12,1953

No. 49 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

BETWEEN

THE ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA (Defendant) . . . . *Appellant*

AND

WEST CANADIAN COLLIERIES LIMITED, INTERNATIONAL COAL & COKE COMPANY LIMITED, McGILLIVRAY CREEK COAL & COKE COMPANY LIMITED, HILLCREST MOHAWK COLLIERIES LIMITED, CADOMIN COAL COMPANY LIMITED and BRAZEAU COLLIERIES LIMITED (Plaintiffs) . . *Respondents.*

Case for the Respondents.

RECORD.

1. This is an appeal by leave of the Appellate Division of the Supreme Court of Alberta by the Defendant against the unanimous judgment of the Appellate Division of the Supreme Court of Alberta, dated 18th September, 1951, which affirmed the judgment of the Trial Judge, The Honourable Mr. Justice McLaurin, dated 16th March, 1951 in which judgment was given for the Plaintiffs, the present Respondents. p. 80. p. 77. p. 27.

2. The action concerns the validity and interpretation of Section 8 of Chapter 36, Statutes of Alberta, 1948, which provides as follows :—

> " 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 of which is held under lease from the Crown in the right of the Dominion or in the right of the Province ;

(*b*) a royalty of fifteen 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."

The appeal also involves the consideration of the interpretation and effect of certain grants and leases of mining lands and minerals granted by the Crown to the Respondents.

p. 1. 3. The action was commenced by the Respondents as plaintiffs in the Supreme Court of Alberta against the Appellant for declarations to the effect that the monies sought to be imposed by the said Section 8 of Chapter 36 of the Statutes of Alberta, 1948 were not payable by the Respondents in respect of the lands or mineral rights held by them on grant or lease from the Crown in the right of the Dominion of Canada or the Province of Alberta either on the ground of the inapplicability of the p. 3. Statute, or on the ground that it was *ultra vires* or otherwise. The action was tried on an agreed Statement of facts and a number of exhibits without p. 7. further evidence.

4. The Respondents have been at all material times the holders of p. 64. leases or grants of lands, or minerals or mining rights in the Province of Alberta under the terms of various grants and leases originally issued by the Crown in right of the Dominion, but in the case of some leases renewed in or about 1946 on slightly different terms, the validity of which was in question in the proceedings, by the Crown in right of the Province of Alberta. The right of the Crown in right of the Dominion to make grants of such rights was not in general in dispute in the proceedings and was at the material times governed by the legislation of the Dominion as amended pp. 7, 8. from time to time as set forth in paragraph 1 of the Agreed Statement of Facts, by the various Orders in Council of the Dominion listed in para- p. 9. graph 2 of the Agreed Statement of Facts. The right and obligation of the Province to receive the benefit of the Crown's rights under the grants and leases and to renew the leases was governed by the concurrent legislation of the Province, the Dominion and the Imperial Parliament contained, so far as the legislation of the Imperial Parliament is concerned, in the British North America Act 1930 (20 & 21 Geo. 5 c. 26) s. 1 and Schedule embodying the terms of an agreement dated the 14th December, 1929, between the Dominion of Canada and the Province of Alberta. This agreement which transferred to the Province certain rights previously reserved to the Crown in right of the Dominion at the time of the creation of the Province of Alberta in 1905 is referred to in the Record and hereafter as the Natural Resources Agreement. Under the terms of the Natural Resources Agreement it was provided *inter alia* as follows :—

p. 74, l. 14. " (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 all 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 . . . and the said lands, mines, minerals and royalties
" shall be administered by the Province for the purposes thereof . . .

" (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 legisla-
" tion 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."

5. So many of the lands as are held by the Respondents under lease from the Crown were held on the terms of a royalty clause of which the following by agreement referred to respectively as Types 1, 2 and 3 may be treated as typical :— pp. 11, 12, 13.

Type No. 1.—Lands leased by Dominion Lease No. 2440, dated the 6th day of May, A.D. 1925, and Provincial Renewal Lease No. 5585, dated the 10th day of May, A.D. 1946.

Type No. 2.—Lands leased by Dominion Lease No. 143, dated the 28th day of June, A.D. 1929, and Dominion Renewal Lease No. 2886, dated the 1st day of May, A.D. 1930.

