In the Supreme Court of Canada

On Appeal From the Supreme Court of Alberta Appellate Diviston

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

(*Intervenant*)

Factum of the Attorney General of Canada

H. J. WILSON, Edmonton, Solicitor for the Appellants.

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.

F. P. VARCOE, Solicitor for the Attorney General of Canada.

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1950

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PART I

STATEMENT OF FACTS

1. The respondent is the registered owner under Title 181 T 24 (Ex. 11) registered in the North Alberta Land Registration District of an estate in fee simple of and in:

"As to under rights, Legal Subdivisions 14, 15 and 16 in Section 3, all that portion of Section 10, lying to the South of Clearwater River and Hanging Stone Creek, Legal Subdivisions 1, 7 and 8 of Section 9, all in Township 89, Range 9, West of the 4th Meridian, containing 659·2 acres, more or less; reserving thereout all mines and minerals with the exceptions of petroleum and natural gas."

2. The respondent is also registered as owner under Title 182 T 24 as aforesaid of the petroleum and natural gas underlying a further 661·3 acres.

3. Both titles were issued on the registration in the North Alberta Land Titles Office of the Crown Patent (Exhibit 8) dated Aug. 25th, 1913, and registered Sept. 2nd, 1913.

4. The said titles were issued pursuant to the then Section 43 of The Land Titles Act (now unchanged in wording Section 61 of R.S.A., c. 205) providing that

"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) Etc."

5. On the said Certificates of Title 181 T 24 and 182 T 24 the terms of the said Section 43 were endorsed.

6. The patent (Ex. 8) leading to the issue of the said two titles, so far as appears to be material to the issues reads:

"To all to whom these Presents shall come Greeting:

Whereas the Lands hereinafter described and Dominion Lands within the meaning of the Dominion Lands Act:

And Whereas the Northern Alberta Exploration Company Limited hereinafter called the grantee has applied for a grant of the said lands and after due investigation has been found entitled to such grant in the terms herein embodied;

Now Know Ye, that by these Presents We do grant unto the grantee all those Parcels or Tracts of Land including petroleum and natural gas right situated, lying and being in the Eighty-ninth Township, etc.

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 now are 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."

7. Following the making of the Agreement as to the transfer of the Natural Resources to Alberta (Statutes of Canada 1930 c. 3; Alberta 1940 c. 21) the Government of Alberta (Appeal Case p. 8) contended that it had the right to impose such royalties on the petroleum and natural gas underlying the said lands as might be from time to time determined and that the orders in council referred to in paragraph 23 of the Statement of Defence applied to the lands in question.

The respondent thereupon brought this action against the Attorney General and the Minister of Lands and Mines seeking a declaration that the Lieutenant Governor in Council is not entitled to impose royalties as aforesaid.

The respondent also claimed alternatively an order rectifying the Patent by striking out all reference to royalties.

To this Statement of Claim the appellants filed a Statement of Defence contending that the Orders in Council of the Lieutenant Governor in Council imposing royalties applied, and counterclaiming for a declaration that the Crown in the right of Alberta is entitled to impose a royalty on the lands in question.

8. The Statement of Claim (pp. 1-4) asserts:

(a) in paragraph 1 the respondent's title to surface;

(b) in paragraph 2 the respondent's title to under rights;

(c) in paragraphs 3 and 4 the grant to the respondent's predecessor in title and the reservations and exceptions contained in the Patent and the habendum clause;

(d) in paragraph 5 that at the time of the issue of the patent and on September 1st, 1909, there was no royalty imposed on oil and gas, nor was there any power or right in the Crown to impose such royalty;

(e) in paragraphs 6 and 7 that the appellant Minister of Lands and Mines asserts that the Provincial Orders in Council of May 28, 1941 (O.C. 725/41); Aug. 2nd, 1941 (O.C. 1162/41); May 3rd, 1943 (O.C. 659/43) and March 30th, 1948 (O.C. 348/48) apply to the petroleums and natural gas in question;

(f) in paragraph 8 that by virtue of the terms of the Patents and the regulations in force and by virtue of the Certificate of Title the Lieutenant Governor in Council is not entitled to the royalty to which he asserts a claim.

