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For Monday 6th October, not before 2 o'clock.

In the Privy Council.

No. 27 of 1951

ON APPEAL FROM THE SUPREME COURT OF CANADA

33190

BETWEEN

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA and THE MINISTER OF LANDS AND MINES OF THE PROVINCE OF ALBERTA ... (*Defendants*) APPELLANTS

AND

HUGGARD ASSETS LIMITED ... ... (*Plaintiff*) RESPONDENT

AND

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF SASKATCHEWAN and THE ATTORNEY GENERAL OF MANITOBA ... ... INTERVENERS.

CASE FOR THE APPELLANTS

RECORD

1.—This is an Appeal by special leave from a Judgment of the Supreme Court of Canada, dated 6th February, 1951, which affirmed, but on different grounds, the Judgment of the Appellate Division of the Supreme Court of Alberta dated the 4th January, 1950. The said Judgment on an equal division of the Court (O'Connor and W. A. Macdonald, JJ.A. for dismissal of the Appeal, and Parlee, J.A. with whom Frank Ford, J.A. concurred for allowance of the Appeal) dismissed an Appeal from the Judgment dated the 13th August, 1949, of McBride, J. declaring that the Province of Alberta has no right to demand, impose or exact payment of any royalty with respect to petroleum and natural gas produced from 1320.5 acres of land owned and held by the Respondent and described in the Pleadings and Judgment. p. 54 p. 34 p. 21

2.—The Respondent's title to natural gas and petroleum had its origin in an application to the Dominion Government for a reservation of a tract Exhibit 11 Exhibit 13

RECORD

of land made in September, 1905, by Israel Bennetto. This application was made under regulations governing the disposition of Dominion lands in the Province of Manitoba, the North-West Territories and the Yukon Territory containing petroleum authorised by the Dominion Lands Act (R.S.C. 1886 c. 54), established by P. C. Order No. 893 dated the 31st May, 1901, and amended by P.C. Orders Nos. 1899, 513, 1638, 1393 and 2287.

Exhibit 5
Exhibit 6

3.—Section 47 of the Dominion Lands Act (R.S.C. 1886 c. 54) (as amended by Statutes of Canada, 1892, c. 15) and Sections 90 (h) and 91 of the Act read as follows :—

47. Lands containing coal or other minerals, including lands in the Rocky Mountains Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor General in Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing or other disposal thereof : Provided, however, that no disposition of mines or mining interests in the said park shall be for a longer period than twenty years, renewable in the discretion of the Governor in Council, from time to time, for further periods of twenty years each, and not exceeding in all sixty years.

90. The Governor in Council may—

* * * * *

(h) Make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act ; and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect ; and, from time to time, alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead ;

91. Every order or regulation made by the Governor in Council, in virtue of the provisions of the next preceding clause, or of any other clause of this Act, shall, unless otherwise specially provided in this Act, have force and effect only after the same has been published for four successive weeks in the Canada Gazette ; and all such orders or regulations shall be laid before both Houses of Parliament, within the first fifteen days of the session next after the date thereof.

The Dominions Land Act of 1908 (c. 20) contained in Section 76 (k) substantially the same provision as the above Section 90 (h), and also the following provision : RECORD

> " 77. Every regulation made by the Governor in Council in virtue of the provisions of this Act, and every order made by the Governor in Council authorizing the sale of any land or the granting of any interest therein, shall have force and effect only after it has been published for four consecutive weeks in The Canada Gazette, and all such orders or regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof, and such regulations shall remain in force until the day immediately succeeding the day of prorogation of that session of Parliament, and no longer, unless during that session they are approved by resolution of both Houses of Parliament."

4.—The amended regulations under which the application of Bennetto was made, contained the following clauses which apply to the right given to him to purchase the petroleum and natural gas and available surface rights in the tract of land reserved for him : Exhibit 7

> All unappropriated Dominion Lands in Manitoba, the North West Territories and within the Yukon Territory, shall be open to prospecting for petroleum by an individual or company desiring to do so. In case there should arise any dispute as to whether lands are or are not unappropriated the question shall be decided by the Minister of the Interior, whose decision shall be final; provided, however, that the Minister may reserve for an individual or company who has machinery on the land to be prospected, an area of 1,920 acres for such period as he may decide.
>
> This tract of land may be selected by the said individual or company so soon as machinery has been placed on the ground, but the length of such tract shall not exceed three times the breadth thereof. Where the circumstances of the case, however, appear to be exceptional the Minister of the Interior may permit the selection to be made in areas of not less than a quarter-section, or a fractional quarter-section, which may have resulted from the convergence of Meridians in each section affected, and the several parcels of land selected must be contiguous.
>
> Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including the oil well, will be sold to the person or company making such discovery at the rate of $1.00 per acre, and the remainder of the area reserved, namely,

RECORD

1,280 acres, will be sold at the rate of $3.00 per acre. The patent for the land will convey the surface and the petroleum, but will exclude all other minerals.

