ATTORNEY -GENERAL OF ONTARIO v. FRANCIS ET AL.

Previously unreported.

Ontario High Court, Chancery Division, Ferguson H.C.J., 19 January 1889

Text of judgment transcribed from manuscript copy in the Archives of Ontario (Aemilius Irving Papers, Box 42, file 42, item 9) and collated with partial transcripts in: Toronto Empire, 21 January 1889 p. 4; Toronto Globe, 21 January 1889 p. 4; and Public Archives of Canada, Record Group 10, volume 2443 files 92799 and 92800. Text obtained through the kind offices of Ms. Bennett McArdle.

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO . . . . . *Plaintiff*

AND

John Harvey FRANCIS: Allan FRANCIS; Théophile ROCHON; THE ATTORNEY-GENERAL OF CANADA; John David SMITH, James Guest WILLIAMS and George Henry Graham McVITTY (for the estate of Robert Charles SMITH); James BALFOUR; William John MENZIES; THE QUEBEC BANK; Thomas LAING; and John LAING . . . . . *Defendants*

Counsel:

Aemilius Irving, Q.C., J.A. Barron, M.P. and Mr. McLaughlin of Lindsay, Ont., for the plaintiff.

Christopher Robinson, Q.C., Charles Moss, Q.C., and H.J. Wickham for the Attorney-General of Canada

and the Dominion timber licencees, defendants.

W. Cassels, Q.C., S.S. Smith of Port Hope, Ont., and W.H.L. Gordon for the Provincial timber licensees, defendants.

J.A. Macdonnell, solicitor for the Dominion government and Dominion timber licensees, defendants.

JUDGMENT (Ferguson, H.C.J.):

The action is brought by the Attorney -General of the Province of Ontario, on behalf of Her Majesty the Queen, against James Harvey Francis, Allan Francis and Théophile Rochon for, amongst other things, an injunction restraining these defendants from trespassing by cutting timber on certain lands situated in, and, as is alleged, the property of the Province of Ontario, lying near Whitefish Lake, in the district of Algoma: the lands referred to being described as lands known as certain timber limits of Ontario, Nos. 69, 70, 75, 76, 77, 83 and 84, it being alleged that these defendants had entered upon these lands without permission from the Crown or from the Province of Ontario and cut pine timber therefrom upon limits Nos. 69, 70 and 76 amounting to about 10,000 logs and 1,000 pieces of timber. The Attorney-General for the Dominion of Canada was made a party defendant. The first-named defendants claimed to have the right to cut the timber in question, under the authority of certain licenses so to do, granted by the proper department or officers of the Government of the Dominion of Canada to certain persons from or through whom these defendants claimed by purchase for valuable consideration. The defendants John David Smith, James Guest Williams and George Henry Graham McVitty are executors and trustees under the will of the late Robert Charles Smith, who was, as they allege, at the time of his death the owner of limit or berth No. 69, one of those above mentioned, by virtue of a sale thereof by the executive Government of the Province of Ontario.

The defendants James Balfour and William John Menzies claim to be entitled to limit or berth No. 70, also one of those above mentioned, by virtue of a license granted to them by the Province of Ontario.

The defendants the Quebec Bank claim to be entitled to or to have some right in respect of limit or berth No. 76 by virtue of a sale thereof to one McRae by the Government of the Province of Ontario, saying that this limit is now standing in the name of one Walker upon certain trusts.

The defendants Thomas Laing and John Laing have been added by an amendment as having

some interest in limit or berth No. 84, one of those above mentioned. These do not seem to have filed any statement or defence, but they were duly represented by counsel, who appeared for all the defendants interested under licenses issued by the Government of the Province of Ontario. One does not readily perceive any sufficient reason for making persons claiming under licenses from the Government of Ontario parties defendant in the action, for it could scarcely have been expected that in matters of so great importance as are involved in the action substantial and material relief could properly be granted in favor of some defendants against other defendants without any pleadings between them or any specific issues being raised by one or any of them against the other or others of them, and so far as any of the defend- ants might appear to be entitled to any relief against the plaintiff, this could not be obtained in this action, or, as was contended, and I think rightly, in any way except by a petition of right.

