Privy Council Appeal No. 27 of 1951

The Attorney General of the Province of Alberta and another - *Appellants*

v.

Huggard Assets Limited - - - - - - - *Respondent*

and

The Attorney General of Canada and others - - - *Interveners*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH 1953

Present at the Hearing:

LORD PORTER
LORD OAKSEY
LORD REID
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD ASQUITH OF BISHOPSTONE]

The issue raised on this appeal is shortly whether the Crown in right of the Province of Alberta is entitled to levy certain royalties from Huggard Assets Ltd. respondents in the appeal and plaintiffs in the action, on petroleum and natural gas derived by them from a certain area in that Province.

The facts leading up to this litigation, which will have to be unfolded in more detail later, can with advantage be stated in brief outline at the outset. The plaintiffs claim an interest in these minerals as successors of a company called the Northern Alberta Exploration Company Limited, the original grantees of the area under a grant in the form of a patent dated the 25th August, 1913 (Ex. 8 of the Appendix of Exhibits). The grantor was the Crown in right of the Dominion.

The Crown in right of Alberta succeeded, under the Transfer Agreements Acts of 1930, to any right which the Crown in right of the Dominion had theretofore owned in Crown Lands, mines and minerals situate in Alberta, and royalties derived therefrom ; together with the right to enforce " any power or right, which by any 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 Crown in right of the Dominion. These provisions have been described as constituting a " statutory novation ", the Province stepping into the shoes of the Dominion, and succeeding to its rights. The main issue in the case is whether the Dominion, at the time of the grant in 1913, was entitled to the right to exact royalties, which are now in dispute. The determination of that issue depends on the answer to the two further questions :—

(1) What, on its true construction, does the grant of 1913 in its reddendum purport to provide in respect of royalties payable by the grantee?

(2) Whatever on its true construction that provision means, is it legally valid and enforceable?

It may be convenient to set out the habendum and reddendum of the grant at this stage:—

"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 of 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 1st September, 1909: " and there follow provisions for forfeiture on failure to pay such royalty.

At the time of the grant there were regulations in existence affecting the terms on which the Dominion could dispose of Crown lands, mines and minerals in Alberta, but none of these regulations prescribed a specific rate of royalty chargeable in respect of petroleum or natural gas derived from these sources.

(1) The first question which their Lordships have to decide is whether in these circumstances, having regard to the terms of the grant, and in particular to the words "from time to time", the reddendum purported to entitle the Crown, as Grantor—then in right of the Dominion—to levy royalties "prescribed" by a Regulation, or a succession of Regulations, made *after* the date of the grant. Their Lordships have considered this question and are clearly of opinion that the answer must be in the affirmative. The grant *does* purport to confer such a right on the Grantor. This was the unanimous opinion of the Supreme Court of Canada. Any other answer would render the words "from time to time" meaningless. It is true that in the case of *Majestic Mines Ltd.* v. *A.-G. Alberta* 1941 W.W.R. 353, a different conclusion was reached but the crucial words "from time to time" were absent, and clearly the decision might have been the other way if they had been present. (Their Lordships may point out, as some argument was based on the words "if any" as used in the reddendum in the present case, that in their view these words plainly qualify the word "royalty" and not "petroleum or natural gas", or "natural gas" only.)

(2) This answer, however, merely disposes of the problem what it was that the grant *purported* to provide. A more difficult question remains, viz.: whether the grant could validly contain such a provision. This question emerged when, some time after the 1930 Transfer Agreement had vested Crown lands, mines and minerals (situate in Alberta) and rights and powers in respect of royalties on such lands, etc., in the Crown in right of that Province, the Province, by various Orders in Council made between 1941 and 1948 (ref: S/C p. 3 para. 6) purported to impose a royalty on any petroleum and natural gas derived from lands, etc., vested in the Province by the 1930 Act. As the result of this imposition the plaintiffs brought the present action and claimed in the prayer to their Statement of Claim the following relief:—

"1. A declaration that the Lieutenant Governor in Council (of Alberta) was not entitled to exact any royalty with respect to petroleum and natural gas produced from the lands.

