12, 1953

In the Privy Council.

No. 49 of 1951.

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

BETWEEN

THE ATTORNEY GENERAL FOR 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.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

Supreme Court of Alberta. Trial Division.

No. 1. Amended Statement of Claim, 29th January 1949—

No. 1.

Amended Statement of Claim.

IN THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA JUDICIAL DISTRICT OF CALGARY.

Between

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*

and

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA ... *Defendant.*

1.—The Plaintiffs are duly incorporated Companies carrying on business in the Province of Alberta with offices at Blairmore, Coleman, Coleman, Bellevue, Cadomin and Nordegg respectively.

2.—The Plaintiffs are the holders of leases of coal lands granted by His Majesty the King represented by the Minister of the Interior of the Dominion of Canada, said leases providing for the payment to the lessor of the sum of five cents per ton of 2,000 pounds of merchantable coal mined from the lands covered by the said leases.

Supreme Court of Alberta. Trial Division.

No. 1. Amended Statement of Claim, 29th January 1949— *continued.*

3.—The Plaintiffs are the holders of leases of coal lands granted by His Majesty the King in the right of the Province of Alberta, and issued in accordance with the Agreement referred to in paragraph 7 hereof and providing for the payment of five cents per ton as set out in the immediately preceding paragraph.

4.—The Plaintiffs are also the holders of lands granted by His Majesty the King, said grants covering all coal within, upon or under the lands mentioned in the same. By Order in Council, dated the 16th day of January, 1915, it was provided that the royalty of ten cents per ton of 2,000 pounds imposed by Order in Council, dated the 21st day of May, 1901, payable in respect of such grants, be reduced to seven cents per ton of 2,000 pounds on merchantable coal mined, such reduction to take effect on the 1st day of January, 1915.

5.—By Chapter 36 of the Statutes of Alberta, 1948, being an Act to amend the Provincial Lands Act, it was enacted by Section 8 thereof as follows :

> " 44. c. 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 " 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."

6.—The Plaintiffs say that the said payments provided for by the said leases and grants and Order-in-Council do not constitute a royalty reserved to the Crown within the meaning of said Section 8 of Chapter 36, and the said leases and lands are not affected by said Section 8.

7.—The Plaintiffs say that the said enactment is contrary to the terms of Section 2 of the Agreement dated the 14th day of December, 1929, made between the Government of the Dominion of Canada and the Government of the Province of Alberta, and set out as a schedule to Chapter 3 of the Statutes of Canada, 1930, and made law by Chapter 26 of the Imperial Statutes, 1930, in that—

(a) The said legislation is a breach of the covenant of the Province of Alberta contained in paragraph 2 of the said agreement to

" 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."

(b) The said legislation purports to affect or alter the terms of such contracts, leases or other arrangements and was passed without the consent of the parties thereto, and does not apply generally to all similar agreements relating to lands, mines or minerals in the Province of Alberta; or to interests therein irrespective of who may be the parties thereto.

7. 2.—The Plaintiffs say that the true interpretation of certain Grants in issue herein, and the relevant Order-in-Council or Orders-in-Council is that such Grants are subject only to the Orders-in-Council in effect at the date of issue.

8.—The Plaintiffs say that the said legislation is invalid so far as the same purports to affect the said leases and that the said enactment is not severable and is therefore invalid in toto.

9.—In the alternative to paragraph 8 hereof the Plaintiffs say that the said legislation is invalid so far as the same purports to affect grants from the Crown and that the said enactment is not severable and is therefore invalid in toto.

10.—The Plaintiffs further say that they are the owners of coal mines and minerals in lands granted by His Majesty the King, the said grants containing no provision for the payment of any sums to His Majesty, and that the Department of Lands and Mines of the Province of Alberta is demanding the payment of money in respect of coal mined by the Plaintiffs in respect of such lands.

11.—The Plaintiffs further say that the provisions of said Section 8 of Chapter 36 impose indirect taxation and are therefore *ultra vires* the Province of Alberta.

THE PLAINTIFFS THEREFORE CLAIM:

(a) A declaration that said Section 8 of Chapter 36 of the Statutes of Alberta, 1948, does not apply to the said leases and lands.

(b) A declaration that said Section 8 of the Statutes of Alberta, 1948, is *ultra vires.*

(c) A declaration that no monies are payable whether by royalty or otherwise to the Department of Lands and Mines in respect of the lands mentioned in paragraph 10 hereof.

