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IN THE MATTER OF THE ARBITRATION

BETWEEN

THE DOMINION OF CANADA

AND

THE PROVINCES OF ONTARIO AND QUEBEC.

Answer of Quebec to the Claim of Canada for Indian Increased
Annuities under the "Robinson Treaties."

Filed 11th October 1894,

D. Girouard

D. GIROUARD,
Counsel for Quebec.

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IN THE MATTER OF THE ARBITRATION

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Answer of Quebec to the Claim of Canada for Indian Increased Annuities under the "Robinson Treaties."

Quebec intends to deal with this case as presented by the Dominion of Canada against the late Province of Canada.

Canada demands from the said Province the sum of \$325,440.00, being, as alleged, arrears of annuities under the "Robinson Treaties" from the year 1851 to the year 1867, made up, about 1875, of the difference between the payments at \$1.60 and \$4.00 per head, with interest to the first of December, 1892.

Quebec does not intend to deal with the arrears of annuities claimed from the Province of Ontario, as specified in paragraphs 2 and 3 of the "Statement of Case of the Dominion."

This case involves several questions of fact and also of law.

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It is based upon the following clause of the "Robinson Treaties":

"The said William Benjamin Robinson, on behalf of Her Majesty, who desires to deal liberally and justly with all her subjects, further promises and agrees that should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then, in that case, the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial cur-20

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“rency in any one year, or such farther sum as Her Majesty may be
 “graciously pleased to order, and provided further that the number of
 “Indians entitled to the benefit of this treaty shall amount to two-thirds
 “of their present number, which is fourteen hundred and twenty-two, to
 “entitle them to claim the full benefit thereof. And should they not at
 “any future period amount to two-thirds of fourteen hundred and twenty-
 “two, then the said annuity shall be diminished in proportion to their
 “actual number.”

The questions of fact may be summed up as follows :

I. At any future period from and after the date of the said Treaties 10
 did the territories ceded produce an amount—and, if so, what amount—
 such as would have enabled the Government of the late Province of
 Canada, “without incurring loss,” to increase the annuity or annuities
 secured to the Indians under the said Treaties ?

II. What amount has been paid to each individual Indian every
 year ?

III. What has been the number of Indians at any one time after the
 making of the said Treaties entitled to the benefit of the said Treaties ?

IV. What have been the expenditures and charges in respect of the
 Territories ceded under the said Treaties, and what have been the receipts 20
 in respect of the same ?

These are so many questions of fact which should be fully investigated
 before the Board can decide : whether the Territories ceded have produced
 such an amount as would have enabled the Government to increase the
 annuities, “without incurring loss.”

Before adducing evidence, Quebec urges that several questions of law
 should be first determined by the Board :—

I. What is the definition of the word “Indian” within the meaning
 of these treaties ? What Indians are entitled to the annuities and increase
 of annuities under the said “Robinson Treaties” ? Are they only the 30
 Indians named and contemplated by the said treaties, namely : The
 Ojibeway Indians, inhabiting and claiming the eastern and northern
 shores of Lake Huron, from Penetanguishene to Sault Ste. Marie and
 Batchewanaung Bay ; and the northern shore of Lake Superior, together
 with the islands in said lakes opposite to the shores thereof, and inland to
 the height of land ?

And also the Indians inhabiting French River and Lake Nipissing, as
 stated in the “Huron Treaty.”

And also the Ojibeway Indians of the Lake Superior district, as stated
 in the “Superior Treaty.” See C. S. L. C., ch. 14, s. 11 ; C. S. U. C., ch. 40
 81, s. 20, 25 ; Indian Act, C. R. S., ch. 43 ; 31 V., c. 42, s. 8, 15 ; 32-33 V.,
 c. 6, s. 6.

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Will Indians not belonging to the said tribes, or not inhabiting the said district, be entitled to the benefit of the same ?

Quebec contends that Indians, or their descendants, not belonging to these tribes, or not inhabiting these territories, are not entitled to benefit by said treaties.

II. In determining the increased annuities, is the value of the territories or lands, at the date of the treaties, to be considered ? Is such value settled by the treaties ? Should not the amount of the increased annuities be based upon the profit realized, rather than upon the increased value ?

Quebec contends that only the increase in value since the date of the treaties or the profits, can be taken into consideration.

