Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Ontario Mining Company, Limited, and The Attorney-General for the Dominion of Canada v. *Seybold and Others and The Attorney-General for the Province of Ontario, from the Supreme Court of Canada; delivered the 12th November* 1902.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

In this case leave was given by His Majesty in Council on the advice of this Board to appeal against a judgment of the Supreme Court of Canada dated the 5th June 1901. In their petition for leave to appeal the Appellants the Ontario Mining Company alleged that the title to 365,225 acres of land purporting to have been set aside by the Dominion Government as reserves for the Indians was affected by the judgment and represented that the question involved was one of great constitutional and general importance affecting not only the Dominion and Provincial Governments but also all the Indians in the Province of Ontario. By the Order in Council giving the Appellants leave to appeal it was ordered that the Government of the Dominion of Canada and the Government of the Province of Ontario should be at liberty to

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intervene in the Appeal or to argue the same upon a special case raising the legal question or questions in dispute. The two Governments have availed themselves of this liberty and were represented by Counsel on the hearing of the Appeal. A preliminary objection was taken to the Appeal being heard on its merits by Counsel for the Respondents and also by Counsel for the Ontario Government on the ground that the petition for leave to appeal did not disclose an agreement made between the Governments of the Dominion and of Ontario and confirmed by their two Legislatures respectively which it was said if disclosed would have shown that the question between the parties to the litigation did not as alleged affect the title to the large tract of land mentioned and that in existing circumstances there was not any question of constitutional or general importance involved affecting either the Governments or the Indians. Their Lordships will postpone for the present their consideration of this objection.

The dispute is between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The Appellants claim to be entitled to certain lands situate on Sultana Island in the Lake of the Woods within the Province of Ontario and the minerals thereunder under Letters Patent dated the 29th March 1889 the 30th April 1889 the 2nd September 1889 and the 23rd July 1890 issued by the Government of the Dominion to their predecessors in title. The Respondents claim an undivided two-thirds interest in the same lands and minerals under Letters Patent issued to them by the Government of Ontario and dated the 16th January 1899 and the 24th January 1899. The action was brought by the Appellants against the Respondents in the High Court of Justice of Ontario and their claim was

to have the Letters Patent of Ontario under which the Respondents claimed declared void and set aside and cancelled and for consequential relief. One of the Respondents on the other hand counterclaimed for similar relief respecting the Letters Patent of the Dominion under which the Appellants claimed title.

The lands in question are comprised in the territory within the Province of Ontario which was surrendered by the Indians by the Treaty of 3rd October 1873 known as the North-West Angle Treaty. It was decided by this Board in the *St. Catharine's Milling Company's* case (14 A. C. 46) that prior to that surrender the Province of Ontario had a proprietary interest in the land under the provisions of Section 109 of the British North America Act 1867 subject to the burden of the Indian usufructuary title and upon the extinguishment of that title by the surrender the Province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. 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 legis-"lature the land itself being vested in the "Crown." 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.

After the making of the treaty of 1873 the Dominion Government in intended pursuance of its terms purported to set out and appropriate portions of the lands surrendered as reserves for the use of the Indians and among such reserves was one known as Reserve 38 B of which the lands now in question form a part. The Rat-Portage band of the Salteaux tribe of Indians resided on this reserve.

On the 8th October 1886 the Rat Portage band surrendered a portion of Reserve 38 B comprising the land in question to the Crown in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with the provisions of a Dominion Act known as the Indian Act 1880. But it was not suggested that this Act purports either expressly or by implication to authorise 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.

The action was tried before the Chancellor of Ontario and by his Judgment of the 2nd December 1899 it was dismissed with costs. By a second Judgment of the 22nd December 1899 on the counterclaim it was declared that the several patents under the Great Seal of Canada under which the Appellants claimed were *ultra vires* of the Dominion and null and void as against the Respondents. On appeal to the Divisional Court these judgments were affirmed.

The reasons of the learned Chancellor for his decision are thus summarised in his judgment.

