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 on Behalf of the Appellants

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

MESSRS. FIELD, HYNDMAN, FIELD and OWEN, Edmonton,
Solicitors for the Respondent.

MESSRS. GOWLING, MACTAVISH, WATT, OSBORNE and HENDERSON, Ottawa,
Agents for the Appellants.

MESSRS. SMART & BIGGAR, Ottawa,
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PART I

Statement of Facts

This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta where on an equal division of the Court (Mr. Justice G. B. O'Connor (now Chief Justice) and Mr. Justice W. A. Macdonald for dismissal, and Mr. Justice Parlee, with whom Mr. Justice Frank Ford concurred for allowance of the appeal) the judgment of the learned trial Judge, Mr. Justice Boyd McBride, was upheld. The learned trial Judge gave judgment for the Plaintiff, declaring that the Province of Alberta has no right to demand, impose or exact payment of any royalty on petroleum and natural gas owned and held by the Plaintiff in or upon 1,320.5 acres described in certificates of title No. 181-T-124 and No. 182-T-124, thus allowing the Respondent's claim and dismissing the Appellants' counterclaim.

It was agreed between the parties that certificates of title No. 181-T-124 (Exhibit 11) and No. 182-T-124 are identical in terms, and that the chain of titles is the same and that the transactions leading up to the issue of each certificate of title follow the same course and that only photostatic copies of certificate of title No. 181-T-124 and the chain of titles which preceded it (Exhibit 10) need be put in as exhibits at the trial.

The title to natural gas and petroleum (Exhibit 11) now held by the Plaintiff had its origin in an application for a reservation of a tract of land made in September, 1905, by Israel Bennetto. The application was made by Mr. Bennetto under regulations governing the disposition of Dominion lands in the Province of Manitoba, the North West Territories and the Yukon Territory containing petroleum established by P.C. Order No. 893 dated the 31st day of May, A.D. 1901 (Exhibit 5), and amended by P.C. Orders numbered 1899, 513, 1638, 1393 and 2287 (Exhibit 6) and made pursuant to the provisions of section 47 of the Dominion Lands Act of 1892 which 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."

The regulations for the disposition of Dominion lands in the Province of Manitoba, the North West Territories and the Yukon Territory containing petroleum, established by P.C. Order No. 893 (Exhibit 5) as amended under which the application of Mr. Bennetto was made, contained on the date of Mr. Bennetto's application the following clauses which apply to the right given Israel Bennetto to purchase the petroleum and natural gas rights and available surface rights in the tract of land reserved for him. (See consolidation—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, 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 will also be levied and collected from 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."

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 Israel Bennetto on the 1st day of January, A.D. 1906. (See P.C. Order No. 1263 (Exhibit 2.))

There were subsequent alterations in the area reserved for Israel Bennetto due to squatters having acquired certain of the surface rights, but by P.C. Order No. 1263 (Exhibit 2) the area was definitely defined, the right previously granted to the applicant to purchase the lands designated and under rights reserved was extended until the 17th day of June, A.D. 1913, and the Minister was authorized to sell lands reserved to the Company under the provisions of the old petroleum regulations.

Israel Bennetto assigned his rights to the Northern Alberta Exploration Company Limited shortly after his application for the reservation was granted, (see P.C. Order No. 627 (Exhibit 1)) and the Plaintiff in this action is the successor in title from the Northern Alberta Exploration Company Limited.

On the 21st day of March, A.D. 1913, P.C. Order No. 627 (Exhibit 1) authorized the sale to the Northern Alberta Exploration Company Limited of the petroleum and natural gas rights under the entire area reserved for the Company by the Order in Council dated the 31st day of May, A.D. 1911, together with the available surface rights thereof at the rate of $3.00 per acre and accordingly the patent to the lands in question (Exhibit 8) was issued to the Northern Alberta Exploration Company Limited.

The patent contained the following relevant clauses:

" . . . 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."

At the date of the issue of the patent (Exhibit 8), no royalty was imposed under the regulations although P.C. Order No. 1822 dated the 6th day of August, A.D., 1898, (Exhibit 4) which first established regulations for the disposal of lands in which petroleum had been found contained a provision that a royalty of 2½% upon the sales of petroleum be paid to the Crown.

Subsequent to the date of issue of the patent (Exhibit 8), P.C. Order No. 802 dated the 6th day of June, A.D., 1914, (Exhibit 3) authorized the Minister to issue supplementary letters patent to the patentees conveying the right to asphalt which might be upon the lands conveyed in the original patent (Exhibit 8) and accordingly, on the 2nd day of September, A.D. 1914, a patent was issued for the said asphalt (Exhibit 9).

