Supreme Court of Canada
Gauthier v. The King, (1918) 56 S.C.R. 176
Date: 1918-03-05

Emma E. Gauthier (Suppliant) Appellant;

and

His Majesty The King (Respondent) Respondent.

1917: November 8, 9; 1918: March 5.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Provincial statute—Application to Crown in right of Dominion—Arbitration—Revocation of submission—"Ontario Arbitration Act" R.S.O. [1914] c. 65, ss. 3 and 5.

A reference to the Crown, without more, in a provincial statute means the Crown in right of the province only.

Sec. 5 of the "Ontario Arbitration Act" making a submission to arbitration irrevocable except by leave of the court does not apply to a submission by the Crown in right of the Dominion notwithstanding sec. 3 provides that the Act shall apply to an arbitration to which His Majesty is a party.

Per Fitzpatrick C.J., Where a liability is imposed on the Crown in right of the Dominion it must be ascertained according to the laws of the province in which the cause of action arose in force at the time it was so imposed and cannot be added to by subsequent provincial legislation.

Judgment of the Exchequer Court of Canada (15 Ex. C.R. 444) affirmed.

APPEAL from a judgment of the Exchequer Court of Canada[1], in favour of respondent on the claim to enforce an award of arbitrators, but allowing the suppliant's claim for damages.

The suppliant is a licensee of fishing rights in the Detroit River which the Dominion Government agreed to purchase the price to be settled by arbitration. Each party appointed an arbitrator and the two chose a third but before any proceedings were taken the Government gave notice revoking the

[Page 177]

submission and announcing its intention to abandon the purchase. The Government arbitrator having withdrawn the other two proceeded to arbitrate and made an award in favour of the suppliant for a large amount and a petition of right was filed by the suppliant to enforce the award or, in the alternative, for damages. The judge of the Exchequer Court

[1] 15 Ex. C.R. 444

refused enforcement but gave judgment for damages with a reference. The suppliant appealed against the refusal to enforce the award. The Crown did not cross-appeal.

McGregor Young K.C. for the appellant. The liability of the Crown must be determined by the law of Ontario. *City of Quebec* v. *The Queen*[2], *The Queen* v. *Filion*[3], *The King* v. *Armstrong*[4], *The King* v. *Desrosiers*[5], And section 10 of the "Dominion Interpretation Act" makes the law to be applied that in force when the cause of action arose.

The "Arbitration Act" applies to cases in which His Majesty is a party to an arbitration and in applying this provision there is no distinction between the Crown in right of the province and in right of the Dominion. *Exchange Bank of Canada* v. *The Queen*[6], *Attorney-General of Canada* v. *Attorneys-General of Ontario Etc.*[7].

Hogg K.C. for the respondent. No provincial legislation can bind the Crown in right of the Dominion. See *Powell* v. *The King*[8]; *Burrard Power Co.* v. *The King*[9]. And the Ontario Act could not take away the Crown's common law right to revoke the submission in this case. *Attorney-Gen-*

[Page 178]

eral of Canada v. *Attorney-General of Ontario*[10], *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*[11]. And see *Attorney-General of British Columbia* v. *Attorney-General of Canada*[12], per Fournier J. at page 363.

The appellant is seeking to enforce an award but no such remedy is open to him against the Crown. See *McQueen* v. *The Queen*[13], *Dominion Atlantic Railway Co.* v. *The Queen*[14].

McGregor Young K.C. for the appellant.

Hogg K.C. for the respondent.

THE CHIEF JUSTICE. — The only question that falls to be decided on this appeal is the contention of the appellant that the Crown in right of the Dominion of Canada is bound by the Ontario statute, "The Arbitration Act," R.S.O. [1914] ch. 65.

