11, 1953

No. 27 OF 1951.

In The Supreme Court of Canada

ON APPEAL FROM THE SUPREME COURT OF ALBERTA
APPELLATE DIVISION

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*

FACTUM OF THE RESPONDENT

H. J. WILSON, EDMONTON
Solicitor for the Appellant.

MESSRS. GOWLING, MACTAVISH, WATT, OSBORNE AND HENDERSON, OTTAWA,
Agents for the Appellants.

MESSRS. FIELD, HYNDMAN, FIELD AND OWEN, EDMONTON,
Solicitors for the Respondent.

MESSRS. SMART & BIGGAR, OTTAWA,
Agents for the Respondent.

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(Plaintiff) *Respondent,*

FACTUM OF THE RESPONDENT

I. STATEMENT OF FACTS

1. THIS IS AN APPEAL by the Defendants from a judgment of the Appellate Division of the Supreme Court of Alberta dated the 4th day of January 1950. This judgment on an equal division of the Court dismissed an appeal by the Defendants from the judgment of The Honourable Mr. Justice Boyd McBride dated the 13th day of August 1949 by which it was declared that the Government of the Province of Alberta had no right to demand, impose or exact payment of any royalty with respect to the petroleum and natural gas produced from the lands described in the pleadings.

2. Order in Council P.C. No. 893, dated the 31st day of May 1901, Exhibit 5, Appendix, provided (a) that all unappropriated Dominion Lands in Manitoba, North West Territories and the Yukon Territory should on or after the 1st day of July 1901 be open to prospecting for petroleum by any individual or company desiring to do so, and (b) contained provisions for the purchase of the surface and the payment of royalty.

3. Amending Orders in Council were passed from time to time including provisions for prospecting for natural gas and the consolidation of these Orders in Council and the regulations made pursuant thereto are found in Exhibit 7, Appendix. The important provisions of these regulations are,

(1) All unappropriated lands were open for prospecting for petroleum and natural gas up to an area of 1,920 acres.

(2) If oil were discovered in paying quantities by a prospector and such discovery established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres would be sold to the person making such discovery at the rate of $1.00 per acre and the remainder of the area reserved 1,280 acres would be sold at the rate of $3.00 per acre.

(3) A royalty at such rate as might from time to time be specified by Order in Council would also be levied and collected upon the sale of petroleum and the patent issued for petroleum lands was to be made subject to the payment of such royalty.

4. Order in Council P.C. No. 1263, dated the 31st day of May 1911, Exhibit 2, Appendix, recited that on the 1st day of January 1906 a tract of land at the junction of the Clearwater and Athabasca Rivers had been reserved under the late petroleum regulations to Israel Bennetto to enable him to carry on prospecting operations thereon; that the reservation would expire on the 17th day of June 1911, and in the meantime Bennetto had assigned his rights to Northern Alberta Exploration Company Limited. The recital then continues to the effect that this company had applied for a renewal of the reservation and it was then discovered that a number of *bona fide* squatters had taken possession of the River Lots included in the lands reserved to Bennetto.

5. The Order in Council then provides that in view of the large sums of money expended by the Company and Mr. Bennetto in its operations, the available petroleum and natural gas rights on an adjoining tract of land be reserved to the company for a further period of two years from the 7th day of June 1911 together with a reservation of the surface rights of this area for a period of one year and the reservation of the surface rights of a specified portion for a period of two years.

6. The Order in Council then provides,

"Should oil or natural gas be discovered in paying quantities within the period of one year from the 17th of June 1911 the Minister also recommends that he be authorized to sell to the company under the provisions of the old Petroleum Regulations all the lands contained within the

entire area above mentioned both as regard to the surface and petroleum and natural gas rights and if oil in paying quantities is discovered after the expiration of the first year but before the 17th of June 1913, he be authorized to sell to the company the petroleum and natural gas rights under the entire area reserved and the surface rights of that portion lying between the Southerly boundary of the McMurray Settlement and Horse Creek."

7. A further Order in Council, P.C. No. 627, dated the 21st of March 1913, Exhibit 1, Appendix, recited that representations had been made to the Department of the Interior that the company had incurred an expenditure of about $80,000 in an effort to discover petroleum and natural gas on the lands in question; that two holes had been drilled, one to a depth of 1,475 feet and the second to a depth of 1,200 feet; that at a depth of 940 feet a good showing of oil strata was obtained; but that as better results were anticipated at greater depth nitro-glycerine was not used to shoot the well; that in October 1912 an inspection of the location in question was made by the Inspecting Engineer of the Department of the Interior who reported that he was satisfied that the sum of at least $75,000 must have been expended on and in connection with drilling operations on the said property.