By the Agreement transferring the natural resources set out in The Alberta Natural Resources Act, being chapter 21 of the Statutes of Alberta, 1930, it is provided by paragraph 1 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 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 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."

Also paragraph 3 provides:

"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.

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, being chapter 62 of the Revised Statutes of Alberta, 1942, as amended by section 4 of chapter 28 of the Statutes of Alberta, 1946, and by section 6 of chapter 35 of the Statutes of Alberta, 1947, and reads as follows:

"(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."

PART II

Statement Setting Out in What Respect the Judgment Appealed from is Alleged to be Erroneous

The Appellants contend that the judgments of the learned trial Judge and of those members of the Appellate Division upholding it are erroneous in holding:

(1) That the grant contained in the patent to the Northern Alberta Exploration Company Limited, subsequently transferred to the Plaintiff, did not reserve to the Governor in Council the right to impose any royalty on petroleum and natural gas in the future.

(2) That such right was not transferred to the Province under the terms of the Natural Resources Transfer Agreement.

PART III

Argument

1. The Appellants contend that under the terms of the relevant petroleum regulations and the patent issued granting title to the petroleum and natural gas in or under the area of land in question, the Governor in Council had a clear right to exact or impose a royalty on the petroleum and natural gas, title to which is held by the Plaintiff, at any time in the future and that such right passed to the Province under the Natural Resources Transfer Agreement.

The learned trial Judge determined that the inquiry was narrowed down to a proper interpretation of the language employed in the patent (Exhibit 8). At page 18 of the Appeal Case he states:

> "In my opinion, the inquiry narrows down almost entirely to the proper interpretation of the language employed in the Patent, ex. 8. This instrument follows in the main a well known and customary form for such instruments, but when it deals with and makes provision for a possible royalty there is an appearance of loose draftsmanship on the part of those responsible for its issue, as will be seen from the three phrases which I shall mention in a moment."

The learned trial Judge seemed to consider that he was bound by the decision rendered in the case of **Majestic Mines Limited v. Attorney General for Alberta, (1941) 2 W.W.R., 353.** At pages 19 and 20 of the Appeal Case he states:

> "There is a marked similarity between the issue in the case at bar, and the issue as to the second parcel dealt with in Majestic

Mines Limited vs. Attorney General for Alberta (1941) 2 W.W.R. p. 353. There the judgment at trial of O'Connor, J. (now J.A.) is to the effect that if a grantor wishes to reserve any rights over land granted, he must do so expressly, and accordingly he held that Alberta could not impose a royalty on petroleum produced from the second parcel in question. The principle there relied on is well established law, and I take it that it extends to and includes the proposition that if a grantor fails to be sufficiently explicit with respect to a reservation or reddendum set out in his grant, he has then no complaint when he finds that, as he cannot derogate from that grant, the obscure reservation or reddendum will be construed and interpreted strictly as against him in favour of the grantee. Before the Crown can here exact a royalty in my opinion the language of the grant must be unambiguous and must clearly impose the obligation. O'Connor's J. judgment was affirmed in unanimous judgments of the Appellate Division (1942) 1 W.W.R. p. 321 and of the Supreme Court of Canada (1942) S.C.R. p. 402.

The words of the Patent, including the reddendum clause under consideration in the Majestic Mines case, are quoted in full at p. 404 of the report of the Supreme Court judgment supra, and as pointed out by Hudson, J. (p. 405) the real question there 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. That appears to be the identical position here, there having been no existing royalty prescribed, as already pointed out.

A little ago I mentioned three phrases as to royalties. In the Patents under consideration in the Majestic Mines case two of them are to be found, (1) as to coal in parcel 1, the East half of 25, the phrase used is, 'a royalty at such rate as may from time to time be specified by our Governor General in Council,' (1942) 1 W.W.R. at p. 324; (2) as to oil and gas and other minerals in parcel 2, the North East Quarter of Section 26, it is, 'the royalty, if any, prescribed by the regulations of our Governor in Council,' (at p. 326); and (3) in the case at bar it is, 'such royalty . . . if any, from time to time prescribed by regulations of our Governor in Council.'

Having carefully reviewed the various exhibits and read and considered the cases and relevant statutory provisions cited in argument, in my view, the issue here is determined in favour of the plaintiff by the decision in the Majestic Mines case, supra."