The learned judge of the Exchequer Court holds against the view that in dealing with rights arising in any province regard must be had to the laws of the province as they were in

---

[2] 24 Can. S.C.R. 420.
[3] 24 Can. S.C.R. 482.
[4] 40 Can. S.C.R. 229.
[5] 41 Can. S.C.R. 71.
[6] 11 App. Cas. 157.
[7] [1898] A.C. 700.
[8] 9 Ex. C.R. 364 at p. 374.
[9] [1911] A.C. 87.
[10] 19 Ont. App. R. 31; 23 Can. S.C.R. 458.
[11] [1892] A.C. 437.
[12] 14 Can. S.C.R. 345.
[13] 16 Can. S.C.R. 1.
[14] 5 Ex. C.R. 420.

force at the time of the passing of the "Exchequer Court Act," 50 & 51 Vict. 1887. He quotes section 10 of the "Interpretation Act," R.S.C. [1906] ch. 1.

> The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof, according to its spirit, true intent and meaning.

And continues:

> I do not think the view put forward can be upheld. If such a construction were placed on the "Exchequer Court Act" innumerable absurdities might arise, as the statute laws of the various provinces are from time to time repealed or varied.

So that but for other reasons which I shall presently discuss the learned judge would apparently hold that

[Page 179]

the Dominion Crown would be bound by the "Ontario Arbitration Act."

It may be well to clear up at once an obvious error in the suggestion that it is always the laws in force at the time of the passing of the "Exchequer Court Act" to which regard must be had. The error has probably arisen from judicial decisions upon clause (*c*) of section 16 (now sec. 20) of that Act, by which it was determined that it imposed a liability upon the Crown which did not previously exist. The Crown, however, was of course liable in many cases, as of contract for instance, before the passing of the "Exchequer Court Act." *Thomas* v. *The Queen*[15]. The principle is the same however, viz., that the liability is such as existed under the laws in force in the province at the time when the Crown became liable.

The learned judge's holding seems rather inconsistent with his subsequent statement that

> the local Legislature could not enact laws making the Crown, represented by the Dominion, liable.

I think too that difficulties, not to say absurdities, may arise whether the view is taken that the liability of the Dominion Crown is to be ascertained with reference to the laws of each province as they were in force when the Crown first came under liability, or as they may be from time to time varied by the statutes of the province. The question, however, has already been settled so far as this court is concerned by judicial decision.

[15] L.R. 10 Q.B. 31.

In the case of *Armstrong* v. *The King*[16], in which the cause of action arose under section 16 (*c*), Mr. Justice Burbidge, after referring to the case of the *City of Quebec* v. *The Queen*[17], *The Queen* v. *Filion*[18],

[Page 180]

Ryder v. The King[19], and Paul v. The King[20], added:

> I think, too, that it may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed.

On the appeal of the same case[21], Mr. Justice Davies said:—

> I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the "Exchequer Court Act" and determined that it not only gave jurisdiction to the Exchequer Court, but imposed a liability upon the Crown which did not previously exist and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed.

Although this was a case under section 16 (*c*) of the "Exchequer Court Act" by which a particular liability was for the first time imposed upon the Crown, the same principle, as I have said, must apply to all cases and the liability in each be ascertained according to the laws in force in the province at the time when the Crown first became liable in respect of such cause of action as is sued on. In other words, the local Legislature cannot subsequently vary the liability of the Dominion Crown, or at any rate, cannot add to its burden.

This was the opinion expressed by Mr. Justice Burbidge in *Powell* v. *The King*[22], at p. 374, where he said:

> The question is whether an assignment of a claim against the Government of Canada, made in the Province of Ontario, gives the assignee a right to bring his petition therefor in his own name; or, in other words, whether the Crown as represented by that Government is bound by the statutes that have from time to time been passed by the Legislature of that Province to enable the assignee of a *chose in action* to bring an action thereon in his own name. * * * There is,

---

[16] 11 Ex. C.R. 119.
[17] 2 Ex. C.R. 252 at p. 269; 24 Can. S.C.R. 420.
[18] 24 Can. S.C.R. 482.
[19] 9 Ex. C.R. 333; 36 Can. S.C.R. 462.
[20] 38 Can. S.C.R. 126.
[21] 40 Can. S.C.R. 229.
[22] 9 Ex. C.R. 364.

