

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE ST. CATHARINES MILLING AND
LUMBER COMPANY, (Defendants) *Appellants*;

AND

THE QUEEN, ON THE INFORMATION OF
THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO, (Plaintiff) *Respondent*.

CASE OF THE RESPONDENT.

10 1. The short question involved in this appeal is, whether certain land, admittedly situated within the boundaries of Ontario, belongs to that Province or to the Dominion of Canada. It has been held by all the Canadian Courts to belong to the Province; it was so held first by the Chancellor of Ontario; then unanimously by the four Judges of the Court of Appeal; and, finally, by four of the six Judges of the Supreme Court of Canada, the Chief Justice being one of the four. Record, p. 11.
Record, pp.
38-51.
Record, pp.
138-178.

20 2. The question is purely one of law, and is raised under the following circumstances: The Appellants, who were Defendants in the Court of first instance, cut timber on the land referred to, which is Crown Land, without authority from the Ontario Government, who thereupon brought the action in which this appeal arises for an injunction and damages. The Defendants justified by setting up a license from the Dominion Government, dated the 1st May, 1883. This defence was made and carried on at the expense of the Dominion. The substance of the defence was, that the land belongs to the Dominion, and not to the Province, because the Indians who hunted and fished over the extensive region of which this land formed part, had not surrendered their claim thereto before Confederation, and the Dominion Government had since entered into a treaty with them or their chiefs by which such a surrender was made to Her Majesty. Record, p. 9.
App. p. 275.

30 3. The land on which the timber was cut lies in the westerly part of Ontario, and is a portion of the territory which at the time of Confederation was claimed by Canada as part of Upper Canada, and the title to which was then disputed by the Hudson's Bay Company. The right of Upper Canada to

App. p. 76.

this territory had been asserted and insisted on by the successive Governments of the Province of Canada for many years before Confederation, and continued to be insisted on by the Federal Government until 1870. The Federal Government in that year effected a compromise with the Hudson's Bay Company; the Company surrendered all its claims to Her Majesty; and Her Majesty by Order in Council, dated 23rd June, 1870, gave to the Dominion Rupert's Land and the North-West Territory. The Federal Government then for the first time departed from what had hitherto been its contention—that the territory in question was within the limits of Upper Canada or Ontario, and set up the case that it had never been within these limits, but passed 10 to the Dominion under the Order in Council just referred to. The controversy thus raised was determined in favour of the Province by Arbitrators in 1878, and finally on the reference to the Imperial Privy Council in 1884, it being thus established that this territory from the year 1774 had been within the boundaries of the old Province of Quebec, and of Upper Canada and Ontario, successively, and was therefore not within the operation of the Order in Council of 1870. A claim is now set up that the land in question, although forming a part of this territory, belongs to the Dominion, as having been land “reserved for the Indians” within the meaning of sub-section 24 of section 91 of the British North America Act, 1867, by which authority is given to the 20 Federal Parliament of Canada to make laws respecting “Indians and lands reserved for the Indians.” The contention which the Appellants found on this provision is, that besides extensive tracts of land “reserved” by methods as to which there is no controversy, all other lands in Ontario as to which the nomade Indians had not before Confederation entered into treaties surrendering their claims thereto are also “lands reserved for the Indians,” and were intended by the Act to go to the Dominion, subject to Indian claims.

4. If this construction is correct, the boundary controversy was a mistake, and by both parties to it. The Indians had before the Act entered into no treaty in respect of any territory north of the “height of land,” and half of the 30 Province is north of the height of land. It was because the ownership of the land in the disputed territory, though it had not been the subject of any such treaty, was supposed, notwithstanding, to depend on the boundaries of the Province, that the controversy as to the boundaries north of the height of land was important to either claimant. Without the ownership of the land to provide, or aid in providing, for the government and development of this territory, jurisdiction over it would be an enormous burden instead of an advantage. But the Respondent submits that there was no mistake; that (with certain exceptions expressly specified in the British North America Act) the ownership of all Crown Lands passed to the Province, whether there had or 40 had not theretofore been a treaty of “surrender”; that in the case of lands not theretofore surrendered for public use, they so passed subject to any Indian claim, whether of right or otherwise, and that the Dominion was in no event to have any beneficial interest in them.

