their title to the Crown of and in large tracts of land situated as aforesaid and all within the boundaries of the late Province of Canada. These treaties are set out in full in the Record and are

Record p. 22.

Record p. 25.

APPELLANT'S CASE

designated "The Lake Huron Treaty" and "The Lake Superior Treaty," and are alike in their terms and stipulations with the exception that the fixed annuity in the Lake Huron Treaty is £600 currency, and in the Lake Superior Treaty £500 currency. With respect to these fixed annuities no question arises in this Appeal, they having been capitalized at the sum of \$88,000 at the time of confederation, and added to the debt of the Province of Canada by which the Dominion has been enabled to pay and has paid such annuities from the income of such capitalization.

4. In addition to the said fixed annuities, each of the Indian Treaties contained the following provision under which additional or increased annuities might, under certain circumstances, become payable to the Indians :—

Record p. 23.

Record p. 26.

" 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 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."

5. The fixed annuities were paid from the date of the treaties, and divided amongst the Indians, gave to each individual the sum of about \$1.60, but under the clause above set out they claimed to be entitled to all moneys produced from the lands surrendered not exceeding \$4.00 per individual Indian, after deducting the proper expenditure in connection with the administration and development of such lands, and they alleged that from a date shortly after the execution of the treaties the lands had in fact produced from year to year such sums as would have enabled the Government to pay some amount in addition to the fixed annuities.

6. The claim of the Indians was shortly after confederation, about 1873, brought to the attention of the Dominion Government and it was then ascertained that the proceeds of the lands would justify a payment of \$4.00 to each individual. Accordingly, some communications took place between the Dominion and Ontario with reference to such increased annuity, but nothing

definite was then arrived at. Ontario, however, admitted that the revenues from the land in question would seem to justify increased payments to the Indians, and suggested that the Dominion should, in the meantime, pay the increased annuity and that the question of liability should be referred to a Court for determination. The Dominion adopted this suggestion, and began in the year 1874 to pay the increased annuity of \$4.00 per individual Indian coming within the scope of the treaties, and has continued to do so up to the present time.

7. By the British North America Act, 1867, a union of the Provinces of Canada, Nova Scotia and New Brunswick was effected, in which Union the Province of Canada was divided into two distinct Provinces of Ontario and Quebec. The surrendered lands were all situated in Ontario.

8. By the 91st section of the said Union Act, No. 24, the Parliament of the Dominion is given legislative authority over "Indians, and lands reserved for Indians," and the Dominion has accordingly since enacted laws for the government and management of the Indians of Canada and their lands, and has administered the affairs of the Indians generally.

9. The said Act contains also the following provisions:—

Record p. 4.

"Section 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."

10. The award of 1870, which was made under the authority of the 142nd section of the British North America Act, for the division and adjustment of the assets and liabilities of the Province of Canada at the Union is printed in full in the Record. The 13th clause of that award is as follows:—

Record pp. 5
to 11.

"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

Record p. 10

“ 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.”

Record p. 14. 11. In 1891 the Parliament of the Dominion passed a Statute, 54–55 Vic.,
 Record pp. 14, 15, 16. cap. 6, and the Legislatures of Ontario and Quebec passed similar Statutes,
 54 Vic., cap. 2 and, 54 Vic., cap. 4 respectively, having for their object the final
 and conclusive settlement and determination of the accounts between the
 Dominion and the said two Provinces both jointly and severally, and between
 the two Provinces concerning which no Agreement had hitherto been arrived at,
 and for this purpose the Statutes enacted that the three Governments might
 unite in the appointment of three Arbitrators who should be Judges, to whom
 should be referred such questions as the Governments should agree to submit.

12. Under the provisions of these Statutes the said Governments duly
 passed Orders in Council whereby the Honorable John Alexander Boyd,
 Chancellor of the Province of Ontario, the Honorable George Wheelock
 Burbidge, Judge of the Exchequer Court of Canada, and the Honorable Sir
 Louis Napoleon Casault, Chief Justice of the Superior Court of the Province
 of Quebec, were appointed to act as Arbitrators in the matter of the disputed
 accounts.

Record p. 16. 13. The 6th section of the said Statutes of 1891 is as follows :—
 “ 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.”

Record p. 17. 14. On the 10th day of April, 1893, an Agreement of submission of the
 questions in dispute was prepared and executed by Counsel for the respective
 Governments, which submission was subsequently adopted and confirmed by
 Orders in Council of the said Governments, and the Board of Arbitrators so
 constituted have proceeded with and have disposed of a number of questions
 involved in the general controversy.

15. The present Appeal arises upon a Claim presented to the Arbitrators
 by the Dominion on behalf of the said Ojibeway Indians under sub-clause (d) of
 clause 1 of the Agreement of submission, which is as follows :—

Record p. 18. “ 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 claim was based upon the clause in the Treaties hereinbefore set out dealing with augmented annuities, and was divided into three branches—

(a) Against the Province of Canada for \$325,440·00, being 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 to the Indians from 1874 to 1892.