2. An order rectifying the Patent by striking out all references to royalties."

Four points of varying importance may conveniently be noted here:—

(*a*) No facts are alleged or were proved which could possibly support a plea of rectification. There was no preceding contract representing the real bargain to which the terms of the grant failed to give effect. This disposes of the second branch of the prayer.

(*b*) The plaintiffs at no stage contended—nor did the defendants—that the grant was *wholly* invalid. The plaintiffs impugned only the provision as to royalties, wishing this to be deleted and the rest to stand.

(*c*) No point was taken in the Statement of Claim, or at any stage of the argument till the case was heard before this Board, to the effect that a grant in terms of this reddendum or a royalty levied in accordance therewith could only be authorised by a Regulation as opposed to an Order in Council. At every stage until the ultimate appeal an Order in Council was assumed to be as good as a Regulation for these purposes. Nevertheless much of the Board's time was occupied with this argument and with a number of other contentions not raised below.

(*d*) No point was taken by counsel prior to the hearing before this Board, that the English Statute of Tenures, 1660 (12. Car. II c. 24) extended to this region of Canada and invalidated any grant of minerals in fee simple on terms which permitted the Crown as Grantor to levy a royalty the existence or quantum of which could be determined from time to time by its own caprice or whim. This last point was however raised proprio motu by the Supreme Court of Canada, which by a majority of 4 to 3, decided the appeal before them largely on it.

It is now time to indicate the course which the proceedings below followed. The Supreme Court of Alberta, Trial Division (McBride J.) decided for the Plaintiffs. It considered that only point (1)—the construction of the reddendum of the grant—was in issue. The learned Judge decided—erroneously in their Lordships' view—that the reddendum did not on its true construction purport to entitle the Crown as Grantor to impose royalties on petroleum and natural gas by Regulations to be made in future, none having been imposed thereon by any Regulation in force when the grant was made. He did not consider what might be the validity of a provision which *did* purport to give the Crown such a right: but decided for the plaintiffs on the ground that the Crown did not in the Grant even stipulate for the power it claimed later to exercise.

The Defendants appealed to the Appellate Division of the Supreme Court which, the four learned Judges being equally divided, dismissed the appeal.

There was then a further appeal to the *Supreme Court of Canada.* The learned Judges (7 in all) were unanimously of opinion that the learned trial Judge and the Appellate Division were in error in supposing that the reddendum of the grant did not purport to have a prospective operation. They all thought that according to its tenor it empowered the Crown to prescribe royalties in respect of petroleum and natural gas by a Regulation posterior to the date of the grant, albeit none were prescribed by any Regulation anterior to that date. In this view their Lordships have recorded their concurrence. The Supreme Court, though favourable to the Appellant Defendants on this point, dismissed the appeal by a majority of 4 to 3, for a different reason : one which, their Lordships were informed, was not raised before them by counsel, and which had certainly been raised by no one in the Trial or Appellate Divisions.

The main reason for this decision was that owing to the supposed application of Charles II's Statute of Tenures, 1660 (12. Car. II c. 24) a royalty in the form contended for by the Crown was contrary to law, bad for uncertainty, and void, and that no competent legislation had validated it. They further held that the condition for payment of royalties being bad, the forfeiture clause conditioned on its breach was bad also, and that the grant was valid minus the provision as to royalties.

Such is a bare summary of the three Canadian decisions upon which the appeal came before this Board.

The ratio on which the Supreme Court of Canada reached its conclusions, albeit by a bare majority, must be most carefully weighed, and a more precise account of it given ; for so far it has only been adumbrated.

But before doing so their Lordships observe that it may prove convenient to describe a royalty which the grantor claims to be entitled to impose for the first time after the contract or grant, at any figure he chooses, or to vary from time to time at his uncontrolled discretion, as a " variable royalty ". It will also make for brevity to refer to the areas which came to be called after 1670 " Prince Rupert's Land " and the " North Western Territories ", simply as " Rupert's Land ".

The argument in support of the proposition that the grant could not validly provide for a " variable royalty " in this sense of the term may be summarised under the following heads:—

(1) A royalty is akin to rent if not a species of it. A rent must be " certain ": and a rent variable at the whim of the lessor is uncertain. So, therefore, is a royalty similarly variable: and unenforceable independently of any argument founded on the Statute of King Charles II.