Mr. Justice O'Connor (now Chief Justice) adopts this reasoning as to the interpretation of the terms of the patent where he states at page 25 of the Appeal Case:

"As to the provision in the patent for royalty, I adopt the words of Clarke, J.A. in the Majestic case (1942) 1 W.W.R. at page 326:

> 'Order in Council of May 31, 1901 . . . provides for opening lands for prospecting and selling to the prospector in case of discovery of oil and provides for a royalty in such a case. *This provision does not appear to extend to oil lands purchased and held without regard to operations otherwise than as 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 12 *as well as to lands not so held in respect of which there is no royalty.*'

I do not accept the argument of counsel for the defendants that the words 'if any' modify 'petroleum and natural gas'. If no petroleum or natural gas is found, there would be no royalty and therefore no need to provide for this contingency."

Mr. Justice W. A. Macdonald states at pages 27 and 28 of the Appeal Case:

> "I agree with the learned trial judge that the real issue in this case is 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 and this issue under the reasoning in the Majestic Mines case should be decided in favour of the plaintiff."

It is submitted that for the reasons outlined in the judgment of Mr. Justice Parlee concurred in by Mr. Justice Frank Ford that he is correct when he states at page 30 of the Appeal Case:

> "With respect I am unable to agree with the conclusion reached by the trial judge. In my opinion, the language of the patent here clearly reserves to the Governor in Council the right at any time in the future to exact a royalty on the petroleum or natural gas produced and sold from the land granted."

and at page 33 where he states:

> "It is my opinion that this right and power reserved to the Governor in Council by the patent was transferred to the Province by the Natural Resources Transfer Agreement . . ."

2. The facts of this case can be clearly distinguished from the facts of the Majestic Mines case.

The learned trial Judge and the members of the Appellate Division who agreed with him hold that the issue must be determined in favour of the Plaintiff by reason of the decision in the **Majestic Mines** case. On the other hand, the Appellants contend that an analysis of the judgment

of the various members of the Court who determined that case will show that it is really a decision in favour of the Appellants in this action and clearly distinguishable from the present case.

In the **Majestic Mines** case the relevant words of the patent were "Yielding and paying unto Us and Our Successors the royalty, if any, prescribed by the regulations of our Governor in Council . . ."

In this case the words of the patent (Exhibit 8) are "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 . . ."

There are two clear distinguishing marks in these two reservations:

(1) The words "from time to time" are omitted in the **Majestic Mines patent.**

(2) In the **Majestic Mines** case the words "if any" follow the word "royalty" whereas in this case the words "if any" follow the words "petroleum and natural gas".

It is suggested that the learned trial Judge failed to note this clear-cut distinction in that the words "if any" in this case must relate to the words "petroleum and natural gas" whereas in the **Majestic Mines** case they relate to the word "royalty". (See Appeal Case, page 20.) This, of course, makes a vast difference in the meaning to be applied to the reservation.

It would seem that Mr. Justice O'Connor (now Chief Justice) would have held differently if the words "from time to time" had been included in the patent under consideration in the **Majestic Mines** case. At page 358 he states:

> "The net result of these various orders in council appears to be that on March 11, 1908, when the land was granted to Canada West Coal Co., Ltd., there was no regulation in force prescribing a royalty on petroleum. If the provision in the order in council of May 31, 1901, Ex. 12, providing for a royalty 'at such rate as may from time to time be specified by order in council,' had continued in force it could be fairly said that the order in council reserved the right to prescribe royalties from time to time, but this provision was rescinded by the order in council of December 22, 1902 (Ex. 14) and subsequent orders in council.
>
> The neat question for determination is whether 'the royalty prescribed by the regulations' means prescribed at the date of the grant or prescribed 'from time to time.' Counsel for the plaintiff points out that the Crown grant of the other parcel, Ex. 2, which is dated five days earlier, expressly says 'as may from time to time be specified by our Governor in Council.'

> I interpret the words 'the royalty, if any, prescribed by the regulations' as the royalty prescribed at the date of the grant and as no royalty or petroleum was then prescribed I hold the lands are not subject to a royalty on petroleum. I reach this conclusion on the principle that if the grantor wishes to reserve any rights over the land granted he must do so expressly."

The words "from time to time" have been interpreted as having a prospective meaning.

See Stroud's Judicial Dictionary at page 781.

See Bryan vs. Arthur, 11 A. & E. 117, 173 E.R. 354.

In the latter case Williams, J. at page 358 interpreted the words "from time to time" as meaning "as occasion may arise".

3. It is also submitted that a careful reading of the judgment of the Appellate Division on appeal on the **Majestic Mines** case indicates that in reality it is a judgment in favour of the contention of the Appellants in this case.

