

## THE PROVINCE OF ONTARIO.....CLAIMANT ;

1906

April 9.

AND

## THE DOMINION OF CANADA.....RESPONDENT.

*Funds held in trust by Dominion for Ontario—Rate of Interest—Right to pay over funds and extinguish liability—Tender—Sufficiency of.*

*Held*, that the Dominion of Canada, prior to the 31st December, 1904, was under an obligation to pay to the Province of Ontario interest at the rate of 5 per cent. per annum on the capital of certain trust funds held by the Dominion and belonging to the Province, viz. :—The Upper Canada Grammar School Fund, the Upper Canada Building Fund and the Upper Canada Improvement Fund.

2. That the Dominion at the date mentioned had no right, without the assent of the Province, to reduce the rate of interest from 5 per cent. to 4 per cent. per annum.
3. That the Dominion has the right at any time to pay or hand over to the Province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof both as to the principal and the interest.
4. On the 29th of December, 1903, the Minister of Finance for the Dominion of Canada wrote to the Premier of Ontario respecting the payment of interest on the above funds as follows :—“ It has been decided, to pay on the 1st of January, 1904, the interest on these funds at the rate heretofore paid, namely, 5 per cent. After that date, interest at the rate of 4 per cent. will be paid until further notice, or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your Government I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date.”

On the 6th January, 1904, the Premier of Ontario replied that such proposal was not satisfactory to his Government ; and intimated that the rate of interest, 5 per cent., was not susceptible of modification without the consent of the Province.

*Held*, that the terms of the letter of the Finance Minister did not constitute a good tender of the amount of the said funds. To make it effective for such purpose, the letter should have been followed or supplemented by an unconditional offer and tender of the money by Dominion to the Province.

**THIS** was an action by the Province of Ontario against the Dominion of Canada to recover certain moneys.

The facts are stated in the reasons for judgment.

October 5th and 6th, 1905.

The case was heard at Toronto.

*Æmilius Irving, K.C.*, and *G. F. Shepley, K.C.*,  
for the claimant.

*W. D. Hogg, K.C.*, for the respondent.

Mr. *Irving*, in opening for the claimant, made an exhaustive review of the documentary evidence bearing upon the issues raised. He contended that the whole trend of the evidence negatived the right of the Dominion either to relieve itself of the burden of the funds in question, or to reduce the rate of interest without the consent of Ontario.

Mr. *Shepley* followed for the claimant. He contended that under the award of the Dominion and Provincial Arbitrators of the 2nd of November, 1893, the trust funds in question were to be preserved intact and unimpaired by the Dominion of Canada as an obligation imposed upon it by the terms of *The British North America Act*, bearing interest at the rate of 5 per cent. The Award says explicitly that "the trust funds shall be treated as intact and unimpaired, and interest thereon at the rate of five per centum per annum shall be carried half-yearly into the separate accounts of Ontario and Quebec." I contend that we are entitled to rely upon that Award as an adjudication by a competent authority of the question we are arguing here. The Award embodies the view of the law held by the Arbitrators as to the rights of the parties in respect of the funds in question.

Mr. *Hogg*, for the respondent, argued that upon the face of the documents in evidence there was no obligation to pay interest at the rate of five per centum; nor was there anything to show a disability on the part of the Dominion to at any time pay over the trust funds to the Province

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and discharge all its obligations thereunder. Furthermore, the Dominion of Canada had through the Hon. Mr. Fielding, Finance Minister, made a good and sufficient tender of the amount of these funds to the Province in April, 1903. This not having been accepted by the Province, the Dominion had the right to reduce the interest.

Mr. *Shepley* replied.

THE JUDGE OF THE EXCHEQUER COURT, now (April 9th, 1906) delivered judgment.

The action is now brought on behalf the Province of Ontario to recover from the Dominion of Canada the sum of \$9,549.23 alleged to be payable to the Province on the 31st of December, 1904; such sum being—one half of one per centum interest on the capital of certain Trust Funds held by the Dominion and belonging to the Province, such Trust Funds being known as

The Upper Canada Grammar School Fund..	\$ 312,769 04
The Upper Canada Building Fund.....	1,472,391 41
The Upper Canada Improvement Fund....	124,685 18

Total.....\$1,909,845 63

The Province also asks for a declaration that the Dominion of Canada is not entitled, without the assent of the Province of Ontario, to make any alteration in or reduction from the rate of interest of five per centum per annum alleged to be payable upon such Trust Funds.