(2) The Statute of Tenures 1660 applies to Canada or that part of it called Rupert's Land, which was vested in the Dominion in 1870 and from which in 1905 Alberta (including the mineral lands in question) was carved out. This Statute by Clauses 2 and 4 abolishes grants in fee of land on tenures (such as the old English tenure by knight service) for which the consideration consisted at one time of uncertain services, or of payments by way of composition for such services which reflected in their quantum or in the method of their determination the uncertainty of the services themselves. Clause 4 provided that " all tenures hereafter to be created by the King's Majesty. . . . Upon any grants . . . of any estate of inheritance at common law . . . shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight service, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, ousterlemain," and certain other burdens incident to tenure by knight service. Clause 4 relates to estates to be created " hereafter ". Clauses 1 and 2 abolish knight service tenure and its characteristic burdens (which in those Clauses were described as including " escuage ") in respect of existing estates, and convert them also into tenure by free and common socage, free from those burdens for the future. The hall mark, it was said, in Littleton, Coke on Littleton, and Blackstone, of tenure by " free and common socage " was and is that any services, or cash composition in lieu thereof, must be " certain ": and, so the argument continued, since a " variable royalty " could not be described as " certain " in any sense of the word, ergo " a variable royalty " was prohibited by the Statute.

(3) It was further contended that whether or not the Act of 1660 applied to Rupert's Land with the results described in (2) above, in any case the Charter, by which in 1670 Charles II granted Rupert's Land to the Hudson's Bay Company expressly included a term providing for the prevalence of free and common socage as the standard basis of tenure of land therein. The same result, it was suggested, could be reached if Rupert's Land was a " settled " colony (as it has been since held to be *Walker* v. *Walker* 1919 A.C. p. 947: *Board* v. *Board* ibid p. 956): even if there were no such provision in the Charter, for it is well established that settlers import into a settled Colony the Common and Statute Law of their country as they existed at the time of settlement and so far as applicable to the settled territory. But the terms of the Charter would seem to make resort to this rule superfluous so far as the establishment of socage tenure is concerned.

All these three arguments, even if otherwise sound, are liable to be met by two answers:—(i) that a " variable " royalty *is* consistent with " free and common socage ", or (ii) that if it is not, Dominion legislation has displaced the requirement of such socage tenure and validated a form or forms of tenure which are inconsistent with it. The second of the three arguments—that based on the 1660 Act—may, in addition to these

possible objections, be exposed to a third: namely that the Statute of Charles II never applied to Canada; or to the material part of Canada, namely "Rupert's Land".

Their Lordships proceed to consider each of these three arguments in turn: in the first instance in abstraction from the possible effect of any "validating" legislation.

(1) They do not consider that the first of the arguments in question is established. There may well be an analogy between royalties in respect of a grant, and rent in respect of a lease and it may well be that rents must be in some sense of the word "certain". But what does "certain" mean in this connection? What is an "uncertain" rent? A rent, payable in year 1, the amount of which is to depend on events which cannot happen till year 3, would seem to be in any sense of the word, "uncertain" and bad. The tenant could never tell till year 3 how much rent he was liable to pay in year 1; consequently neither he nor his lessor could know for how much, if anything, the latter could in year 1 distrain. This is an extreme case. Short of it, it is clear that a fluctuating rent is not as such necessarily "uncertain"—certainly not if it is mathematically calculable, so as to attract the operation of the maxim "certum est quod certum reddi potest". The only decided case cited to the Board in which a rent was held "uncertain" is the old case of *Parker* v. *Harris* (1) Salkeld 261 the report of which is both laconic and obscure. It would seem that what was "uncertain" there was not the quantum of the rent but the times at which it was to be payable. It is said in the present case that the royalty is "uncertain" because its amount depends on the whim, from time to time, of the grantor. It seems doubtful whether this quality is fatal. In this very case, the Charter of 1670 provided for a royalty which in some sense depends on the whim of the grantor, the King. He is to receive two elks and two black beavers every time he visits the territories in question. No one can tell whether he will visit the territory at all; nor if he does, how often: yet his unpredictable election to visit it never; seldom; or repeatedly, determines the number of elks and beavers to be "yielded up". In these circumstances their Lordships are not satisfied that this contention is made out. But whether sound or unsound, it would still (like the other two) fall to the ground if adequate "validating legislation" were proved.

