

# In the Privy Council

33520

No. 49 of 1951.

## ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION)

UNIVERSITY OF LONDON  
W.C.I.  
- 9 FEB 1954  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA  
(Defendant) APPELLANT

AND

WEST CANADIAN COLLIERIES LIMITED, INTERNATIONAL  
COAL AND COKE COMPANY LIMITED, MCGILLIVRAY  
CREEK COAL AND COKE COMPANY LIMITED, HILLCREST  
MOHAWK COLLIERIES LIMITED, CADOMIN COAL  
COMPANY LIMITED and BRAZEAU COLLIERIES LIMITED  
(Plaintiffs) RESPONDENTS

AND

THE ATTORNEY GENERAL OF MANITOBA AND THE  
ATTORNEY GENERAL OF SASKATCHEWAN INTERVENANTS.

### CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from Judgments of the Appellate Division of the Supreme Court of Alberta, dated the 8th August and the 18th September, 1951, which confirmed the Judgment of McLaurin, J. dated the 16th April, 1951, in which he declared that Section 8 of Chapter 36 of the Statutes of Alberta, 1948, does not apply to the leases and lands referred to in the Respondents' Statement of Claim.

p. 77  
p. 78  
p. 27

2.—The Respondents are severally the holders of certain leases and grants from the Crown of lands and coal rights leased and granted in the first instance by Canada under the Dominion Lands Act and regulations made pursuant thereto. The facts are not in dispute and are set out in an agreement between the parties.

pp. 7-14

3.—The leases presently held by the Respondents are with respect to lands and coal rights which were originally leased by the Government of Canada to one or other of the Respondents or their

## RECORD

predecessors in title and which subsequently were again leased to the holders of the original leases when the latter expired. In several instances the renewal leases were issued by the Government of Canada, and the balance were issued by the Province, by reason of the transfer of the natural resources in Alberta from Canada to the Province under the Natural Resources Transfer Agreement, more fully referred to in paragraph 15 of this Case. For this reason and because the provisions of the regulations either of Canada or of the Province, pursuant to which the leases were issued, vary in their content, the lands and coal rights leased by the Respondents have been divided into three types of which the following are agreed examples : 10

p. 11, ll. 18-43  
Exhibit 17  
Exhibit 18

TYPE NO. 1. Lands leased by Dominion Lease No. 2440, dated the 6th May, 1925, and Provincial Renewal Lease No. 5585, dated the 10th May, 1946.

p. 12, ll. 1-21  
Exhibit 19  
Exhibit 19

TYPE NO. 2. Lands leased by Dominion Lease No. 143, dated the 28th June, 1909, and Renewal Lease No. 2886, dated the 1st May, 1930, and executed by the Deputy Minister of Lands and Mines on the 15th June, 1932, pursuant to the Natural Resources Transfer Agreement.

p. 12, l. 22-p. 13,  
l. 5  
Exhibit 20

TYPE NO. 3. Lands leased by Dominion Lease No. 350, dated the 22nd October, 1910, and Provincial Renewal Lease No. 5040, dated the 30th April, 1934.

4.—The following matters relating to the leases illustrative of Type No. 1 are relevant :

Exhibit 17

(A) Lease No. 2440 dated the 6th May, 1925, was issued under regulations made pursuant to the Dominion Lands Act, and a copy of the regulations was attached to and formed part of the lease.

(B) The lease, after reciting that application had been made for a lease under the regulations for the disposal of coal mining rights, granted in consideration of the rents and royalties reserved and subject to the terms of the lease the coal-mining rights in specified land. 30

(C) The lease provided for the payment by the lessee of an annual rental of \$1.00 per acre and for the payment of a royalty at the rate of 5 cents per ton of 2,000 pounds on the merchantable output of coal taken out of the said lands. The royalty was payable in the manner provided in the regulations.

(D) The lease was for a term of twenty-one years “ . . . renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such 40

“ lease, and with the provisions of the regulations under which it was granted, and subject to renewal for additional periods of twenty-one years on such terms and conditions as may be prescribed by the Governor in Council.”

(E) The lease also required the lessee to perform and abide by all the obligations, provisos and restrictions imposed by the regulations upon lessees or upon the said lessee.