Besides the relief that I have already mentioned, the plaintiff asks that it may be declared that the defendants, the Francis's and Rochon, have no legal rights in respect of the timber cut from and on any part or portion of the area covered by the above-mentioned timber limits, and that the timber that had been cut should be delivered up to the plaintiff, also an injunction against the removal of the same as well as an order for the payment of the damages alleged to have been sustained.

The plaintiff asks, in addition to the foregoing, that the defendant by the Attorney -General of the Dominion of Canada may be restrained from laying out or interfering with the lands as the reserve for the Indians on the timber limits before mentioned, or any part thereof, and that the true locality of the Indian reserve described by the treaty, mentioned in the second paragraph of the statement of claim, be declared, and such directions given as may be thought proper.

This treaty was made with the Indians inhabiting the eastern and northern shores of Lake Huron, from Penetanguishene to Sault Ste. Marie, and thence to Botchewaning Bay, on the northern shore of Lake

Superior, together with the islands in these lakes opposite to the shores thereof, and inland to the height of land which formed the southern boundary of the territory covered by the charter of the Hudson's Bay Company, whereby the whole of such territory, save and except the reservations set forth in the schedule to the treaty annexed, was surrendered and ceded to Her Majesty, Her Heirs and Successors forever. This treaty was made in the year 1850, and is known as the "Robinson-Huron Treaty", the representative of Her Majesty in the treaty having been the late Honorable William B. Robinson.

The treaty was signed and executed by Mr. Robinson and a large number of chiefs and head men of the Indians, and in the schedule are mentioned seventeen reserves or reservations to chiefs and

their respective bands of Indians. It provides that these reservations should be held and occupied by the chiefs and their tribes, in common for their own use and benefit, and that should the chiefs and their respective tribes at any time desire to dispose of any such reservations or of any mineral or other valuable productions thereon, the same should be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit and to their best advantage.

The reserve mentioned in the plaintiff's statement of claim and in respect of which the present difficulty and contention seems principally to have arisen, is the one No. 6 in this schedule and is thus mentioned therein: "Sixth, Shawenakishick and his band, a tract of land now occupied by them and contained between two rivers, called Whitefish and Wanabitaseke, seven miles inland."

Other than this there does not seem to have been at the time any other or further description of this reserve, and the others of the seventeen reserves are mentioned or described in the schedule to the treaty in a manner somewhat similar, if not in the same manner, or at all events with great brevity. The evidence shows that it was intended and that it was promised to the Indians that the reserves should soon after the treaty be surveyed by the Crown and their true boundaries marked out, and I think it sufficiently appears that it was understood that when the Crown surveyors were sent for the purpose of making the surveys, the Indians were to point out and show to them the lands that they claimed and had claimed as such reservations.

Many years ago these reserves were surveyed by the Crown, as was contemplated, excepting this one, No. 6 in the schedule and, as was stated at the trial, another one. The reason why all the surveys were not completed at the same time does not appear in the evidence, but it was said that the survey stopped before completion for a reason personal to the Crown Surveyor who was engaged in the work.

In the year 1872 the Executive Government for the Province of Ontario, for the purposes of timber sales in the region or tract ceded by the above-mentioned treaty, projected on a plan into an area of six square miles each, berths which were numbered and sold according to the regulations prescribed by the Government of the province on the 15th day of October in that year, and among others then sold were the several berths aforesaid and in pursuance of such sales licenses to cut timber on the timber berths were in consideration of certain payments, and to continue to force for one year, issued to the purchasers by the Crown Land Department of the province, and it is not disputed that these licenses have been renewed every year since, either by the purchasers or those to whom the licenses have been assigned, according to the provisions of the statutes in that behalf.

Early in the year 1884 the Dominion Government caused a survey of this Reserve No. 6 to be

made by Mr. Aubrey [sic], a provincial land surveyor.