A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum. . . . .

The patent which may be issued for petroleum lands will be made subject to the payment of the above royalty, and provision will be made therein that the Minister of the Interior may declare the patent to be null and void for default in the payment of the royalty on the sales of the petroleum.

Exhibit 2

5.—The area of land applied for together with the right to purchase the petroleum and natural gas rights and available surface rights should oil in paying quantities be discovered was reserved for Bennetto on the 1st January, 1906. This reservation was extended from time to time because prospecting operations satisfactory to the Minister were being carried on. Exhibit 1 Bennetto assigned his rights to the Northern Alberta Exploration Company Limited and the Respondent is that company's successor in title.

Exhibit 2

6.—The extended reservation was due to expire on the 17th June, 1911, but on the 31st May, 1911, except for certain alterations in the area due to squatters having acquired some of the surface rights within the area Exhibit 2 originally reserved, was extended by P.C. Order No. 1263 until the 17th June, 1913. The Order also extended the right to purchase the petroleum and natural gas rights and available surface rights, should oil or natural gas in paying quantities be discovered, by providing that if such discovery was made within one year the Minister was authorized to sell to the Northern Alberta Exploration Company Limited under the provisions of the old petroleum regulations, all the surface rights and petroleum and natural gas rights within the entire area and by further providing that should the discovery be made after the expiration of the first year and prior to the expiration of the second year the Minister was authorized to sell to the Company the petroleum and natural gas rights under the entire area reserved and a portion of the surface rights reserved.

Exhibit 1
Exhibit 2

7.—By P.C. No. 627 dated the 21st March, 1913, the Northern Alberta Exploration Company Limited, having substantially complied with the conditions of P.C. Order 1263, was authorized to purchase the petroleum and natural gas rights and available surface rights, which the Minister by that Order had been authorized to sell to the Company. Following an application dated the 26th April, 1913, on behalf of the Company a patent in respect of the surface and under rights in the land was issued which contained the following relevant clauses :

Supplementary Document 15 Exhibit 8

. . . . reserving all mines and minerals except natural gas and

petroleum which may be found to exist within, upon or under such lands together with full power to work the same . . . .

To have and to hold the same unto the grantee in fee simple. Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of Our Lord one thousand nine hundred and nine, and that our Minister of the Interior of Canada may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

8.—At the date of the issue of this patent, no royalty was imposed under the regulations although P.C. Order No. 1822 dated the 6th August, 1898, which first established regulations for the disposal of lands in which petroleum had been found contained a provision that a royalty of $2\frac{1}{2}$ per cent. upon the sales of petroleum be paid to the Crown. p. 4,ll.22-27 Exhibit 4

9.—Pursuant to P.C. Order No. 802, dated the 6th June, 1914, the Minister on the 2nd September, 1914, issued supplementary letters patent conveying the right to asphalt which might be upon the lands. Exhibit 3 Exhibit 9

10.—In 1929 an agreement was made between the Dominion Government and the Government of Alberta whereby the natural resources in Alberta were transferred to the Province. The agreement was confirmed by statutes of the Parliament of Canada (Statutes of Canada, 1930, c. 3) the Legislature of Alberta (Statutes of Alberta, 1930, c. 21) and the Parliament of the United Kingdom (20 to 21 Geo. 5 c. 26).

11.—The Agreement transferring the natural resources is set out in The Alberta Natural Resources Act (Statutes of Alberta, 1930, c. 21) and provided by paragraphs 1, 2 and 3 as follows :

1. In order that the Province may be in the same position as the original provinces of Confederation are in virtue of Section 109 of The British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of

RECORD

this Agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payments received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this Agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

By these provisions the Province is subrogated to and has all the rights that the Dominion Crown had at the date of the transfer of the resources.

