*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of the Attorney-General for the Dominion of Canada* v. *the Attorney-General for the Province of Ontario, and the Attorney-General for the Province of Quebec* v. *the Attorney-General for the Province of Ontario, from the Supreme Court of Canada; delivered 9th December* 1896.

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Present:

LORD WATSON.
LORD HOBHOUSE.
LORD MORRIS.
SIR RICHARD COUCH.

[*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 400*l.* Both treaties contained the further promise and agreement, that, in case the territory ceded should at any future period

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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 (Sections 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 Quebec, and the other being directly chargeable either to Ontario or to Quebec.

Section 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." Section 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 five per centum per annum thereon. Then, by Section 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 Section 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 Section 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, sometime after the Union, the value of these annuities was capitalized, and, with consent

of all the parties interested, added to the debts and liabilities which were assumed by the Dominion under the provisions of Section 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 Section 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 Section 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 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 right to an increase of annuity either constituted a trust burdening the surrendered lands and their proceeds, within the meaning of Section 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 Section 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 Court may make any other direction as to the necessary changes.

The learned arbitrators, by a supplementary order, dated the 26th March 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 Chief Justice Strong, 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 9th 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 stipulated by the treaties of 1880, is so connected with or attached to the surrendered territory and its

proceeds, in the sense of the concluding enactments of Section 109, as to follow the beneficial interest, and form a charge upon it in the hands of the Province.

The enactments of Section 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 show 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 Section 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 Section 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." Mr. Justice Burbidge, 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 entirely agree with the following observations made by Mr. Justice King, 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 Section 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 Section 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 6,666*l.* currency, were by the Provincial Act, 9 Vict., cap. 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 Con-"solidated Revenue Fund of this Province," for the purpose of paying these annuities, and other charges included in Schedule B. of the Act. And there is no evidence to show 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.