Type No. 3.—Lands leased by Dominion Lease No. 350, dated the 22nd day of October, A.D. 1910, and Provincial Renewal Lease No. 5040, dated the 30th day of April, A.D. 1934.

Each of the said leases contained provision for a royalty of 5 cents per ton of 2,000 lbs. on the merchantable output of coal taken out of the lands comprised in the lease. The lease in Type 1 was renewed by the Province on the 10th May, 1946, in modified terms providing for royalty— p. 30, l. 40. p. 31, l. 10. p. 31, l. 29. p. 31, l. 41. p. 32, l. 10. p. 32, l. 20.

" at the rate of 5 cents or at such other rate as may from time to p. 31, l. 10.
" 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 . . . "

The lease in Type 2 was renewed by the Dominion on the 1st May, 1930, p. 31, l. 33.
and that in Type 3 by the Province on the 30th April, 1934, on terms so p. 32, l. 13.
far as material identical with the original lease.

The right of the Province to make the modification in the Type 1 leases referred to above was in question in the proceedings and the Court of Appeal unanimously declared that the Province possessed no such right. p. 76, l. 1.

6. The grants of freehold lands and mining rights possessed by the Respondents were of two types referred to by agreement in the Record and hereafter as Type 1 (Lands) and Type 2 (Mining rights) each of which contained, but in materially different terms, a royalty clause prescribing

pp. 9, 10. p. 9, l. 31. a royalty payable at a rate determined by reference to Regulations of the Governor General in Council. Royalty Clause Type 1 so far as material provided as follows :—

> " 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."

p. 10, l. 20. Royalty Clause Type 2, so far as material provided as follows :—

> " Yielding and paying unto Us and Our Successors the royalty, " if any, prescribed by the regulations of Our Governor-in-Council."

p. 68, l. 23. 7. The first Regulation of the Governor General in Council P.C. No. 235 of 6th February, 1901, provided for a royalty in terms as to which it was the Respondents' contention that on its true construction it permitted the Crown to make grants at a fixed rate only, although the rate for different grants made at different dates might be different. The Appellant contended that this Order purported to permit a variable royalty, but the Respondents contend that, if so, such a grant would be illegal and beyond p. 68, l. 25. the powers of any Order in Council to authorise. In any event P.C. 235 of 1901 was superseded by P.C. 552 of 19th May, 1902, which provided for a fixed royalty of 10 cents per ton of 2,000 lbs., and this was reduced p. 11, l. 1. by P.C. No. 103 of 16th January, 1915, to a fixed royalty of 7 cents per p. 68, l. 10. ton, which remained the royalty in force until the date of the legislation p. 68, l. 5. in question in these proceedings. All the grants were in fact made after P.C. 552 of 19th May, 1902, although some of the contracts of sale were of date before the issue of this Order.

p. 2, l. 1. 8. In this state of affairs in 1948 the Province of Alberta passed the legislation in question in these proceedings and the Respondents began their action in the Supreme Court of Alberta on 29th January, 1949, seeking a declaration that this legislation was ineffective to render payable p. 2, l. 20. the charge which it purported to impose. It was agreed that the Respondents never in fact consented to the increase purported to be imposed by this Statute.

9. For the Respondents it was and is contended :—

(1) That grants of the type referred to as of Type 2 were to be construed as imposing a charge of royalty at the fixed rate prescribed by the Regulations at the time of the grant.

(2) That this was also the true construction of Type 1 grants.

(3) That if or in so far as the true construction of either of these grants purported to impose a variable rate of charge the reservation purporting to do so was void for uncertainty for the reasons given in and on the authority of the decision in *A.G. of Alberta* v. *Huggard Assets Ltd. et al.* [1950] 1 D.L.R. 823 [1951] 2 D.L.R. 305 S.C.

(4) That on their true construction all the leases imposed a charge of royalty at the fixed rate of 5 cents per ton only.

(5) That in so far as the Province purported to impose a variable charge in renewing leases of Type 1 such variable charge was *ultra vires* the Province in view of Clause 2 of the Natural Resources Agreement or alternatively void for uncertainty for the same reasons and on the same authority as any variable royalty purported to be imposed by the grants.