12.—The statutory provision existing at the commencement of this action relating to the imposition of royalties is contained in subsection (3) of Section 44 of The Provincial Lands Act (Revised Statutes of Alberta, 1942, c. 62, as amended by Statutes of Alberta, 1946, c. 28, s. 4, and by

Statutes of Alberta, 1947, c. 35, s. 6) and reads as follows :— RECORD

> (3) Notwithstanding the terms, conditions and provisions of any mineral lease or mineral sale for which a certificate of title has been issued now subsisting whether made by the Crown in the right of the Dominion of Canada or by the Crown in the right of the Province, and which is subject to the payment of a royalty on the minerals or any of them, the royalty to be computed, levied and collected shall be as now prescribed by the Lieutenant Governor in Council or hereafter from time to time prescribed by him, and shall be payable on any mineral when and where obtained, recovered or produced.

The Lieutenant Governor in Council purported to impose a royalty upon petroleum and natural gas produced upon land required under the provisions of the regulations for the disposal of the petroleum and natural gas rights in provincial lands. p.3,ll.10-17; p. 4, l. 28

13.—The learned trial judge, McBride, J., determined that the inquiry was narrowed down to a proper interpretation of the language employed in the patent. He stated that the real question was whether or not the provisions of the patent were such as to reserve to the Crown the right to impose new royalties in the future, none having been prescribed at the date of the issue of the patent. He held that the *habendum* clause did not give the right to impose or prescribe royalties in the future and found in favour of the Plaintiff. pp. 17–20 Exhibit 8

14.—On appeal to the Appellate Division, O'Connor, J.A., held that the reservation did not give the right to impose royalties in the future and held that there was an outright sale to the Plaintiff without liability for royalty. Alternatively he held that there was no concluded arrangement between the parties for payment of a royalty. W. A. Macdonald, J.A., adopted the reasoning of McBride, J., and agreed that the reservation to the Crown did not give the right to impose new royalties in the future. Parlee, J.A., with whom Ford, J.A., concurred, held that the provisions of the patent expressly and in clear terms reserved to the Governor in Council the right and power to impose and collect a royalty on any petroleum and natural gas produced and sold in the future. pp. 22–25 p.25,ll.17-24 pp. 25–28 pp. 28–34

15.—On appeal to the Supreme Court of Canada, the Court heard argument and reserved judgment. Subsequently the Court made the following order for the re-hearing of the appeal :

> " The Court orders re-hearing of this appeal and directs that the same be placed with the Alberta appeals to be heard during the course of the October term.

RECORD

In particular the Court would like to hear counsel on the following points :

(1) Whether or not the reservation as to royalties interpreted as meaning royalties at any time and from time to time fixed or declared by Order in Council or Regulation is invalid on the ground of uncertainty or any other ground, including the nature or effect of a Regulation under the Dominion Lands Act and whether viewed :

(*a*) as a rent service ;

(*b*) as a rent charge ; or

(*c*) as any other incorporeal right.

(2) Whether the non-payment of royalties or monies so fixed or declared constitutes a valid condition subsequent to the grant in fee simple."

On the re-hearing the Attorney General for Canada, who intervened and filed a factum, was heard in support of the appeal.

pp. 36–53 16.—The learned Judges of the Supreme Court of Canada were all of the opinion that the learned trial judge and the members of the Appellate Division supporting his judgment were in error in holding that the reservation clause had not a prospective effect ; and they all held that the language of the *habendum* clause prescribed a royalty that might in the future be provided by regulations. However, the four Judges who favoured dismissing the appeal did so on the ground that the *habendum* clause or the reservation contained in the patent was void for uncertainty. Rand, J., pp. 44–49 in his reasons for judgment states as follows :—

p. 47, l. 11 By Section 11 of the Dominion Lands Act, 1906, the administration of the lands was entrusted to the Minister of Interior, to be carried out subject to the provisions of the Act and regulations made by order-in-council. What was the nature of these regulations ? They were intended, clearly, to be administrative and so far legislative in character ; but in relation to grants, I am unable to discover any power to introduce by them new incidents of land ownership by reservation or otherwise in the ordinary instrument of conveyance. Conceivably they might regulate from time to time royalties payable on leases or even patented lands prior to the establishment of the province ; but as legislation, from and after that time they could have no application to granted lands or interests ; nor could any such sub-legislation authorize grants creating reservations which, under the existing law of real property, would be invalid.

