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 No. 27 of 1951  
 INSTITUTE OF ADVANCED  
 LEGAL STUDIES

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT  
OF CANADA

33491

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 ... INTERVENER.

CASE FOR THE RESPONDENT

RECORD.

1.—This is an Appeal from the Judgment of the Supreme Court of Canada dated the 6th day of February, 1951, dismissing an Appeal from the Judgment of the Appellate Division of the Supreme Court of Alberta dated the 4th day of January, 1950, affirming on an equal division the Judgment of the trial judge, the Honourable Mr. Justice McBride dated the 14th day of August, 1949. In the Appellate Division, O'Connor, J.A., and MacDonald, J.A., were in favour of dismissing the Appeal. Parlee, J.A., and Ford, J.A., were in favour of its allowance. In the Supreme Court of Canada the majority Judgment was the Judgment of Rand, Keelock, Estey and Cartwright, J.J., the Chief Justices Kerwin and Fateux, J.J., dissented. In the Supreme Court of Canada the Attorney General intervened and supported the submission of the Appellant.

2.—The question at issue is whether the Appellant, the Minister of Lands and Mines for the Province of Alberta, is entitled to charge or exact a royalty at such rate as he may deem proper on all oil and gas produced from lands owned by the Plaintiff.

RECORD.

3.—The lands in question originally formed part of the land acquired by the Dominion of Canada from the Hudson's Bay Company and prior to the transfer of natural resources to the Province hereinafter referred to was administered by the Dominion Government under the terms of the various Dominion Land Acts from time to time in force. The relevant sections of the Dominion Land Act, 1908, being Ch. 20 of the Statutes of 1908, are as follows:—

“ 37. Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the Governor in Council: and these regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, insofar as they may be affected under these regulations. 10

“ 76. The Governor in Council may—

“ (κ) make such orders as are deemed necessary 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 any regulations which are considered necessary to give the provisions of this section full effect.” 20

4.—No relevant regulations were made subsequent to the enactment of the Dominion Lands Act of 1908 but at the time when Israel Benneto, the Plaintiff's predecessor in title, made his application for a reservation, the following regulations were in force:

Unappropriated Dominion lands were to be opened to prospecting for petroleum with power to the Minister to reserve for an individual company who had machinery on the land to be prospected an area of 1,920 acres for such period as he might decide. Paragraphs 5, 6 and 8 of the regulation were as follows: 30

Exhibit 5

“ 5. 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, 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. 40

“ 6. 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, and it will be necessary for the  
 “ person operating the location to furnish the Agent of Dominion  
 “ Lands within whose district it is situated, with sworn returns  
 “ monthly, or at such times as the Minister of the Interior may  
 “ direct, accounting for the full quantity of oil obtained and sold,  
 “ and pay the royalty thereon at the prescribed rate.”

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10 By para. 8. “ 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.”

5.—In September, 1905, one Israel Benneto applied for a reservation  
 and Order in Council P.C.W. 263 dated the 31st day of May, 1911, recited  
 that under date of January, 1906, reservation was made under the then  
 petroleum regulations of a tract of land situate at the junction of the  
 Clearwater and Athabasca Rivers in the Province of Alberta to enable  
 Mr. Benneto to carry on prospecting operations and that the reservation  
 20 would expire on June 7, 1911 ; that a number of *bona fide* squatters were  
 in occupation of a number of the River Lots at this point and that in view  
 of the large expense incurred by Mr. Benneto and his company the Minister  
 recommended that a reservation be made for a period of two years from  
 June 7, 1911, of the available petroleum and natural gas rights on the  
 adjoining lands to the total area of 1,920 acres and also a reservation of the  
 surface rights. The Order in Council then provided that should petroleum  
 or natural gas be discovered in paying quantities within the period of  
 one year from the 12th June, 1911, the Minister was authorised to sell to the  
 company under the provisions of the old petroleum regulations all the lands  
 30 contained in the entire area above mentioned both as regards surface,  
 petroleum and natural gas rights, and that if oil be discovered in paying  
 quantities after the expiration of the first year or before June 11, 1913, that  
 the Minister be authorised to sell to the Company the petroleum and natural  
 gas rights under the entire area and a limited amount of the surface.

