Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Dominion of Canada v. *The Province of Ontario, from the Supreme Court of Canada; delivered the 29th July* 1910.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY THE LORD CHANCELLOR.]

In this Appeal the only question argued was whether or not the Dominion of Canada is entitled to recover from the Province of Ontario a proper proportion of annuities and other monies which the Dominion bound itself in the name of the Crown to pay to an Indian tribe and its chiefs under a treaty of the 3rd October 1873. There has been a marked difference of opinion in the Canadian Courts. Mr. Justice Burbidge 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.

J. 10. 100.—7/1910. E. & S. [40.]

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 recognised 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 are 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.

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 *bonâ fide* possessor or purchaser of real estate who pays money to discharge an existing encumbrance 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 encumbrance

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 express no 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 Mr. Justice Burbidge 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 Company* v. *The Queen*, 14 A. C. 60. 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 Mr. Justice Idington and Mr. Justice Duff 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.

In the Privy Council.

THE DOMINION OF CANADA

v.

THE PROVINCE OF ONTARIO.

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