5. Even if all lands not theretofore surrendered by the Indians who

roamed over them were lands "reserved for the Indians" within the meaning of the Act, the Respondent submits that the mere power of legislating about them did not confer on the Dominion either the ownership of the lands, or a right to become owner by purchase from the Indians; and there is nothing in the Act on which to ground the Federal claim except this power of legislating.

6. On the other hand, the right of the Province rests on express and unequivocal enactment. Section 109 of the Act provides, 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." It is submitted that under this section the land in question, whether it is or is not land "reserved" within the meaning of the Act, goes to the Province, subject to any "trust" for or "interest" of, the Indians. It is admitted on all hands that the Indians had no power of selling either unsurrendered lands or reserved lands except to the Crown; and the Respondent contends that, by force of the 109th section of the Act, this Crown right of purchase went to the Province, even if the lands in question were (as the Appellants contend) "lands reserved" within the meaning of the Act.

7. The Provincial view of the intention of the Act is confirmed by the 108th section, which shows by express enactment what lands alone were to go to the Dominion. That section provides that the "public works and property of each Province enumerated in the third schedule to this Act shall be the property of Canada." The schedule sets forth lands and other property, and it is not pretended that the lands now in question fall within the enumeration. The argument from this section and the schedule has increased force from the fact that the lands now claimed by the Dominion were of far greater value than most or all of the particulars specified in the schedule. Indeed, the Province of Canada at and before the passing of the British North America Act was claiming that Upper Canada, now Ontario, extended far beyond the boundaries as now ascertained, and as far as the Rocky Mountains on the west, and on the north to the North Pole. Again: By the 91st section of the Act (pl. 9), the Dominion Parliament has exclusive jurisdiction to make laws respecting Sable Island; and yet, it being intended that that island should belong to the Dominion, Sable Island is expressly mentioned in the schedule referred to in the 108th section. It is thus plain that the mere power to legislate was not supposed or intended to carry or imply ownership.

8. The expression "lands reserved for Indians" was well known and had a well understood meaning in the Provinces when the British North America Act was passed. In every Province, except Prince Edward Island, there were lands which had from time to time been specifically "reserved" to or set apart for certain tribes or bands of Indians by the Crown or the Provincial Government

App. p. 257.

App. p. 248.

or the Provincial Legislature. This was done sometimes to secure the goodwill of the Indians; sometimes from motives of humanity; sometimes as the reward of the loyalty and services of the Indians in war; sometimes as compensation for losses they had thereby sustained. In Upper Canada a special reservation of this kind had usually been agreed to as one of the terms on which the tribe or band surrendered its claim on the territory of which the reserve formed part; the lands being appropriated by the nation, it was deemed just that the bands of Indians who had been accustomed to gain a livelihood by roaming over them as their hunting grounds should be aided towards providing for themselves otherwise. In some of the Provinces lands were appropriated for the same purpose by private individuals or societies. The lands so specifically reserved or appropriated for particular tribes or bands were commonly spoken of as so "reserved," or as "Indian reservations," or "Indian reserves"; and the Respondent contends that the lands thus reserved are those only as to which the Federal Parliament was intended to have the power of making laws. Of these "reserves" there were at the time of Confederation in Ontario about 1,500,000 acres; in Quebec 345,000 acres; in Nova Scotia 20,000 acres; in New Brunswick 60,000 acres; and in Prince Edward Island 1,500 acres. Such reserves (it may be observed) have sometimes been purchased by the Crown or Provincial Government for the public benefit from the bands for whom they have been reserved, but generally speaking they were kept, sold, or otherwise administered by the Crown or the Provincial Government for the exclusive benefit of the bands for whom they had been reserved. The Indian population for which these lands were held in trust numbered in Upper and Lower Canada, by the last census taken before the British North America Act, as follows: Upper Canada (Ontario), 7,841; Lower Canada, 4,876. What the Indian populations of the other Provinces were at this date does not appear. By a census taken in 1871 the Indian population of Ontario was then 12,978; of Quebec, 6,988 (not including in either case the disputed territory); of Nova Scotia, 1,666; of New Brunswick, 1,403.