III. In considering whether the annuities could be increased, is the Government entitled to charge against receipts all expenditures in respect of the said territories, and especially those mentioned at page 6 of the Answer of the Province of Ontario ?

Quebec submits that all expenditure and charges in respect to the said territories should be taken into account.

IV. The administration of Indian affairs being in the hands of the Imperial Government up to the year 1860, is the late Province of Canada responsible for any omission in rendering an account of the said receipts and expenditures in respect to the said territories ? Was the said Province bound to render such account, and if so, when and to whom ? Was the said Province bound to prepare and present an account without any demand being made, either by the Imperial Government or the chiefs of the said Indians ?

Quebec contends that there is no law and no agreement which obliged them to keep and present such account ; and more particularly so in the absence of any demand for the same.

V. Is the Province of Canada responsible for any fault or negligence in the administration of Indian affairs by the Imperial Government in respect to the said treaties ?

VI. In 1868, the Department of the Secretary of State was organized, and the management of Indian lands was transferred to that department. 31 V., c. 42.

Before that time and since 1860, when the Imperial Government ceased to manage Indian affairs, the latter were under the management of the Commissioner of Crown Lands, who was a responsible officer bound to give security for the due discharge of his duties. 23 V., c. 2, s. 6.

Under such circumstances, how can it be held that the late Province of Canada was in any way responsible for the said management of Indian affairs ?

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VII. Were not the "Chiefs and their tribes," contracting with the Honourable William B. Robinson *es qualite*, bound to see that the terms of the treaties were kept?

Quebec answers in the affirmative.

VIII. Can interest be claimed on arrears of annuities, if any, so long as no demand or protest has been made?

Quebec answers in the negative.

IX. Looking at the nature of the claim, can interest be demanded?

Quebec submits that the nature of the claim does not justify the allowing of interest, as the transaction is not of a mercantile character; 10 and inasmuch, also, as there has been no default and no promise on the part of the Province, express or implied, to pay interest, and no such promise can be inferred from the circumstances of the case.

X. Is not the said claim subject to prescription, as it is not due to the Government, but merely to the said "Chiefs and Tribes." Is it not subject to the same prescription as the claim of any other person?

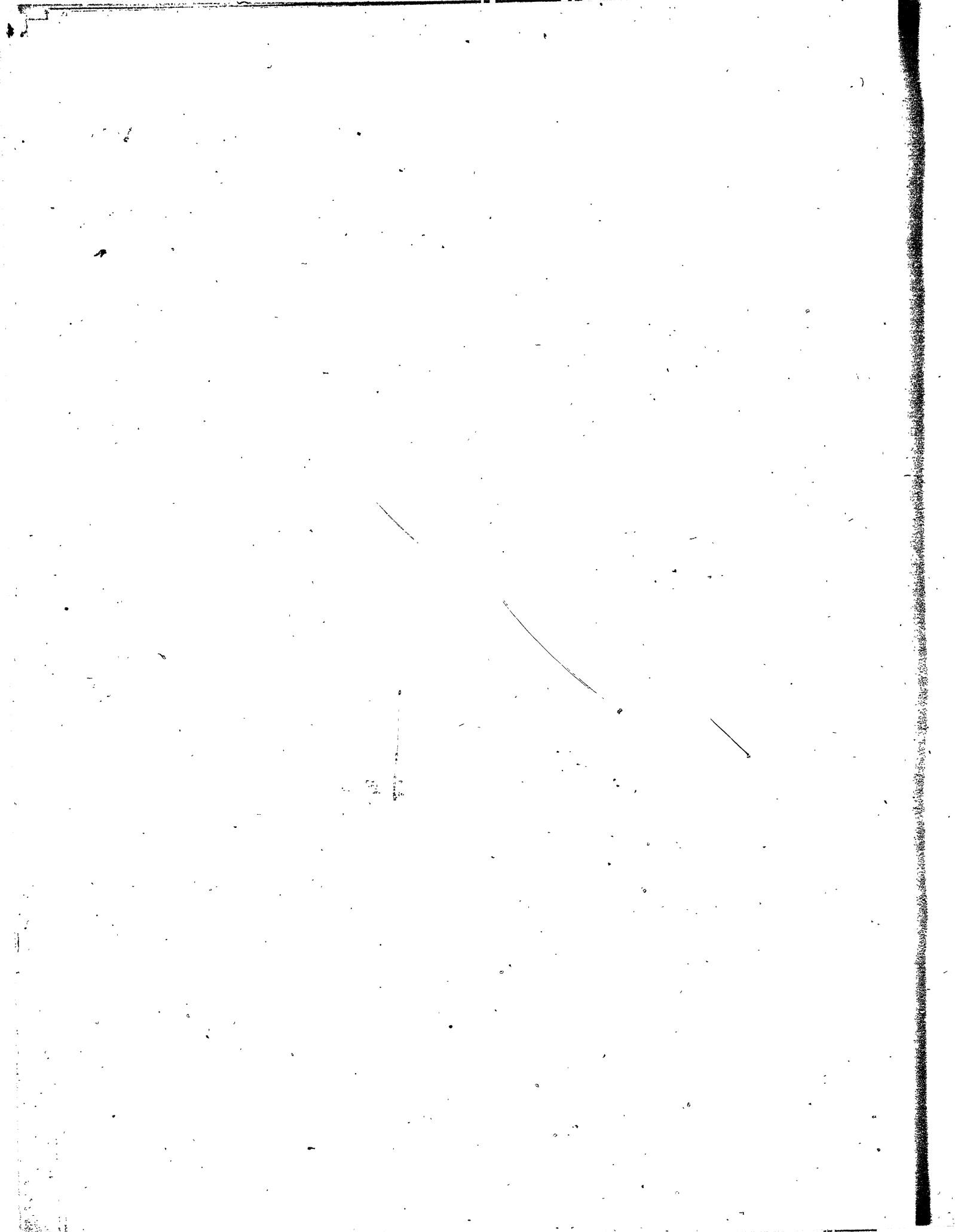
Quebec contends that it is.