In July, 1886, the same Government obtained from the Indians through their chief and head men or principal men, a deed whereby they surrendered, released and quitted claim to Her Majesty the Queen, her heirs and successors forever all and singular the whole of the merchantable timber on the reserve in trust, to be sold for the joint benefit of the band on such terms and conditions as to Her Majesty's Government of Canada should seem proper, and as therein mentioned and on the 14th of October, 1886, the timber licenses were issued by the Dominion Government. These have been regularly renewed, according to law, and the licenses under the authority of which the defendants Francis' and Rochon were professing to act in cutting the timber on this Reserve. They had been assigned in the meantime by the original licensees but I need not, I think, say anything further as to this.

The plaintiff, in the statement of claim, complains that although the sales made by the Ontario Government in 1872 had been widely advertised, and plans of the territory and berths thereon distributed showing that the berths covered the territory now claimed by the Government of Canada as Reserve No. 6, yet that no notice was given by the Superintendent-General of Indian Affairs, or by anyone on behalf of the Government of Canada to the Crown Land Department of Ontario, of any reservation being required within that area for the Indians, or of any Indian reservation or of any right to lay out such reservation, and that no action was taken by the Indian Department or the Government of Canada for twelve years or thereabouts after the sales made by the Province of Ontario. The argument based upon this complaint does not go the length of asserting that any right additional to the rights such as they were was gained by what had been done by the Ontario Government and what was said to have been left undone by the Indian Department of the Dominion Government, and it was somewhat difficult for me to see why the contention was raised at all.

The evidence of Mr. Vankoughnet, a gentleman who has been 28 years in the Indian Department of the Government, and the correspondence between that department and the Department of Crown Lands at Toronto seem to put the matter in this shape. The Department at Ottawa were not aware that the Crown Land Department at Toronto had made the sales of these limits till long after the fact; that the knowledge of the fact was gained accidentally; that before any sale was made by the Dominion Government of this timber, or, rather, the licenses to cut it, the Indian Department had communicated with the Crown Land Department of the Government of Ontario; that, in consequence of not having received an answer to a certain letter on this subject, Mr. Vankoughnet, acting for the Indian Department, endeavored to see the Commissioner of Crown Lands at Toronto but failed in so doing at the time, but had instead an interview with the Deputy Commissioner on the subject, who said it was a mistake to sell the timber on the reserve. Mr. Vankoughnet, in his evidence, says that Mr. Johnston, the Deputy Minister of Crown Lands, said it was a mistake of some of the officers of the department in not having noticed the reserve on the plans; that he asked him what he pro- posed doing, and the answer was to the effect that the Provincial Government would have to settle with the purchasers of the licenses. The witness

further says: "I think he said he would bring the matter before the commissioner." He also says that he came from Ottawa to Toronto expressly for the purposes of this interview.

The letter of the 27th August, 1886, refers to this interview. It seems to me that what really appears is that, after this interview, Mr. Vankoughnet thought that the Ontario Government would simply settle for the consequences of the mistake, and that the department, of which he was the deputy superintendent, in this view proceeded to a sale of the timber, or the right to cut the timber, a surrender of which had been obtained by the Dominion Government from the Indians, and I repeat that I do not see why there was so much contention on this subject. I do not see that either Government was in a position to blame the other in the matter. I do not see that this or the contrary of it would make any difference in regard to the rights to be determined.

As the locality of the reserve had to be determined, and as it had to be found as a fact whether or not the cutting of timber complained of had taken place upon the reserve, it was thought for various reasons that it would be convenient to take the evidence of the Indian witnesses at or near the place in question, and this evidence was so taken.

During the time of the taking of the evidence I was led to think that the only question to be determined between the contending parties was as to whether or not the timber, the cutting of which was complained of, had been cut upon land outside of the boundaries of the reserve, it being, as I thought, conceded that if it had been cut upon the reserve the cutting was done under proper authority so to do, but if done upon land not part of the reserve, it was wrongly done without any authority. These statements were certainly more than once made by counsel. Upon the final argument, however, counsel dissented from this as being the sole matter and contended that whether the cutting was done upon the reserve or not the property in the land and timber being (as was contended) vested in the Ontario Government, the cutting complained of was wrongful and could not be justified under any licenses issued under the authority of the Dominion Government. The plaintiff asks, as I have said, that the true locality of this reserve should be declared. This is or is similar to asking for a declaration of right, and my duty in this respect is to fix the boundaries of the reserve as well as I can upon the evidence.