(F) The third clause of Section 1 of the attached regulations reads as follows :

10 “ The term of the lease shall be twenty-one years, renewable for a further term of twenty-one years, provided the lessee furnishes evidence, satisfactory to the Minister, to show that during the term of the lease he has complied fully with the conditions of such lease, and with the provisions of the regulations regarding the disposal and operation of coal-mining rights which may have been made from time to time by the Governor in Council, and subject to renewal for additional periods of twenty-one years on such terms and conditions as may be prescribed by the Governor in Council.”

20 (G) Lease No. 2440 was renewed by the Province on the 10th May, 1946, by the issue of Lease No. 5585, pursuant to The Provincial Lands Act and regulations made thereunder, a copy of which was attached to and formed part of the lease. The renewal lease, after referring to the regulations regarding the disposal of coal-mining rights provided that it was issued in consideration of the rents and royalties reserved and further provided for the payment of a rental of \$1.00 per acre and for the payment of a royalty  
 30 “ . . . . at the rate of 5 cents or at such other rate as may from time to time be prescribed by order of the Lieutenant Governor in Council upon each and every ton of 2,000 pounds on the saleable and merchantable output of coal taken out of the said lands. . . . .”

Exhibit 17  
Exhibit 18

(H) The lease was for a term of twenty-one years “ . . . . renewable for a further term of twenty-one years subject to the regulations in force at the time such renewal is granted, provided the lessee can furnish evidence satisfactory to the Minister of Lands and Mines to show that during the term of the lease he has complied fully with the conditions of such lease, and with the provisions of the regulations in force from time to time during the currency of the lease, and subject to renewal for additional periods of twenty-one years upon such terms and conditions as may be prescribed by the Lieutenant Governor in Council.”

40 (I) The third covenant of the lease provided as follows :

“ 3. That the lessee will, at all times, perform, observe and comply with all the provisions of the regulations made pursuant

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“ to the Provincial Lands Act, 1939, or any regulations which  
 “ may at any time hereafter be made under the authority of the  
 “ aforesaid Act or of any Act passed in substitution therefor  
 “ and all such regulations shall be deemed to form a part of these  
 “ presents which shall be read and construed as if such regulations  
 “ had been set out and incorporated herein.”

(J) The lease also stipulated that the royalties reserved would be payable in the manner prescribed in the regulations and that the lessee would, at all times, observe and comply with the provisions of the regulations and such regulations should be deemed to form part of the lease. 10

(K) Paragraph two of the attached regulations provided as follows :

“ The term of the lease shall be twenty-one years, renewable  
 “ in the discretion of the Minister for a further term of twenty-one  
 “ years, provided the lessee furnishes evidence satisfactory to the  
 “ Minister to show that during the term of the lease he has complied  
 “ fully with the conditions of such lease, and with the provisions  
 “ of the regulations regarding the disposal and operation of coal  
 “ mining rights, which may have been made from time to time by  
 “ the Lieutenant Governor in Council, and subject to renewal for  
 “ additional periods of twenty-one years, upon such terms and 20  
 “ conditions as may be prescribed by the Lieutenant Governor  
 “ in Council.”

5.—The following matters relating to the leases illustrative of Type No. 2 are relevant :

Exhibit 19

(A) Lease No. 143, dated the 28th June, 1909, was issued under regulations made pursuant to the Dominion Lands Act, and a copy of the regulations was attached to and formed part of the lease. After reciting that application had been made pursuant to the regulations for a lease of the coal mining rights in the lands contained in the lease, the lease provided that it was issued in consideration of the rents and royalties reserved, for the payment of an annual rental of \$1.00 per acre and for the payment of a royalty at the rate of 5 cents per ton of 2,000 pounds on the merchantable output of coal taken out of the said lands. 30

(B) The lease, which was for a term of twenty-one years, further stipulated that the royalty should be paid in the manner prescribed in the regulations and that the lessee should observe, perform and abide by all the obligations, conditions, provisos and restrictions imposed by the regulations upon lessees or upon the said lessee.

Exhibit 19

(C) Lease No. 2886, dated the 1st May, 1930, was issued in renewal of Lease No. 143, pursuant to the Dominion Lands Act and regulations made thereunder, a copy of which regulations was attached to and formed part of the lease, and was executed by the Deputy Minister of Lands and Mines 40

for the Province of Alberta, pursuant to the terms of the Natural Resources Transfer Agreement on the 15th day of June, 1932. After reciting that application for the coal mining rights in the lands referred to in the lease had been made pursuant to the regulations, the lease provided that it was issued in consideration of the rents and royalties reserved and for the payment of an annual rental of \$1.00 per acre and a royalty at the rate of 5 cents per ton of 2,000 pounds on the merchantable output of coal taken out of the said lands. The royalty was to be paid in the manner prescribed in the regulations.

