

**THE NORTHERLY AND WESTERLY
BOUNDARIES OF THE PROVINCE
OF ONTARIO: AND THE AWARD
RELATING THERETO, AS
DISCUSSED AND EXPLAINED**

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The Northerly and Westerly Boundaries of the Province of Ontario: And the award relating thereto, as discussed and explained by Sir Francis Hincks

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SIR FRANCIS HINCKS

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THE
Northerly and Westerly Boundaries

OF THE
PROVINCE OF ONTARIO,

AND THE
*AWARD RELATING THERETO, AS DISCUSSED AND
EXPLAINED*

BY THE
HON. SIR FRANCIS HINCKS, K.C.M.G.,

IN HIS
PUBLIC LECTURE AT THE EDUCATION DEPARTMENT, TORONTO,
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THE

Northerly and Westerly Boundaries

OF THE

PROVINCE OF ONTARIO.

SIR FRANCIS HINCKES having been introduced to the meeting by the Chairman, the Hon. Sir W. P. Howland, K.C.M.G., C.B., delivered the following lecture :—

SIR WM. HOWLAND, LADIES AND GENTLEMEN,—

Before entering on the subject to which I propose to invite your attention this evening, I must express to you the deep gratification which I felt on being invited, during a recent visit, to address a Toronto audience after the lapse of so many years. Should my life be spared for another twelve months, a period of fifty years will have elapsed since, as a young man, I settled in the old capital of Upper Canada, then popularly known as Little York, but within two years afterwards incorporated as the City of Toronto. Ten years after my first settlement at York, I became a member of the Government of United Canada, and was under the necessity of taking up my residence at the capital, since which time, with the exception of about two years, when the sessions of Parliament were held at Toronto, under the alternate system, I have been a comparative stranger among you, although I have had frequent opportunities of seeing several of my old fellow pioneers, and have had the gratification of being invariably met with a friendly greeting, not only by my old friends, but by those with whom I had had differences of opinion on what may now be properly termed dead issues.

Having several years ago entirely withdrawn from party connection, a political address would be wholly repugnant to my feelings ; but circumstances seem to me to render it desirable that the public should

be better informed on a subject which is generally supposed to be imperfectly understood, while it is due as well to my own character, as to the memory of the late lamented Chief Justice Harrison, that a full explanation should be given of the grounds on which the Arbitrators appointed to determine the true boundaries of the Province of Ontario arrived at their decision. Such an explanation is, I think, likewise due to the Right Honourable Sir Edward Thornton, Her Majesty's Minister at Washington, who was good enough, at the joint request of the Governments of the Dominion and of Ontario, to act as third Arbitrator on the occasion referred to. While it is no part of my duty to defend the action of the Dominion and Provincial Governments in agreeing to leave the disputed boundary of the Province of Ontario to be determined by Arbitrators, I may remark that there are many precedents for such a mode of settling conflicting claims. It is fortunate that there is no danger of this question, complicated though it is at present, leading to the fearful consequences which history, as well as our daily observation, teaches us to be the result of territorial disputes. A very large proportion of the wars which have occurred during past centuries, and which have entailed such immense losses of blood and treasure, must be attributed to quarrels regarding boundaries; and in modern times the expediency of resorting to arbitration as the best mode of settling such disputes, has been very generally admitted.

CRITICISMS ON THE AWARD.

In the case of the Ontario boundary arbitration in 1878, the unanimous award made after a most careful and conscientious examination of the voluminous papers submitted to the Arbitrators, together with the cases of the learned counsel on both sides, has been severely criticized, not only by the Select Committee of the House of Commons in 1880, but by the leaders of the Dominion Government in the Senate and House of Commons during the last session. It has been stated as an objection to the competency of the Arbitrators, that two of the three were not members of the legal profession, but I have been unable to find any precedent in analagous cases for confining the choice of arbitrators to lawyers. In one of the most recent cases, when arbitrators were appointed to determine the boundaries between Zululand and the Transvaal in South Africa, there was one lawyer, the Attorney-General of the Cape, joined with a civilian, and an officer holding the rank of Lieutenant-Colonel. I own that I fail to discover the value of special legal attainments in such a case; and, moreover, there were before