The words in the schedule of the treaty are certainly very meagre for this purpose. I may first dispose of the concluding words "seven miles inland" by saying that after hearing the evidence that was given in regard to the Indians' understanding, or rather want of understanding, of the meaning of the word "mile"; and general evidence as to the locality that was occupied by this band of Indians at the date of the treaty; and as to the distance of any part of the locality so occupied from the main waters; and the evidence as to the word in their language used by them indiscriminately to signify the measure of distance or any other measure such, for instance, as a bushel; counsel very properly, I think, abandoned any contention resting upon the use of these words. The distance from the main waters to the nearest part of the lands at the time of the treaty occupied by this band of Indians seems to have been more than twice seven miles, but this is not

to make any difference.

In taking the evidence for the purpose of ascertaining the meaning of the Treaty so far as it related to the rights and interests of this band of Indians, evidence was given and received respecting the preliminary facts and instructions to the agent or plenipotentiary of and on behalf of the Government (the Crown). Evidence was offered respecting the preliminary facts on the other side: that is to say, the instructions that were given to the chief of the band, Shewanakishick, by the

Council of his band convened for the special purpose of such instructions; that is, instructions as to what territory he was to claim as being in the occupation of the band and to which they should be entitled as a reserve. Such evidence was objected to, but was received subject to the objection. I am of the opinion this evidence was properly received, and that the objection to it could not be sustained. I think that for this or a like purpose this band of Indians should be considered as standing in the same position as any other high contracting power or government, and it is a proposition of law that if an agent of a government exceed his authority, the principal is not bound. For this reason I think both the instructions and the contract must be seen in such a case. (1) Story on Agency, sec. 307a, 8th. Ed., and notes and cases there referred to. By the law of agency at common law there is this difference between individuals and the government: the former are liable to the extent of the power they have apparently given their agents while the government is liable only to the extent of the power it has actually given to its officers. etc. Besides, it would seem to be improper to receive such evidence on the part of one party to the contract and not on behalf of the other party. I may here remark that the Indian witnesses appeared to me to give their evidence with a high degree of candour and much intelligence. The interpreter was, I think, an excellent one. I did not, with, I think, very careful observation, notice a single instance in which I was disposed to doubt the veracity of the witness.

On the subject to which I have last referred, Mongowin, the chief of the Band, was called and he said, "Shewanakishick was my father and the chief before me. I remember my father getting a message to go to the Sault to see about a reserve for the band. I do not know my own age. I was grown up at the time of the message. I remember my father calling a council in consequence of getting the message. The meeting was held where I now live at the Whitefish Lake. I was present at the meeting. My father told the people or asked the people: 'shall I reserve so much', and they answered, 'Yes'." Here the objection was interposed, and after it was disposed of the witness said: "I will endeavor to follow the road around the proposed Reserve that was then mentioned". This he did by mentioning objects and places in the Indian tongue, nine in number. He commenced with:

1. *Nebenenekahming*--which was translated to mean "the place of the high cranberries", a place known as Cranberry Lake. He says this was mentioned at the council.

2. [*Anhasahquah*(?)*]*. This is the name of a lake near the house of the Hudson Bay agent imme- diately north of Whitefish Lake.

3. *Mahdahgohming*. This is the name of the next lake to the west of the last mentioned one [.] The name means "where the waters stir".

4. *Koshgo[wee wee]shing*. The witness said this was the name of a lake [nam]ed by f[our?] people, and that the waters he had before mentioned run into it.

5. *Keecheemenessing*. This means "great island". The witness says it is in Washkahgahming lake, and that the waters of this Lake flow down to the waters of the Great Lake (Huron).