10 (D) The lease was for a term of twenty-one years “. . . renewable for  
 “ a further term of twenty-one years, provided the lessee can furnish  
 “ evidence satisfactory to the Minister of the Interior (to be read as a refer-  
 “ ence to the Minister of Lands and Mines) to show that during the term of  
 “ the lease he has complied fully with the conditions of such lease, and with  
 “ the provisions of the regulations under which it was granted, and subject  
 “ to renewal for additional periods of twenty-one years on such terms and  
 “ conditions as may be prescribed by the Governor in Council.”

(E) The lease also stipulated that lessee would observe, perform and  
 20 abide by all the obligations, conditions, provisos and restrictions imposed  
 by the regulations upon lessees or upon the said lessee.

(F) Paragraph three of Section 1 of the attached regulations was in  
 precisely the same terms as set out above in paragraph 4 (F). After the  
 transfer of natural resources the reference to the Governor in Council is  
 deemed a reference to the Lieutenant Governor in Council.

6.—The following matters relating to the leases illustrative of Type Exhibit 20  
 No. 3 are relevant :

(A) Lease No. 350, dated the 22nd October, 1910, was issued under  
 regulations made pursuant to the Dominion Lands Act and a copy of the  
 regulations was attached to and formed part of the lease. After reciting  
 30 that the lessee had applied for a lease under the regulations for the disposal  
 of the coal mining rights in the lands described in the lease, the lease  
 provided that it was issued in consideration of the rents and royalties  
 reserved and for the payment of an annual rental of \$1.00 per acre and a  
 royalty at the rate of 5 cents per ton of 2,000 pounds on the merchantable  
 output of coal taken out of the said lands payable in the manner prescribed  
 in the regulations.

(B) The lease was for a term of twenty-one years “. . . renewable  
 “ for a further term of twenty-one years, provided the lessee can furnish  
 “ evidence satisfactory to the Minister of the Interior to show that during  
 40 “ the term of the lease he has complied fully with the conditions of such  
 “ lease, and with the provisions of the regulations under which it was  
 “ granted.”

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(c) The lease also stipulated that the lessee would observe, perform and abide by all the obligations, conditions, provisos and restrictions imposed by the regulations upon lessees or upon the said lessee.

(D) Section 1 of the regulations attached reads in part as follows :

“ The term of the lease shall be twenty-one years, renewable  
 “ for a further term of twenty-one years, provided the lessee can  
 “ furnish evidence satisfactory to the Minister of the Interior, to  
 “ show that during the term of the lease he has complied fully with  
 “ the conditions of such lease, and with the provisions of the  
 “ regulations under which it was granted.”

10

Exhibit 20

(E) Lease No. 5040, dated the 30th April, 1934, was issued in renewal of lease No. 350 by the Province. The lease provided that it was issued in consideration of rents and royalties reserved and for the payment of an annual rent of \$1.00 per acre and a royalty at the rate of 5 cents per ton of 2,000 pounds on the merchantable output of coal taken out of the said lands. The lease stipulated that the royalty should be paid in the manner prescribed in the regulations and that the lessee would observe, perform and abide by all the obligations, conditions, provisos and restrictions imposed upon the lessee by the regulations upon lessees or upon the said lessee.

(F) The third paragraph of Section 1 of the attached regulations reads 20 as follows :

“ The term of the lease shall be twenty-one years, renewable  
 “ for a further term of twenty-one years, provided the lessee  
 “ furnishes evidence, satisfactory to the Minister, to show that  
 “ during the term of the lease he has complied fully with the  
 “ conditions of such lease, and with the provisions of the regulations  
 “ regarding the disposal and operation of coal mining rights which  
 “ may have been made from time to time by the Governor in  
 “ Council.”