The Dominion of Canada by its answer denies its liability to pay the sum demanded and asks for a declaration,

1. That the Dominion is under no obligation to pay interest at the rate of five per centum per annum upon the said funds, but may reduce the interest to a lower rate; and

2. That the said trust funds may at the option of the Dominion be paid over to the Province.

A third declaration was asked for, namely, that the Dominion may set off *pro tanto* the said trust funds against the indebtedness of the Province to the Dominion. That question, however, was not pressed at the hearing, and has been withdrawn from consideration.

By an amendment to the statement of defence it is alleged on behalf of the Dominion that on the 29th day of December, 1903, the Minister of Finance of Canada, being the proper Minister of the Crown in that behalf, duly made a tender in writing to the Treasurer of Ontario to pay the amount of the indebtedness due by the Dominion to the Province of Ontario in respect of the said Trust Funds; that the said tender was not accepted by the Government of the Province of Ontario, whereby the Dominion became and was discharged from further payment of interest upon the said indebtedness.

The parties regard the amount in controversy in the present action as a matter of minor importance. The main object is to obtain a declaration as to their respective obligations towards, and rights in, the funds mentioned.

The questions that are presented for solution may, I think, be stated as follows:—

1. Was the Dominion of Canada, prior to the 31st day of December, 1904, under an obligation to pay to the Province of Ontario interest on the funds mentioned at the rate of five per centum per annum?

2. Had the Dominion the right, at the date mentioned without the assent of the Province, to reduce the rate of interest from five to four per centum per annum?

3. Has the Dominion the right at any time to pay or hand over to the Province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof, both as to principal and interest?

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4. Was a good tender made to the Province on behalf of the Dominion, before this action was brought, of the amount of such funds, so as to discharge the Dominion of any obligation theretofore existing to pay interest on such funds?

The first question is of no importance, except in respect of its bearing upon the second. Upon the 30th of June, 1904, the Dominion paid the Province interest on the funds mentioned at the rate of five per centum per annum, and such payments are not in question now in any sense other than this: that for the Province of Ontario it is contended that the Dominion of Canada was under an obligation to pay such interest at the rate mentioned, and being under such an obligation, could not, without the assent of the Province, reduce such a rate to four per centum per annum, while on the other hand the contention made on behalf of the Dominion is that such payments of interest were voluntary, that there was no obligation to pay interest, and that being the case, the Dominion authorities could fix the rate to be paid. Of the four questions the third is the most important. But before attempting to answer any of them it will be necessary to go back to the 1st of July, 1867, when the old Province of Canada became a part of the Dominion and see how these funds then stood and what has since happened in respect thereof.

At the date of the Union the Province of Canada held, among others, the following funds:—The Upper Canada Building Fund, the Upper Canada Grammar School Fund, and the Common School Fund. These funds have been raised under certain statutes of the Province for the purposes therein mentioned. A small part of each of the funds consisted of investments that had been made of moneys belonging to the fund, but in the main they were represented by amounts standing to the credit of such funds in the books of account of the

Province, such amounts forming part of the public debt of the Province, on which it was at the time paying interest at the rate of five per centum per annum. On the one hand such funds were assets of the Province of Canada to be held and administered for the purposes for which they were respectively established. On the other hand the Province was a debtor in respect of such funds and liable therefor and for the interest payable thereon. To this liability of the Province the Dominion of Canada succeeded by virtue of the 111th section of *The British North America Act*, 1867, which provided that Canada should be liable for the debts and liabilities of each Province existing at the Union. With respect to the other aspect of the matter, namely, that these funds were assets, the 142nd section of the Act last cited provided that the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada should be referred to the arbitrament of three arbitrators chosen as therein mentioned. These arbitrators having been appointed, and the matter having been proceeded with, two of them made their award in the premises on the 3rd day of September, 1870, and thereby, among other things, ordered and adjudged that certain special or trust funds, among which were the Upper Canada Grammar School Fund, the Upper Canada Building Fund, and the Upper Canada Improvement Fund, and the moneys thereby payable including the several investments in respect of the same or any of them, were and should be, and the same were thereby declared to be, the property of and to belong to the Province of Ontario, for the purposes for which they were established, and further that from the Common School Fund the sum of \$124,685.18 should be, and the same was thereby, taken and deducted and placed to the credit of the Upper Canada Improvement Fund. This award was questioned, and its validity was not determined