(6) That Section 8 of the provincial Statute of 1948 was *ultra vires* the Province as inconsistent with the Natural Resources Agreement scheduled to the British North America Act 1930, alternatively as an attempt by the Province to impose indirect taxation contrary to the provisions of the British North America Act 1867.

(7) That, whether or not contentions (1) to (5) inclusive were correct, the increased royalty was sought to be imposed solely under the provisions of the said Statute of 1948 which was manifestly invalid on the face of it as purporting to impose a charge " notwithstanding the terms of any agreement, etc., . . . or lease," and that, whether or not this provision was or was not inconsistent with the terms of the leases or grants in question, it was void and *ultra vires* as an attempt on the face of it to legislate in contravention of the Natural Resources Agreement and the Imperial Statute.

(8) That in any event the provisions of the said Section 8 were not severable, and that the invalidity of any part of the said provisions inevitably affected the validity of the whole.

(9) That the Respondents had never consented to the increase in charge of royalty, and the said section was not " legislation applying 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," within the meaning of the Natural Resources Agreement.

(10) That, for the purpose of determining whether a piece of legislation was legislation applying generally as aforesaid, the Court must consider all agreements etc. of the class in question and was not limited to agreements etc. of the class to which the Crown was one of the parties.

10. For the Appellant it was contended as follows :—

(A) That at all material times there had existed in the Crown, at first in right of the Dominion, and after the legislation giving effect to the Natural Resources Agreement in right of the Province, the right to alter by legislation or regulation the rate of royalty payable on mining grants and leases, and that this right was expressly recognised in grants of Type 1 and the renewal of lease of Type 2 and had been exercised at least once by the Crown when it reduced the rate of royalty from 10 cents to 7 cents.

(B) That the grants and leases must in any event be read and construed in the light of this right of the Crown.

(C) That the said Section 8 did no more than exercise a right which had always existed and was not inconsistent with the said grants or leases properly construed and therefore not inconsistent with the Natural Resources Agreement or the British North America Act 1930.

(D) That the section was in any event legislation in relation to property or civil rights and therefore within the exclusive sphere conferred on the Province by the British North America Act 1867.

(E) That in any event the said section was legislation applying generally to all similar agreements relating to lands, mines or minerals in the Province or interests therein within the meaning of Clause 2 of the Natural Resources Agreement.

(F) That in determining whether the said section was legislation applying generally as aforesaid the Court should regard only such agreements etc. in which the Crown was the grantor or lessor of the rights conferred.

(G) That the terms of the leases and grants expressly or by implication recognised the right of the Crown to vary the charge.

(H) That in any event Type 1 of the grant and Type 1 of the leases as renewed recognised such a right.

(I) That the provisions of the said Section 8 were in any event severable and the invalidity of some of the provisions would not necessarily involve the invalidity of the whole section.

p. 22. p. 64. 11. Both the trial judge (McLaurin J.) and the unanimous judgment of the Court of Appeal (O'Connor C.J.A., Parlee, MacDonald, Ford JJ.A.) upheld the contentions of the Respondents.

12. McLaurin J. after setting out the history of the lands and the terms of the Natural Resources Agreement referred in general to a number of authorities, and the terms of the grants and leases and of the legislation in question. In his view, had it not been for the terms of the British North America Act 1930, the Province, under its jurisdiction with respect to property and civil rights conferred by Section 92 (13) of the British North America Act 1867 could have arbitrarily disregarded the agreement with the Dominion and increased the royalties. He held, however, that the legislation in question was caught by the Natural Resources Agreement enacted by the British North America Act 1930 and did not come within the terms of the exception of legislation applying generally to all similar agreements. Relying on the judgment of O'Connor (then J.) in *Anthony* v. *A.G. for Alberta* (1942), 1 W.W.R. 833, McLaurin J. held in construing this exception regard must be had to contracts to which the Crown was not a party, and that the Act of 1948 was not therefore permitted by Clause 2 of the Natural Resources Agreement. He also held on the authority of *Huggard Assets Ltd.* v. *Attorney General* (then unreported) that the Crown had no inherent power to make a grant subject to a variable royalty,

p. 25, l. 5.

p. 26, l. 30.

and, even if it had, McLaurin J. questioned whether this would avail the present Appellant since the increased charge in this case was " flatly based on the Statute." p. 26, l. 28.