[Page 181]

> I think, no reason to think that these statutes were or are binding upon the Crown; but even if it were conceded that the Crown, as represented by the Government of the Province of Ontario, was bound thereby, I should be of opinion that the Crown as represented by the Government of Canada is not bound. The only Legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.

If I have rightly appreciated the reasoning of the learned judge of the Exchequer Court (Cassels J.), he holds that, whilst in an ordinary case the Dominion Crown would be bound by a provincial statute, the present case may be distinguished on the ground that the statute affects a prerogative right of the Crown. I find it very difficult to discover any principle on which such a conclusion could be arrived at.

The right to revoke a submission to arbitration was, prior to its curtailment by the Ontario statutes, one common to all subjects within that province. I do not understand how such a right as this can be considered as one of the prerogatives of the Crown, so as to base on this a conclusion that it could not be legislated against by the Provincial Legislature. It seems to me that the argument must involve any right of the Crown.

I do not derive any assistance from the authorities referred to in the judgment. The case of *Burrard Power Co.* v. *The King*[23], involved a question of Dominion property and the "B.N.A. Act, 1867," reserves to the Dominion Parliament the exclusive legislative authority over such property. The quotation from M. Chitty's book on "The Prerogatives of the Crown" to the effect that:—

> Acts of Parliament which would divert or abridge the King of his prerogatives, his interests or his remedies in the slightest degree, do not in general extend to, or bind the King, unless there are express words to that effect,

[Page 182]

seems rather pointless, since the statute now in question does expressly purport to bind the King.

It is, however, unnecessary for me to comment further on the judgment. I agree with Anglin J. that the provincial Act, read as a whole, cannot be interpreted as applicable, for the reasons he gives, to bind the Dominion Crown.

---

[23] 43 Can. S.C.R. 27.

And, in any event, the provinces have, in my opinion, neither executive, legislative nor judicial power to bind the Dominion Government. Provincial statutes which were in existence at the time when the Dominion accepted a liability form part of the law of the province by reference to which the Dominion has consented that such liability shall be ascertained and regulated, but any statutory modification of such law can only be enacted by Parliament in order to bind the Dominion Government. That this may occasionally be productive of inconvenient results is one of the inevitable consequences of a divided authority inherent in every federal system such as provided by the constitution of this country.

I agree also with Mr. Justice Anglin that section 19 of the "Exchequer Court Act" merely recognizes preexisting liabilities; and cases falling within it must be decided not according to the law applicable to the subject matter as between subject and subject, but to the general law of province in which the cause of action arises applicable to the Crown in right of the Dominion.

The respondent, in his factum, declares that he is content to abide by the judgment of the Exchequer Court and to pay to the appellant the damages assessed by the referee. I agree with the conclusion of the judgment, though basing my opinion upon different grounds from those of the learned judge.

[Page 183]

The appeal should therefore, I think, be dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The appellant represents a suppliant who had sought by means of a petition of right to enforce an alleged award made pursuant to an alleged submission by him and the respondent to the determination of arbitrators.

The claim so made has been dismissed by Mr. Justice Cassels and hence this appeal.

It seems to me there are several rather formidable and indeed some insuperable obstacles in the way of the appellant.

In the first place, on the argument I asked counsel for the appellant what authority any one agreeing on behalf of respondent to the alleged submission had for doing so. He admitted

he had not in fact considered that matter but said he would consider it. Since then he has been good enough to hand in a memorandum which first refers to the material in the case shewing that the object of the Minister was to serve the fish breeding establishment of the Dominion, and next refers to the "Appropriation Acts" of 1910, by which one appropriation of $241,725 "to salaries, building and maintenance of fish breeding establishments" and another for $80,575 alike thereto, had been made and then refers to the report of the Auditor-General for the fiscal year 1910-1911 ending 31st March, 1911, which shews, he says, that $101,572.34 of this appropriation was not used.