It is to be noted that in the judgment of Mr. Justice Ford in the Appellate Division (**1942**) **1 W.W.R., 321,** at page 332 he was inclined at first to hold that the words "if any" had a prospective meaning, but on reflection decided against that construction because the patent had included coal and a royalty had been imposed by the Dominion Crown in relation to coal. Therefore he concluded that the words "if any" might be applied to minerals other than petroleum.

It may be pointed out that in the **Majestic Mines** case one quarter-section was granted in respect of the sale of mineral rights in coal lands and the other quarter-section was granted in respect of the sale of all minerals other than gold and silver. In the present case, the sale of the minerals was restricted specifically to petroleum and natural gas and all orders in council leading to the issue of the patent clearly indicate that the sale was restricted to this purpose. This fact further distinguishes the case from the **Majestic Mines** case as indicated in the judgment of Mr. Justice Ford where on page 332 he states:

> "Before the reargument of the appeal and the production of the files I was of the opinion that the patent to the north-east quarter of sec. 26, dealt, not with the sale of mineral rights in coal lands, but with the sale of all minerals other than gold and silver in lands of which the surface rights had been patented or entered for or otherwise disposed of and the mining rights in which had been reserved but which were considered to contain minerals other than coal. In respect of this latter class no royalty had, at the time of the issue of the patent, been prescribed in respect of any mineral, and I was of the opinion that it was necessary and sufficient, in order to reserve a royalty on whatever mineral or minerals are recovered, to provide as has been done for the

payment of 'the royalty, if any prescribed,' and that in order to give some meaning to the words of reservation must be construed as reserving such royalty as might from time to time be prescribed by order in respect of any mineral recovered.

I was therefore of the opinion that the Governor General in Council had the right or power to provide by regulation for the imposition, levying and payment of a royalty on any mineral recovered, and that this power is now vested in the province to be exercised in accordance with the Natural Resources Transfer Agreement which is to be found in the schedule to 20-21 Geo. V. (Imp.), ch. 26, and in the statutes of Alberta, 1930, ch. 21.

It is clear, however, from the file that the application for this patent was made for mining rights in land containing coal other than anthracite for which payment was made of $7 per acre, being $10 per acre less $3 fixed as the ruling price for the surface rights which had been disposed of to a homesteader, and in respect of which the royalty of 10 cents per ton was the only royalty prescribed under the order-in-council of May 19, 1902 (Ex. 13) already dealt with in respect of the east half of 25. See clause 11 of Ex. 13 as amended by order-in-council of August 25, 1902 (Ex. 15).

The intention of the grant seems therefore to have been to reserve only the royalty on coal, the reservation being to the same effect as in respect of the east half of 25."

The judgment of Mr. Justice Ewing on page 336 in which Harvey C.J. concurred, indicates that if words such as we have in the patent issued in this case (Exhibit 8) were included in the patent dealt with in the **Majestic Mines** case, he would have held that there was a prospective right to impose a royalty. At page 336 he states as follows:

"The patent grants to the grantee its successors and assigns 'all minerals other than gold or silver which may be found to exist within, upon or under' the said lands. The Crown released to the grantee 'all rights and powers heretofore reserved to the Crown in so far as the same relate to or in any wise affect such minerals.' Then follows the habendum clause with the following reservation:

'Yielding and paying unto Us and Our Successors the royalty, if any, prescribed by the 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 minerals or any of them. . . . '

It is admitted by counsel for both parties that at the time this patent was issued there were no royalties prescribed with respect to petroleum or oil, but a royalty was prescribed with respect to coal. It is then necessary to examine the patent in order to determine whether or not the Crown by the terms of its patent, lost all right to impose royalties in the future. The language used in the patent and above quoted seems to me to have a present rather than a prospective outlook and purpose. It is argued that the use of the words 'if any' points to the opposite conclusion. The grant includes all minerals other than gold and silver. One of these other minerals, viz., coal, was at that time subject to royalty, but the others were not so subject. In this situation the words 'if any' may quite consistently be used. Further, I think that if the Crown or any other vendor wishes to reserve rights over land which is being sold, such reservation must be expressly stated. Apt words to carry out the intention which is alleged by the appellant are to be found in Crown grants. It is pointed out that the patent of the east half of sec. 25 (being the other parcel of land dealt with above in this case) reserves a coal royalty in the following words:

> 'Rendering therefor yearly and every year unto Us and Our Successors a royalty at such rate per ton on all coal taken out of the said lands as may from time to time be specified by our Governor General in Council. . . . '

These words are clear and unequivocal and are contained in a patent issued only five days before the patent in question here was issued. I agree with the conclusion reached by the learned trial Judge ((1941) 2 W.W.R. 353) that the grantee of the mines and minerals other than gold and silver took the same subject only to such royalties, if any, as were prescribed at the time of the grant."