" Over the Reserve 38 B, the Dominion had and
" might exercise legislative and administrative
" jurisdiction, while the territorial and proprietary

" ownership of the soil was vested in the Crown " for the benefit of and subject to the legislative " control of the Province of Ontario. The treaty " land was, in this case, set apart out of the sur- " rendered territory by the Dominion, that is to " say, the Indian title being extinguished for the " benefit of the Province, the Dominion assumed " to take of the Provincial land to establish a " Treaty Reserve for the Indians. Granted that " this might be done, yet when the subsequent " surrender of part of this Treaty Reserve was " made in 1886, the effect was again to free the " part in litigation from the special treaty " privileges of the Band, and to leave the sole " proprietary and present ownership in the Crown " as representing the Province of Ontario. That " is the situation so far as the title to the land is " concerned."

The learned Judge expressed his opinion that it was not proved that the Provincial Government had concurred in the choice or appropriation of the Reserves though in the view which he took of the case he considered it immaterial.

In the Divisional Court Mr. Justice Street expressed himself as follows:—

"The surrender was undoubtedly burdened " with the obligation imposed by the treaty to " select and lay aside special portions of the " tract covered by it for the special use and " benefit of the Indians. The Provincial Govern- " ment could not without plain disregard of " justice take advantage of the surrender and " refuse to perform the condition attached to it; " but it is equally plain that its ownership of " the tract of land covered by the treaty was so " complete as to exclude the Government of the " Dominion from exercising any power or autho- " rity over it. The act of the Dominion officers " therefore in purporting to select and set aside " out of it certain parts as special reserves for

" Indians entitled under the treaty, and the act " of the Dominion Government afterwards in " founding a right to sell these so-called reserves " upon the previous acts of their officers, both " appear to stand upon no legal foundation " whatever. The Dominion Government, in " fact, in selling the land in question, was not " selling 'lands reserved for Indians,' but was " selling lands belonging to the Province of " Ontario."

The Chief Justice adopted the reasons of the learned Chancellor.

There was a second Appeal to the Supreme Court. The majority of the learned Judges in that Court held that the case was governed by the decision of this Board in *St. Catharine's Milling Company* v. *The Queen* and the Appeal was dismissed. Mr. Justice Gwynne dissented but the reasons for his opinion given by that learned and lamented Judge seem to be directed rather to show that the decision of this Board in the previous case was erroneous.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catharine's Milling Company* v. *The Queen*. The argument of the learned Counsel for the Appellants at their Lordships' Bar was that at the date of the Letters Patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians and therefore there was no beneficial interest in the lands left in the Province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion officers as against the Government of Ontario and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By Section 91 of the British North America Act 1867 the Parliament of Canada has exclusive

legislative 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 legislation to appropriate lands 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 purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the Fisheries Case (1898 A. C. 700) 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 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. 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. c. 5) and the Legislature of Ontario (54 Vict. c. 3) and subsequently signed (16th April 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 had 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 yet 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 dis-"content 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.

The learned Counsel of the Appellants however says truly that his clients' titles are prior in date to this agreement and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below and at their Lordships' Bar was suggested rather than seriously argued that the Ontario Government by the acts and conduct of their officers had in fact assented to and concurred in the selection of at any rate Reserve 38 B notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the Province cannot be bound by alleged acts of acquiescence on the part of various officers of the Departments which are not brought home to or authorised by the proper

executive or administrative organs of the Provincial Government and are not manifested by any Order in Council or other authentic testimony. They therefore agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

It is unnecessary for their Lordships taking the view of the rights of the two Governments which has been expressed to discuss the effect of the second surrender of 1886. Their Lordships do not however dissent from the opinion expressed by the Chancellor of Ontario on that question.

To revert now to the preliminary objection their Lordships do not desire to impute any want of good faith to the advisers of the Appellants. They may have thought that their clients were not bound by the statutory agreement and that it was not therefore necessary to mention it in their petition for leave to appeal. But the omission to do so was a grave and reprehensible error of judgment, for the existence of the agreement supplies an answer to the allegation of the general public importance of the questions involved upon which the petition for leave to appeal was founded as regards both the two Governments and the Indians. If the objection had been taken in a petition to rescind the leave granted it would probably have succeeded and their Lordships would now be amply justified in refusing to hear the Appeal on its merits. But it was necessary to hear the argument in order to appreciate the objection and the Appeal has had this advantage that it has enabled Mr. Blake as Counsel for Ontario to state that he and the learned Counsel for the Dominion acting under authority from their respective Governments have arranged terms for their adoption which will it is hoped have the effect of finally settling in a statesmanlike manner all questions between the Governments relating to the Reserves.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the Respondents' costs of it but the Interveners will neither pay nor receive costs.