(2) The majority of the Supreme Court, as has been stated, based their decision, in the main, on the *Statute of Tenures* 1660. Their reasoning assumes that this Statute applied to Canada, or at least to "Rupert's Land".

The Act has no express "extent" clause. An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession. In 1660 there was, of course, no United Kingdom. The Acts of Union of 1706 (with Scotland) and of 1800 (with Ireland) were still in the womb of time. True, it happened that since the accession to the English throne of James I—already then King of Scotland—the same person was the Sovereign of both England and Scotland, just as later, the same person was to occupy the British and the Hanoverian throne. But that coincidence of sovereignties is beside the present purpose.

Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England (which since 1536 has by Act of Parliament included Wales) must depend in such circumstances on the intention of its framers: to be deduced from the nature of its subject-matter and substantive provisions. It would presumably have no such external application if its subject matter were beyond question of merely insular and domestic import.

Their Lordships, if it were necessary to decide the point, would incline to the view that the Act of 1660 was of purely local application: that it applied to England only. Its main objects were two (i) to abolish certain

oppressive incidents of feudal military tenure, " wardships ", " marriages " " primer seisin ", " ousterlemain " and the like. To effect this it was necessary to abolish the military or knight service tenures themselves,—the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (Clauses 15 to 27) by certain duties on strong liquors, for instance beer, cider, perry and aqua vitæ ; some home produced, some imported. It seems to their Lordships strained to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country thousands of miles away which was only inhabited at the time by a few Indians and half castes: people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them. It seems to their Lordships that these and the other provisions of the Act—notwithstanding that it provides that " free and common socage " should prevail in future, and abolishes tenure by " escuage "—were not intended to apply outside England and Wales ; to which, along with Berwick-on-Tweed, the machinery for collecting the compensatory duties is expressly confined. (Clause 47.)

Their Lordships have dwelt on this point somewhat at length because the judgments of the majority of the Supreme Court of Canada are so largely founded on it. Having regard however to the conclusions they have reached on other points, it is almost academic, because apart from the rule governing settled colonies the Charter of 1670 under which the Hudson's Bay Company was granted Rupert's Land provides expressly for tenure of that land in " free and common socage and not in capite or by Knightes service ". That being so, two questions remain:—

A. Were the terms of the grant which is in question in this case —a grant subject to a " variable royalty "—inconsistent with and in breach of the requirements of tenure in " free and common socage "?

B. If yes, were those requirements still valid when the grant was made in 1913, or had legislation, regulations or orders passed in the meantime so far modified them as to validate the grant?

A. The first of these questions is open to doubt ; for as their Lordships have observed, in the Charter itself the consideration moving from the tenant—the royalty—is as to its amount largely at the discretion of the Grantor, the King of England. If he chooses never to visit the area, no royalty is payable at all: and this would seem to argue that a considerable degree of " uncertainty " in the consideration moving from the tenant is compatible with " free and common socage ", notwithstanding the dicta of Littleton, Coke and Blackstone, to the contrary. One instance given by Littleton (Coke on Littleton 96A) of a tenure on " certain " services is where the tenure depends on the tenant shearing all sheep on the grantor's land: a service which can clearly be made more or less burdensome according as the grantor chooses to have upon his land few or many sheep. Littleton himself describes this as a " certainty in uncertainty ".

Rather than plunge into the jungle of learned disagreement which surrounds what is or is not involved in free and common socage, their Lordships will assume, without deciding, that it is inconsistent with the terms of the 1913 grant.

B. Upon that assumption, the residual question is whether competent legislation has validated the grant. Their Lordships have come to the conclusion that it *has* done so.