7.—The Dominion regulations, pursuant to which the Respondent's 30 lands were leased or in respect of which renewals of the leases were granted, at all material times contained the following provisions, or provisions to the same effect :

“ 1. The coal mining rights which are the property of the  
 “ Crown in the Provinces of Manitoba, Saskatchewan and Alberta,  
 “ the Yukon Territory, the Northwest Territories, the Railway  
 “ Belt in the Province of British Columbia, and within the tract  
 “ containing three and one-half million acres of land acquired by  
 “ the Dominion Government from the Province of British Columbia  
 “ and referred to in sub-section (B) of Section 3, of the Dominion 40  
 “ Lands Act, may be leased by the Minister at an annual rental of  
 “ \$1 per acre, payable yearly in advance.

\* \* \* \* \*

“ The term of the lease shall be twenty-one years, renewable  
 “ for a further term of twenty-one years, provided the lessee  
 “ furnishes evidence satisfactory to the Minister, to show that  
 “ during the term of the lease he has complied fully with the  
 “ conditions of such lease, and with the provisions of the regula-  
 “ tions regarding the disposal and operation of coal mining rights  
 “ which may have been made from time to time by the Governor in  
 “ Council.”

10 “ 19. In addition to the rent a royalty at the rate of 5 cents  
 “ per ton of two thousand pounds, shall be levied and collected  
 “ on the merchantable output of the mine, and such royalty shall  
 “ be payable monthly to the Agent from the date upon which  
 “ operations may be commenced. The person operating a mine  
 “ shall furnish the Agent of Dominion Lands with sworn returns  
 “ monthly or at such times as the Minister of the Interior may  
 “ direct, accounting for the full quantity of merchantable coal  
 “ mined.”

20 “ 21. Default in payment of the royalty, or in furnishing the  
 “ returns, if continued for thirty days after notice has been posted  
 “ at the mine, or conspicuously on the property in respect of which  
 “ it is demanded by the Agent of Dominion Lands, or by his  
 “ direction, may be followed by cancellation of the lease, or the  
 “ imposition of a fine in the discretion of the Minister of the  
 “ Interior.

30 “ 22. Any attempt to defraud the Crown by withholding any  
 “ part of the revenue thus provided for, by making false statements  
 “ of the amount taken out, may, in the discretion of the Minister,  
 “ be punished by fine, or by the cancellation of the lease in respect  
 “ of which fraud or false statement has been committed or made.  
 “ In respect to the facts as to such fraud or false statements or  
 “ nonpayment of royalty or failure to furnish returns, the decision  
 “ of the Minister of the Interior shall be final.”

8.—The lands and coal mining rights presently held by the Respondents p. 9, l. 16—p. 11, l. 6  
 in fee simple were originally granted by the Government of Canada to one  
 or other of the Respondents or their predecessors in title as a result of  
 applications made therefor under the provisions of the Dominion Lands p. 7, l. 23—p. 9, l. 15  
 Act set out in the Agreed Statement of Facts and the regulations made  
 pursuant thereto for the disposal of coal mining rights belonging to the  
 Crown.

40 9.—The patents issued with respect to the land and coal mining rights p. 9, l. 30 ; p. 10,  
 held by the Respondents contained one of the royalty clauses set out in l. 19  
 the Agreed Statement of Facts.

Exhibit 15  
p. 9, l. 30-p. 10,  
l. 17

10.—The patent containing royalty clause Type No. 1 shows that it was a coal land sale. After reciting that the grantee had applied for a grant of the lands, the patent grants the lands therein described in the following terms :

“ TO HAVE AND TO HOLD the same unto the grantee—in fee  
“ simple.

“ 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, such royalty to be levied and 10  
“ collected on the gross output of any and all mines in and upon  
“ the said lands, to which end sworn returns are to be made by  
“ the grantee its successors or assigns, such payments and returns  
“ to be made at such times and in such manner as Our Minister  
“ of the Interior of Canada may from time to time prescribe, and  
“ in the absence of such prescription to be made on the first day  
“ of each month and each such return to account for the full  
“ quantity of coal mined since the next preceding return.  
“ Provided that nothing herein contained shall be taken or held  
“ to vest in the grantee as riparian proprietor or otherwise any 20  
“ property in or title to the land forming the bed of the said  
“ Crowsnest River.