It will be noted that the judgment of Mr. Justice Ewing was adopted by Mr. Justice Hudson in delivering the judgment rendered in the Supreme Court of Canada. **Attorney-General for Alberta v. Majestic Mines Ltd., (1942) S.C.R. 402.** At page 404 Mr. Justice Hudson stated as follows:

"As pointed out by Mr. Justice Ewing in the Court below,

> 'the grant includes all minerals other than gold and silver. One of these other minerals, viz., coal, was at that time subject to royalty, but the others were not so subject. In this situation the words 'if any' may quite consistently be used.'"

and at page 405 he states:

> "I agree with the statement of Mr. Justice Clark. The rights acquired under a grant in freehold made for a definite purchase price, as in the present case, are altogether different from rights which are acquired under a prospector's license."

It is submitted that Mr. Justice O'Connor (now Chief Justice) and Mr. Justice Macdonald erred when they held that the words "if any" in the patent were related to the word "royalty" and not to the words "petroleum and natural gas." The words "if any" should be given their natural meaning in the context and they are naturally related to the words "petroleum and natural gas." In any event their judgments do not explain or give any meaning to the words "from time to time."

For the reasons given, the words are not ambiguous and should be given their clear and unmistakable meaning, namely, that the *habendum* clause enables the Crown to impose a royalty upon petroleum and natural gas at any time in the future.

4. If any ambiguity does exist then it is submitted that the *habendum* clause should be interpreted strictly in favour of the Crown and against the grantee.

The learned trial Judge, following the views expressed by O'Connor J. in the **Majestic Mines** case, *supra*, states at page 19 of the Appeal Case:

> "The principle there relied on is well established law, and I take it that it extends to and includes the proposition that if a grantor fails to be sufficiently explicit with respect to a reservation or reddendum set out in his grant, he has then no complaint when he finds that, as he cannot derogate from that grant, the obscure reservation or reddendum will be construed and interpreted strictly as against him in favour of the grantee."

It is to be noted that in the judgment of Hudson J. in **Attorney General for Alberta vs. Majestic Mines Limited (1942) S.C.R. 402** at page 405, he made the following reference to the argument of Mr. Gray in that case:

> "It was argued by Mr. Gray on behalf of the appellant that the grant from the Crown must be construed favourably to the Crown. In so far as this is a rule of construction, it could only operate in a case of ambiguity and, in my opinion, there is no ambiguity here."

It would appear that Mr. Justice Hudson inferentially adopted the well-known rule of construction that a Crown grant is to be interpreted strictly in favour of the Crown and against the grantee if the grant is ambiguous.

See Beal's Cardinal Rules of Legal Interpretation, 3rd Edition at pages 186 and 187.

In Feather vs. The Queen 6 B. & S. 257, 122 E.R. 1191 at page 1201 it is stated by Cockburn, C. J.:

"It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown. The rule is nowhere better expressed than in the clear and perspicuous language of Lord Stowell in the case of the Rebeckah (1 Ch. Rob. 227, 230). He there says, 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments, are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.'"

In **Thompson vs. Fraser Companies Ltd. (1930) S.C.R. 109 at page 115** it is stated:

"Furthermore, it is a rule of interpretation of Crown grants of this character that they shall be construed most favourably to the Crown; wherefore it should follow that the statement of erroneous distances, tending to reduce the excepted area, upon the inset of the plan accompanying the Saunders grant, ought ought not to control the interpretation of the exception as derived by express reference to the Prince William grant, by which the excepted lots were constituted and defined, and extend from the river by ground measurement 40 chains farther."

See also Halsbury's Laws of England, 2nd Edition, Volume 6 at page 571.

5. It will thus be seen in this case that although the Dominion had not imposed a royalty on petroleum and natural gas at the time the patent was issued, it had undoubtedly the right to do so at that time or at any prospective time in the future. In other words, it had a right to levy a royalty at any time and from time to time, and this was the

situation at the time the resources were transferred to the Province by the Natural Resources Transfer Agreement (**20-21 Geo. V (Imp.) ch. 26, and in the Statutes of Alberta, 1930, ch. 21**). The Natural Resources Transfer Agreement by its terms specifically preserved this right and passed it on to the Province. The true purport and intent of the Transfer Agreement was that the Province was to be placed in the same position as the other provinces and was to have the same rights as the Dominion. Paragraph 3 of the Agreement states:

> "Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to . . . mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council . . . may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time. . . ."

