

## IN THE MATTER OF A CASE STATED

BETWEEN

1902  
Dec. 5.

THE DOMINION OF CANADA

AND

THE PROVINCE OF ONTARIO.

*Disputed accounts—Award of arbitrators—Interest on award—Agreement as to date from which interest should be computed.*

In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec, the first mentioned province was found to be indebted to the Dominion in the sum \$1,815,848.59 on the 31st December, 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two provinces, concerning the rate per centum and the time from which interest was to run on the amount of the award, was opened by the Deputy Minister of Finance for Canada in a letter to the Treasurer of Quebec, of the 21st December, 1893, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from the 1st January, 1894, simple interest at 5 per cent. upon the balances in account standing in favour of the Dominion on the 31st December, 1892. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a letter from the Assistant Treasurer of Quebec to the Deputy Minister of Finance for Canada, of the 6th July, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on the 31st December, 1892, and existing on the 1st July, 1894, should be at the rate of 4 per cent. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of the 18th August, 1894, from the acting Deputy Attorney-General of that province to the acting Deputy of the Minister of Finance for Canada stating, in effect, that Ontario accepted the same conditions as Quebec in respect of the payment of the interest. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated 26th July, 1894, as follows :—

"I understand that your Government has paid to Quebec the subsidy due July 1st instant, on the consent of the Government to pay 4 per cent. on any balance of account that might be found between the Province and the Dominion, such interest to be reckoned from and after the said 1st of July, 1894. I presume this means the balance of account in respect of the items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms."

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Upon a case stated to determine whether interest was payable by the province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only :

*Held*, that the correspondence showed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned.

**CASE STATED** in a controversy as to the date from which interest was to be paid by the Province of Ontario to the Dominion of Canada, upon the balance found due from Ontario to the Dominion on the 31st December, 1892, by the award of Arbitrators dated 1st August, 1900.

The following is the statement of facts admitted by the parties relating to the questions in controversy between the Dominion of Canada and the Province of Ontario, in respect of interest upon the account of the said province with the Dominion of Canada, since the 31st December, 1892.

1. By an award dated the 2nd day of November, 1893, made by the Board of Arbitrators, acting under a Deed of Submission made between the Governments of the Dominion of Canada, the Province of Ontario and the Province of Quebec, upon the authority of the Act of Parliament of Canada, 54 & 55 Victoria, chapter 6, the Act of the Legislature of the Province of Ontario, 54 Victoria, chapter 2, and the Act of the Legislature of the Province of Quebec, 54 Victoria, Chapter 4, for the settlement of the disputed accounts between the said several Governments, the said Board

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of Arbitrators did thereby award, order and adjudge, amongst other things, as follows:—

“That the ‘trust funds’ shall be treated as intact and unimpaired, and interest thereon, at the rate of five per centum per annum, carried half-yearly into the separate accounts of Ontario and Quebec.”

“That in the separate accounts of Ontario and Quebec, the said provinces shall respectively be allowed interest on any balance from time to time existing in their favour, at the rate of five per centum per annum, except where some other rate has been expressly agreed to.”

“That the question as to whether or not the Dominion shall be allowed simple interest at the rate of five per centum per annum on any balance that may be found from time to time to exist in its favour in the separate accounts of Ontario and Quebec, be reserved for further argument.”

2. The “trust funds” referred to in paragraph 5 of the said Award of the 2nd day of November, 1893, on which interest at five per cent. per annum is payable semi-annually, are the following sums, belonging to Ontario:—

Upper Canada Grammar School .....	\$	312,769	04
“ “ Building Fund.....		1,472,391	41
“ “ Improvement Fund.....		124,685	18
			<hr/>
		\$1,909,845	63

Belonging to Ontario and Quebec:—

Common School Fund..... \$2,457,688 62

(The proportion of interest payable to Ontario, according to the award of 3rd of September, 1870.)

3. On the 31st of August, 1894, the said arbitrators made and published their second award, by which they did award, order and adjudge, among other things:—

“That in respect of the separate accounts of both provinces, the Dominion be allowed interest at five per centum per annum on all sums included in any balances in its favour that represent transfers from the Province of Canada account, or payments made by the Dominion under any liability of the Province of Canada to which it succeeded.”