“ PROVIDED ALWAYS, and this grant is subject to the condition  
“ that if the grantee its successors or assigns shall make default  
“ in payment of said royalty or any part thereof, or shall fail to  
“ make any such sworn return as aforesaid, for ninety days after  
“ the same should have been paid or made, then and in every  
“ such case Our said Minister of the Interior may by writing  
“ under his hand and seal cancel these presents and declare the  
“ same to be null and void, and the same shall thereupon become 30  
“ and be null and void to all intents and purposes whatsoever,  
“ except that no remedy for the recovery by Us or Our successors  
“ of any royalty shall thereby be in any way affected, and it shall  
“ be lawful for Us or Our successors or assigns into or upon the said  
“ lands (or any part thereof in the name of the whole) to re-enter  
“ and the same to have again, repossess and enjoy as of Our and  
“ Their former estate therein, anything herein contained to the  
“ contrary notwithstanding.”

Exhibit 16  
p. 10, ll. 19-29

11.—The patent containing royalty clause Type No. 2 shows that it was a mineral rights sale and after reciting that the grantee had applied 40 for a grant of the mining rights, granted all minerals other than gold and silver with the mining rights therein described in the following terms :

“ TO HAVE AND TO HOLD the same unto the grantee in fee simple.  
“ Yielding and paying unto Us and Our Successors the royalty,



10 “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, and that our Minister  
 “of the Interior 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.”

12.—The Dominion regulations pursuant to which the patent of the Respondents' lands were granted contained the following provisions : p. 10, ll. 35-41

20 “Lands containing anthracite coal may be sold at an upset Exhibit 3  
 “price of \$20.00 per acre, and coal other than anthracite at an  
 “upset price of \$10.00 per acre, or may be sold by public  
 “competition if the Minister of the Interior shall so decide.  
 “Payment for the land in cash or scrip shall be made when the  
 “application is granted, or payment may be made of one quarter  
 “of the purchase price only and the balance in three equal annual  
 “instalments with interest at the rate of six per cent. per annum  
 “upon the unpaid balances. Scrip, however, cannot be accepted  
 “unless payment is made in full at the time of the sale. If  
 “payment is not made accordingly the right to purchase will be  
 “cancelled.

30 “In addition to the above a royalty at such rate as may from  
 “time to time be specified by Order in Council, will be levied  
 “and collected on the gross output of the mine, and it will be  
 “necessary for the person operating a mine to furnish the Agent  
 “of Dominion Lands with sworn returns monthly, or at such  
 “times as the Minister of the Interior may direct, accounting  
 “for the full quantity of coal mined, and pay the royalty thereon  
 “at the above rate.

“Default in payment of such royalty, if continued for ten days  
 “after notice has been posted at the mine in respect of which it  
 “is demanded, or in the vicinity of such mine, by the Agent of  
 “Dominion Lands or by his direction, shall be followed by  
 “cancellation of the sale. In case of such cancellation no  
 “payments which may have been made on account of the purchase  
 “will be refunded.

40 “The patent which may be issued for coal 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 coal mined.

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“ Any attempt to defraud the Crown by withholding any part  
 “ of the revenue thus provided for, by making false statements  
 “ of the amounts taken out shall be punished by cancellation of  
 “ the sale of the land in respect of which fraud or false statements  
 “ have been committed or made, and the Minister of the Interior  
 “ may, for the same cause, declare the patent which may have  
 “ been issued for the land to be null and void. In respect to  
 “ the facts as to such fraud or false statements or non-payment  
 “ of royalty the decision of the Minister of the Interior shall  
 “ be final.”

10

Exhibit 4

13.—On the 31st May, 1901, by order in council of that date it was provided that “. . . until further order, the said royalty shall be and  
 “ is hereby fixed at the rate of ten cents per ton of 2,000 pounds.”

Exhibit 5

The governing Dominion regulation, subsequent to the 19th May, 1902, contained as paragraph 2 the following provision “ In addition to the above a royalty  
 “ at the rate of ten cents per ton of 2,000 pounds will be levied and collected  
 “ on the output of the mine, and it will be necessary for the person  
 “ operating a mine to furnish the Agent of Dominion lands with sworn  
 “ returns monthly, or at such times as the Minister of the Interior may  
 “ direct, accounting for the full quantity of coal mined and pay the royalty 20  
 “ thereon at the above rate.”

Exhibit 13

14.—The rate of 10 cents per ton imposed by order in council dated 31st May, 1901, remained in effect until Order in Council No. 103, dated 16th January, 1915, reduced the royalty on coal from 10 cents per ton to 7 cents per ton.