(d) Costs.

Place of trial—Calgary, Alberta.

Supreme Court of Alberta. Trial Division.

DATED at the City of Calgary, in the Province of Alberta, this 29th day of January, A.D. 1949, and delivered by Messrs. Patterson, Hobbs & Patterson, Solicitors for the Plaintiffs, whose address for service is 204 Insurance Exchange Building, Calgary, Alberta.

No. 1. Amended Statement of Claim, 29th January 1949— *continued.*

ISSUED out of the office of the Clerk of this Court at Calgary aforesaid, this 29th day of January, A.D. 1949.

V. R. JONES,
Clerk of the Court.

No. 2. Amended Statement of Defence 6th February 1950.

No. 2.

Amended Statement of Defence.

1.—The Defendant admits the allegations contained in paragraph 1 of the Plaintiffs' Statement of Claim.

2.—The Defendant denies the allegations contained in paragraphs 2 and 3 of the Plaintiffs' Statement of Claim.

3.—The Defendant denies that the Plaintiffs are the holders of lands granted by His Majesty the King and the Defendant further denies that the said grants cover all coal within, upon or under the lands mentioned in the said grants. The Defendant admits that by Order-in-Council dated the 16th day of January, A.D. 1915 it was provided that the royalty of ten cents per ton of 2,000 pounds imposed by Order-in-Council dated the 21st day of May, A.D. 1901, payable in respect to such grants, be reduced to seven cents per ton of 2,000 pounds on merchantable coal mined, and further admits that such reduction was to take effect on the 1st day of January, A.D. 1915, but the Defendant says that this reduction applies only to those grants on which the royalty was imposed by Order-in-Council dated the 21st day of May, A.D. 1901.

4.—The Defendant admits the allegations contained in paragraph 5 of the Plaintiffs' Statement of Claim.

5.—The Defendant denies the allegations contained in paragraph 6 of the Plaintiffs' Statement of Claim and says that the payments provided for by the leases, grants and Orders-in-Council constitute a royalty reserved to the Crown within the meaning of Section 8, chapter 36 of the Statutes of Alberta, 1948, and the Defendant further says that the leases and grants of land which the Plaintiffs acquired from the Crown in the right of the Dominion of Canada or in the right of the Province of Alberta are affected by and subject to the provisions of the said Section 8.

6.—The Defendant denies that the said enactment is contrary to the terms of Section 2 of the Agreement referred to in paragraph 7 of the Plaintiffs' Statement of Claim and the Defendant denies that the said legislation is a breach of the covenant of the Province of Alberta contained in paragraph 2 of the said Agreement and the Defendant further denies that the said legislation purports to affect or alter the terms of any contract to purchase or lease any Crown lands, mines or minerals or any other arrangement whereby any person has become entitled to any interest therein as against the Crown.

7.—The Defendant says that the said Section 8 is legislation which applies generally to all similar agreements relating to lands, mines or minerals in the Province and to interests therein, irrespective of who may be the parties thereto, within the meaning of Section 2 of the Agreement referred to in paragraph 7 of the Plaintiffs' Statement of Claim.

8.—The Defendant says that the said enactment does not affect or alter any term of any contract to purchase or lease any Crown lands, mines or minerals or any other arrangement whereby any person has become entitled to any interest therein as against the Crown within the meaning of Section 2 of the Agreement referred to in paragraph 7 of the Plaintiffs' Statement of Claim.

8. 2.—The Defendant denies the allegation contained in paragraph 7. 2. of the Statement of Claim that the true interpretation of certain grants in issue herein, and the relevant Orders-in-Council or Order-in-Council is that such grants are subject only to the Orders-in-Council in effect at the date of issue and the Defendant says that the true interpretation of the said grants and Orders-in-Council is that the grants are subject to all Orders-in-Council relating to the disposition of land containing coal or other minerals in effect at the date of issue and to all Orders-in-Council relating to the disposition of land containing coal or other minerals in effect at any time before or after the date of issue of the said grants.

9.—The Defendant denies that the said legislationis invalid in so far as it purports to affect the said leases and further denies that the said enactment is not severable and further denies that it is invalid in toto.

10.—The Defendant denies that the said legislation is invalid in so far as it purports to affect grants from the Crown and denies that the said enactment is not severable and further denies that it is invalid in toto.