App. p. 248.

App. p. 93.

9. The quantity of land in regard to which there had before the Act been no treaty of "surrender" or "cession" by the nomades, was greater by perhaps a hundred times. In Ontario, before the Act, there had been no Indian treaty respecting any territory north of the height of land; and this territory, within the limited boundary assigned to the Province on the west, comprises nearly half the Province, and has a very small Indian population. In Quebec, at the time of the Act there were of such lands south of the height of land and not yet disposed of 109,370,116 acres, and an enormous area north of the height of land; in Nova Scotia, there were of such lands undisposed of at the time of the Act 6,328,327 acres; and in New Brunswick, 9,762,863 acres. The Indians interested under Treaty No. 3 as "ceding" 55,000 square miles numbered, according to the Official Report of 1876, 2,661 at that date, and of the year 1885, 2,620. The larger number said in one of the printed papers to have been estimated was evidently a mistake, and perhaps a misprint. Having reference to the general purview of the Act, its language will not be

App. p. 149.

App. p. 209.

App. p. 218.

App. p. 96.

read in an unusual and unnecessary sense in order to include in it these extensive tracts. If Parliament had meant to include them, unequivocal words would have been chosen for this purpose.

10 10. This view is confirmed by other facts. (a) The words "reserves" and "reserves of land" were used in the limited sense, and the limited sense only, in the very treaty No. 3 on which the present claim of the Dominion is made, and in the other treaties of the same series. These treaties cover 450,000 square miles of territory. Treaty No. 3 is the only one which relates to territory adjudicated in 1884 to be within Ontario; it includes 55,000 square miles in all, 32,000 miles of this area being in Ontario, and the residue being outside of the Province. It is to be observed, also, that every one of these treaties carefully avoids the smallest appearance of recognising any Indian ownership to be surrendered or paid for, and (on the contrary) puts the transaction on the ground of Her Majesty's desire "that there may be peace and goodwill between them (the Indians) and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence." (b) So, in Dominion legislation the term "reserves" and kindred words continued to be used after the Act with respect to Indian lands in the same limited sense as they had been used in the Provinces before they were confederated—another evidence of the sense in which these expressions had always been understood throughout the Dominion. (c) That is the sense also in which, at the time of the passing of the British North America Act, like expressions were habitually used over the whole American continent in statutes, public documents and otherwise, and had been habitually used for centuries before.

App. p. 275-
281.

App. p. 257.

20 11. In one of the dissenting judgments it is observed that, by giving to the Federal Parliament jurisdiction to make laws respecting Indians and lands reserved for the Indians, "it must have been intended to assign to the Dominion the tutelage or guardianship of the Indians;" and the right "of so legislating as to restrain or regulate the making of treaties of surrender which might be deemed improvident dispositions of Indian lands." Assuming this to be the relation of the Dominion to the Indians, the Provincial construction takes from the Dominion any interest which would conflict with its duty, and leaves the Dominion authorities free to protect the Indians in negotiations with the Provinces, without any misleading interest of their own. There is nothing unreasonable in this construction, but the contrary. Nor is it without ample precedent; it has from an early period been a settled rule in the United States that treaties with Indians in respect of State lands require the concurrence of both the General Government and the State Government; and before the American Colonies became independent an Agent of the British Government frequently acted for the Indians in like transactions with Crown grantees of such lands.

Record, p.145.

40 12. In the same judgment it is further said, as an argument for the Federal construction, that the Dominion Parliament has "to provide for the necessities of the Indians," that "the burden has been borne exclusively by

Record, p.145.

“ the Government of the Dominion ;” and that the Provinces are not only
 “ free from all liabilities respecting the Indians, but are not even empowered
 “ to undertake them, and cannot legally do so.” These observations go too
 far. The Act does not cast on the Dominion any such burden, or put the
 Provinces under any such disability. The recent Indian outbreak in Canada
 was confined to territory outside of the Provinces.