I assume this is all that can be found and it falls very far short of anything that by implications of the most liberal kind could extend to the purchase by the

[Page 184]

Minister of a property worth nearly two hundred thousand dollars if the award is right.

There is no express authority to be found anywhere in these statutes relative to anything of that magnitude.

The Act, ch. 44 of the R.S.C. 1906, defines the Minister's duties and powers and they neither expressly nor by implication authorize the acquisition of such a costly property.

What he proposed to buy was a licence of occupation for twenty-one years issued by the Province of Ontario to have the effect of a lease of certain parcels of land covered by water, for which fifty dollars a year was to be paid by the licensee.

I can easily see authority to the Minister implied in the Act I have referred to enabling him to deal with what looked like a routine transaction even assuming the licensee were given double or treble what was apparently involved and the personal property that it was proposed to buy.

But when in the mind of the licensee and some of the arbitrators it became apparent that for some reason or other the transaction was going to result in one of such magnitude as seemed to transcend anything the Minister could reasonably have anticipated, he found his way out by revoking the authority given and properly did so if not bound irrevocably by the submission.

It is quite true he did not expressly ground it on the want of authority, but upon mistake on the part of some of the arbitrators as to the scope of the submission and what was intended thereby, which is perhaps another way of saying so.

I have, however, no hesitation in coming to the conclusion that if the transaction involved in the

[Page 185]

award was of the magnitude it indicates, there never was authority in any one on behalf of the respondent to bind him by a submission of that kind, the arbitrators presumed to find in it, and hence the proceeding null.

I am not overlooking the fact that Ministers every day rightly deal with what involves far more than in question herein. But the authority of some statute always has to be relied upon in the last analysis; or their conduct and contracts on behalf of respondent must be ratified by Parliament.

And when it comes to a question of routine transactions each case must stand on its own merits as to whether or not it falls within the scope of what may reasonably be held to be of that character. And it must be borne in mind that even as regards contracts made by a Minister in respondent's name or on his behalf in the course of the routine discharge of duty it rests, or should rest, upon the express provision of some statute, or in the necessary implications found therein.

That is recognized in the order for damages to be assessed which has been made herein by the learned trial judge.

Lest, however, this vulgar mode of looking at such things should be considered as an unwarrantable assumption of the limitations of or a repudiation of the existence of the Royal prerogative, a vital force in which in the eyes of some, in regard to affairs of state at least, we must be held to live and move and have our being, let us consider the legal aspects involved from that point of view.

Let it be observed that no one in argument impugned the doctrine of the common law, as laid down by the learned trial judge, that it was quite competent

[Page 186]

for respondent to have withdrawn from such a submission.

Reliance is placed upon the provisions of the "Ontario Arbitration Act." Indeed the appellant's counsel seemed to rest his entire case thereon and the implications in the provisions of the "Exchequer Court Act."

There seems to me to be assumed in that argument an interpretation of the provisions of the said "Arbitration Act," which is by no means obvious on close examination thereof, in relation to the old well established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect.

The "Arbitration Act" in itself does include the King in these terms:—

> Section 3:—This Act shall apply to an arbitration to which His Majesty is a party.

If that had been passed in the like legislation enacted by the Dominion Parliament then there would have been an end of argument on the point.

But can we for a moment assume that the local Legislature intended thereby to include the Crown on behalf of the Dominion or, for that matter, on behalf of the Crown in England or elsewhere in many parts of the Empire where it stands for many varying shades of meaning in relation to the Royal prerogative?

I cannot think so or impute to the Legislature any intention to go beyond what it was entitled to enact in relation to, and to be acting only within its proper sphere of activity.