11.—The Defendant denies that the Plaintiffs are the owners of coal mines and minerals in lands granted by His Majesty the King, and further denies that the grants referred to in paragraph 10 of the Statement of Claim contain no provision for the payment of any sums to His Majesty, and the Defendant says that the said grants reserve to His Majesty a royalty on

Supreme Court of Alberta. Trial Division.

No. 2. Amended Statement of Defence, 6th February 1950— *continued.*

all coal produced on the said lands and the right to impose and collect the said royalty.

12.—The Defendant pleads the provisions of Sections 61 and 62 of The Land Titles Act, being chapter 205 of the Revised Statutes of Alberta, 1942, and says that the reservations, exceptions and conditions contained in the original grants from the Crown were continued in the existing Certificates of Title issued out of the Land Titles Office for the Land Registration District in which the lands in question are situated.

13.—The Defendant denies the allegations contained in paragraph 11 of the Plaintiffs' Statement of Claim.

14.—The Defendant says that the said Section 8 is legislation in relation to property and civil rights in the Province and in relation to matters of a purely local or private nature in the Province.

15.—The Defendant further says that by virtue of Dominion Regulations affecting the coal lands and the provisions of the leases and grants of the said lands mentioned in the Plaintiffs' Statement of Claim and the provisions of the Agreement referred to in paragraph 7 of the Plaintiffs' Statement of Claim, the Province has the right to exact and collect the royalties mentioned in Section 8 of chapter 36 of the Statutes of Alberta, 1948.

COUNTERCLAIM.

1.—The Defendant repeats the allegations contained in the Statement of Defence.

2.—By the terms of the said grants, leases, Regulations and Orders, the Plaintiffs' predecessors in title and the Plaintiffs were and are required to pay to the Crown in the right of the Dominion and its successors the Crown in the right of the Province of Alberta a royalty on all coal produced from the lands in question in this action.

3.—By an Agreement made on the 14th day of December, A.D. 1929, between the Government of the Dominion of Canada and the Government of the Province of Alberta, approved by The Alberta Natural Resources Act, being chapter 21 of the Statutes of Alberta, 1930, and by The Alberta Natural Resources Act, being chapter 3 of the Statutes of Canada, 1930, all Crown lands, mines, minerals and royalties derived therefrom and every interest of the Crown in the right of the Dominion in the lands and under rights within the Province were transferred to the Province of Alberta.

4.—By virtue of the grants, leases, Regulations and Orders and by virtue of the terms of the aforesaid Agreement, and by virtue of the ownership of its natural resources the Province is entitled to receive the royalties referred to in paragraph 5 of the Plaintiffs' Statement of Claim.

The Defendant therefore claims :

(A) A declaration that the said Section 8 of chapter 36 of the Statutes of Alberta, 1948, applies to any of the Plaintiffs' land the title to which is held under lease from the Crown in the right of the Dominion of Canada or in the right of the Province of Alberta ;

(B) A declaration that the said Section 8 of chapter 36 of the Statutes of Alberta, 1948, applies to any of the Plaintiffs' 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 of Canada ;

(C) Costs.

DATED at the City of Edmonton, in the Province of Alberta, this 6th day of February, A.D. 1950, and DELIVERED by H. J. Wilson, Legislative Buildings, Edmonton, Alberta, Solicitor for the Defendant, whose address for service is at the office of C. S. Blanchard, K.C., Agent of the Attorney General, at 400 Burns Buildings, in the City of Calgary, in the Province of Alberta.

No. 3.

Agreement as to the Facts.

It is agreed between the parties hereto that the following are the facts in the case :

1.—In 1886 the Dominion Lands Act was enacted as Chapter 54 of the Revised Statutes of Canada and Section 47 thereof read 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."

In 1892 Section 47 of the Dominion Lands Act, being Chapter 54 of the Revised Statutes of Canada, 1886, was amended by Section 5 of Chapter 15 of 55–56 Victoria to read as follows :

" 47. Lands containing coal or other minerals, including " lands in the Rocky Mountain Park, shall not be subject to the " provisions of this Act respecting sale or homestead entry, but

Supreme Court of Alberta. Trial Division.

No. 3. Agreement as to the facts, 21st February 1950— *continued.*

" the Governor General in Council may, from time to time, make " regulations for the working and development of mines on such " lands, and for the sale, leasing, licensing or other disposal " thereof; Provided, however, that no disposition of mines or " mining interests in the said park shall be for a longer period than " twenty years, renewable, in the discretion of the Governor in " Council from time to time, for further periods of twenty years " each, and not exceeding in all sixty years."