“That in respect of the Quebec account, the Dominion be allowed interest at the rate of five per centum per annum on the two balances of \$500,000 and \$125,000, whenever it happens that there is a balance of \$625,000 or more, and more, and whenever such balance is less than \$625,000. then on such balance.”

“That in respect of the Ontario account, the Dominion be allowed interest at the rate of five per centum per annum on \$936,729.33, transferred to the Common School Fund, and at the rate of four per centum on the \$500,000 advanced, at four per cent., Dominion stock, whenever it happens that there is a balance in favour of the Dominion of \$1,436,729.33 or more, and whenever such balance is less than \$1,436,729.33, then interest shall be allowed to the Dominion at the rate of four per centum per annum on such balance, to the amount of \$500,000, and at the rate of five per centum per annum on any sum in excess of the amount of \$500,000.”

4. In pursuance of the said awards, the separate accounts of Ontario and Quebec were prepared and brought down to the 31st day of December, 1892, that being the date to which, by the statutes and orders in council constituting the said deed of submission, the accounts were to be brought down and extended, the arbitrators not having any jurisdiction or authority, under the terms or the statutes and orders, to impose or declare any liability extending or arising after the said date; and by an award made by the said arbitrators,

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on the 1st day of August, 1900, they did award, order and adjudge, that on the 31st day of December, 1892, the Province of Ontario was indebted to the Dominion of Canada in the sum of \$1,815,848.59, which amount was the balance shown in the separate account as set out in full in the above award of 1st of August, 1900.

5. It is with respect to the interest payable between 1st of January, 1893, and 30th June, 1894, upon the said balance of \$1,815,848.59 due by Ontario to the Dominion since the 31st December, 1892, that a controversy has arisen between the Province and the Dominion, and in respect to which controversy certain letters and correspondence passed between the parties.

The full effect of the correspondence between the parties is set out in the reasons for judgment.

November 26th, 1902.

The case was heard at Toronto.

*W. D. Hogg, K.C.*, for the Dominion of Canada ;

The only question which comes before the court in this case is as to the time at which interest runs upon a balance found by the Arbitrators to be due, in the matter of the disputed accounts between the Dominion and Ontario and Quebec, from the former province to the Dominion. There is no question as to the rate, which is to be four per centum ; but the whole question here is, has the Dominion agreed to take interest only from the 1st July, 1894, or at the time when the balance of the accounts between the parties was struck, viz.: on the 31st December, 1892? On that date the sum of \$1,815,848.59 was found to be due by the province to the Dominion, and unless there is any agreement to the contrary, the interest must run from that date. It is contended on the part of the province that upon the correspondence between the parties an agreement is to be found whereby the Dominion con-

sented that interest should be payable only from the 1st July, 1894.

(Counsel here read the correspondence the effect of which is stated in the reasons for judgment.)

Then here we have an agreement established between the parties in this case, but an agreement for what? I submit it is an agreement that the rate of interest shall be four per cent. and nothing more. The whole tenor and object of this correspondence has reference only to the fixing of the rate of interest.

So far as the provinces were concerned they were seeking in their letters to define a time from which interest was to run, but I do not think your lordship will find anything in the letters written by the Dominion showing that there was an acceptance of any period as the date from which interest was to be calculated, because what the Dominion was dealing with throughout was the balance or balances which would be determined by the Arbitrators.

*Æmilius Irving, K.C.*, for the Province of Ontario:

There is nothing clearer upon the face of the correspondence than that the Dominion Government agreed that interest should run only from the 1st July, 1894.

With reference to the conduct of the parties as interpreting their agreement, I do not know that it is important where the agreement is so plain as to speak for itself; but the conduct between the parties was that the Dominion did retain the trust fund interest, \$47,000, half-yearly, and I believe up to the present time all the while, and that on the theory that the interest only began to run on the 1st July, 1894.

Again, there must be an agreement upon which the Crown in right of the province is to be held liable to pay interest at all. (*Algoma Central Railway v. The King* (1). There is an agreement, but that agreement

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limits the rate to 4 per cent. and the time at which the interest is to run from and after the 1st July, 1894.