8. The order in Council then went on to recommend,

"That in view of the very large expenditure which the Northern Alberta Exploration Company, Limited, has incurred for the purpose of demonstrating the existence or otherwise of petroleum in the McMurray field, which demonstration must be of very great public benefit, and in view of the fact that the location first reserved for the application was lost to him through the encroachment of squatters, the Minister recommends that the above company be permitted to purchase the petroleum and natural gas rights under the entire area reserved for them by the Order in Council dated the 31st of May 1911, together with the available surface rights thereof, at the rate of $3.00 an acre, subject, however, to such rights as may be established under the provisions of the Dominion Lands Act and the regulations, by any persons in a position to show that they have in the meantime squatted upon these lands.

9. By subsequent Order in Council, P.C. No. 802, dated the 6th of June 1914, Exhibit 3, Appendix, recited that as asphalt would appear to be a product of petroleum, the right to which has been patented to the company, supplementary Letters Patent be issued conveying the right to the asphalt in and upon these lands. The patent issued for the asphalt has no reservation of royalty.

10. The patent issued by the Crown contained the following provisions:

> "Saving and reserving, nevertheless, unto Us, Our Successors and Assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that are now or may be hereafter found on or under, or flowing through or upon any part of the said Parcels or Tracts of Land, also reserving thereout and therefrom all rights of Fishery and Fishing and occupation in connection therewith upon, around and adjacent to the said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of Fishery and Fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights; also 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 and for this purpose to enter upon, use and occupy the said lands or so much thereof and to such extent as may be necessary for the effectual working and extracting of the said minerals, also reserving the rights, if any, acquired under the Dominion Lands Act or any regulations made thereunder by any person or persons who may have squatted upon the said lands.
>
> 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."

11. The title issued by the Land Titles Office to Northern Alberta Exploration Company, Limited was subject to the reservations and conditions under the Land Titles Act and the following reservation:

> "Reserving thereout all mines and minerals with the

exception of petroleum and natural gas with full power to work the same."

The Respondent, the Company's successor in title held a title similarly worded and had no knowledge of the terms of the patent at the time of the acquisition of their interest.

12. No royality was imposed on either oil or natural gas by the Dominion Government.

12. (a) The Donminion Lands Act, Statutes of Canada 1908, Ch. 20, in force at the time of the making of the Orders in Council, Exhibits 1 and 2, contains the following Sections:

"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."

"76. The Governor in Council may —

"(k) 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;"

13. By an agreement dated the 14th day of December 1929 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 and provided 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 this Agreement and subject as therein otherwise provided, 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 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 payment 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 terms 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 insofar 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 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."

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.

14. The Plaintiff had an opportunity of dealing with its petroleum and natural gas rights and a question arose with regard to the rights of the Crown to impose a royalty under the patent and the Plaintiff's solicitors communicated with the Deputy Minister of Lands and Mines, who advised them of the position taken by him on behalf of the Government; that the Government claimed a right to impose such royalties on the petroleum and natural gas as might be from time to time determined. (See A.C. p. 8).

II. JUDGMENTS

15. The learned Trial Judge found it unnecessary (A.C. p. 17) to consider any of the issues other than the proper interpretation of the patent. He held following the judgments in *Majestic Mines Limited* v. *The Attorney General of Alberta* 1941, 2. W.W.R., p. 353, affirmed by the unanimous judgment of the Appellate Division 1942, 1 W.W.R., p. 321, and the Supreme Court of Canada 1942 S.C.R., at p. 402, that before the Crown could exact a royalty the language of the grant must be unambiguous and clearly impose the obligation and that an obscure and ambiguous reservation in a grant would be considered and interpreted strictly against it. Applying this principle, he held that the words of the grant "such royalty on the said petroleum and natural gas, if any, from time to time prescribed by regulations of our Governor in Council" did not give a power to impose royalties in the future.

16. At the opening of the appeal, counsel for the Appellant applied for leave to adduce further evidence and tendered the documents marked 12, 13 and 14 in the Appendix to the Appeal Case. Counsel for Respondent opposed the application but submitted that if it were granted he should have the right to also tender documents 15, 16 and 17. The Court permitted the documents to be tendered subject to argument as to their admissibility. Counsel for the Respondent objected to the admissibility of documents 14 and 15.