There can be no question that the Dominion Parliament was competent at all material times, after 1870, by clear enactment to repeal or vary any law as to land tenure prevailing in Rupert's Land before that region was in that year vested in the Dominion : even if this meant introducing forms of tenure unknown in the past to English law, or forbidden by it. The question is not whether the Dominion possessed the necessary power but whether in fact it exercised it.

The Legislature of a new country with a small population and vast possibilities of development might well favour an elastic policy in its efforts to attract settlers, and be the less inclined to submit indefinitely to the fetters of English feudal tradition in such matters as land tenure.

By a complex of legislation between 1868-1870, into the details of which their Lordships do not think it necessary to enter, the Hudson's Bay Company surrendered its grant of Rupert's Land for £300,000 and on 23rd June, 1870, that region was admitted to the Dominion. The Charter of 1670 under which it had been granted to the Hudson's Bay Company expressly provided, as has been seen, that tenure should be in "free and common socage". Interim legislation (e.g. the Act of 1869 (Dom.) 32-33 Vic. c. 3) provided that all laws in force in Rupert's Land at the time of its admission should (unless contrary to the B.N.A. Act, 1867) remain in force till altered. An Imperial Act of 1871 (34-35 Vic. c. 28), "to remove doubts", confirmed all Dominion Statutes relating to this transaction and gave power to the Dominion *inter alia* to make provision for the "peace order and good government . . . of any territory not yet for the time being included in any province". (Which would aptly describe that part of Rupert's Land which later became Alberta.) Subsequent Dominion Acts followed containing similar provisions, e.g. Revised Statutes of Canada, 1906, c. 62 (which itself reproduced similar provisions in an Act of 1886 and even earlier legislation) and by clause 12 enacted as follows: —

> "Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories."

This provision was in force at the time of the disputed grant of 1913.

It can hardly be said that tenure by socage was in 1870 a part of the "Laws of England" *inapplicable* to Rupert's Land, since this tenure had been in force in that tract under the terms of its charter, for exactly two centuries before its transfer to the Dominion. Nevertheless, the question remains whether by competent legislation subsequent to the transfer, this part of the "Laws of England" had been "repealed, altered, varied or modified" in such a way as to validate the present grant. Such validating provisions, if they exist, must be sought mainly, if not entirely, in the successive "Dominion Lands Acts" and Regulations or Orders made thereunder.

The Dominion Lands Act in force at the time of the 1913 grant was c. 20 of the Statutes of 1908. Before referring to its terms it may however be helpful to refer to an earlier Statute, the Dominion Lands Act, 1886, (R.S.C. 1886 Cap. 54). Section 47 of that Act reads as follows: —

> "47. Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council, by regulations made in that behalf."

and was reproduced by s. 47 of the Dominion Lands Act, 1892, with the addition of a proviso which does not affect the present case.

The Act of 1886 further provided by s. 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."

Their Lordships pause to note two points in relation to these provisions of the 1886 Act:—(1) s. 47 gives the Governor in Council powers as wide as are readily imaginable as to the "disposal" of coal and other minerals *by Regulation.* He can impose any terms he, "from time to time," fancies: and employ any method of disposal. If this provision had stood unmodified at the time of the grant, and a regulation had been made giving effect to it, it would, in their Lordships' view, have authorised the grant notwithstanding any inconsistency between the terms of the grant and technical socage tenure. (2) Side by side with this power, in s. 90 (*h*) there is a power to make "Orders"—in certain special cases e.g. "*casus omissi*". These two parallel powers are somewhat sharply distinguished: and the distinction persists in the Act of 1908, to which reference should next be made. Before, however, going to that Statute, it is proper to note that Regulations under the 1886 Act (as amended in 1892) were made between 1901 and December, 1906, inclusive, in which month they were consolidated, the consolidation appearing in the Appendix of Exhibits as exhibit 7. They will be referred to as "the 1906 Regulations" and their tenor explored later, so far as relevant.

The sections of the 1908 Act corresponding to those cited from the 1886 Act, and dealing respectively with "Regulations" and "Orders"; are section 37, and section 76 (k) of the later Act.

Section 37 is as follows:—

"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, in so far as they may be affected under these regulations."