This power or right has been exercised by the Province under the terms of Order in Council No. 725/41 dated the 28th day of May, A.D. 1941, and has also been preserved and exercised by the Legislature. (O.C. No. 348/48. See Appeal Case, page 3.)

6. The fact that titles have been issued by the Province to petroleum and natural gas without any specific reservation of royalties to the Crown does not affect the situation because by the terms of section 61 of The Land Titles Act, being chapter 205 of the Revised Statutes of Alberta, 1942, these reservations are implied and it is not necessary to make special mention in the certificate of title of such reservations. Section 61 in part states 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;"

Every certificate of title issued by the Province has a stamp on the title (see Exhibit 11) stating that the land or mines and minerals are subject to this implied provision which is applicable in this case and which gives notice to the registered owner that his land or mines and minerals are subject to subsisting reservations or exceptions.

The fact that the Respondent did not know of the reservation of the royalties in the grant from the Crown until it had acquired title is of no consequence. Such knowledge must be imputed to the Respondent by virtue of the provisions of section 61 of The Land Titles Act, *supra*.

It was so held in the case of **Ball v. Gutschenritter (1925) S.C.R. 68.** Duff, J. (as he then was) states at page 75:

". . . by s. 60 of the Saskatchewan Land Titles Act, C. 67, R.S.S. 1920:

'Any certificate of title granted under the Act, shall, 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.'

As Lord Haldane says, in Grand Trunk Ry. Co. v. Robinson (1), the law imputes to people who are subject to it the duty of knowing its principles, and purchasers of land in Saskatchewan registered under the Land Titles Act there, must have their rights determined on the footing that such purchasers act with knowledge of this provision of that enactment. Knowledge, generally, of the provisions of statutes and orders in council affecting land titles in that province must be imputed to them. That is to say, the rights of parties to dealings in lands must be determined on the footing that such knowledge exists; the purchaser must, for example, be assumed to know that any title to land acquired in the ordinary way by homestead entry since 1889, embracing, admittedly, much the greater part of the Crown granted agricultural land of the province, is subject to precisely the same reservations affecting fishing and minerals as those affecting the respondents' title, and to be aware of the enactments of the Irrigation Act. For the same reason, knowledge must also be ascribed to both parties of the fact that, in the ordinary course the precise character of such reservations can be ascertained by inspection of the documents in the Land Registry."

As previously pointed out, the original grant (Exhibit 8) specifically contained a reservation of royalties which may be imposed by the Dominion Crown or by the Provincial Crown after the Transfer Agreement.

7. There can be no doubt that a reservation under section 61 of The Land Titles Act includes a royalty payable to the Crown.

It has been held that a reservation does not necessarily have to be part of the thing *in esse*, but may be a new thing, e.g., a rent. If a rent can be said to be a reservation, surely a royalty is in the same category.

See Doe d. Douglas v. Lock (1835) 2 Ad & E. 705 at pages 743 and 744; 111 E.R. 271 at page 287.

Humberstone Coal Co., Ltd. (1925) 2 W.W.R. 68 at pages 71 and 72.

B. & B. Royalties v. Minister of National Revenue (1940) Ex. C.R. 90 at page 92.

Halsbury's Laws of England, Second Edition, Volume 22 at page 603.

Williams' Canadian Law of Landlord and Tenant, 2nd Edition at page 168.

MacSwinney on Mines, Fifth Edition at page 123.

Halsbury's Laws of England, Second Edition, Volume 10 at page 297.

Halsbury's Laws of England, Second Edition, Volume 20 at page 109.

It is to be noted that section 61 of The Land Titles Act was amended by section 2 of chapter 56 of the Statutes of Alberta, 1949,—

(a) by striking out the words "unless the contrary is expressly declared", where the same occur in subsection (1);

(b) by adding immediately after the word "exceptions," where it occurs in paragraph (*a*) of subsection (1), the words "including royalties".

8. It is submitted that Mr. Justice O'Connor (now Chief Justice) erred when he stated at page 24 of the Appeal Case:

> "On the admissible evidence, I have come to the conclusion that there was an outright sale because (1) oil and gas was not found in paying quantities so as to comply with the Petroleum Regulations, and (2) the purchase price was $3.00 an acre, for the whole area, not $1.00 for the first 640 acres as required by the Petroleum Regulations."