15.—In 1930 an agreement between the Government of the Dominion of Canada and the Government of the Province of Alberta whereby the administration of the natural resources within the province was transferred to the province, was confirmed by The British North America Act, 1930 (20 & 21 Geo. 5 c. 26) and by Chapter 3 of the Statutes of Canada, 1930, and 30  
 by Chapter 21 of the Statutes of Alberta, 1930. Sections 1, 2 and 3 of that agreement provided as follows :

“ 1. In order that the Province may be in the same position  
 “ as the original provinces of Confederation are in virtue of  
 “ Section 109 of The British North America Act, 1867, the interest  
 “ of the Crown in all Crown lands, mines, minerals (precious and  
 “ base) and royalties derived therefrom within the Province, and  
 “ all sums due or payable for such lands, mines, minerals or  
 “ royalties, shall, from and after the coming into force of this  
 “ Agreement and subject as therein otherwise provided, belong to 40  
 “ the Province, subject to any trusts existing in respect thereof,  
 “ and to any interest other than that of the Crown in the same.

10 “ and the said lands, mines, minerals and royalties shall be  
 “ administered by the Province for the purposes thereof, subject,  
 “ until the Legislature of the Provinces 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 Agree-  
 “ ment, and that the Province shall not be liable to account to  
 “ Canada for any such payment made thereafter.

20 “ 2. The Province will carry out in accordance with the  
 “ terms thereof every contract to purchase or lease any Crown  
 “ lands, mines or minerals, and every other arrangement whereby  
 “ any person has become entitled to any interest therein as against  
 “ the Crown, and further agrees not to affect or alter any term of any  
 “ such contract to purchase, lease or other arrangement by  
 “ legislation or otherwise, except either with the consent of all the  
 “ parties thereto other than Canada or in so far as any legislation  
 “ may apply generally to all similar agreements relating to lands,  
 “ mines or minerals in the Province or to interests therein,  
 “ irrespective of who may be the parties thereto.

30 “ 3. Any power or right, which, by any such contract, lease  
 “ or other arrangements, or by any Act of the Parliament of  
 “ Canada relating to any of the lands, mines, minerals or royalties  
 “ hereby transferred or by any regulation made under 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.”

16.—In 1931 the Province of Alberta enacted The Provincial Lands Act as Chapter 43 of the Statutes of Alberta, 1931. Section 39 governs the disposal of mineral lands and provides by subsection (1) as follows :

40 “ 39. (1) Provincial lands containing any minerals, together  
 “ with the right to win, work and get the same, may be leased in  
 “ such manner as may be prescribed by regulations made by the  
 “ Lieutenant Governor in Council; and the regulations may  
 “ provide for the leasing of mining rights underneath Provincial

“ 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 the  
 “ regulations.”

This provision remained substantially unchanged until 1946 when the following new subsection (6) was added to Section 44 of The Provincial Lands Act, being chapter 62 of the Revised Statutes of Alberta, 1942 :

“ 44. (6) Notwithstanding the terms, conditions and provi- 10  
 “ sions 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.”

Subsequently by Chapter 36 of the Statutes of Alberta, 1948, the following new section 44c was added to the Act :

“ 44c. Notwithstanding the terms and provisions of any  
 “ certificate of title, agreement for sale, or lease which conveys coal  
 “ or the right to mine, win, work or excavate the same, where the  
 “ payment of a royalty has been reserved to the Crown in the right  
 “ of the Dominion or in the right of the Province, there shall be  
 “ payable to the Minister on, from and after the first day of April,  
 “ 1948,

“ (a) a royalty of ten cents per ton on any coal mined or  
 “ excavated from any land, the title to which is held under 30  
 “ lease from the Crown in the right of the Dominion or in  
 “ the right of the Province ;

“ (b) a royalty of 15 cents per ton on any coal mined or excavated  
 “ from any land, the title to which is held in fee simple,  
 “ or under an agreement for sale from the Crown in the  
 “ right of the Dominion.”

It should also be noted here that in The Provincial Lands Act, being chapter 62 of the Revised Statutes of Alberta, 1942, Section 83, subsection (2) provided as follows :

“ 83. (2) Notwithstanding anything contained in any lease,  
 “ license, permit, instrument, document, or other arrangement 40  
 “ whether made under the provisions of this Act or The Dominion  
 “ Lands Act and the regulations made under the said Acts, any

“renewal or re-issue of such leases, license, permit, instrument,  
 “document, or other arrangement shall be in every respect in  
 “accordance with and subject to the regulations made under the  
 “authority of this Act and in force at the time of the making of  
 “such renewal or re-issue.”