XI. Could the Dominion Government increase the annuities at any time without the consent of the Province or Provinces interested, or without at least putting them in default of rendering an account with respect 20 to the said Territories? Are the said Indians entitled to any increase without "the gracious pleasure" of Her Majesty—that is, without a vote of Parliament, or at least an Order-in-Council? Can such grant have a retroactive effect without the consent of the Provinces?

Quebec answers in the negative.

XII. The lands so ceded under the said "Robinson Treaties" being in the Province of Ontario, do the said Annuities or increased Annuities constitute "a trust existing in respect thereof, and an interest other than that of the Province in the same" within the meaning of section 109 of the British North America Act?

Quebec contends that the said Section 109 of the B. N. A. Act can 30 have no other meaning. All claims of third parties, whether of individuals or of corporations, or of Indians, must be met and liquidated by the Province upon whose lands any trust or claim existed in favor of third parties at the time of Confederation. In the Indian Treaties referred to, it is stated that the Annuities granted to the Indians might be increased to £1 currency per head, provided the value of the lands thus ceded by the Indians would warrant the increase, or, at the pleasure of the Government. This might happen before or after Confederation, but at all times it was a burden upon the lands so ceded. This, also, shows that a trust 40 was created on those lands, and that the amount payable from the proceeds of the same might be increased from time to time.



At the time of Confederation, anything due under the said Treaties had apparently been already paid, and anything that could be claimed in the future under the said Treaties was a part of the said Trust which the Province of Ontario was bound to carry out. See also the Indian Act, C. R. S., ch 43, s. 41; 29-30 V., c. 20; 31 V., c. 42, ss. 6, 7.

Such has always been the contention of Quebec, and especially before the first Board of Arbitrators in 1869. The Quebec case, which is quoted in full in the Answer of Ontario, says:—

“By Section 109 of the above Act, all lands are made over to the Province within which they are situated, subject, however, to any trust existing in respect thereof, and to any interest other than that of the Province in the same. These annuities being the price unpaid of the lands themselves, are a charge on them. The contract between Government and the Indians ought to be governed by the same rules as similar contracts between Individuals. The lands, being within the Province of Ontario, became, under said Section 109, the property of that Province, subject, however, to the interest of the Indians in the same. This interest is the payment of the annuities stipulated as a compensation for the lands ceded. It might also be called a trust, the administration of which is left to the Dominion, the legal guardian of the Indians Ontario, receiving the lands and the arrears due for those sold, is subject to all legal and equitable claims which may exist on them. It should therefore be charged with the principal of the annuities.”