*G. F. Shepley, K.C.*, followed for the Province of Ontario :

Counsel for the Dominion, it would seem to me, when he presented the case felt himself in a good deal of difficulty. My learned friend says what? He says in the first place there is an agreement. Beyond all question there is an agreement that the rate shall be 4 per cent; but he says there is no agreement, no consensus, that the interest shall run from the 1st of July, 1894, and only from the 1st of July, 1894. If there is not, then what right has the Crown, represented by my learned friend, here? If that is so the Crown has no contract to pay interest from any date. My learned friend puts himself out of court if he says that there is no contract upon the subject of the date, and my learned friend is forced to argue, and there is where his argument is inconsistent, that you must reform this contract so as to make it a contract to pay interest from the 31st December, 1892, which is not referred to from beginning to end in the correspondence making the contract. That is the exact position.

In the second place, counsel for the Dominion contends if there is a contract between the parties, you get it by reforming the agreement by correspondence into a contract, not to pay interest from the 1st of July, 1894, which is the date named in the contract, but by reforming it into a contract to pay interest from the 31st December, 1892. Where does my learned friend get the material to reform the contract by making that the date for the payment of interest? And if that is not the date, when is the interest to begin; is there any other contractual date, and therefore any remedy that the Crown, represented by my learned friend, has for this interest except that fixed by the contract itself? I submit there is none.

*W. D. Hogg, K.C.*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (December 5th, 1902) delivered judgment.

In August, 1894, an agreement was concluded between the parties whereby the Province of Ontario agreed to pay interest at the rate of four per centum per annum upon the balance that should, in certain proceedings by way of arbitration mentioned in this case, be found to be due from the Province to the Dominion, and the only question in controversy and to be determined in this case is whether it was a term or condition of that agreement that such interest should be computed from the first day of July, 1894. If so, Ontario is entitled to the judgment of the court; if not, judgment should go for the Dominion.

By the terms of the submission under which, and subject to certain statutes referred to in the case, the arbitration was being proceeded with, the Arbitrators were to bring down and extend the accounts submitted to them to the 31st day of December, 1892, inclusive. That is, the balance was to be struck as of that date. The Arbitrators had power to make, and made from time to time a number of awards dealing with different matters submitted to them. The first award made, and set out in this case, was published on the 2nd of November, 1893. By that award it was, among other things, provided that certain trust funds belonging to the Provinces of Ontario and Québec should be treated as intact and unimpaired, and that interest thereon at the rate of five per centum per annum should be carried half-yearly into the separate accounts of Ontario and Québec; that the Province of Canada account should be made up at simple interest at the rate of five per cent. per annum; that in the separate accounts of Ontario and Québec these provinces should respectively be allowed simple interest on any balance from time to time existing in

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their favour, at the rate mentioned (except where some other rate had been expressly agreed to); and that the question as to whether or not the Dominion should be allowed simple interest at the rate mentioned on any balance that might from time to time be found to exist in its favour in the separate accounts of Ontario and Quebec, should be reserved for further argument. That question was not decided until August 31st, 1894, when the award dealing therewith and set out in the present case was made. By another award, also set out in the case, published on the 1st of August, 1900, the balance due on the 31st of December, 1892, by the Province of Ontario to the Dominion of Canada, apart from the trust funds mentioned, and subject to some matters not disposed of, was determined to be \$1,845,848.59. The contention of the Dominion is that interest on this sum at the rate of four per centum per annum should be computed half-yearly from and after January 1st, 1893. The contention of Ontario on the other hand is that such interest should, as a result of the agreement come to between the parties, be computed half-yearly from and after July 1st, 1894, the difference between the two contentions being represented by a sum of \$113,176.54.

Between the dates of the two awards first-mentioned, that is, between the 2nd of November, 1893 and the 31st of August, 1894, the correspondence took place, out of which arose the contract or agreement now in question. It was commenced by letters dated the 21st of December, 1893, from Mr. Courtney, the deputy of the Minister of Finance, to the Treasurers of the Provinces of Ontario and Quebec, in which attention was called to the state of the accounts between the Dominion and the Province as affected by the award of November 2nd, 1893. It appears from the correspondence (see Sir Oliver Mowat's letter of December

28th, 1893, in answer to Mr. Courtney's) that the accounts that had from time to time been prepared, and which had been submitted to the Arbitrators, showed balances in favour of the Province of Ontario apart altogether from the trust funds referred to; and I think it is a fair inference from what appears in the case that at the time this correspondence opens it had come to be known that apart from such trust funds the balance of account would be in favour of the Dominion for a large sum.