13. The judgment of the Appellate Division was delivered by Parlee J. After referring to the issues and the general legislation Parlee J. went on to consider the particular terms of the Type 1 grants as those least favourable to the present Respondents. He pointed out, however, that the particular phrase " as may from time to time be specified " on which reliance was placed was in point of fact anachronistic at the time of the grants in question here. He also dealt with the argument of the present Appellant that the Crown had an inherent right to vary by legislation the appropriate rate of royalty. He proceeded to distinguish *Chapelle* v. *Regem* [1904] A.C. 127 and to hold on the authority of *Majestic Mines Ltd.* v. *A.G. for Alberta* [1942] S.C.R. 402 that the expression " Royalty, if any, prescribed by the regulations " in the Type 2 grants referred only to the rate prescribed at the date of the grant. He then proceeded to cite *A.G. for Alberta* v. *Huggard Assets Ltd.* [1950] 1 D.L.R. 823 and [1951] 2 D.L.R. 305 S.C. as establishing that grants purporting like grants of Type 1 (if this is the true construction of Type 1) are void for uncertainty. p. 64. p. 68, l. 20. *ibid.* p. 71. p. 72, l. 1.

14. The learned judge next proceeded to consider the Natural Resources Agreement, and said :— p. 75, l. 33.

> " 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 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."

15. The learned judge concluded the judgment of the Court dealing with the contentions that the situation could be altered in favour of the Appellant either by the renewal by the Province of the Type 1 leases in terms purporting to modify the royalty or by the reduction of the royalties in the grants from 10 cents to 7 in 1915. The former contention he disposed of by pointing out that what the Respondents were entitled to was " a renewal lease on the same terms as the one renewed so far as royalty was concerned " and that " in any event the provincial renewal contains the phrase which is void for uncertainty for the reasons already discussed." The latter point was answered by the Court by observing that a charge by way of reduction was an advantage to the grantees and was quite different from the assertion by the grantors of the right to increase the charge. p. 76, l. 1. p. 76, l. 8. p. 76, l. 11. p. 76, l. 17.

16. In the premises the Respondents humbly submit that the judgments of the trial judge and of the Appellate Division were correct and ought to be affirmed, and that this appeal ought to be dismissed for the following amongst other

REASONS.

(1) BECAUSE the legislation in question is on the face of it invalid in whole and in part as on the face of it an attempt to legislate in contravention of the British North America Act 1930, and the corresponding Dominion Statute.

(2) BECAUSE the rates of royalty provided for in the relative grants and leases and permitted by the relevant Orders in Council were and are fixed and not subject to increase.

(3) BECAUSE in any event any provision in either grants or leases or in any Order in Council providing for a variable rate of royalty was or would be void and bad for uncertainty.

(4) BECAUSE any attempt by the Province to increase the rate of royalty charged whether in grants or leases is void as inconsistent with the British North America Act 1930, and the comparable Dominion Statute.

(5) BECAUSE in the alternative the proposed charges were a form of indirect taxation and *ultra vires* the Province under the provisions of the British North America Act 1867.

(6) BECAUSE the Respondents have never consented to the proposed charges and the proposed charges are not and are not contained in legislation applying generally to all similar agreements relating to mines or minerals in the Province or to interests therein irrespective of who may be the parties thereto within the meaning of the Natural Resources Agreement.

(7) BECAUSE in any event the provisions of the legislation in question are not severable and the invalidity of any part thereof necessarily involves the invalidity of the whole section.

(8) BECAUSE the judgments of the trial judge and of the Appellate Division are each and both of them correct and ought to be affirmed.

H. S. PATTERSON.

HAILSHAM.

No. 49 of 1951.

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ON APPEAL

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BETWEEN

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Appellant

AND

WEST CANADIAN COLLIERIES LIMITED and Others . *Respondents.*

Case for the Respondents

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