Section 76 reads:—

"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;"

Thus this Act maintains the distinction between Regulations and Orders, which seemingly are intended to serve different purposes: and the distinction, in this Act of 1908, is emphasised by s. 77 thereof.

This section reads as follows:—

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

This section provides that while both Regulations and Orders shall be laid before both Houses of Parliament within 15 days of the session next after their date, Regulations (though not, apparently, Orders) shall become inoperative on the day succeeding the prorogation of the session of Parliament unless during the session approved

by a confirmatory resolution. Orders are seemingly not now defeasible for want of such a resolution: though it will be observed that the corresponding section of the 1886 Act—s. 91—while providing for similar formalities, does not distinguish between the effect of not complying with them in the case of a Regulation on the one hand, and an Order on the other.

As against this attention should be called to a difference between the language of s. 37 of the Act of 1908 and s. 47 of the 1886 Act, which would seem, if it is significant, to limit the almost despotic powers of disposal vested in the Governor in Council by the latter provision. For where s. 47 spoke of " disposal " of lands, etc., " in such manner and on such terms and conditions as are, from time to time, fixed by the Governor in Council ", by " Regulations ", s. 37 provides simply that such lands, etc., " may be sold or leased under Regulations made by him ". On the other hand if this change of language does impliedly narrow the powers of the Governor in Council under the 1908 Act when proceeding by Regulations, there is no corresponding limitation in that Act in his powers to proceed by *Order*. On the contrary an Order (though no doubt it can be superseded by a later Order) cannot, like a Regulation, lapse for want of a confirmatory resolution, and would seem to be capable of dealing with cases uncovered, or not adequately dealt with, by any Regulation.

As regards " Regulations " the position is complex and obscure. But the instrument by virtue of which the grant of 1913 purported to be made was an Order in Council, or rather two such orders, dated 31st May, 1911, and 21st March, 1913 (being exhibits 2 and 1 (in the Appendix of Exhibits) respectively) and not a Regulation. The point that a grant in these terms could not be made under Orders but only under some Regulation, and that no such Regulation at the material time existed, was not taken until the case was argued before this Board.

The points therefore remaining are:—

(1) Did these Orders, if themselves valid, purport to authorize a Grant in the terms of that of 25th August, 1913?

(2) Were the Orders which purported to be made under s. 76 (*k*) of the 1908 Act a valid exercise of the powers conferred by that subsection? Or should the subsection be read as not authorizing any Order which runs counter to tenure by " free and common socage "?

Before grappling with these questions, it may be pertinent to ask for what reason the Acts of 1886 and 1908 provided that some things could be done by Regulations and some by Order. That this was done deliberately admits of no doubt. The only question is " why? ".

Their Lordships can only suppose the explanation to be that a *Regulation* normally (though perhaps not quite necessarily) applies uniform treatment to every one, or to all members of some group or class. There is one and the same " rule " (" Regula ") for all. On the other hand there may be special cases which the rule did not contemplate (" *casus omissi* ", are expressly instanced in the Acts) or to which owing to special circumstances it cannot apply without hardship, or without violating the spirit —" the true intent "—of the Act: and the object of the " Order-making " power is to enable the Crown to make special and equitable provision ad hoc for such cases.

If anything is clear it is that this case was a very special one, not covered by ordinary rules: and was so considered and treated by those who on behalf of the Crown in right of the Dominion made the two Orders—Exhibits 2 and 1—and issued the grant or patent (Exhibit 8).

What do the two Orders provide? Their Lordships, while holding they should be read together, will deal with them, in the first instance, seriatim.

I. *The first Order, dated* 31*st May*, 1911, opens with a reference to Regulations assumed to be obsolete or rescinded: " the late Regulations ": and refers to them in its last paragraph once more as " the old Regulations ". These are the Regulations made under the 1886 and 1892 Acts,