Exhibit 2

6.—Oil was not discovered in paying quantities but a large sum of  
 money was spent in prospecting and according to the report of the  
 Government engineers, the prospects of discovering oil were favourable.  
 Accordingly Order in Council dated the 21st of March, 1913, after reciting  
 these facts authorised the Minister to sell to the Northern Alberta Explora-  
 40 tion Company Limited, Benneto's successor, the petroleum and natural gas  
 rights under the entire area reserved for them by the Order in Council  
 dated the 31st of May, 1911, at the rate of \$3.00 per acre, subject, however,  
 to such rights as might be established under the provision of the Dominion  
 Lands Act and the regulations by any persons in a position to show that

Exhibit 1

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they had in the meantime squatted upon these lands. No reference whatever was made to royalties.

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No. 16

7.—Benneto was advised of the fact that he was entitled to purchase, under the terms of the Order in Council, and pay cash on the terms of that Order.

Exhibit 8

8.—The patent for the lands subsequently issued granted the lands to the Grantee, Northern Alberta Exploration Company Limited, in fee simple and had added thereafter the following words :

“ Yielding and paying unto us and our successors such  
“ royalty upon the said petroleum and natural gas, if any, from 10  
“ 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 on natural gas as were in force on the 1st day of  
“ September in the year of Our Lord nineteen hundred and nine,  
“ and the Minister of the Interior of Canada made by writing  
“ under his hand declared 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 20  
“ immediately become and be absolutely null and void.”

Exhibit 3

9.—Order in Council P.C. 802 dated the 6th day of June, 1914, recited that Northern Alberta Exploration Company Limited had been permitted to purchase at \$3.00 an acre an area of about 1,296 acres of land and that under this sale the company was permitted to purchase the petroleum and natural gas rights under the entire area together with the available surface rights and that payment had been made in full of the purchase price and patent issued in favour of the company for the rights in question and that since asphalt would appear to be a product of petroleum, the right to which had been patented to the company, that authorisation be granted to issue 30  
to the Patentee Supplementary Letters Patent conveying the right to the asphalt which might be upon such lands.

10.—Such Supplementary Letters Patent were subsequently issued and contained no reservation of any royalty.

11.—The Plaintiff is successor in title of the Northern Alberta Exploration Company Limited and had no knowledge of the reservation in the grant from the Crown until after he acquired title.

12.—No royalty was imposed upon oil and gas by any regulation in force at the time of issue of the patent.

13.—By an agreement dated the 14th day of December, 1929, and made between the Government of the Province of Alberta and the Government of the Dominion of Canada (hereinafter referred to as the “ Transfer Agreement ”) it was agreed :—

10 (A) That the interest of the Crown in all Crown lands, mines, minerals, precious and base, and all royalties derived therefrom within the Province and all sums due and payable for such lands, mines, minerals or royalties, should belong to the Province subject to any trust existing in respect thereof and to any interest other than that of the Crown in the same, and by Section (3) of the Agreement it was further provided that any power or right which by any contract, lease or other arrangements or by any Act of Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under such Act is reserved to the Governor in Council or 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.

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14.—This Agreement was confirmed by the Legislature of the Province of Alberta by Ch. 21 of the Statutes of 1930, by the Parliament of Canada by Ch. 3 of 1930, and by the Parliament of the United Kingdom by The British North America Act, 1930, Ch. 26, and by virtue of these statutes has the force of law.

15.—The Plaintiff had an opportunity of dealing with its petroleum and natural gas rights when a question arose with regard to the rights of the Crown to impose a royalty under the terms of the patent. The Plaintiff's solicitors communicated with the Deputy Minister of Lands and Mines, who advised them that the position taken by the Government was that it claimed a right to impose such royalties on petroleum and natural gas produced from the Plaintiff's lands as might be from time to time determined.