Interpreting the patent, then, in the light of that law, I am forced to the conclusion that the reservation of royalties purporting to be made is void for uncertainty. p. 47, l. 24

Kellock, J., in his reasons for judgment states as follows : pp. 49–53

While Parliament, as the unitary legislature for the territory in question, could, doubtless, have created estates not then known to the law, it is plain that, apart from such legislation, " the King cannot make law or custom by his grant : " Chitty on Prerogatives of the Crown, p. 386. I find nothing in the above legislation which contemplates disposal of mineral lands so as to create estates therein of a novel character. The question, therefore, in the case at bar is as to whether the provision in the patent, authorizing the grantor to exact " such royalty . . . . from time to time prescribed by regulations of our Governor in Council " upon the petroleum and natural gas, was a valid provision under which an interest remained in the Dominion and passed to the province by virtue of the Natural Resources Act of 1930. The case for the appellant is exclusively rested on this basis and not upon any legislative jurisdiction in either the Dominion or the province apart from the terms of the patent. In my opinion, the provision in question is not effective for such a purpose but is void as repugnant to the grant. p. 49, l. 29

Estey and Cartwright, JJ., agreed with the reasons given by Rand and Kellock, JJ. p. 54

17.—Kerwin, J., delivered a dissenting judgment in favour of the Appellants in which Rinfret, C.J., and Fauteux, J., concurred. He held that the *habendum* clause in the patent was not void for uncertainty and came within the general rule expressed by the maxim " *id certum est, quod certum reddi potest.*" He referred to the case of *Cooper* v. *Stuart* (1889) 14 A.C. 286 and held that the royalty reserved in the present case is certain within the meaning of the rule, pointing out that their Lordships in the *Cooper* v. *Stuart* case had no difficulty in deciding that a reservation comparable to the present reservation was valid. pp. 36–44 p. 42, l. 42 p. 43, l. 5

18.—It is submitted that Rand and Kellock, JJ., erred in holding that the reservation of a royalty in the present case was void for uncertainty and that Kerwin, J., was correct in holding that the reservation was valid within the meaning of the maxim " *id certum est, quod certum reddi potest.*"

19.—The Appellants submit that the judgment of the Supreme Court of Canada is wrong and should be reversed ; that the appeal should be allowed ; that the action should be dismissed and that the Appellants should have judgment on their counterclaim whereby they asked for a declaration of the Crown's rights, for the following among other p. 7,ll.25–30

REASONS

(1) BECAUSE all the judges in the Supreme Court of Canada rightly rejected the grounds upon which the judgments of the trial judge and the Appellate Division were based, and properly held, specifically or by implication, that the reservation in the patent had a prospective effect.

(2) BECAUSE the reservation reserved to the Crown as set out in the *habendum* clause of the patent is not void for uncertainty but is certain within the meaning of the rule as expressed in the maxim " *id certum est, quod certum reddi potest.*" 10

(3) BECAUSE the majority in the Supreme Court of Canada erred in holding that royalties or payments reserved to the Crown in the *habendum* clause of the patent constituted a " rent service," from which such " royalties " differ in many important respects.

(4) BECAUSE the patent was issued under and in compliance with wide statutory powers and therefore the reservation could not be void for uncertainty.

(5) BECAUSE the disposal of public lands in the best interests of the people of Canada is a matter of public policy and a 20 reservation of a royalty to the Crown under statutory authority cannot be defeated by any rule of law which may render transactions between subject and subject void.

(6) BECAUSE the Crown has a prerogative right to dispose of public lands as it may see fit and to retain an interest therein for revenue purposes, and therefore the right to receive royalties is a *jura regalia* which cannot be defeated by a rule of law applicable to transactions between subject and subject.

(7) BECAUSE the reservation contained in the *habendum* clause in the patent issued by the Crown in right of the Dominion 30 was a valid and legally enforceable condition to the grant which from the enactment of the transfer agreement of 1930 became enforceable by the Crown in right of the Province.

(8) BECAUSE the judgment of the minority of the Supreme Court of Canada delivered by Mr. Justice Kerwin was correct and should be followed.

H. J. WILSON.

FRANK GAHAN.

W. Y. ARCHIBALD.

In the Privy Council.

No. 27 of 1951.

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BETWEEN

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CASE FOR THE APPELLANTS

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(A58894)