(1) The evidence is all to the effect that the patent was issued under and pursuant to the petroleum regulations:

(a) The recital to Exhibit 1 states that the reservation was made under P.C. Order No. 893 dated May 31st, 1901, (Exhibit 5).

(b) Exhibit 2 recites:

> ". . . reservation was made under the late petroleum regulations. . ."
>
> ". . . 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. . ."

(c) Exhibit 3 dealing with the Order in Council recommending the granting of title to asphalt recites the sale to the Company of land ". . . which land had originally been reserved for petroleum prospecting purposes under the

provisions of the regulations approved by Order in Council dated 31st May, 1901, as amended by subsequent Orders in Council."

(2) Under section 76 (k) of Chapter 20 of the Statutes of Canada, 1908, the Governor in Council was given power to make such orders as are necessary to carry out the provisions of the Act according to the true intent thereof and to meet any cases which arise and for which no provision is made in the Act.

It is submitted that if the Governor in Council did depart in any particular from the regulations, he was authorized to do so under this provision but that did not mean that the other relevant provisions of the regulations would not be applicable.

This is borne out by the Requisition for Patent (Supplementary Document 14) where on page 2 thereof it is stated:

"The patent should make provision for the payment of a royalty at such rate as may from time to time be specified by Order in Council, on the sales of petroleum and natural gas, . . ."

This provision is in the exact terms of the regulation and indicates an intention that the provisions of the regulations in so far as they were applicable should be observed.

(3) The Plaintiff in this action is bound by the royalty reservation contained in the patent regardless of whether it was made under the regulations or not.

Even if Mr. Justice O'Connor (now Chief Justice) is correct in stating that there was an outright sale of the petroleum and natural gas, nevertheless it was made subject to the reservation set out in the *habendum* clause of the patent. No objection was made by the grantees to the form of the patent which was issued on August 25, 1913. No evidence has been adduced to indicate that they sought at any time a rectification of the patent. In fact, the evidence is all to the effect that the grantees accepted the patent in the terms of the grant.

It is difficult to understand the concluding paragraph of the judgment of Mr. Justice O'Connor (now Chief Justice) where he states on page 25 of the Appeal Case:

"If I am wrong in holding that there was a sale outright I find that on the admissible documents the minds of the parties were not ad idem. Bennetto and his company applied to purchase without liability for royalty. If Mr. Rowatt recommended the sale in the belief that royalty would be payable, then in any event there was no concluded arrangement for royalty which would pass to the Province of Alberta under the Alberta Natural Resources Act (c. 21, Canada, 1930) as interpreted in re Timber

Regulations (1934) 3 D.L.R. 43 and Anthony v. Attorney General (1943) 3 D.L.R. 1."

It may be said if the minds of the parties were not *ad idem*, then there was no binding contract, and if so, the grantees might be entitled to a rescission of the contract and return of the purchase moneys. No such claim is made nor is there any claim for rectification of the patent. Mr. Justice Parlee in his judgment states at page 33 of the Appeal Case:

"No evidence was submitted which would entitle the plaintiff to rectification of the patent."

It is suggested that at this late date the Northern Alberta Exploration Company Limited, the grantees, could not claim a rescission or rectification of the patent and by its action is estopped from asserting any such claim. In any event, no such right could possibly accrue to the Plaintiff in this action. They acquired only such title as the Northern Alberta Exploration Company Limited had and nothing more and not being privy to any contract with the Crown in the right of the Dominion, they would have no right of action against the Crown in the right of the Dominion or the Crown in the right of the Province, its successors under the Natural Resources Transfer Agreement.

9. The Appellants further submit that the Natural Resources Transfer Agreement of 1930 quoted herein is an agreement, the true intent and purpose of which was to place the Province in the same position as the original provinces of Confederation by virtue of section 109 of The British North America Act, and that reading the Agreement as a whole it is clear that the Province was to be placed in the same position as and given the same powers as the Dominion had prior to the Agreement. If the Respondent's argument is adopted, the Province would not have the right which the Dominion undoubtedly had prior to the Agreement to provide for a royalty under the terms of the *labendum* clause in the patent. It is submitted that the cases previously referred to herein holding that if there is any ambiguity in a grant that it should be resolved in favour of the Crown as against the grantee are equally applicable to the transfer of the grant, including the royalty reserved which was effected by the Natural Resources Transfer Agreement under the Act. The same principle should be applied to the interpretation of the provisions of the Natural Resources Transfer Agreement and any ambiguity resolved in favour of the Crown.