6. *Wah bok tee nong*. Which means "[illegible] channel with banks on high hills on each side coming near together".

7. *Pee kee an doh wanahking*. This means "an island where there stands a tree having a spreading top", and the lake is called by this name after the tree on the island.

8. *Kee no gah ming*. This means "long lake". The witness says he calls the lake so because it is long.

9. *Muckohdehwaugohming*. This means "black lake". The witness says the water is very black, and that is the reason why he calls the lake by that name

The witness now says "I have gone around". These nine places are places that surround the territory that was to be bargained for as a reserve, and he says they were all mentioned at this meeting of the council of the band, that this piece of land was what his father was instructed by the council to bargain for.

He says he went with his father to the Sault and only the two went; the he was present there with his father and Mr. Robinson, and heard his father say to Mr. Robinson, to put it in the witness's own words translated, "I have now said as to the marks of the reserve". [Deleted from MS: "He says he knows why his father wanted this land reserved"]. This witness says he recollects coming home from the Sault after seeing Mr. Robinson there, but he cannot tell how many years since. He says the band of Indians have been using this reserve ever since, and that the first interference with them was when the railway was about to be built, when the people were searching for a good route or track for the road.

This witness and others -- amongst whom was the witness Coucroche -- were examined in respect of the occupation of this piece of land, their sugarbushes, their plantations, their burial grounds for their dead, their dwellings, etc. The witness Coucroche was the one who seemed to have the most general knowledge and the best memory as to occupation of places for long periods for particular purposes, and as to the places that were actually in occupation by the members of the band at the date of the treaty in 1850.

I was and I am entirely satisfied that the evidence given by Coucroche and the other witnesses in regard to occupation is true. There is not an agreement in every particular, but there is as nearly this as one often finds in evidence involving long recollection of witnesses. I think their testimony remarkably satisfactory in this respect.

I find, and I have no hesitation in finding, that the meeting of the Council of the Band was held as stated by Mongowin, the present chief; that the instructions given by the council to Shawenakishick were as he has stated; and that these were stated to Mr. Robinson on the occasion of the making of the treaty, as stated by this witness.

And I am of the opinion, and I find that it is shown by the evidence, that the band at the time of the treaty were in occupation (in the way, and the only way, they could in their manner of living occupy territory: that is, by their plantations, their sugar bushes, their burial grounds, hunting, fishing, etc.) of the parcel of land embraced by the nine marks -- immovable marks -- mentioned by the witness Mongowin the present chief; that is, if lines be reasonably drawn from one mark to the other all the way around the tract of land. There was not, of course, occupation of every portion of this. I do not think that the proper meaning to be given the word "occupied" in the treaty would require this. There was actual occupation by members of the band in various parts of this tract, and to include all these by lines reasonably drawn would embrace all the land within the boundary indicated by the nine marks given by the witness Mongowin; and after hearing all that was said by the witness, and all the remarks of counsel, one cannot entertain any doubt but that this tract of land was what these Indians honestly thought they were getting as their reserve, and in my opinion the evidence shows that it is the tract of land they did get as their reserve.

I do not feel at all pressed by what was urged respecting certain attempted charts or diagrams shown to have been made by some of the Indians to represent the tract that they claimed as being their reserve. Where I take into account the facts that the only word, as I have before said, that these Indians have to signify the measure of distance, is equally applicable to other measures; that they did not and do not yet know what distance is meant by a mile, reckoning, as they do, their distances by the length of time occupied in travelling over them, and being unable to express in so doing fractional parts of a day; together with their manifest inability to make a sketch or diagram to represent a tract of land; I think it impossible to say that any argument

against the present claim of these Indians resting upon such a foundation can prevail, even though such charts or diagrams should apparently differ widely from one really representing what I think has been shown to be the reserve, and any and every argument against the contention of the Indians as to the area of land really in the reserve, or its location, which is based upon anything they or any of them may have said or represented in regard to distance or expanse, must give way to the conclusion having its foundation upon actual facts ascertained by evidence respecting the immovable objects upon the ground. They did not and do not know what is meant by a mile, or a league, or the difference between the two measures, nor indeed any measure that to us would be a measure at all.