17. The documents admitted were:

(a) Supplementary Document 12, a report of Neil Cameron, a mining expert employed by Northern Alberta Exploration Company Limited.

(b) The report referred to in Exhibit 1, of O. S. Finnie, Inspecting Engineer for the Department (Supplementary Document 17), in which he reports that no oil or gas had been struck at least in commercial quantities, but at various intervals there had been some indication of oil and gas but only in quantities to encourage further prospecting.

(c) Supplementary Document 15, a letter from J. T. Huggard to the Deputy Minister, offering to purchase the petroleum and natural gas rights and surface rights as set out in the Order in Council passed on the 21st of March 1913, and that he was prepared to pay cash as soon as the Government was in a position to give Title.

(d) Supplementary Document 16, a letter from Mr. Rowatt, the Controller, acknowledging receipt of this letter and referring to the Order in Council which authorized the Department to sell to Northern Alberta Exploration Company Limited "the petroleum and natural gas rights under the area described in the Order in Council dated the 31st of May 1911" at the rate of $3.00 an acre subject to such rights as may be established under the provisions of the Dominion Lands

Act and the regulations by persons who are in a position to show that they have in the meantime squatted upon these lands.

18. The documents to which objection was taken were:

(a) Supplementary Document 13, a report of H. H. Rowatt, Controller of Mining Lands, Yukon Branch;

(b) His requisition for a patent. (Supplementary Document 14).

19. Mr. Justice O'Connor held that Supplementary Documents 13 and 14 were not admissible. (A.C., p. 24, line 29). Mr. Justice W. A. Macdonald made no reference to them. Mr. Justice Parlee, with whom Mr. Justice Frank Ford concurred, held with some doubt that they should be admitted as they tended to show whether oil had been discovered in paying quantities and why the patent of the company was issued, and in the *Majestic Mines* case, the original file of the Department of the Interior was produced at the hearing of the appeal and Mr. Justice Clarke quoted from the requisition for the patent. (A.C. p. 33, line 13).

20. On the merits of the appeal, Mr. Justice O'Connor (now Chief Justice O'Connor) held that the petroleum and natural gas regulations did not apply because oil and gas were not found in paying quantities and the purchase price of $3.00 an acre for the whole area, not $1.00 for the first 640 acres and $3.00 for the balance as set forth in the regulations, that the sale was, therefore, an outright sale under the power conferred upon the Governor by Section 76 of the Dominion Lands Act and he rejected the submission that the words "if any" modified "petroleum and natural gas" and held that they modified the word "royalty". He adopted the following quotation from the judgment of Clarke, J.A., in the *Majestic Mines* case:

> "Order in Council of May 31st, 1901 (Exhibit 7 in this case) provides for opening of land for prospecting and selling to the prospector in the case of discovery of oil and provides for royalty in such case. This provision does not appear to extend to oil lands purchased and held without regard to operations otherwise than provided by this order and it appears to be a very reasonable explanation for the use of the words "if any" in the reservation that the grant may apply to lands in respect of which there is a royalty (as provided in Exhibit 7 of this action) as well as to lands not so held in respect to which there is no royalty."

21. The learned Judge further held that if there was no sale outright then there was no concluded arrangement for the imposition of royalty which would pass to the Province of Alberta under the Natural Resources Act as interpreted in *In re Timber Regulations.* (Cited in his judgment as 1934 3 D.L.R. 43, but correctly cited as 1943 1 D.L.R. 43).

22. Mr. Justice Macdonald held that there was an outright sale; that the words "if any" in the patent modified the word "royalty" and not the words "petroleum and natural gas." He relies upon the judgment of the Supreme Court of Canada in the *Majestic Mines* case which adopted the citation from the judgment of Mr. Justice Clarke cited above, and further held that the rights acquired under grant and freehold made for a definite purchase price are altogether different from rights acquired under prospector's license. He further relies upon the judgment of the Supreme Court of Canada to the effect that "the imposition of a royalty on lands or goods of a subject by Executive Order could be justified only by the clearest and most definite authority from the competent legislative body." (See A.C. 25 to 28).

23. Mr. Justice Parlee, with whom Mr. Justice Frank Ford concurred, holds that the words of the patent are broad enough to include future royalties; that sale was subject to the regulations and suggests that there was evidence that oil was found in paying quantities.