As has been observed, the arbitrators had by their award directed that these trust funds should be treated as intact and unimpaired. It is obvious that this direction should be read in the connection in which it occurs, and that its primary object and purpose was to prescribe a rule to be followed in the computation of interest in taking accounts which by the terms of the submission were to be brought down to the 31st of December, 1892. Whether such funds, or any of them, were held by the Dominion on terms that prevented it from paying them off at any time at its will, or if not, whether the arbitrators intended, or if they so intended, whether they had authority to attach any such condition to the terms on which such funds were held, are questions outside of the present enquiry. What is evident from the correspondence printed in this case is that in December, 1893, there was some question as to the right of the Dominion to pay the Provinces the amount of these funds and so get rid of the obligation to pay interest thereon at the rate of five per centum per annum.

Briefly then, the circumstances under which the correspondence opened, were these:—An arbitration was proceeding upon accounts that showed on the face of them that apart from certain trust funds the Dominion was indebted to the Provinces of Ontario and Quebec.

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In the course of these proceedings it had become apparent that on a proper taking of the accounts the balances would be the other way, and there seems to have been some question whether or not these trust funds could be brought into account to lessen or discharge such balances. Moreover, the question of the Dominion's right to interest on such balances had not then been determined. Under these circumstances Mr. Courtney, writing for the Government of Canada, stated in the letters referred to that while it was contended on behalf of the Dominion that the Dominion should be awarded interest upon these balances, the right to such interest, so far as the past was concerned, was still a matter for determination ; but as to the future, it was deemed prudent and advisable that an understanding should be come to with regard to interest upon the balances in favour of the Dominion which would avoid any further misunderstanding or difference ; and he proposed to the treasurer of each province that the province should agree to pay to the Dominion from the 1st of January then next (1894) simple interest at five per cent. upon the balances in account then standing in favour of the Dominion, until such balances should be discharged by the Province, or in the event of the Province failing so to agree the subsidies to which it was entitled should be applied in reduction and payment of such balances. No conclusion was arrived at upon that proposal. Action was eventually deferred until the July subsidies were about to fall due when the question was again raised. And here it may be convenient to observe that while the Province of Quebec is not a party to this case, and is in no way bound by any conclusion that is come to, it is necessary to refer to the correspondence on this subject that took place between the Dominion and that Province,

and which was made the basis of the agreement come to between the Dominion and Ontario.

On the 4th of June, 1894, Mr. Courtney, in a letter to Mr. Machin, the Assistant Treasurer of Quebec, referring to previous correspondence, asked to be informed whether the Province of Quebec was willing to agree to pay the Dominion simple interest at five per cent. upon the balances in account standing in favour of the Dominion, until such balances should be discharged by the Province, or in the event of the Province failing so to agree the subsidies should be applied in reduction and payment of such balances. Passing over some correspondence that is not material now to the question in issue it will be found that in a letter of the 26th of June, 1894, Mr. Taillon, Premier and Acting Treasurer of Quebec, wrote to the Minister of Finance that the financial position of the Province of Quebec was such that it would absolutely require the half-yearly subsidy to enable it to meet its engagements, and rather than fail in these his Government was prepared, in the event of the Dominion insisting upon exerting its power to retain the subsidy, to agree to a rate of interest to be computed upon any balances which might, as a result of the arbitration then in progress, be established to exist in favour of the Dominion by the Province on the general account from the 1st of July proximo; and he suggested that three and one half per cent. per annum, being the rate of interest on the last issue of Dominion securities, should be the rate fixed upon and paid until such balances were discharged by the Province, it being fully understood that Quebec under any circumstances should not be placed in any worse position than the Province of Ontario. To that letter Mr. Courtney, on the 29th of June, 1894, answered that the arrangement could not be closed at a rate of interest less than four per cent. By a tele-

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gram of the 2nd of July, 1894, Mr. Taillon agreed to the rate of four per centum, and promised a letter confirming his telegram. On the 6th of July, 1894, Mr. Machin in a letter to Mr. Courtney acknowledging the receipt of a cheque in payment of the half-yearly subsidy and interest on trust funds stated that he was directed to confirm Mr. Taillon's telegram of the 2nd and added that "this determines the rate of interest to be paid by the Province on any balances that may be established by the arbitration as existing in favour of the Dominion at the 1st of July instant, at 4 per cent. per annum."