Thus, assuming that the reserve in question is em- braced by a line reasonably drawn through the nine objects or places that are mentioned and pointed out by Mongowin, the question arises as to where the location is. In my opinion it became entirely plain at the conclusion of the evidence upon the subject that the survey made by Mr. Abrey for the Dominion Government in the early part of '84 (I think) and the boundary lines laid down by him show the location of this reserve excepting that the true boundary on the northerly side or limit is the line of the waters called sometimes "Whitefish River" and sometimes "Whitefish Branch". This line of water is also sufficiently designated by the names of objects on the ground that I have before mentioned. The part of Mr. Abrey's survey lying northerly of this line of waters does not, I think, form any part of the reserve. The reason why this area of land was embraced in the survey was shown by the evidence. It is this: When the survey was being made the agent of the Hudson's Bay Company being there and taking or feeling some interest in the Indians suggested that they might as well have this piece of land, as it was in parts better adapted to cultivation such as they do than most of the land in the neighborhood, saying that they might as well have it as not, and that the Government would not object to it. The Indians, and it appears the surveyor, fell in with the idea and the survey was made so as to comprehend this piece of ground. From the manner in which other surveys were made long before this time and soon after the treaty, so far as appears by the report of the same and the evidence and the spirit of liberality that seems to have pervaded the dealings of the Government with the Indians, it can scarcely be doubted that if this piece of land had at an early day, and, perhaps, at any time before the occurrence of the facts giving rise to this contention, been asked by the Indians as part of their reserve it would have been given them. Nevertheless, my finding and decision is that it is not a part of or belonging to the reserve. There is also another point at which there is some difference between Mr. Abrey's boundary line and the line reasonably drawn through or by the objects or places before alluded to; this difference is however but trifling. Mr. Abrey's line fall[s] at the place inside of the other line, but the Indians are manifestly satisfied to adopt at this place Mr. Abrey's line, and as there is not any material or valuable or substantial, or I may say appreciable difference, I think that Mr. Abrey's boundary line may reasonably be adopted at this place.

I am of the opinion, then, that Mr. Abrey's survey, varied by making the line of the water that I have before mentioned in this connection the northerly boundary, and casting out the part of the survey lying northerly of this water line, will show the location and boundaries of this reserve. This, to my mind, has been shown and placed beyond reasonable cavil. This survey has been manifested upon a chart or upon charts, and there is a written description of the lands included in

it, and unless it is considered necessary for the purposes of the Public Records, I do not see any grave necessity for directing another survey varying this one, as before stated. Counsel in this case will be good enough to offer me such suggestions as may occur to them or their

clients on this subject before the formal judgment is drawn up.

The next question is as to whether or not any timber was cut by the defendants, licensees, or rather claiming under licenses of the Government of the Dominion out- side of the boundaries of what I have determined was and is this Indian Reserve. The answer to this question is that it has not been shown by the evidence that these defendants or any of them did by themselves or their agents cut or remove any timber upon any land lying outside of the boundaries of the reserve as I have found and decide such boundaries to be. All the timber cut or removed by these defendants, that appears at all, by the evidence has been shown to have been upon and from the lands of the reserve as I find it to be. None was shown to have been cut upon the lands lying north of the water line before mentioned and within the boundary laid down by Mr. Abrey in his survey.

It was attempted at a late stage of the evidence to show that some dry timber or wood had been cut by these defendants or for them for the purposes of fire wood, upon lands that are not within this reserve, but this evidence did not connect these defendants with the cutting of the timber that was shown; besides, the evidence of their cutting seems as if it had been hurriedly gathered up, and such cutting of fallen or dry timber for use there or in the neighborhood did not and does not appear to me to be a materially substantial matter within the proper scope or subject of the contention in this action, although it may be technically so. I am of the opinion that this effort entirely failed.