This provision has been carried forward with very little variation as Section 7 of The Mines and Minerals Act, being chapter 66 of the Statutes of Alberta, 1949.

17.—Pursuant to the foregoing statutory enactments, Order in Council  
 10 No. 666/31 was promulgated and established regulations for the disposition  
 of mining rights in the Province of Alberta. Under the regulations  
 provision was made for leasing the lands and coal mining rights at an  
 annual rental of \$1.00 per acre; the lease to be for twenty-one years,  
 renewable for a further twenty-one years, and a royalty at the rate of  
 5 cents per ton was provided for.

18.—Order in Council No. 666/31 was amended by Order in Council  
 No. 193/35. It provided that the leases would be for twenty-one years,  
 renewable in the discretion of the Minister for a further term of twenty-one  
 years, and subject to renewals of additional periods of twenty-one years  
 20 upon such terms and conditions as the Lieutenant Governor in Council  
 should prescribe.

19.—On 18th August, 1948, Order in Council No. 927/48 amended  
 the regulations established by Order in Council No. 666/31 as amended,  
 by increasing the royalty prescribed from 5 cents per ton to 10 cents per ton.

20.—The learned Trial Judge held that the Province could not alter  
 or increase the royalty payable to the Crown because it did not bring itself  
 within the exception contained in Clause 2 of the Natural Resources Transfer  
 Agreement. He held that general legislation under the exception in  
 Clause 2 must be applied to everyone and is not confined to leases, grants  
 30 or contracts with the Crown. He also found that as to the grants he was  
 bound by the decision of the Supreme Court of Canada (now under Appeal  
 to Her Majesty in Council) in the case of *Huggard Assets Limited vs. the  
 Attorney General of Alberta and the Minister of Lands and Mines of the  
 Province of Alberta*, 1951, S.C.R. 427, and that no alteration could be made  
 in the rate of royalty under the Crown grants. He also found that the  
 Dominion Orders in Council contemplated the fixing once and for all of  
 a royalty at the time of the making of the grant and the language of the  
 order in council should not have been incorporated in the patent. He also  
 held that the Province could not alter the royalties under the leases which  
 40 were for a fixed amount and which the Dominion Government could not have  
 disturbed.

pp. 22-27

p. 26, l. 34-p. 27,  
l. 16

p. 27, ll. 17-20

pp. 64-76

p. 68, ll. 13-17

p. 71, l. 43-p. 76,  
l. 25p. 74, l. 13  
p. 75, l. 44

21.—On appeal to the Appellate Division in the Supreme Court of Alberta, Parlee, J., in whose reasons for Judgment the other Judges concurred, upheld the decision of the Trial Judge and held that the grant was subject to the royalty provided by the regulations at the time of the grant and that such royalty was not liable to be increased by any future regulations. He also held that the decision of the Supreme Court of Canada in the *Huggard Assets* case (supra) was binding on the Court and precluded any increase in the royalty under the grants. With respect to the interpretation of Clause 2 of the Natural Resources Transfer Agreement, Mr. Justice Parlee held that the language of the exception 10 could not be restricted only to contracts, leases or arrangements in which the Crown was a party. He stated as follows :

“ In my opinion it is not possible, as is contended by the  
 “ appellant to construe the language of the section as referring  
 “ only to contracts, leases or arrangements in which the Crown  
 “ was a party. The obvious intention of the section, was to  
 “ place a limitation on the right of the Province to alter or affect  
 “ any of the instruments mentioned. As the trial judge has said,  
 “ the expression ‘ irrespective of who may be the parties thereto ’  
 “ must be given full effect. The legislation to be allowed must 20  
 “ apply generally to ‘ all similar agreements relating to land,  
 “ ‘ mines or minerals in the Province or interests therein ’ whether  
 “ or not the Crown is a party thereto. If the contention for the  
 “ appellant should prevail, it would be open to the Province to  
 “ discriminate against contractees with the Dominion and the  
 “ purpose of the section would be rendered largely nugatory.”

p. 76, ll. 1-10

He also held that the term of a renewal lease with the Province of Alberta as illustrated in Lease Type No. 1 was void for uncertainty under the authority of the *Huggard Assets* case.