The inquiring mind may see how this distribution of the Royal prerogative in the federal system has been worked out in other regards by the Judicial Committee of the Privy Council in the case of the *Bonanza Creek Co.* v. *The King*[24], at pp. 578 *et seq.*

[Page 187]

And when we turn to the "Interpretation Act" of the province 7 Edw. VII. ch. 2 we find the following in section 7, subsection 5:—

> The words "His Majesty," "Her Majesty," "The King," "The Queen" or "The Crown," shall mean the Sovereign of the United Kingdom of Great Britain and Ireland for the time being.

Section 7, subsection 53 of that Act provides:—

[24] [1916] 1 A.C. 566.

> No Act or enactment shall affect in any manner the rights of His Majesty, his Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

Surely these provisions can only mean in relation to that which, as a whole, relative to its own powers the Legislature was entitled to speak. If so then the enactment relied upon can only have relation to submissions in which His Majesty on behalf of the province might happen to be an actor.

I had occasion in the recent case of *Hamilton* v. *The King*[25], to consider the possible application of Ontario Statutes of Limitation expressly made to bind the Crown, and formed a decided impression that they never could have been intended to extend to cover the case of a like question arising between the Crown and a subject relative to property held by the Crown on behalf of the Dominion and claimed to have been acquired by His Majesty's subjects by virtue of the Statutes of Limitation.

The more I have considered the matter the more I see nothing but confusion likely to arise in defining judicially the relative rights of the Dominion and the provinces by assuming legislation of either in this regard in attempting to fasten on the other its own view of the prerogative.

Again this "Arbitration Act" evidently was intended to work out the solution of litigious questions.

[Page 188]

And to carry into effect the principle contended for in its widest possible extent, would produce some curious results which I venture to think were neither intended nor expected.

For example; why was it not followed up by this appellant with the legal machinery therein provided to enforce it?

I imagine it must have been because if ever relied upon it was concluded it would not stand such a strain.

I must conclude it never was intended to be and hence is not applicable to a submission between respondent on behalf of the Dominion and a subject.

---

[25] 54 Can. S.C.R. 331.

Properly speaking this submission was only intended for an appraisement or valuation but unfortunately in law as laid down by Sir Alexander Cockburn in *In re Hopper*[26], at page 373, the terms of the submission having contemplated the examination of witnesses and a judicial investigation and determination it must be held to be a submission in arbitration. And again I am tempted to ask by what authority ? Needless, however, in my view to pursue that inquiry.

The other ground taken by appellant as to the applicability of the Act by means of the "Exchequer Court Act" fall with that view I have expressed if sound.

The only possible part of the "Exchequer Court Act," section 20, applicable herein, is subsection (*d*), which is as follows:—

> *(d)* Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

It will be observed that the first obstacle in appellant's way is the meaning of the ambiguous expression "any law of Canada" which I may say has never

[Page 189]

yet been determined though considered in the case of *Ryder* v. *The King*[27], and other cases but got in that case from the majority of this court an interpretation tending to narrow its operation and defeat such contentions as appellant sets up herein.

In the next place, if my view of the "Arbitration Act" be correct, it is not a law of "any part of Canada" in such way as to help appellant, being limited by its very terms to the possible cases of submission by the Crown on behalf of the province and not capable of extension to any other case where the Crown is concerned.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—The Crown has not appealed against the decision of the Exchequer Court holding it answerable to the suppliant in damages for breach of a contract to purchase certain fishing rights held by him.

---

[26] L.R. 2 Q.B. 367.
[27] 36 Can. S.C.R. 462.

The suppliant, however, not content with this relief, seeks to have it determined that the Crown is bound by an alleged award as to the purchase price (which the agreement stipulated should be fixed by arbitration) made, after notice of revocation of the authority of the arbitrators had been given on its behalf, by two of the three arbitrators appointed to determine it.

The Crown maintains its right to revoke the authority of an arbitrator before the award has actually been made; the appellant denies that right.