True, Ontario answered, that in 1846 the Indian annuities were made a special charge, in Schedule B. of 9 V., c. 114, upon the Consolidated Revenue, and that the Indian lands had been released from the same. It is also true that by their award the arbitrators disposed of the Indian annuities as follows:—“That all lands in either of the said Provinces of Ontario and Quebec respectively surrendered by the Indians in consideration of annuities to them granted, which said annuities are included in the debt of the late Province of Canada, shall be the absolute property of the Province in which the said lands are respectively situate, free from any further claim upon or charge to the said Province in which they are so situate by the other of the said Provinces.”

Quebec submits that, in 1846, the Indian lands were not released, as alleged by Ontario, and that at all events the trust and lien existing upon them under the several treaties was never set aside and annulled; in fact, could not be set aside without the consent of the Indians, parties to the said treaties.

As to the award of 1870, Quebec also submits that the arbitrators had no power to declare the Indian lands “free from any further claim upon or charge to the said Province in which they are situate,” as by Section

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109 of the British North America Act, it is declared that all lands shall be "subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same." The award, therefore, is *ultra vires* in this respect.

Quebec has already submitted, in the case of the Montreal Turnpike Trust Debentures, that the award of 1870 had been sanctioned by the Privy Council only upon certain points of procedure, specially referred to that tribunal, and not upon its merits. It is not, therefore, *chose jugée*, and the validity of the said award can be now questioned upon its merits. In the Montreal Turnpike Trust case, the Arbitrators had 10 declared that the debentures had been guaranteed by the late Province of Canada, but as a matter of fact they were not so guaranteed, and this Board held that the late Province of Canada was not responsible. The award, therefore, is not a bar to Quebec's pretensions as to the Indian "Trust" or "Interest;" and the present Board has a right to decide that, in dealing with the Indian lands, the former Arbitrators decided against the British North America Act.

XIII. At the time of Confederation, all the Indian Annuities were capitalized and charged as a portion of the public debt of the late Province of Canada. 20

The authorities might have made a misapprehension of the British North America Act, for, under Section 109, the Trust was recognized as remaining attached to the lands.

But whether a mistake or not, can the Dominion now demand more?

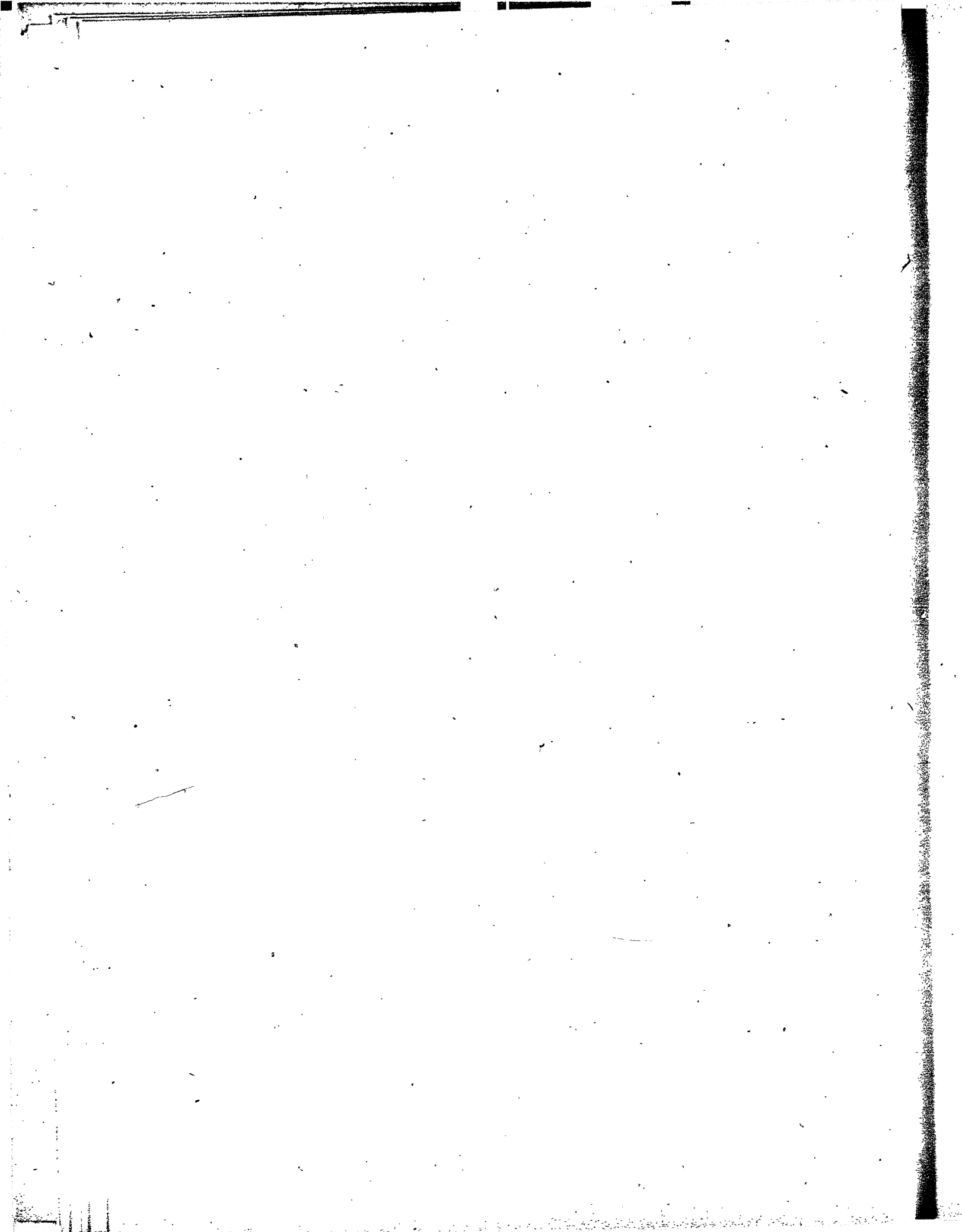
Was it not a final settlement of the Annuities, so far as the Provinces were concerned; and, if not, Quebec contends that anything due under the Robinson Treaties should be charged to Ontario.