22.—It is submitted that the Judgments of the learned Trial Judge 30 and of the Appellate Division of the Supreme Court of Alberta are wrong and should be reversed, that the appeal should be allowed, the action dismissed and the Appellant should be entitled to judgment on his Counterclaim declaring that Section 8 of chapter 36 of the Statutes of Alberta, 1948, does apply to the lands and leases referred to in the Respondents’ Statement of Claim for the following among other

## REASONS

- (1) BECAUSE as to leases of Type No. 1 the lessee had entered into a renewal lease with the Province containing a clause authorising the Province to alter or increase the royalty by 40 Order in Council, thus bringing the case squarely within the exception contained in Clause 2 of the Transfer Agreement.

- (2) BECAUSE the leases of Types Nos. 2 and 3 were made under the provisions of the Dominion Lands Act and regulations passed pursuant thereto; and by the regulations attached to the renewals of these leases, to which the Respondents consented, the Lieutenant Governor in Council had a specific right to alter the royalty payable to the Crown from time to time.
- 10 (3) BECAUSE the Natural Resources Transfer Agreement effected a statutory novation and the Province, being subrogated to the rights of the Dominion, had the same right which the Dominion formerly had to alter the royalties payable under the provisions of the said Leases.
- 20 (4) BECAUSE under grants with a royalty clause of the first type, the regulations passed pursuant to the Dominion Lands Act and the patents issued authorised the Governor in Council to impose such royalty as may be fixed from time to time by Order in Council; and the Province, being placed in this same position as the Crown in right of the Dominion by the Transfer Agreement, has properly exercised the right which belonged to the Dominion prior to the Agreement.
- (5) BECAUSE under grants with a royalty clause of the second type the Governor in Council had the right at any time to impose a royalty in accordance with the regulations, and the regulations passed pursuant to the Dominion Lands Act permitted the Governor in Council to alter the royalties reserved to the Crown at any time.
- (6) BECAUSE the Parliament of Canada had wide powers of disposing of its Crown lands and could fix the terms of leases and grants by regulations which had the force of law.
- 30 (7) BECAUSE the exception in Clause 2 of the Natural Resources Transfer Agreement enabled the Province to pass legislation of general application increasing the royalty payable under the grants and leases entered into between the grantees or lessees and the Crown in right of the Dominion.
- (8) BECAUSE the exception in Clause 2 should not be interpreted so as to extend beyond the scope of the main provision which related solely to the contracts to purchase or lease Crown lands and other contracts with the Crown and did not apply to transactions to which the Crown was not a party.

- (9) BECAUSE by the terms of the Transfer Agreement and subject to Clause 2 thereof the Crown in the right of the Province could exercise the same power which the Dominion could have exercised under its legislation and regulations.
- (10) BECAUSE under its exclusive legislative jurisdiction over property and civil rights within the Province the Province can alter or amend the provisions of any contract entered into with the Crown ; and this right has not been altered or abrogated by the Natural Resources Transfer Agreement so long as the provincial legislation is of general application. 10
- (11) BECAUSE the case of *Huggard Assets Limited vs. the Attorney General of Alberta and the Minister of Lands and Mines of the Province of Alberta* was wrongly decided.
- (12) BECAUSE the provisions of the grants or leases authorising the alteration of the royalty from time to time or the imposition of a variable royalty are not void for uncertainty.

H. J. WILSON.

FRANK GAHAN.

W. Y. ARCHIBALD.



In the Privy Council.

No. 49 of 1951.

ON APPEAL FROM THE SUPREME COURT OF  
ALBERTA.

(APPELLATE DIVISION)

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BETWEEN

THE ATTORNEY GENERAL OF THE  
PROVINCE OF ALBERTA

(*Defendant*) APPELLANT

AND

WEST CANADIAN COLLIERIES  
LIMITED, INTERNATIONAL COAL  
AND COKE COMPANY LIMITED,  
McGILLIVRAY CREEK COAL AND  
COKE COMPANY LIMITED,  
HILLCREST MOHAWK COLLIERIES  
LIMITED, CADOMIN COAL  
COMPANY LIMITED and BRAZEAU  
COLLIERIES LIMITED

(*Plaintiffs*) RESPONDENTS

AND

THE ATTORNEY GENERAL OF  
MANITOBA AND THE ATTORNEY  
GENERAL OF SASKATCHEWAN

INTERVENANTS.

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CASE FOR THE APPELLANT

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