The Appellants submit that under paragraph 3 of the Natural Resources Transfer Agreement there is no doubt that the Province has the right to enforce and carry through any right which the Dominion had prior to the passing of the Agreement. Under that paragraph it is provided that:

"3. Any . . . right, which, by . . . other arrangements . . . relating to . . . royalties hereby transferred . . . is reserved to the

Governor in Council . . . may be exercised by such officer of the Government of the Province as may be specified. . . ."

In the case of **Reference re Refund of Dues Paid Under S. 47 (f) of Timber Regulations, 1933, S.C.R., 616,** Duff, C. J., referring to paragraph 2 of the Agreement states on page 625:

"The subject of the clause comprises two classes of arrangements, (1) contracts 'to purchase or lease any Crown lands, mines or minerals,' and, (2) 'every other arrangement whereby any person has become entitled to any interest therein as against the Crown'.

It is quite impossible, of course, to contend that the second class includes only arrangements which are strictly contracts, because if that had been the purpose of the clause, the word 'contract' would have been used, instead of 'arrangement,' to describe the kind of transactions falling within it.

Then, is the statutory system, under which the homestead entrant becomes entitled to the rights which the statute conditionally gives him, an 'arrangement,' within this second class? It would not be misleading, though, perhaps, not technically accurate, to speak of the provisions of the statute as an offer, and the performance of the conditions as an acceptance, and the resulting statutory rights as rights arising from the offer so made and so accepted. This is, we repeat, not a precise legal description, of what takes place, but at least it may be stated that, if this statutory system under which these rights arise, involving, as it does in its working, co-operation between the entrant, in the performance of the prescribed statutory conditions, and the Crown and the officers of the Crown, in recognizing the resulting statutory rights of the entrant, and giving effect to them, is not an 'arrangement' or does not involve arrangements of such a nature as to bring it within the second class, then the scope of that class, except in so far as it comprehends transactions which are simply and strictly contracts, embraces only an extremely narrow field. We think the language of the clause is altogether too explicit to justify such a restriction of its scope. It seems to us that the character of the arrangements contemplated is clearly defined by the adjectival phrase 'whereby any person has become entitled to any interest therein as against the Crown'; and that these words should be construed in their ordinary sense.

As to the term 'arrangement' itself, comment seems unnecessary. It clearly extends to the transaction or series of transactions, by which the entrant becomes entitled, first, to his homestead, and afterwards to his Crown grant; as well as to the transacttion by which he acquires his rights under a permit."

It is clear from this judgment that the Court construes other arrangements in the widest sense, including a Crown grant, and therefore it would apply to the patent issued to the Northern Alberta Exploration Company Limited with the royalty reservation included therein. This arrangement was transferred to the Province under the terms of the Natural Resources Transfer Agreement contained in The Alberta Natural Resources Act. This decision was upheld on appeal, **1935, A.C., 184.**

In the case of **Anthony et al v. The Attorney-General for Alberta et al, 1943, S.C.R., 320,** it was held that the terms of the Natural Resources Transfer Agreement constituted a statutory novation. At page 330 Hudson J., states as follows:

> "The terms of the transfer agreement from the Dominion to the province came up for consideration before the Judicial Committee in a reference in re Timber Regulations for Manitoba (1), and it was there held that the transfer amounted to a statutory novation. It was said by Lord Wright at p. 198:
>
> > 'But their Lordships agree with the Supreme Court that in the special circumstances of this case the statute of 1930 did effect such a novation. Under clause 2 it is the Province, to which the lands have been transferred, that can alone as a matter of law thereafter grant the patent to an entrant; the agreement, made law by the Act of 1930, requires the Province to carry out the various specified obligations in respect of the lands transferred; these obligations are now imposed on the Province by law; by the same reasoning they do not any longer attach to the Dominion; that implies that by law the entrant must go to the Province to obtain the carrying out of the various obligations which the statute of 1930 by confirming the agreement requires the province to fulfill.' "

It is submitted that under the authority of this decision the Crown in the right of the Province has the same rights to provide for a royalty either by statute or order in council in case petroleum and natural gas are recovered from the lands in question and the Province is subrogated to any right which the Dominion may have had prior to the passing of the Natural Resources Transfer Agreement.

For the reasons stated and the reasons set forth in the judgment of Mr. Justice Parlee, it is submitted that the appeal should be allowed, the action dismissed and the Defendants should be entitled to judgment on their counterclaim.

H. J. WILSON,

W. Y. ARCHIBALD,

of Counsel for the Appellants.