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until the 26th day of March, 1878. During the intervening time it was necessary, of course, for the Dominion to hold these funds; but after the validity of the award had been sustained it seems to me to be clear that the Province of Ontario had a right to demand payment of them, both as to principal and interest; and that equally the Dominion had a right to pay or hand over these funds, with any interest accrued thereon, to the Province of Ontario in discharge of its liability under *The British North America Act, 1867*. These funds were assets of the old Province of Canada, held for the purposes for which they were established, and by the award of 1870 they became the property of the Province of Ontario for the purposes for which they were so established, and that gave the Province the right to have the possession and administration, not merely of the income arising from such funds, but of the several funds themselves. That seems to be clear from the language used in the award in dealing with these funds. They are declared to be the property of and to belong to the Province of Ontario for the purposes for which they were established. And it will be observed that when the arbitrators came to deal with the residue of the Common School Fund and to place it in a position similar to that in which the funds now in question would be if all the contentions made on behalf of the Province of Ontario were upheld, they used apt terms to give effect to their intention. They declared in express terms that such residue should continue to be held by the Dominion of Canada, and that the income therefrom should be apportioned between and paid over to the respective Provinces of Ontario and Quebec.

I know that a view different from that which I have expressed as to these funds has at times been taken, more especially before the award of September, 1870, was made; but since then I do not see what doubt there

can be about the matter, and it is not pretended that any of the opinions that have been expressed or discussions that have taken place have amounted to an agreement by the parties to deal with these funds differently from the way in which they stand to be dealt with under *The British North America Act*, 1867, and the award of the 3rd day of September, 1870.

It is, however, suggested—perhaps I should say contended—that the relations of the Dominion of Canada and the Province of Ontario to these funds have been altered by the fifth clause of the award of the Dominion and Provincial arbitrators of the 2nd day of November, 1893, by which it was ordered that the trust funds, of which the three funds in question here were part, should be treated as intact and unimpaired, and interest thereon at the rate of five per centum per annum should be carried half-yearly into the separate accounts of Ontario and Quebec. But that direction must be read in connection with the matters with which the arbitrators were dealing. Assuming the view to be correct that under the Act and award referred to these funds at the time belonged to the Province of Ontario and were its property, both principal and interest, and that it was entitled to the actual possession and administration of such funds if it so desired, the arbitrators last mentioned would have had no authority or power to change that condition of things and to declare that the Dominion should hold such funds in perpetuity, paying the interest thereon only to the Province. And I think it quite clear that they made no attempt to do anything of the kind. They were giving directions as to how certain accounts should be made up. It had been agreed between the parties that these accounts should be brought down and extended to the 31st day of December, 1892, inclusive. The funds in question had up to that time remained in the possession of the

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Dominion, and for the purposes of making up the accounts a direction was given that up to that date these funds should be treated as intact and unimpaired, and that the interest thereon should be credited half-yearly in the accounts. Later, in August, 1901, counsel for the Dominion made an application to the Board of Arbitrators for a direction that the amounts of the several special or trust funds should, in the final closing and disposition of the disputed accounts between the Dominion and the Provinces of Ontario and Quebec, respectively, be brought into account and credited to the Province to which they respectively belonged. But as it appeared that the parties had themselves come to an understanding and agreement as to the manner in which the special and trust funds, and any amounts found to be due on the 31st of December, 1892, by the Province of Ontario and Quebec, respectively, to the Dominion, should be dealt with after that date and during the pendency of proceedings to determine such amounts, and having acted upon such agreement, the arbitrators were of opinion that it would not be proper for them to give any direction or to make any award that would be inconsistent with such understanding and agreement, and that the direction asked for on behalf of the Dominion would be inconsistent therewith. But the arbitrators carefully refrained from expressing any opinion as to their powers to give the direction asked for, or whether or not, but for the agreement come to by the parties, such a direction would have been proper. It is obvious, of course, that such a direction would not have been proper in respect of any particular fund unless that fund belonged to and was the absolute property of the Province to which it was proposed to credit it. But as stated, the question was not dealt with, and its solution is, I think, in no way affected by anything that occurred in the proceedings that were had

for the settlement of the accounts of the Dominion and of the Province of Ontario and Quebec respectively.

Of the three questions that I have stated, I would answer the first and the third in the affirmative, and the second in the negative.

And that brings us to the fourth question, namely:— Whether there has been by the Dominion such an offer or tender of payment of these funds to the Province of Ontario as would discharge the Dominion from the payment of the sum of \$9,549.23 of interest claimed by the Province in this action.