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16.—Section 62 of The Land Titles Act at the relevant date was as follows :—

“ 62. Every certificate of title granted under this Act shall  
 “ (except in case of fraud wherein the owner has participated or  
 “ colluded) so long as the same remains in force and uncanceled  
 “ under this Act be conclusive evidence in all courts as against  
 “ His Majesty and all persons whomsoever that the person named  
 “ therein is entitled to the land included in the same, for the estate  
 “ or interest therein specified, subject to the exceptions and  
 “ reservations mentioned in Section 61, except so far as regards

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“ any portion of land by wrong description of boundaries or parcels  
 “ included in the certificate of title and except as against any  
 “ person claiming under a prior certificate of title granted under  
 “ this Act or granted under any law heretofore in force relating to  
 “ titles to real property in respect of the same land ; and for the  
 “ purpose of this section that person shall be deemed to claim  
 “ under a prior certificate of title who is holder of, or whose claim  
 “ is derived directly or indirectly from the person who was the  
 “ holder of, the earliest certificate of title granted, notwithstanding  
 “ that the certificate of title has been granted upon any transfer or 10  
 “ other instrument. (R.S.A. 1922, C. 133, s. 58).”

17.—One of the exceptions and reservations mentioned in Section 61 was any subsisting reservations or exceptions contained in the original grant of land from the Crown.

p. 20 18.—The trial judge held that the words of the patent should be interpreted as restricting the power of the Governor in Council to the collection of such royalties as had been prescribed by regulation up to the date of its issue and that the patent did not confer any right upon the Crown to impose royalties in the future.

p. 24  
p. 26 19.—In the Appellate Division O'Connor, J.A., and Macdonald, J.A., 20 held that since oil was not discovered in paying quantities and that since part of the surface was sold at \$3.00 instead of \$1.00 an acre, the sale was not governed by the regulations and was an outright sale which, under the terms of the Order in Council of the 21st of March, 1913, was free from royalty and that therefore the Provincial authorities had no right to impose or collect a royalty. O'Connor, J.A., also held that since Benneto had bought in reliance upon the terms of the above-mentioned Order in Council there was no “ contract or other arrangements ” for the imposition of royalty which could pass to the Province. Parlee, J.A., with whom Ford, J.A., p. 24  
p. 25 concurred, held that the sale was under the regulations and that these 30  
p. 33 regulations gave the power to the Crown to impose a royalty in the future.

p. 47 20.—In the Supreme Court of Canada the judgment of Rand, J., and Kellock, J., with whom Estey, J., and Cartwright, J., concurred, held that the reservation was void for uncertainty ; that the grant was made under the terms of the Dominion Land Act and that Act conferred no power upon the Governor in Council to create reservations which under the existing law of real property would be invalid. Rand, J., also held that the regulations even as legislation could have no application to lands or interests granted after the formation of the Province. Kerwin, J., with whom the Chief Justice and Fauteux, J., concurred, held that the words of the patent 40  
p. 41 imposed a valid condition subsequent.

21.—The Respondent submits that the Judgment of the Courts below is right and should be affirmed for the following amongst other

### REASONS

- (1) BECAUSE the purported reservation of royalty is void for uncertainty, repugnant to the terms of the grant, in violation of the rule against perpetuities and beyond the powers conferred upon the Governor in Council by the Dominion Lands Act.
- 10 (2) BECAUSE the power of the Governor General to impose royalties ended once the patent was granted for land within the Province.
- (3) BECAUSE the sale was an outright sale to which the regulations dealing with royalty had no application and the Crown was precluded by the terms of the transaction from imposing any future royalty.
- 20 (4) BECAUSE so far as the lands of the Plaintiff were concerned the Crown had no interest in the minerals therein nor in the royalties derived therefrom nor was there any sums due or payable for such royalties which could pass to the Province under the Transfer Agreement.
- (5) BECAUSE there was no power or right reserved to the Governor in Council or other officer of the Government of Canada by any contract, lease or other arrangements or by any Act of the Parliament of Canada or by any regulation made under any such Act which could pass to the Province of Alberta.
- 30 (6) BECAUSE upon the proper interpretation of the patent having regard to the terms of the regulations and the history of the transaction the only royalty which was contemplated by the regulations or which could be imposed under any patent issued was such royalty as had been prescribed before the patent was issued.
- (7) BECAUSE if the words of the grant should be interpreted as creating a condition subsequent for the breach of which the grant may be avoided then such words do not constitute a "reservation or exception contained in the original grant from the Crown" and the Respondent is entitled to rely upon its certificate of title.

S. W. FIELD.

In the Privy Council.

No. 27 of 1951.

ON APPEAL FROM THE SUPREME COURT OF  
CANADA.

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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 ... .. INTERVENER.

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CASE FOR THE RESPONDENT

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