He contends that the liability of the Crown under the "Exchequer Court Act" is to be determined according to the law of the province in which the cause

[Page 190]

of action arises; that its liability is the same as would be that of a subject under like circumstances; and that the "Ontario Arbitration Act," (9 Edw. VII. ch. 35; R.S.O. 1914, ch. 65), which takes away the right of revocation and is made applicable in explicit terms to "His Majesty," defined by the "Interpretation Act" as meaning:—

> the Sovereign of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, (7 Edw. VII. ch. 2, s. 7, s. s. 5)

applies to the Crown in right of the Dominion.

The cause of action arose and all the proceedings have taken place in Ontario, and, no doubt the construction and legal effect of a contract made and to be performed in any province of Canada must ordinarily be determined in the Exchequer Court according to the general law of that province.

There are, however, two fallacies in the appellant's contention—one the assumption that liability *ex contractu* of the Crown in right of the Dominion depends upon the "Exchequer Court Act;" the other, that a series of decisions, culminating in *The King* v. *Desrosiers*[28], holding that a liability of the Crown imposed by clauses of section 20 of that Act is the same as would be that of a subject under like circumstances in the province in which the cause of action arises, applies to cases falling within section 19. This latter provision (originally found in section 58 of 38. Vict. ch. 11) does not create or impose new liabilities. Recognizing liabilities *(in posse)* of the Crown already existing, it confers exclusive

[28] 41 Can. S.C.R. 71.

jurisdiction in respect of them upon the Exchequer Court and regulates the remedy and relief to be administered. In regard to the matters dealt with by this section there is no

[Page 191]

ground for holding that the Crown thereby renounced whatever prerogative privileges it had theretofore enjoyed and submitted its rights and obligations to be determined and disposed of by the Court according to the law applicable in like cases between subject and subject. The reasons for which it was so held in regard to liabilities imposed by section 20, are stated by Strong C.J. in the earlier part of his dissenting judgment in *The City of Quebec* v. *The Queen*[29], See, too, *The Queen* v. *Filion*[30], *The King* v. *Armstrong*[31], and *The King* v. *Desrosiers*[32]. No other law than that applicable between subject and subject was indicated in the "Exchequer Court Act" as that by which these newly created liabilities should be determined. Placing upon that section a "wide and liberal" —a "beneficial construction"—"the construction calculated to advance the rights of the subject by giving him an extended remedy,"—it was the view of the former learned Chief Justice, and is now the established jurisprudence of this Court, that it was thereby

> not intended merely to give a new remedy in respect of some preexisting liability of the Crown but that it was intended to impose a liability and confer a jurisdiction by which the remedy for such new liability might be administered in every case in which a claim was made against the Crown, which, according to the existing; general law, applicable as between subject and subject, would be cognizable by the Courts.

But, since section 19 merely recognizes pre-existing liabilities, while responsibility in cases falling within it must, unless otherwise provided by contract or statute binding the Crown in right of the Dominion, be determined according to the law of the province in which the cause of action arises, it is not that law as applicable between subject and subject, but the

[Page 192]

general law relating to the subject-matter applicable to the Crown in right of the Dominion which governs. That law in the Province of Ontario is the English common law except in so far as it has been modified by statute binding the Crown in right of the Dominion.

By the English common law, while an agreement to submit any matter to arbitration has always been irrevocable like any other contract, and the breach of it entails liability for

---

[29] 24 Can. S.C.R. 420.
[30] 24 Can. S.C.R. 482.
[31] 40 Can. S.C.R. 229.
[32] 41 Can. S.C.R. 71.

damages, the authority of the arbitrator, because in its nature revocable, might be withdrawn by any party to the submission at any time before the award was made, even though declared irrevocable by express words in the agreement. Legislative action alone could render it irrevocable. In England it was first sought to control this power of revocation by a statutory provision that every submission to arbitration might be made a rule of court (9 & 10 Wm. III., ch. 15), thus subjecting the party who might attempt to escape from carrying it out to the penalties of contempt, but still leaving him the actual power of revocation. By the Act 3 & 4 Wm. IV., ch. 42, s. 39, it was, however, expressly provided that the authority of an arbitrator under a submission containing a provision that it might be made a rule of court should not be revocable without the leave of the court. By 17 & 18 Vict. ch. 125, sec. 17, it was further enacted that every submission might be made a rule of court, unless a contrary intention should appear. It was not until 1889 that the term or condition of irrevocability, then declared to attach to every submission which did not provide otherwise, was also made applicable to the Crown (52 & 53 Vic., ch. 49, ss. 1 & 23).