9. The appellants in their Statement of Defence (pp. 4-7)

(a) in paragraph 4 admit that as of the date of the issue of the patent and as of Sept. 1st, 1909, there was no royalty actually imposed on oil and gas,

(b) But in paragraph 5 plead that as of Sept. 1st, 1909 and at the time of the issue of the patent and thereafter the Lieutenant Governor in Council had the right and power to impose a royalty,

(c) in paragraph 8 deny that the Lieutenant Governor in Council is not entitled under the Patent and the regulations to demand and receive the royalty claimed,

(d) in paragraphs 10-16 plead the respondent's claim of Title leading to the grant of the patent reserving a royalty the amount of which was to be determined in the future; that the grant was made pursuant to regulations in force on Sept. 1st, 1909, the date referred to in the patent (as quoted in para. 16),

(e) in paragraph 17 plead that the regulations set out (i.e. those found as Exhibit 5 as amended at various times as shown by Exhibit 6) were in full force and effect,

(f) in paragraph 18 plead Sections 61 and 62 of the Land Titles Act.

(g) in paragraphs 19-23 plead the Natural Resources Agreement and the Provincial Orders in Council made following the effective date of that agreement imposing royalties on petroleum and natural gas,

(h) in paragraph 23 counter claim for a declaration that the Lieutenant Governor in Council has the right to exact royalty as claimed.

10. The action was tried by Boyd McBride, J. who (for reasons found at pp. 17-20) made a declaration that the Government of Alberta had no right to the

royalties claimed on the ground that the patent was not sufficiently explicit to justify the claim and he relied on the decision in the Majestic Mines case (1941-2, W.W.R. 353; 1942 S.C.R. 402).

11. An appeal to the Alberta Appellate Division was dismissed on an even decision of the court.

O'Connor, J. A. (now Chief Justice) held (for reasons stated pp. 22-25) that there was an outright sale with no mention of royalties in any admissible document leading up to the sale; that the Governor in Council had the right to sell and the learned Judge relies on the obiter decision of Clarke, J. A. in the Majestic Mines case to the effect that the provisions as to royalty contained in the regulations (Ex. 5) had no application to cases such as that under discussion where no provision for royalty had been made at the time of the sale.

12. W. A. Macdonald, J. A. also favoured the dismissal of the appeal being of the opinion that the decision in the Majestic Mines case governed. The learned Judge's reasons are found at pp. 25-28.

13. Parlee, J. A. with whom Ford, J. A. concurred would have allowed the appeal for reasons stated at pp. 28-34. Reliance is placed on the language of the patent clearly reserving to the Governor in Council the right at any time in the future to exact a royalty. The words of the patent, viz. "such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations" in the opinion of the learned Judges "look to the future and have a prospective outlook."

14. An appeal was taken to this Court and heard as between the original parties.

The order for re-hearing reads:

> "The Court orders a 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.
>
> 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; or
>
> *(b)* as a rent charge; or
>
> *(c)* as any other incorporeal right.

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

On re-hearing of the appeal the Attorney General for Canada has been given leave to intervene.

PART II

POINTS FOR ARGUMENT

15. It is assumed that the regulations found as P. C. 893 dated May 31st, 1901 (Ex. 5 in Appendix to Appeal Case) as amended by the subsequent orders in council found as Exhibit 6 apply to the grant in question either because the grant was actually made pursuant to those regulations or because they were incorporated therein by reference.

16. On that assumption the points for argument would seem to be:

(1) What is the nature or effect of a regulation under The Dominion Lands Act?

(2) Having in mind such nature or effect and whether the reservation of royalty is viewed as a rent service, rent charge or as any other incorporeal right, is such reservation in this case invalid on the ground of uncertainty?

(3) Is the non-payment of royalties or moneys fixed or declared by order in council or regulation a valid condition subsequent to the grant in fee simple?

PART III

ARGUMENT

17. (1) THE NATURE OR EFFECT OF A REGULATION UNDER THE DOMINION LANDS ACT.

The regulations were made pursuant to the power given by Sec. 47 of The Dominion Lands Act, R.S.C. c. 54 as amended by Statutes of Canada 1892 c. 15 reading:

"47. Lands containing coal and other minerals, including lands in the Rocky Mountain 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: Providing, however, that no disposition of mines or mining interest 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."

This section is found unchanged in wording in R.S.A. 1906 c. 55, Sections 159 and 160.

It is under this Section 47 of The Dominion Lands Act that the regulations were made which are applicable to the issue pursuant to the Orders in Council of May 31st, 1911 (Ex. 2) and March 21st 1913 (Ex. 1) of the patent Exhibit 8.

The regulations above referred to are it is submitted within the limits of the powers thus delegated to the Governor in Council and have the binding force of law.

Institute of Patent Agents vs. Lockwood 1894 A.C. 347 at pp. 355-8.