13. The general policy pursued by the British Government in dealing
 with the Indian tribes was thus described by the learned Chancellor before
 whom the case was heard in the first instance:—“ The Colonial policy of Great
 Record, p. 12. “ Britain, as it regards the claims and treatment of the Aboriginal populations 10
 “ in America, has been from the first uniform and well defined. Indian
 “ peoples were found scattered wide-cast over the Continent, having as a
 “ characteristic no fixed abodes, but moving as the exigencies of living
 “ demanded. As heathens and barbarians, it was not thought that they had
 “ any proprietary title to the soil, nor any such claims thereto as to interfere
 “ with the establishment of plantations, and the general prosecution of
 “ colonisation. They were treated ‘ justly and graciously,’ as Lord Bacon
 “ advised, but no legal ownership of the land was ever attributed to them.”

14. The Chancellor then referred to a joint opinion given by eminent
 counsel about the year 1675, touching land in New York, while yet a Province 20
 under English rule, and observed that he thought this opinion “ accurately
 “ states the constitutional law in these words: ‘ Though it hath been and still is
 “ ‘ the usual practice of all proprietors to give their Indians some recompense
 “ ‘ for their lands, and so seem to purchase it of them, yet that is not done for
 “ ‘ want of sufficient title from the King or Prince who hath the right of
 “ ‘ discovery, but out of prudence and Christian charity, lest otherwise the
 “ ‘ Indians might have destroyed the first planters (who were usually too few
 “ ‘ to defend themselves), or refuse all commerce and conversation with the
 “ ‘ planters, and thereby all hopes of converting them to the Christian faith
 “ ‘ would be lost. In this the Common Law of England and the Civil Law 30
 “ ‘ do agree Though some planters have purchased from the Indians,
 “ ‘ yet having done so without the consent of the proprietors for the time
 “ ‘ being, the title is good against the Indians, but not against the proprietors,
 “ ‘ without a confirmation from them upon the usual term of other
 “ ‘ plantations.’ ” The Chancellor proceeded: “ This right of
 “ occupancy attached to the Indians in their tribal character. They were
 “ incapacitated from transferring it to any stranger, though it was susceptible
 “ of being extinguished. The exclusive power to procure its extinguishment
 “ was vested in the Crown—a power which, as a rule, was exercised only on
 “ just and equitable terms. If this title was sought to be acquired by others 40
 “ than the Crown, the attempted transfer passed nothing, and could operate
 “ only as an extinguishment of the Indian right for the benefit of the title
 “ paramount.”

15. The policy in regard to “ lands reserved,” in the sense in which alone
 the same learned Judge held, in common with the other Canadian Courts, that

the British North America Act uses the expression, was thus stated by him :

“ One distinctive feature of the system in Canada was the grouping of the
 “ separate tribes for the purposes of exclusive and permanent residence within
 “ circumscribed limits. These limits were almost invariably allocated at their
 “ usual centres of settlement, and within the orbit of their respective hunting
 “ ranges as recognised among themselves. Contrasted with this is the plan
 “ chiefly followed in the United States, where the main object has been to
 “ mass all the Indian nations and tribes in one vast district called the ‘ Indian
 “ ‘ Territory,’ which comprises an area of about 70,000 square miles. But in
 10 “ Canada, the bounds of the separate reserves being ascertained by survey or
 “ otherwise, the various communities betake themselves thereto as their ‘ local
 “ ‘ habitation.’ Here they are furnished with appliances and opportunities to
 “ make themselves independent of the precarious subsistence procured from the
 “ chase; they are encouraged to advance from a nomadic to an agricultural or
 “ pastoral life, and thus to acquire ideas of separate property and of the value
 “ of individual rights to which in their erratic tribal condition they are utter
 “ strangers, so that ultimately they may be led to settle down into the
 “ industrious and peaceful habits of a civilised people.

Record, p. 23.