III. ARGUMENT

24. *As to the Admissibility of the Documents.*

The Respondent submits that the judgment of the Honourable Mr. Justice O'Connor is clearly right. Mr. Rowatt's views as to the interpretation of the Order in Council can have no evidential value as against the Respondent. There is nothing in his report which indicates that oil was in fact found in paying quantities and any such inference is expressly contradicted by the report of Mr. Finnie, the Inspecting Engineer for the Department. (Supplementary Document 17).

25. Mr. Justice Parlee relies in his judgment on the fact that the Appellate Division in the *Majestic Mines* case looked at the Department file and the requisition for the patent but in that case the Court itself sent for the file and the documents were admitted without objection.

26. *On the Merits.*

The Respondent relies on the judgments of the Trial Judge, of Mr. Justice O'Connor, and of Mr. Justice W. A. Macdonald in the Appellate Division, and submits:

(1) That it is clear upon the documents that the sale was not a sale under the petroleum regulations.

(a) That oil and gas were not discovered in paying quantities.

(b) The price was not the price provided by the regulations, being $3.00 an acre for the whole tract instead of $1.00 an acre for the first 640 acres and $3.00 an acre for the balance.

(c) The operative Order in Council, Exhibit 1, expressly makes the sale subject only to the rights of squatters and not to any regulations. The correspondence between Mr. Rowatt and the representative of Northern Alberta Exploration Company Limited, (Supplementary Documents 15 and 16) confirm this view.

(2) The wording of the reservation in the patent is, at its best, ambiguous, and having regard to the background and history of the transaction, it is clear that Mr. Justice Clarke's explanation of the insertion of the words in the patent cited above in the *Majestic Mines* case, is the true explanation.

27. The Respondent relies upon the judgment of the Supreme Court of Canada in the *Majestic Mines* case to the effect that the imposition of a tax on the subject could be justified only by the clearest and most definite authority from the competent legislative body.

The words "if any" in the patent clearly modify "royalty" and not "petroleum and natural gas." The Appellant's contention that there should be a finding that oil and gas had been found in paying quantities is inconsistent with his proposed interpretation of the words "if any" as applying to "petroleum and natural gas."

28. *The Appellant further submits* that the Transfer of the Natural Resources Agreement did not pass any power to the Provincial Government to impose a royalty upon the oil and gas of the Appellant. The powers transferred are those exercisable by contract, lease or other arrangement, or by any regulation made under any Act. There was, as Mr. Justice O'Connor points out, no concluded arrangement whereby such a royalty could be imposed and if the power is to be found, it must be found in the patent.

29. It is submitted that 'patent' is not included under the term 'arrangement' and that if it had been intended to include rights under patent, the agreement would have expressly so provided. (*In re Timber Regulations* 1934, 1 D.L.R., p. 43, and in the Privy Council 1935, A.D. 184).

30. The Appellant also relies upon Sections 61 and 62 of the Land Titles Act, Ch. 205, R.S.A. 1942, which, at the relevant time, were as follows:

> "61. (1) The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to,—
>
> (a) any subsisting reservations or exceptions contained in the original grant of the land from the Crown;
>
> (b) all unpaid taxes, including irrigation and drainage district rates;
>
> (c) any public highway or right-of-way or other public easement, howsoever created upon, over or in respect of the land;
>
> (d) any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same;
>
> (e) any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner;
>
> (f) any right of expropriation which may by statute be vested in any person, body corporate, or His Majesty;
>
> (g) any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the Province."

"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 uncancelled 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 any portion of land by wrong description of boundaries or parcels included in the certificate or 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 other instrument. (R.S.A. 1922, C. 133, s. 58)."

The Act was amended at the 1949 Session by adding after the word "exceptions" in sub-paragraph (a) the words "including royalties" but this is common ground and does not affect the rights of the parties.

31. The word "reservation" has different meanings in different contexts. It is submitted that in the case at Bar the reference to the royalty cannot be a reservation since there already is a reservation in express terms followed by a grant in fee simple; and that it must be interpreted as a condition of the grant to which the certificate of title is not subject; that in any event a power to impose royalty in the future cannot be a reservation and the Respondent and his predecessors in title were entitled to rely upon the terms of the certificate of title.

DATED at Edmonton, Alberta, this 30th day of March, A.D. 1950.

S. W. FIELD, K.C.,
Of Counsel for the (Plaintiff) Respondent.