Maxwell Statutes (9th Ed.) p. 305

The Governor in Council also had the powers set out in R.S.C. 1886 c. 54 s. 90 *(h)* reading:

"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;"

Section 76 (*k*) of the 1908 Statute relating to Dominion Lands (c. 20) is in substantially the same words.

It is submitted that the regulations were within the powers given by the statute, and that the regulations applied to the sale.

Alternatively, even if the regulations did not apply, it is submitted that the sale was within the power given by the said Section 90(*h*) or 76(*k*) and that the regulations were incorporated in the contract by reference.

18. (2) HAVING IN MIND SUCH NATURE OR EFFECT AND WHETHER THE RESERVATION OF ROYALTY IS VIEWED AS A RENT SERVICE, RENT, RENT CHARGE OR AS ANY OTHER INCORPOREAL RIGHT, IS SUCH RESERVATION IN THIS CASE INVALID ON THE GROUND OF UNCERTAINTY.

The question would seem to be whether the fact that it was contemplated that the amount of the royalty was left to be determined in future renders the reservation of the royalty void for uncertainty. The answer it is submitted, is that it does not; that the maximum applies that:—

"Certum est quod certum reddi potest"

Broom Legal Maxims (10th Ed.) p. 422
Co. Litt. 45(b); 96(a); 142(a)
Daniel v. Gracie 6 Q.B. 145; 115 E.R. 56
Cooper v. Stuart 14 A.C. 286
Lord v. Sydney etc. XII Moore 472 at 499; 14 E.R. 991 at 1001
Cheshire, Modern Real Property (5th Ed.) 533, where reference is made to Lord Cranworth's statement of the position in:
Clavering v. Ellison, 7 H.L. Cas. 707 at 725; 11 E.R. 282 at 289
as follows:—

"I consider that from the earliest times one of the cardinal rules on the subject has been this: that when a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

19. (3) IS THE NON-PAYMENT OF ROYALTIES OR MONEYS FIXED OR DECLARED BY ORDER IN COUNCIL OR REGULATION A VALID CONDITION SUBSEQUENT TO THE GRANT IN FEE SIMPLE.

The payment required is at common law a royalty in the sense of jura regalia reserved to the Crown and is an incorporeal right.

A.G. for B.C. v. R. 68 D.L.R. 106; 1922 3 W.W.R. 269.

20. Such a royalty is a rent enforceable by distress.

Daniel v. Gracie 6 Q.B. 145; 115 E.R. 56.
R. v. Westbrook 10 Q.B. 178; 116 E.R. 69 at 79.
Re Humberstone Coal Co. Ltd. 1925—2 W.W.R. 68; 1925—3 D.L.R. 154.

21. It may be asked then whether the Crown because it has, under the circumstances of this case, reserved to itself the right to terminate the estate for non-payment of royalties on a day in the future which may be beyond the period fixed by the rule against perpetuities, has brought the transaction within that rule.

The rule against perpetuities is stated by Jessel, M.R. in London and South Western Railway Co. v. Gomm, in Ch. D. at p. 581 in these words:

"I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well-known book on Perpetuities at page 164. He

cites with approbation this passage from Mr. Sanders' Essay on Uses and Trusts: 'A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity.' Then Mr. Lewis adds these words: 'In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.'"

22. It is doubtful whether the Rule against perpetuities applies to the grant by a subject (as distinct from the Crown) of a fee simple defeasible on condition subsequent.

On the one hand are the cases:

Hollis Hospital Trustee re Hagues' Contract—1899 2 Ch. 540.
In Re Da Costa 1912 1 Ch. 337
In re Macleay 1875 L.R. 20 Eq. 186
Dunn v. Flood 25 Ch. D. at 632-3.
Gray Perpetuities (4th Ed.) 334-336

On the other hand are:

A. G. v. Cummins 1906 1 Ir. R. 406.
Walsh v. W. 1927 N.I. p. 1
Challis "Real Property" 3rd Edition—pp. 187-217
1 Jarman on Wills (7th Ed.) 349
Williams Vendor & Purchaser (4th Ed.) pp. 691-2.
See 25 Hals. (2) p. 102 Art. 189. especially note (t) p. 103
Knightsbridge Estates Trust Ltd. v. Byrne 1938 1 Ch. 741 at 757-763

It is submitted on principle that the rule does not apply to the case at bar for the reasons set out in the list of authorities in the second group just cited.

23. The case under discussion however is not one between subject and subject. The grantor is the Crown and it is the Crown that is entitled to avoid the title and re-enter. It is submitted that the Perpetuities Rule can have no application in

such a case. That rule was laid down in Equity on grounds of public policy to promote the free alienation of land.