On the 28th day of April, 1903, in a letter from Mr. Fielding, the Minister of Finance for the Dominion of Canada, to M. Ross, the Premier of Ontario, Mr. Fielding promised to pay interest on these funds on the 1st of July then next at the rate of five per cent.; but pointed out that the Dominion was under no obligation to pay that rate of interest and could not consent to pay it thereafter. "The position of the accounts" he adds, "between the Dominion and the Province at present is, " that there is a certain sum due by the Province to the " Dominion, on which you are paying four per cent., and a " certain sum a little larger due by the Dominion to the " Province upon which you have been claiming five per " cent. Both these sums stand in the position of ordinary " debts which may be paid off at any time. Pending a " mutual arrangement for such payment I would suggest " that the most convenient way to deal with the matter " would be to treat these sums as cross-entries. There " would be a balance in your favour upon which we " would be willing, temporarily, to allow you four per " cent. If this arrangement is not satisfactory we shall " be prepared to pay off the amount of our indebtedness " to your Government before the 1st of January next." That arrangement was not satisfactory to the Ontario Government. The following extract from a letter of the

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8th of May, 1903, from Mr. Ross to Mr. Fielding, will show the position taken by that Government:—"It was a well settled contract between the Dominion and Provincial authorities, that in the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada that the Dominion was to hold the trust funds at five per cent. interest, payable semi-annually, the amount of such funds being included in the debt of the late Province of Canada."

"I have therefore respectfully to inform you that the Government of Ontario will not agree to any change by the Dominion in reduction of the five per cent payable on the trust funds; nor will we acknowledge the right of the Dominion at its option to pay off the said trust funds, or any part thereof." Mr. Fielding returned to the subject in a letter to Mr. Ross of the 29th of December, 1903. This is the letter on which Counsel for the Dominion rely as showing an offer or tender by the Dominion to the Province of the amount of these funds. The following is an extract from the letter:—"It has been decided to pay on the 1st of January, 1904, the interest on these funds at the rate heretofore paid, namely 5 per cent. After that date, interest at the rate of 4 per cent. will be paid until further notice, or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your Government I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date."

Mr. Ross, on the 6th of January, 1904, replied to Mr. Fielding's letter stating that the proposal was not satisfactory to his Government, and that they firmly maintained two positions, namely:—

"1. That the Dominion is not in a position to terminate its trusteeship by payment over to Ontario of the Trust Funds in question.

“ 2. That the rate of interest, 5%, is not susceptible of modification without the consent of Ontario.”

And he suggested that in advance of the action proposed some method of securing a judicial determination of these questions might be found.

On the 2nd of July, 1904, interest on these trust funds at the rate of five per centum per annum was paid “ without prejudice and subject to re-adjustment in a future account.”

On the 3rd day of January a half-year's interest on these funds at the rate of four per centum per annum was paid by the Dominion to the Province. The sum of \$9,549.23 represents the difference in interest, at the rates, respectively of five and four per centum, on these funds for the half-year ending December 31st, 1904.

Now, if Mr. Fielding's letter of the 29th of December, 1903, constitutes a good offer and tender of the amount of the funds in question, then in the view that I have taken of the other questions the Dominion was under no obligation thereafter to pay any interest thereon ; and having for the period mentioned voluntarily paid interest at the rate of four per centum is not now liable to pay the sum claimed. On the contrary, if that letter did not constitute a good offer and tender of such funds, then it seems to me that the Dominion retaining the funds is under an obligation to pay interest thereon at the rate of five per centum. While it may pay off the amount of such funds, and discharge itself from liability therefor, it cannot retain the funds and reduce the interest without the assent of the Province. Of course if the Province refuses to accept the amount of the several funds when actually tendered the Dominion will be relieved from any further liability to pay interest thereon. In my opinion the letter referred to and relied upon by counsel for the Dominion as constituting a good tender of the amount of these funds does not go that far. It states that if the pro-

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posal made by the Minister was not satisfactory to the Government of Ontario, arrangements would be made to pay off the principal sum at an early date. It was not satisfactory to them, and no such arrangements were made, and nothing further was done in that direction. To make a good offer and tender the letter should, I think, have been followed or supplemented by an unconditional offer and tender of the money. For that reason I am of opinion that the Province of Ontario is entitled to recover from the Dominion the sum of \$9,549.23 mentioned.

There will be a declaration,

1. That the rate of interest payable on the funds in question is five per centum per annum, and that the Dominion of Canada cannot retain such funds and reduce such rate of interest, without the assent of the province of Ontario; but

2. That the Dominion of Canada has a right at any time to pay or hand over to the Province of Ontario the amount of any of the trust funds in question in this proceeding, with any interest then accrued thereon, in discharge of its obligations in respect of such fund.

3. That the letter from Mr. Fielding to Mr. Ross of the 29th day of December, 1903, did not constitute a good and sufficient tender and offer by the Dominion of Canada to the Province of Ontario of the funds in question, and that the Province is entitled to recover from the Dominion the sum of \$9,549.23 claimed in this proceeding.

Each party will bear its own costs.

*Judgment accordingly.*

Solicitor for Claimant: *Æmilius Irving.*

Solicitors for Respondent: *Hogg & Magee.*

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