The plaintiff, as I have before said, asks that the true locality of this reserve should be declared. To such a declaration the plaintiff is entitled, and I have endeavored to point out its location and its boundaries in such a manner that a brief declaration may be readily drawn up answering the plaintiff's request or prayer in that respect.

The findings and conclusions of fact upon the evidence are against what was contended for on behalf of the plaintiff during the course of the trial, so far as the location and boundaries of this reserve and the cutting of timber by the defendants who claim under the authority of licenses issued by the Dominion Government are concerned, for what the plaintiff sought to show in regard to the latter was that these defendants had cut timber upon lands not being lands embraced in this reserve, and hence public lands, belonging to the Province of Ontario, although the fee thereof was in the Crown, and in regard to the former what the plaintiff sought to show was that this reserve is not located at all where I decide that it is located, and even if so, that the boundaries were different from what I decide that they are.

It was not at the trial disputed that there was an Indian reserve in this neighborhood somewhere, and until the argument (near the close of the argument, I think) it was, as I thought, fully understood that unless the plaintiff succeeded in showing that these defendants had been cutting timber upon lands outside of the boundaries of this reserve, this case against them must fail. The pleadings of some of the defendants, who claim by virtue of licenses issued by the Government of Ontario, seem to place the matter of contention in this way, and until very near the close of the trial I thought that the only question would be whether or not these defendants had cut timber outside of the boundaries of the reserve.

The plaintiff, however, and as an afterthought, I think, contended, as did also counsel for the defendants claiming by virtue of licenses from the Ontario Government, that whether the cutting of timber that was proved or admitted was within or without the boundaries of the reserve the plaintiff was entitled to succeed, placing the contention on the ground that the property was vested in the Province of Ontario under the provisions of the B.N.A. Act, and that the Government of the province were trustees for the Indians of the amount of money that the Government had received for the timber. I was then of the opinion that this contention could not prevail. These lands are undoubtedly lands reserved for the Indians. The right and power to legislate in regard to the Indians, and lands reserved for the Indians, is clearly given in and by the distribution of legislative powers made by the B.N.A. Act to the Parliament of the Dominion, which Parliament had and has this power and authority.

That parliament did during its first session, by 31 Vic., c. 42, legislate in regard to lands reserved for the Indians by providing, amongst many other things, for the manner in which any surrender of lands by the Indians should be made.

From time to time the same Parliament passed various Acts dealing with the subject of the Indians and lands reserved to them. By 39 Vic., c. 18, enacted by the same Parliament, it was provided, amongst many other things (sec. 25), that no Indian reserve or portion of a reserve should be sold, alienated or leased until it had been released or surrendered to the Crown for the purposes of the Act and by 43 Vic., c. 28, if not earlier, provision was made for granting licenses to cut trees, etc., on the Indian reserves.

I am not aware of any objection ever having been made or any unfavorable comment having been spoken or written in respect of such legislation or anything that was done in pursuance of it, and there seems to me to be reason for thinking that it was a view entertained by both Governments that the Government of the Dominion had the right and power to legislate respecting, and to administer the affairs of and appertaining to, the Indians and the lands reserved for the Indians; there being, however, a difference of opinion as to what lands were "lands reserved for the Indians".

As I have said there can be no doubt that in any view of this latter question these lands are and must be considered lands reserved for the Indians. This cannot be otherwise if there exist any such lands at all; and what the Dominion Government did by obtaining a release or surrender of this timber (the timber upon this reserve) and issuing licenses for the cutting of it, the money arising to be for the benefit of the Indians, appeared to me to be a simple act of administration of the affairs of this little band of Indians and the lands reserved to them, done in pursuance of or in accordance with the legislation on the subject which the Dominion Parliament seemed to me to have the undoubted power to enact, and in accordance with the idea expressed in the Treaty of 1850. See the remarks of Mr. Justice Patterson in *The Queen v. St. Catharines Co*., (1886), 13 O.A.R. 148 at 173.