Vol. 7 Holdsworth History of English Law pp. 193-228
Duke of Norfolk's Case 2 Ch. Cas. p. 1; 22 E.R. 931
Cadell v. Palmer 1 Sim. 173 (Gray p. 161); 57 E.R. 544; 1 Cl. & F. 372; 6 E.R. 956.

It is submitted that there is no ground in principle on which the rule should apply to the Crown.

"Every acre of English soil and every proprietory right therein have been brought within the compass of a single formula, which may be expressed thus:—Z tenet terram illam de . . . domino Rege. The King himself holds land which is in every sense his own; no one else has a proprietory right in it; but if we leave out of account this royal demesne, then every acre of land is 'held of' the King."

Pollock & Maitland History Vol. 1, p. 232.
A.G. Ont. v. Mercer 8 A.C. 767 at pp. 771-2.

Historically, the rule against perpetuities grew up to limit the legal and equitable disposition of tenures held of the Crown. The chief reason behind the rule is that "it is inexpedient, both from the point of view of the land owners and the public, that land 'should be as in mortmain', tied up in the hands of a succession of limited owners."

Holdsworth History of English Law, Vol. 7, p. 202. The question of mortmain or perpetual ownership is not relevant to the allodial ownership of land vested in the Crown. It is submitted that the Crown may, subject to the provisions of any relevant statute, carve out any tenancy reserving as part of its allodial interest, such interest as the Crown may deem proper.

The Crown as allodial owner is no more bound by such a rule as that against perpetuities, it is submitted, than it is bound by statutes, unless named therein.

The question of the applicability of the rule against perpetuities to the estate of the Crown has never been decided.

Cooper v. Stuart, 14 A.C. 286
Gray on Perpetuities (4th Ed.) p. 309

It is submitted that on principle it should be held that the rule does not apply. As stated by Williams in 51 Law Quarterly Review at p. 670, it is a rule which was:—

"invented to meet and which is confined to the case of executory limitations and devises first validated in our law by the Statutes of Uses and Devises of Henry VIII."

24. Conveyances in any event made under the authority of a statute as this conveyance clearly was, no matter from what standpoint it be examined, are not subject to the rule.

Manchester Ship Canal Co. v. Manchester Race Course Co. 1900 2 Ch. 352.

25. It is submitted that the issue before the Court is whether or not the Crown has the right to impose a royalty, not whether the Crown has the right to declare the Grantee's estate forfeit for failure to pay the royalty. Assuming that the Rule against Perpetuities applies against the Crown and assuming that it applies to the provision in this instance respecting revesting of title in the Crown, the Crown may still impose a royalty and may still have the ordinary remedies open to a party possessing a royalty for the recovery of the same. The Crown reserves a right to royalty. The crown also reserves a right to declare the entire grant void for non-payment of the royalty. The invalidity of the provision respecting forfeiture does not relieve the Grantee from the obligation to pay royalty. The obligation to pay royalty remains. It is the validity of this obligation that the Court is asked to decide.

26. In summary, it is submitted that:

(a) the regulations were within the powers given by the statute and the regulations applied to the sale. Alternatively, even if the regulations did not apply, the sale was within the powers conferred by the Act and were incorporated in the contract by reference.

(b) the reservation of royalty is not void for uncertainty, the maxim "Certum est quod certum reddi potest" being applicable.

(c) the reservation in the Crown of the right to terminate the estate of the Grantee for non-payment of royalty does not offend the Rule against Perpetuities. Here there is the grant of an estate in fee simple defeasible on condition subsequent and the Rule is not applicable because:

(i) the rule against perpetuities was invented by the Judges in the 17th Century to restrict the creation of future interests unknown to the common law. The validity of grants of estates in fee simple defeasible on condition subsequent was established before the Rule was laid down.

(ii) the most common instance of a grant of an estate in fee simple defeasible on condition subsequent occurs in mortgages. Their validity in that instance is established.

(d) the Rule against Perpetuities does not bind the Crown because:

(i) the Rule is only applicable to estates in land and not to the allodial interest of the Crown. Here the Crown has reserved the right to forfeiture as part of its allodial interest.

(ii) the Rule is a rule of public policy directed against private restraints on the alienation of land and there is no ground in principle on which the rule should apply to the Crown.

(e) the Rule does not apply to a conveyance made under authority of statute.

(f) in any event, the issue before the Court is not whether the Crown has the right to declare the Grantee's estate forfeit for failure to pay royalty, but rather whether the Crown has the right to impose royalty, and it is submitted that the Crown clearly possesses that right.

GEORGE STEER