Each of the said sums included interest up to the 31st December, 1892, being the date to which all amounts referred to the Arbitrators were to be brought down.

16. With reference to the Claim against the Province of Canada for unpaid arrears of increased annuities from the date of the Treaties to the date of the Union, 1867, no question arises in this Appeal.

17. The claim of the Dominion on behalf of the Indians for the unpaid arrears of augmented annuities from 1867 to 1874 and for the amounts of such increased annuities actually paid by the Dominion to the Indians from 1874 to 1892 is against the Province of Ontario, the Dominion asserting that the Province of Ontario having succeeded to the lands surrendered, is liable for such increased annuities and payments under the stipulations of the Treaties and the 109th section of the British North America Act. The Province of Quebec in effect supports and affirms this contention of the Dominion.

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18. The Province of Ontario has in substance denied this Claim, upon the following grounds:— Record p. 31.

(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 Section 13 of the Award of 3rd September 1870, Ontario was expressly freed from any liability separately from Quebec. (Copy of this Award is set out in the Record at pages 5 to 11).

Record pp.
5 to 11.

(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 Vic., cap. 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. Record p. 32.

19. On the claim now in question coming before the Arbitrators, it was ordered that the question of liability only should in the first place be argued and determined, leaving the amount to be ascertained upon a reference, and after argument the Arbitrators, on the 13th February 1895, made their unanimous award, which, in so far as it relates to the matters at present in question, is as follows :—

Record p. 43.

“ 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 of the matters hereinbefore dealt with, the arbitrators have proceeded upon their view of a disputed question 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 to the Indians, and so fall within and be affected by our previous ruling as to interest on that account”;

Record p. 44. And by a subsequent order of the arbitrators, they declared that in respect of their findings in the 9th clause of the Award they had proceeded upon their view of a disputed question of law. The arbitrators accompanied their Award with written reasons, which are printed in the Record herein.

Record pp.
45-56.

Record p. 56

20. The Province of Ontario then appealed from the above Award to the Supreme Court of Canada, limiting the appeal to the findings of the arbitrators set out in the 6th and 9th paragraphs of the Award. On the 15th and 16th days of May 1895, the appeal was argued before a quorum of that Court, composed of the Chief Justice Sir Henry Strong, and Justices Taschereau, Gwynne, Sedgewick and King. On the 9th day of December 1895, the said Court delivered Judgment. The Chief Justice and Justices Taschereau and Sedgewick held that the appeal of Ontario should be allowed, while Justices Gwynne and King held that the appeal should be dismissed. In the result Judgment was directed to be entered allowing the appeal and ordering the Award to be varied by substituting for the 6th paragraph thereof the following :—

Record p. 120

“ 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 as 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.”

21. The formal Judgment of the Supreme Court and the reasons for the conclusions given by the learned Judges respectively, are set out in the record.

Record pp.
83 to 120.

22. The Appellant submits that the Judgment appealed against is erroneous and ought to be reversed, and the award of the Arbitrators restored, for the following, amongst other,

REASONS.

1. Because the covenant to pay the increased annuities is not a covenant to pay out of general revenue, in the event of the lands producing a sufficient amount, but a covenant to pay should the territory ceded produce such an amount as would enable the Government to pay without incurring loss. It is thus in effect and by necessary implication a covenant to pay out of the proceeds of the lands; and at the time of confederation a trust existed in respect of the said lands, and an interest of the Indians therein or in the said proceeds thereof, within the meaning and proper construction of the said section 109. #
2. Because the 109th section of the said Act does not contemplate only a direct charge or lien upon or an interest in lands, enforceable by legal process, but has reference to a trust or interest created by the Crown to be recognized and carried out by the Crown; and the land in this case having become vested in the Crown in right of Ontario, the trust and interest in favour of the Indians in the lands should be observed and carried out by that Province. #
3. Because the lands having become the property of Ontario with all the advantages of increased value and profits therefrom, that Province should have borne and should bear the burden of paying any increase of annuities justifiable under the terms of the treaties since Confederation. #
4. Because Ontario was not, by the 13th clause of the Award of 1870, freed from any liability to the Dominion for annuities to Indians in consideration of lands surrendered. That

clause meant only that as between the respective Provinces, lands which had been surrendered by the Indians should be held by the Province in which they are situate free from all claims of any of the other Provinces; and if it meant more, and was intended to exclude a claim based upon an interest of the Indians, or the existence of a trust, within the meaning of section 109, it was *ultra vires* the Arbitrators.

5. Because on equitable principles the Award was right, and the declaration that the Arbitrators have proceeded upon their view of a disputed question of law, while it gives a right to appeal, does not preclude the appellate tribunal from considering and giving effect to such principles.
6. Because the Reasons given by the Arbitrators herein and by the minority of the Supreme Court were right and should be sustained.

C. ROBINSON.

W. D. HOGG.

H. W. LOEHNIS.

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Case

OF THE APPELLANT.

BOMPAS, BISCHOFF, DODGSON, COXE & BOMPAS,

4, GREAT WINCHESTER STREET, E.C.,

Solicitors for the Appellant.