For these and the like reasons I was at the close of the argument of the opinion that the Dominion Government had the power and authority to do as they did, and that the defendants claiming under such licenses from the Dominion Government were justified in cutting the timber that they did cut upon this reserve, and that it was a matter with which the Province of Ontario had or has at the present time no concern, no matter what might be considered to be the right that would arise, if any, to the province upon the lands of this reserve being ceded by the Indians to the Crown, or the reserve becoming wholly unnecessary by reason of the bands of Indians becoming extinct, etc.

I then thought that the relief that the plaintiff should have was the declaration as to the reserve and its boundaries to which I have before referred, and that, in other respects, the action should be dismissed, for I did not see that the defendants claiming under licences from the Ontario Government could in this action have any relief against the plaintiff, and I thought that they were entitled to none against their co-defendants.

It was then said, however, that in the case *The Queen v. St. Catharines Co*., which was pending before the Privy Council upon an appeal, it was likely or probable, from the nature of some of the arguments before that court and some remarks that were reported to have been made by some of the learned judges, that there would be an expression of opinion regarding the "quality", as it was called, of the Indian title, although that action was upon a subject and in regard to rights or supposed rights quite different from the matter involved in this action. For this reason this judgment has been delayed till the present time.

I have now had an opportunity of perusing the judgment of the Privy Council in that action upon the appeal to them. They have not seen fit to discuss or decide anything as to the quality of the Indian title, considering that unnecessary for the determination of the appeal before the Council; and after a careful perusal of the whole of the judgment, I am of the same opinion as at the close of the argument. I think the decision does not and cannot affect in any degree in favor of the plaintiff the rights and matters in contention in this action, but, as some of the statements or expressions in the judgment might be thought at first view to have some bearing upon the matters

of this action, I will refer to these and say very shortly why they have in my opinion no such bearing.

One of these is: "The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117. Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all the ordinary territorial revenues of the Crown arising within the provinces." The court then refers to *Attorney General v. Mercer*.

This comprehensive language must, in my opinion, be applied to the subject matter of the case then under consideration. The lands in that case had been ceded to the Crown by the Indians by the Treaty of 1873, and had thus been disencumbered of the Indian title. If there were doubt as to this way of looking at or construing the passage, it is made, I think, plain by the concluding part of that portion of the judgment in which their Lordships decide against the contention on behalf of the Dominion Government in respect to the ceded territory, rested on the provisions of section 91(24). The passage is: "Their Lordships are, however, unable to assent to the argument for the Dominion founded on section 91(24). There can be no a priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of reserves and assets. The fact that the power of legislating for Indians and for lands which are reserved for their use has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

In that case the lands in question has been disencumbered of the Indian title, as before stated, by the Treaty of 1873. In the present case the lands have not been ceded and have not been so disencumbered, besides, the latter part of the passage discloses the view of the court as to the period at which the beneficial interest spoken of becomes available to the province as a source of revenue, namely, when the estate of the Crown is freed from the Indian title, and seems to me not to consist with the argument before me respecting a trust existing in the Province for the benefit of the Indians. Then afterwards the court said: "The treaty leaves the Indians no right whatever in the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that province", indicating in addition to what I have before said that the Indians had before the treaty or surrender rights in respect of the timber, a consequence of which would seem to be that it may be used by them or for their benefit until such time as their title becomes extinguished by cession, surrender or otherwise.

A careful perusal of the judgment of the Privy Council shows, I think, that it does not militate in any degree against the contention of the Dominion Government here, and portions of it indicate that the Dominion Government is right in legislating for these Indians and their lands (a reserve which has not been ceded or surrendered in any way) and in administering their affairs in the manner in which they are doing. The rights of the Indians in respect of this land, and the rights that they had in respect of the timber thereon, were rights and interests other than that of the province in the same, to say the very least; and I do not desire to be understood as indicating any opinion as to what, if any, right the province has in respect of such lands.

The plaintiff is entitled to the declaration that I have before mentioned, but I am still of the opinion that the action must in all other respects be dismissed, with costs to the defendants claiming under licenses of the Dominion Government and to the defendant the Attorney-General for the Dominion Government. I do not see that I can give the other defendants any relief, but I am willing to hear their counsel on the question of their costs.