the Arbitrators conflicting opinions given by eminent judges and lawyers. The greatest judges are far from being infallible, and are themselves always desirous of the assistance of counsel, whose duty is to submit every point of law, and every fact, in support of their respective clients. Let me, for argument's sake, suppose that in a trial before a judge, a clause in an Act of Parliament had a special bearing on the case in controversy, and that the counsel, whose client would be benefited by that clause, were to fail to bring it to the notice of the Court, and that the judgment afforded proof that this important clause had not engaged the judge's attention, surely it would not be contended that, however eminent the judge might be, his judgment ought to carry as much weight as that of a non-professional arbitrator whose opinion had been formed after a full consideration of circumstances, which had never been brought under the notice of the judge. I shall have to make a practical application of this suppositious case to the disputed boundary of Ontario on the south-west, and as bearing on the judgment of Chief Justice Sewell in the De Reinhardt case, which was concurred in by his colleagues. I must, before doing so, notice as briefly as possible some statements, which appear to me to be a sufficient justification of my placing on record the reasons, which induced the Arbitrators to make the award which is now the subject of controversy. During the session of Parliament held in 1880, a Select Committee was appointed by the House of Commons to inquire into, and report upon all matters connected with the boundaries between the Province of Ontario and the unorganized territories of the Dominion. The report, concurred in by nine out of thirteen members of that Committee, declares that "the award does not declare the true boundaries of Ontario," adding, "it seems to your Committee to be inconsistent with any boundary line ever suggested or proposed subsequent to the Treaty of Utrecht." One of the principal witnesses, Mr. William McD. Dawson, a portion of whose evidence is embodied in the report, stated that the Arbitrators had adopted a boundary "which was not a possible one." Sir John Macdonald is reported in *Hansard* to have said:—"We have only to read the written statement of one of those Arbitrators, Sir Francis Hincks, in which he admitted they did not settle the true boundary, to be convinced." Sir Alexander Campbell was reported to have made substantially the same statement in the Senate. It has seemed to me that such allegations as I have cited, render it desirable that the public should be put in possession of the grounds, on which the Arbitrators concurred in an award, which, although adverse to the claims of the

Ontario Government, was promptly accepted by it, and subsequently by the Provincial Legislature.

SOUTH-WESTERN BOUNDARY.

I shall first consider the South-Western Boundary. It is evident from the report of the Select Committee, that its framer attached much greater weight to Commissions to Governors as affecting boundaries, than the Arbitrators did. Commissions may be of assistance in interpreting obscure language in an Act of Parliament, but where the meaning of an Act is free from doubt, it cannot be set aside by a Commission. The south-western boundary of Ontario depends on the construction of the Imperial Act of 1774, on the effect of the subsequent treaty with the United States of 1783, and on the proclamation issued under the Act of 1791. It is important to consider the circumstances under which the Act of 1774 was passed. In the year 1763 a treaty was concluded at Paris, between England and France, which contained the following provision: "In order to establish peace on solid and durable foundations, and to remove forever all subject of dispute with regard to the limits of the British and French territories on the continent of America, it is agreed that for the future the confines between the dominions of His Britannic Majesty, and those of His Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the river Mississippi from its source to the river Iberville, and from thence by a line drawn along the middle of that river and the lakes Maurepas and Pontchartrain to the sea provided that the navigation of the Mississippi shall be equally free as well to the subjects of Great Britain as to those of France in its whole breadth and length from its source to the sea." The treaty from which I have just quoted was concluded on the 10th February, 1763, and on 7th October, 1763, a proclamation was issued erecting four new Governments, one of which was Quebec, the western boundary of which was fixed at the south end of Lake Nipissing. In the year 1774, in consequence of urgent representations, as to the necessity of establishing a settled government in territories, where no government of any kind existed, a bill was introduced by the Government of the day, the object of which was clearly stated by Lord North in language which I shall quote. "It is well known that settlers are in the habit of going to the interior parts from time to time. Now, however undesirable, it is open to Parliament to consider whether it is fit there should be no government in the country, or, on the contrary, separate and distinct governments,