between 1901 and 1906 inclusive, and referred to above as "the 1906 Regulations" because they were issued in a consolidated form in December of 1906. These Consolidated Regulations (Ex. 7 of Appendix of Exhibits) had provided (by para. 1) for the "reservation" in suitable cases for purposes of prospecting for petroleum of an area of 1,920 acres, in favour of an applicant for such reservation, of land in, *inter alia*, the Province of Alberta. They further provided (para. 5 of the Consolidation) that "if oil in paying quantities should be discovered by the prospector" . . . an area not exceeding 640 acres of land, including the oil well, would be sold to the person . . . making such discovery at the rate of $1 per acre, and the remainder of the reserved area, viz. : 1,280 acres, would be sold at the rate of $3 per acre. Para. 6 provided that "a royalty at such a rate as may from time to time be specified by Order in Council will also be levied and collected on the sales of the petroleum. . . .": para. 8 provided that the patent which might "be issued for petroleum lands" would be made subject to the payment of the above royalty ; and that the patent might be declared null and void for default in the payment of such royalty.

The Order of 31st May, 1911, when it refers to these Regulations as the "late" or "old" petroleum Regulations, assumes them to have been rescinded. This may be either because they were made under the 1886-1892 Dominion Land Acts and not under that of 1908 ; or more probably because in 1910 there had been made new Regulations purporting to rescind the 1906 regulations, and to substitute a power of leasing for a power of sale, lease or other disposal.

These last Regulations were not included in the Appendix of Exhibits, and were only produced in the course of the argument before the Board as the result of cables to Canada. It seems doubtful in the circumstances whether any notice should be paid to them at all, particularly as the Board was informed that they were void or had lapsed for failure to be laid before the two Houses of Parliament or having been so laid to obtain the necessary confirmatory resolution. Let it however be assumed in the respondents' favour that the 1906 Regulations were validly rescinded. Then what was their position? There was, in their Lordships' view, nothing to prevent the Minister from proposing, or the Governor in Council from making, an Order in Council, under the powers conferred by s. 76 (*k*) of the 1908 Act dealing with a special case of hardship by providing that it would be governed by the rescinded 1906 regulations if the equity of the case appeared to him so to require. And this is what in fact the Orders in Council of 31st May, 1911, and March, 1913, professed to do.

The facts leading up to both Orders must here be reviewed more closely:—A "reservation" had been made under the old "1906 Regulations" in favour of a Mr. Bennetto on 1st January, 1906, of a tract of land in Alberta, which may be called "Tract X". Bennetto had done prospecting work on that tract, which was continued by his assigns the Northern Alberta Exploration Company, the assignors to the respondents. Oil had been discovered, but not in "paying quantities", hence no right of sale had been acquired by any one. Meanwhile the "reservation" was due to expire on 17th June, 1911. The Northern Alberta Company asked for a renewal of the reservation. The Order recites that large expenditure had been incurred by Bennetto and the Company, and provides that the reservation of petroleum and gas rights should be extended in favour of the Company for two years from 17th June, 1911: but that it should apply to land other than, though overlapping with, the land originally covered by the reservations. This may be called "Tract Y". This substitution was necessitated by the acquisition by *bona fide* squatters of a large area of riverain territory covering part of the surface of "Tract X"—the original reservation. The Order of 1911 finished by reciting and giving effect to the following recommendation:—

> "Should oil or natural gas be discovered in paying quantities within the period of one year from the 17th 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 regards the surface and petroleum and natural gas rights, and that 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."

II. *The Second Order in Council—that of 21st March*, 1913 recites these facts and the provisions of the Order in Council of 1911, in particular its final paragraph which has just been quoted. It does not record, and presumably it was not the fact, that within one year, or even nearly two years of the 17th June, 1911, oil or natural gas "in paying quantities" had been discovered in the substituted area: but it does record that valuable prospecting work had been done by Bennetto and the Northern Alberta Company, and that at least $75,000 had been expended by them by October, 1912.

The Order in Council ended by providing as follows:—

> "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 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."