“ Again, the relations between the Government and the Indians change
 20 “ upon the establishment of reserves. While in the nomadic state they may
 “ or may not choose to treat with the Crown for the extinction of their
 “ primitive right of occupancy. If they refuse, the Government is not
 “ hampered, but has perfect liberty to proceed with the settlement and
 “ development of the country, and so sooner or later to displace them. If,
 “ however, they elect to treat, they then become, in a special sense, wards of
 “ the State, are surrounded by its protection while under pupilage, and have
 “ their rights assured in perpetuity to the usual land reserve. In regard to
 “ this reserve the tribe enjoy practically all the advantages and safeguards of
 “ private resident proprietors. *Bastern v. Hoffman*, 17 L. C. R. 238. Before
 30 “ the appropriation of reserves, the Indians have no claim, except upon the
 “ bounty and benevolence of the Crown. After the appropriation, they become
 “ invested with a legally recognised tenure of defined lands, in which they
 “ have a present right as to the exclusive and absolute usufruct, and a
 “ potential right of becoming individual owners in fee after enfranchisement.”

16. It is apparently maintained by the Appellants that the Indians had,
 in respect to all the land on the American continent, a title recognised by law
 and independent of and paramount to the title of the Crown, and therefore, as
 regards the land in question, paramount to any title conferred either on the
 Dominion or on the Province under the British North America Act. Such
 40 title is apparently alleged not merely to have been conferred by the Royal
 Proclamation of 1763, which the Appellants rely upon, but to have existed at
 common law. A letter from an early Chief Justice of Upper Canada is quoted
 as authority for the position that the “ soil ” in unsurrendered lands belongs
 to the occupying Indians. No such view was ever stated or recognised by the
 Courts in any of the Provinces. Whatever is found in their law reports is to

App. p. 44.

the contrary, and the contrary is expressly asserted in the Courts of the United States, on whose decisions in other respects the Appellants rely. The Indians had no such title as against the King of France before the conquest, nor as against the King of Great Britain after the conquest. The so-called "Indian title" was in the nature of a personal right of occupation during the pleasure of the Crown, and nothing more, but was not a legal or equitable title in the ordinary sense. The Crown made grants of land in every part of British North America before and after the proclamation of 1763, without any previous extinguishment of the Indian claim, and the legal validity of these grants has invariably been recognised in all the Canadian and other American Courts. 10
In such cases the Crown left the grantees to deal with Indian claimants, as was done in the case of the Provinces now constituting the Dominion of Canada.

17. Much of the argument of the two dissenting Judges in support of their view, has proceeded on a mistaken assumption that the practice of requiring a treaty with and formal surrender by the Indians before dealing with Crown Lands had been "uniform" and "invariable" in all the Provinces, with a trifling exception in Ontario. (a) No such assertion had been made by the Appellants in any of the printed documents. (b) The contrary was admitted in effect in the Appellants' Factum for the Supreme Court; and the contrary is 20
the certain fact. (c) In Upper Canada, though the practice referred to had been generally observed, the exceptions had been more numerous and extensive than are suggested, and comprised millions of acres. (d) In the other Provinces of the Dominion there had been no such practice as in Ontario. In App. p. 206.
the report of the Minister of the Interior, 1876, it was expressly stated that "the treatment of the Indians in the several Provinces has unfortunately been far from uniform. . . The Indians were more liberally treated in Upper Canada than in any of the other old Provinces. . . In Prince Edward App. p. 219.
Island the Indians have no reserves from the Crown," etc. (e) It is an historical fact that almost the entire area of Prince Edward Island was granted away more than a century ago by patents under the Great Seal of Great Britain, without any extinguishment of the Indian title and without even an allotment of any reserves for the natives; the lands now in their possession have been the gifts of private individuals and societies, and in the statutes of the Province, before the British North America Act, had been described as "Indian reservations." (f) As to Lower Canada, it is expressly stated in one App. p. 168.
of the official documents that "in Lower Canada no surrenders of land have been made to the Crown by the Indians;" and millions of acres have, notwithstanding, been from time to time granted. The King of France, of his own mere will, had "reserved" some lands for the Indians; others had been 40
appropriated for their benefit by some of his subjects; and additional lands had subsequently been appropriated for their benefit by the mere voluntary acts of the Canadian Government and Legislature, as of grace, bounty and policy; and all these were called in the Canadian statutes before the Act "Indian Reserves," "Indian Reservations," and "Indian Lands." (g) In Nova