or whether the scattered posts should be annexed to Canada. The House of Lords have thought proper to annex them to Canada, but when we consider that there must be some government, and that it is the desire of all those who trade from Canada to those countries, that there should be some government, my opinion is that, if gentlemen will weigh the inconveniences of separate governments, they will think the least inconvenient method is to annex those posts, though few in population, great in extent of territory, rather than to leave them without government at all, or make them separate ones. Sir the annexation likewise is the result of the desire of the Canadians, and of those who trade to those settlements, who think they cannot trade with safety as long as they remain separate." Now, it must be borne in mind, that the principal posts in the unorganized territories, when the Act of 1774 was passed, were situated on the river Mississippi, and of course in British territory by the treaty of 1763. The pretension of the advocates of the due north line, which is the boundary claimed by the Dominion, is that Parliament deliberately abandoned the natural boundary of the Mississippi, thereby excluding from the benefit of the Act, the very persons for whom it was specially intended, and that it adopted, without a single conceivable motive, a conventional line running due north from the junction of the Ohio with the Mississippi. It is well known that the bill was introduced in the House of Lords in 1774, and that as sent down by that House to the Commons the description was "all the said territories, islands and countries, heretofore a part of the territory of Canada in North America, extending southward to the banks of the river Ohio, westward to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the Merchants Adventurers of England trading to Hudson's Bay, and which said territories, islands and countries are not within the limits of some other British Colony as allowed and confirmed by the Crown." Now it has never been pretended that there was any ambiguity in that description as to the western boundary, but a discussion was raised in the Commons by Mr. Edmund Burke, then agent for the State of New York, who had doubts whether under the description Canada might not encroach on territory on the north-east of that State, which had actually been in dispute, and which by amicable agreement had been made over to New York, reserving the rights of Canadian settlers in the disputed territory. The territory on the Mississippi had never been in dispute during the protracted wars between the British and French regarding boundaries in the Ohio valley.

INTENTION OF ACT OF 1774.

There is not the slightest reason to suppose that a single member of the House of Commons desired to alter the natural boundary of the Mississippi, on the banks of which were the principal settlements, for the inhabitants of which the act was specially intended to provide a government. Mr. Burke, as appears from a report of his remarks in a book entitled "The Cavendish Debates," insisted very strenuously on defining the boundaries more precisely. I am not unaware that the framer of the report of the Commons Committee has, on the authority of Mr. Justice Johnson of Montreal, pronounced the Cavendish Debates as of no authority, but the Hon. Wm. Macdougall has given most satisfactory reasons for considering them a valuable contribution to the history of the period. There is however a letter in existence, addressed by Mr. Burke to the Legislature of New York, in which he explains with great precision the object of his amendments, and from which it is clear that it never was contemplated to interfere with the Mississippi boundary. The change in the description of the boundary was made while the House was in Committee on the Bill, four members, one of whom was Mr. Burke, having left the House in Committee to arrange the new description. It is said "the difference was whether the tract of country not inhabited should belong to New York or Canada," and most assuredly this difference could not possibly apply to territory on the Mississippi River. I shall now cite the boundaries as finally agreed to by the House, and I request your most particular attention to the first words, which seem to me to deserve much more consideration than has been given to them by the advocates of the due north line, from the confluence of the Ohio and Mississippi Rivers. "That all the territories, islands and countries in North America, belonging to the Crown of Great Britain, bounded on the south by a line from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence from those which fall into the sea, to a point in forty-five degrees of northern latitude on the eastern bank of the River Connecticut, keeping the same latitude directly west through the Lake Champlain, until in the same latitude it meets the River St. Lawrence, from thence up the eastern bank of the said river to the Lake Ontario, thence through the Lake Ontario and the river commonly called the Niagara, and thence along by the eastern and south-eastern bank of Lake Erie, following the said bank until the same shall be intersected by the northern boundary granted by the Charter of the Province of Pennsylvania, in case the same shall be so intersected, and from thence along