If these two Orders are read together, their effect, if they are *intra vires* the Statute of 1908, is to authorize the grant which followed on 25th August, 1913, both as regards the price of the land and "under rights" sold and as regards royalties. The price under the Grant appears to have been $3 an acre both for the surface (1,296 acres) and the mineral rights (1,320 acres) (as appears e.g. from p. 46 line 12 of the Record). If the Order in Council of 1911 (Ex. 2) had stood alone, the price would have been $1 as to part and $3 as to another part, for the Order of 1911 imports the 1906 Regulations and that is what they provide. But the Order in Council of 1913 (Ex. 1) alters this rate to $3 overall: and the Grant is so far within the authority conferred by the two Orders read together. A more important matter in this appeal is that the Grant contained as part of its terms what has been described as a "variable royalty". The Order in Council of 1911 imports in this regard also the terms of the "old" regulations: they are called the "Regulations in force on 1st September 1909" but these are the same as the "1906 regulations" and these authorize (in the Regulation of 31st May, 1901 (Ex. 5.) or para. 6 of the Consolidating Regulation of 1906 (Ex. 7.)) the levy of royalties on petroleum sold "at such a rate as may from time to time be specified by Order in Council". It matters not in their Lordships' view whether by the years 1911-13 these Regulations had been rescinded or not, or whether the Acts of 1886-1892 under which the 1906 Regulations had been made, had been repealed or superseded by the 1908 Dominion Lands Act, or whether, while the 1906 Regulations were operative, the levy of such royalties under them was to be contingent on a sale which was itself to be contingent on the discovery of petroleum in paying quantities. Under s. 76 (*k*) of the 1908 Act the Crown in right of the Dominion had in their Lordships' opinion power to deal with a case such as this by applying to it certain of the terms (those as to royalties) of a superseded Regulation. This was a special case. Oil and gas had not been discovered in paying quantities but research and expenditure, attended with much benefit to

the public, had been carried out and incurred by the prospectors, the predecessors in title of the respondent Company. Hence they were allowed to acquire the land and rights in question without complying with any Regulation (assuming one to exist) but were compelled to submit to liability in future to a royalty not prescribed by any regulation in force at the time of the grant.

Their Lordships do not consider that in dealing with such special or hard cases under s. 76 (*k*) it was intended that the discretion of the Crown should be fettered or controlled by incidents of English feudal land tenure. It had been expressly enacted that the Dominion Parliament could repeal, vary or modify any English law prevailing before 1870 in territories such as Rupert's Land, and territories like Alberta which might be carved out of it. In providing as it did in s. 76 (*k*) of the 1908 Act for a discretionary power to deal with hard or anomalous cases the Legislature was, as it seems to their Lordships, arrogating to itself the right to infringe the requirements of " free and common socage ", so far as the end in view required. Where the justice of the individual case required it, it seems to their Lordships unreasonable (unless the language of the material enactments forces them to such a conclusion) to hold that the Crown's liberty to deal with such cases was intended to be exercised only within the limits set by a rigid respect for the (obscure and debated) frontiers of historical socage tenure.

If this conclusion is justified, it follows that the grant of 1913 was valid not only in other respects but in respect of the variable and prospective royalties reserved to the Crown in right of the Dominion. Those rights have now been transferred to Alberta. In 1930 the " Transfer Agreement Acts " were passed in identical terms by the Legislatures of Alberta (Statutes of Alberta, 1930, c. 21), of the Dominion (Statutes of Canada, 1930, c. 3), and of the Imperial Parliament (20 to 21 George V, c. 26). Section 1 of the Alberta Act is as follows :—

> " 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,".

Section 3 of the Act is as follows:—

> " 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."

The right to levy a "variable" royalty on these lands was a "right" which within s. 3 by "Contract . . . or other arrangements" . . . "relating to lands, mines, minerals or royalties" was originally reserved to the Crown in right of the Dominion and by sections 1 and 3 was in 1930 transferred from the Crown in right of the Dominion to the Crown in right of the Province of Alberta: which accordingly was justified through its Lieutenant-Governor in Council, in levying by the various Orders in Council of 1941-1948 (set out in para. 6 of the Statement of Claim) the Royalties complained of by the plaintiffs-respondents in the present case.

Their Lordships therefore humbly advise Her Majesty that the appeal should be allowed and the action dismissed.

Each party must pay their costs of the proceedings throughout.

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In the Privy Council

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA AND ANOTHER

v.

HUGGARD ASSETS LIMITED

and

THE ATTORNEY GENERAL OF CANADA AND OTHERS

DELIVERED BY
LORD ASQUITH OF BISHOPSTONE

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