XIV. In 1873, the excess of debt was fixed at \$10,500,038.84. The Dominion Parliament declaring that it was "expedient to relieve the said Provinces of Ontario and Quebec from the said charge, and for that 30 purpose hereafter to consider the fixed amount in their case as increased by the sum of ten million dollars."

Was this final?—or, in other words, are omissions or mistakes, discovered since, to occasion the making of fresh and further claims on the part of the Dominion?

Quebec contends that it would be most unfair to admit any such right on the part of the Dominion.

If the statute of 1873 is not to be considered as final, then Quebec asks that all the Indian annuities on lands situate in Ontario should be charged against Ontario, and that so far the accounts rendered by the 40 Dominion, which made the Indian annuities a liability of the old Province of Canada, should be corrected.



XV. In conclusion, Quebec represents that equity is on her side. The Legislature of the late Province of Canada took from the Crown Lands of the Province of Quebec a large quantity of lands, and made reserves for the various remnants of the Indian Tribes in this Province, for which no compensation was given to Lower Canada. True, a grant of lands was set apart seemingly for the benefit of Lower Canada, but nothing was ever done with those lands, which still form part of the Crown Domain, and were administered and sold, as much for the benefit of Upper Canada as of Lower Canada up to the time of Confédération; whereas in Upper Canada, lands have been purchased from the Indians which the late Province of Canada was bound to pay for by Annuities in perpetuity, and did pay for out of common funds until 1867.

When Confédération took place those lands became the property of Ontario, who derives all the benefits and advantages of the same.

Is it fair that to-day we should be called upon to pay any money for those lands which are administered to the exclusive advantage of Ontario?

The pretension of Ontario: That, although the whole of the proceeds of the sale of the lands mentioned in said Indian Treaties, and the lumber dues thereon, go to the profit of Ontario, Quebec is still responsible for her share of the amount of debt to be added to the late Province of Canada in respect to these lands, is a pretension which ought not to be entertained. In other words it amounts to this: That while Quebec made a present to the Indians of large quantities of land in Lower Canada without any compensation of any kind, that Province must now pay for Indian lands bought from the Indians in Ontario, and all the profits arising from which go to Ontario alone.

D. GIROUARD,

Counsel for Quebec.

Montreal, September 26, 1894.