It is not necessary, I think, to go through the correspondence on the same subject between the Dominion and the Province of Ontario. Mr. Taillon's telegram of July 2nd, 1894, and an extract from Mr. Machin's letter of the 6th of that month were communicated to Sir Oliver Mowat, and Ontario on the 18th of August, 1894, by a letter from the Acting Deputy Attorney-General of that Province to the Acting Deputy of the Minister of Finance accepted the same conditions as Quebec in respect to the payment of the subsidy. I refer also to Sir Oliver Mowat's letter of the 26th of July, 1894, to Sir John Thompson, in which he states that he understood that the subsidy due to Quebec on the 1st of July had been paid on the consent of the Government of that Province to pay interest at four per centum per annum on any balance found to be due to the Dominion, such interest to be reckoned from and after the 1st of July, 1894, and he offered on behalf of Ontario to accept the subsidy on these terms.

Now, as has been observed, the question for determination is whether or not it was a term or condition of the agreement come to that the interest at the rate of four per centum per annum on the balances men-

tioned should be paid from the 1st of July, 1894; and that question of fact should, it seems to me, be answered in the affirmative. Mr. Courtney on behalf of the Dominion was the first to name a day from which the arrangement then proposed should take effect. When later he renewed the negotiation he did not mention any date, but Mr. Taillon in his reply, and Mr. Machin in his letter confirming Mr. Taillon's telegram did, and no question having been raised as to that matter, the Dominion must, I think, be taken to have accepted and agreed to the date proposed by Mr. Taillon. Mr. Courtney's letters of December 21st, 1893, left the question of one year's interest on the balances of the accounts as they would be found to exist on the 31st of December, 1892, to be determined in some way other than by the arrangement or agreement then proposed. Why the proposal was made in that form does not appear. It may be that it was thought at the time that the Arbitrators could deal with all the past to which reference was made, or that any rule as to interest on such balances which they should prescribe would apply until the parties agreed to some other rule. Or it may be that the matter was left to the operation of law, to be determined in any appropriate manner. The latter view of the matter would raise the question as to whether, apart from any agreement, the Dominion would be entitled to interest at the legal and current rate of interest on the balance found in its favour. That question is not raised now, and it may be that the agreement that was come to stands in the way of its being raised at any time. As to these questions it would not be proper for me to express any opinion, and I express none. One thing, however, is clear,—the proposals made in 1893 contained no provision in respect of interest prior to January 1st, 1894, on the balances mentioned. Then the

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agreement come to with the Province of Quebec in July, 1894, left the interest prior to the first of that month to be settled and determined (if at all) by reference to considerations other than those arising from the agreement of the parties. That agreement was, I think, operative from the 1st of July, 1894, and not before that date. If so, no interest could be payable under it prior to that time, and therefore I am unable to agree with the contention set up by the Dominion that it is entitled by virtue of this agreement to interest at the rate mentioned on the balance in its favour from the 31st of December, 1892, to the 1st of July, 1894. On the other hand, with respect to any claim now made for the payment of interest based on the agreement of the parties, I agree with the contention of the Province of Ontario that it is so payable from the 1st of July, 1894, only. And I understand this case to be limited to that question, and not to go beyond it; the question being briefly on the one hand whether the parties agreed to a rate of interest only; or on the other hand not only to such rate, but also to a date from which it should be computed. That, from paragraphs five, six and eleven of the case, and from the arguments of counsel, I understand to be the only question submitted for decision. And confining my answer to that question I agree with the contention put forward on the part of the Province of Ontario, and I think that judgment should, on that issue, be entered for that Province.

*Judgment accordingly.*

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