Scotia and New Brunswick the lands had been invariably dealt with without any preliminary Indian treaty of surrender or cession; and in these provinces, also, lands had by mere voluntary acts of the Government or Legislature been selected, reserved, and set apart for the benefit of the Indians, and (as in the other Provinces) were thereafter designated as Indian reserves or Indian reservations, etc. In fact, no such claim as that made against Ontario is made against the other Provinces of the Dominion, all of which have been left, as before Confederation, to deal with all Crown Lands with or without first treating therefor with the Indians, according to the discretion of the Provincial authorities.

App. p. 207.
App. p. 213.

18. As regards the Royal Proclamation of 1763, it is submitted that the British North America Act (sec. 91, pl. 24) does not refer to lands "reserved" so far as they were reserved by this proclamation, but refers to lands spoken of as "reserved for the Indians," or as "Indian Reserves," in the statutes and public documents of the Provinces which were being united; and with respect to the Appellants' contention, that the proclamation reserved for and gave to the Indians all the lands of the Crown in North America not theretofore dealt with, the Respondent further submits: (a) That the word "reserved" was used in the proclamation in the popular sense; (b) That the proclamation was not intended to divest, and did not divest, the Crown of its absolute title to the lands; (c) That the principal object was, as the context shows, to prevent white subjects from making settlements on the lands not theretofore dealt with; (d) That the reservation was expressed to last only "for the present, and until our further pleasure be known," that is, was to be temporary—(e) a mere "provisional arrangement," as the Lords of Trade said in a paper addressed to the King in 1768; (f) That this temporary and provisional reservation of the territory was as "hunting grounds" only; (g) That as regards the territory now in question the proclamation was superseded by the Quebec Act of 1774; that the reservation never applied to the Province of Quebec as constituted by the proclamation; that the territory in question was added to that Province by the Act of 1774; that the provision in that Act, not thereby to "make void, or to vary or alter any right, title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province or the Province thereto adjoining," had no reference to the reservation made by the proclamation; that this proviso may legally cover lands theretofore set apart by the King of France and others as already mentioned, but was introduced, not on that account, but to cover as well French Grants in the region of Lake Champlain as lands included in the extended boundaries assigned by the Act to Quebec, and which had theretofore been granted, conveyed, and otherwise dealt with, as being within the then adjoining Provinces of New York and Virginia; (h) That it was not the intention of the Act of 1774 to give to the bands of Indians who roamed over the added territory any legal or equitable right not theretofore given to or possessed by Indians within the old boundaries of the Province; (i) That if the Proclamation gave to the Indian occupants any interest, legal or equitable

App. p. 44.

(which for the purposes of the present action the Respondent disputes), the interest was a mere license terminable at the will of the Crown; (*j*) That in no Province of the territory affected by the proclamation had all the lands been permanently reserved for the Indians; and that, on the contrary, in several of the Provinces there were lands which the proclamation purported to reserve as therein mentioned, and which, notwithstanding, without any treaty of surrender, had been granted by the Crown from time to time after the proclamation, or a date shortly subsequent, until the passing of the British North America Act.