There is no Dominion statute in point.

[Page 193]

The introduction of English law into Upper Canada in 1792 carried with it the Imperial statute 9 & 10 Wm. III., ch. 15. None of the later Imperial legislation regarding arbitrations extends to Ontario. The provincial statute, 7 Wm. IV., ch. 3, sec. 29, however, is similar in its terms to the Imperial statute 3 & 4 Wm. IV., ch. 42, sec. 39, and, since 1859 (C.S.U.C., ch. 22, sec. 179), it has been substantially the law of Ontario, as is now provided by section 5 of the "Arbitration Act" (R.S.O. 1914, ch. 65), that the authority of an arbitrator appointed under a submission, which does not contain a stipulation to the contrary, is irrevocable, "except by leave of the court," and that every submission shall have "the same effect as if it had been made an order of the court."

The application of this section of the "Arbitration Act" was first extended to the Crown in 1897 by an amendment declaring that that statute "shall apply to any arbitration to which His Majesty is a party" (60 Vict., ch. 16, sec. 46; R.S.O. 1914, ch. 65, sec. 3).

Until that provision was enacted, although a subject could not do so, the Crown in right of the province was at liberty to revoke the authority of an arbitrator appointed under a submission to which it was a party. Of course the Crown in right of the Dominion had the

same right and, unless it has been taken away by the provincial statute of 1897, it still exists.

Section 5 of the "Ontario Arbitration Act," were it applicable and *intra vires,* would compel the Crown in right of the Dominion, if it would preserve its right of revocation, to safeguard that right by explicit reservation in every submission by it to arbitration in respect of any difference in regard to property or rights in Ontario. If that were the purview of section 3 of

[Page 194]

the "Ontario Arbitration Act" it would, in my opinion, be *pro tanto ultra vires.* Provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion. An interpretation that would render it *ultra vires* should, of course, be placed upon a statute only if unavoidable.

That it was never intended that section 5 of the "Ontario Arbitration Act" should apply to the Crown in right of the Dominion is reasonably clear from its provisions. Thus, if applicable, it would require the Crown in right of the Dominion, should it desire to withdraw from a submission, in the absence of an express reservation therein of that right, to seek the leave of the provincial Supreme Court, (section 2 (*a*); "Interpretation Act," section 20 *(dd)),* and it would purport, since the submission would "have the same effect as if it had been made an order of court" (*i.e.,* of the Supreme Court of Ontario), to subject the Crown in right of the Dominion to the jurisdiction of that court, although by section 19 of the "Exchequer Court Act" the Dominion Parliament has given to the Exchequer Court of Canada

> exclusive original jurisdiction in all cases * * * in which the claim arises out of a contract entered into by or on behalf of the Crown (in right of the Dominion).

The provincial Legislature never intended to attempt anything of the sort.

I think it may be accepted as a safe rule of construction that a reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense. This would seem to be a corrollary of the rule that the Crown is not bound by a statute unless named in it.

[Page 195]

It does not at all follow that, because the liability of the Crown in right of the Dominion is to be determined by the laws of the province where the cause of action arose, that liability is governed by a provincial statute made applicable to the Crown in right of the province, since it is by the provincial law only so far as applicable to it that the liability of the Crown in right of the Dominion is governed. Nor is it a reasonable or proper inference that by executing a submission to arbitration in regard to a matter arising in any province of Canada the Crown in right of the Dominion intended to become bound in respect thereof by a provincial statute otherwise not applicable to it.

I would dismiss the appeal.

Solicitors for the appellant: Young & McEvoy.

Solicitors for the respondent: Hogg & Hogg.