19. The notion that the language of the British North America Act 10 might be made to bear the construction now contended for by the Appellants is of very recent origin, and does not appear to have occurred to any one when the Act was prepared or passed, nor for many years afterwards. (*a*) The Boundary controversy, which began in 1871 (four years after the Act), manifestly proceeded on the Respondent's view of the Act by both parties. (*b*) Again; in the first session of the Parliament of Canada after the Act of Confederation went into effect, an Act was passed (1868) providing, amongst other things, "for the management of Indian Lands" in all the Provinces; and, so far as relates to "Indian Lands," this Dominion Act dealt exclusively with lands "reserved" in the sense in which the British North America Act 20 has been construed by the Canadian Courts; and did not purport or claim to deal (as Provincial Statutes had before dealt) with other lands which had been merely not surrendered or ceded by the Indian bands who roamed over them. (*c*) So in the case of further Dominion Statutes passed on the same subject in 1869, 1876, and 1880. (*d*) In 1871 British Columbia was received into the Dominion, and the negotiations and terms of admission proceeded on the basis of the same construction of the Act. (*e*) In the same year, and in 1874 and 1878 respectively, Orders of the Privy Council of Canada affecting Ontario were passed and approved by His Excellency the Governor-General, which recognised the ownership of the Province in all the ungranted lands within the 30 disputed territory, in case the territory should be found to be within Ontario. (*f*) In 1874 the Minister of the Interior made a report to His Excellency the Governor-General, referring to the "Indian Title" as "extinguished" by the 40 treaties then recently made, and distinctly recognising the extinguishment as enuring to the benefit of the one Government or the other according as the lands should be found to be within or beyond the Province. The report recommended meanwhile "some joint system for the sale of the lands by the "adoption of a conventional boundary to the west and north, and that, after "the final adjustment of the true boundaries, titles to the land should be "confirmed by the Government, whether of Ontario or the Dominion, "whichever should be the proper party to legalise the same." The report was adopted by order of His Excellency the Governor-General in Council; a conventional boundary was agreed on by the two Governments for the purpose so recommended; and it was further expressly agreed "that when the true "west and north boundaries of Ontario shall have been definitely adjusted,

App. pp. 1, 6,
11.

App. p. 7.

App. pp. 7, 8.

“ each of the respective Governments shall confirm and ratify such patents as
 “ may have been issued by the other for lands then ascertained not to be within
 “ the territory of the Government which granted them; and each of the
 “ respective Governments shall also account for the proceeds of such lands, as
 “ the true boundaries, when determined, may show to belong of right to the
 “ other.” This agreement was approved on both sides by Orders in Council.
 (g) It is an historical fact that the Act was construed in the same manner by
 the Federal authorities in 1881 and by the Canadian House of Commons in
 1882.

10 20. It is submitted that, if the correct construction were otherwise
 doubtful, this practical exposition in favour of the Provincial right by the
 Federal Parliament and the Federal Government, and to a large extent under
 the leadership of the very authors and promoters of Confederation, is to be
 regarded as a contemporaneous exposition of conclusive force.

21. The Province, not having been a party to the treaty set up by the
 Appellants, is not bound by it. But, as a matter of policy towards the Indians,
 the Province has done nothing in contravention of the treaty so far as it affects
 the Indians, and, on the contrary, has always been prepared to expressly ratify
 20 the treaty so far as concerns the Indian “ reservations ” in Ontario which were
 thereby made, subject as between the Dominion and the Province to all proper
 questions. But no application for ratification has been made to the Province,
 the Federal Government claiming the absolute ownership of the lands, whether
 within or beyond the Province.

22. The Respondent submits that the judgments of the Courts below
 should be affirmed for the following among other

REASONS :

1. Because the Order in Council of 1884, made upon the Report
 of the Judicial Committee of the Privy Council, determined
 that the lands in question are situate within the boundaries
 of the Province of Ontario ;
2. Because the title of the lands in question, both before and
 after the treaty with the Indians in 1873, was in the Crown,
 and not in the Indians ;
3. Because the Proclamation of 1763 had not in any way
 divested the Crown of its title to the said land ;
4. Because all beneficial interest of the Crown in such lands
 within the Province passed to the Province under the
 British North America Act ;
5. Because the expression in section 91 of the British North
 America Act, “ lands reserved for the Indians,” refers to

lands specifically appropriated for the use of particular tribes or bands of Indians, and does not include lands not so appropriated and as to which there had theretofore been merely no treaty with the Indians for the surrender of the same;

6. Because the land in question is not "land reserved for the Indians" within the meaning of the Act;
7. Because, even if the land in question was "land reserved for the Indians," any extinguishment of the so-called Indian title enured to the benefit of the Province, and could not and did not transfer the land to the Dominion. 10

HORACE DAVEY.
R. B. HALDANE.

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CASE OF THE RESPONDENT.

FRESHFIELDS & WILLIAMS,

SOLICITORS FOR THE RESPONDENT.

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