In 1906 Section 47 of the Dominion Lands Act, being Chapter 54 of the Revised Statutes of Canada, 1886, became, by virtue of the revision of the Dominion Lands Act as Chapter 55 of the Revised Statutes of Canada, 1906, Section 159 which read as follows :

" 159. Lands containing coal or other minerals, including " lands in the Rocky Mountains Park, shall not be subject to the " provisions of this Act respecting sale or homestead entry, but " the Governor in Council may, from time to time, make regula- " tions for the working and development of mines on such lands, " and for the sale, leasing, licensing or other disposal therof."

In 1908 the Dominion Lands Act was consolidated and re-enacted by Chapter 20 of the Statutes of Canada, 1908, and Section 37 thereof reads as follows :

" 37. 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."

In 1914 Section 37 of the Dominion Lands Act as enacted by Chapter 20 of the Statutes of Canada, 1908, was amended by Section 8 of Chapter 27 of the Statutes of Canada, 1914, by striking out the words " sold or " and by striking out the word " disposal " and by substituting therefor the word " leasing " so that Section 37 would then read :

" 37. Lands containing salt, petroleum, natural gas, coal, " gold, silver, copper, iron or other minerals may be leased under " regulations made by the Governor in Council ; and these " regulations may provide for the leasing 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."

2.—It is further agreed that the following Orders in Council are those relevant to this action :

Number	2167	...	Dated 17th September 1889
,,	235	...	,, 6th February 1901
,,	—	...	,, 31st May 1901
,,	552	...	,, 19th May 1902
,,	430	...	,, 4th March 1907
,,	1059	...	,, 9th May 1907
,,	245	...	,, 16th February 1909
,,	186	...	,, 31st January 1910
,,	729	...	,, 20th April 1910
,,	1793	...	,, 12th August 1911
,,	1792	...	,, 12th August 1911
,,	103	...	,, 16th January 1915
,,	851	...	,, 27th May 1924

3.—The lands, including under rights, and under rights involved in this action fall into the following two main categories :

(A) Lands, including under rights, and under rights granted by the Crown in the right of the Dominion of Canada ; and

(B) Coal mining rights leased by the Crown in the right of the Dominion of Canada or by the Crown in the right of the Province of Alberta.

4.—The original grants from the Crown of the said lands, including under rights and under rights contain one of the following types of royalty clauses, and set out in Schedule " A " hereto is the legal description of the surface, the existing Certificate of Title number, the type number of royalty clause contained in each of the said grants, the date of each of the patents and the date of the Mining Sale in each case :

ROYALTY CLAUSE TYPE NO. 1.

" 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 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 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 be " writing under his hand and seal cancel these presents and declare " the same to be null and void, and the same shall thereupon become " 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."

ROYALTY CLAUSE TYPE NO. 2.

" To HAVE AND TO HOLD the same unto the grantee in fee simple. " Yielding and paying unto Us and Our Successors the royalty, if " any, prescribed by the regulations of Our Governor-in-Council, it " being hereby declared that this grant is subject in all respects to " the provisions of any such regulations with respect to royalty upon " the said minerals or any of them, 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 " declarations these presents and everything therein contained shall " immediately become and be absolutely null and void."

5.—It is further agreed that the patent titles whose numbers are hereafter set out opposite the types of royalty clauses are examples of the patent titles to the land described in Schedule " A ":

Royalty Clause Type No. 1	Patent Title No. R I 189
Royalty Clause Type No. 2	Patent Title No. G V 230

6.—It is further agreed that for the purposes of this action it is to be assumed that the patent titles referred to in paragraphs 3 (a), 4 and 5 hereof were issued by virtue of the authority contained in the Regulations relating to the disposal of coal lands as set forth in Order in Council P.C. No. 235, dated February 6th, 1901, as amended by Order in Council dated May 31st, 1901, or under the Regulations relating to the disposal of coal lands contained in Order in Council P.C. No. 552, dated May 19th, 1902;

Provided that the Plaintiffs will in subsequent proceedings be entitled to question any title not so issued.

7.—It is further agreed that Order in Council P.C. No. 103, dated January 16th, 1915, reducing the royalty on coal from ten cents per ton to seven cents per ton was applicable to the royalty imposed by Orders in Council P.C. No. 235, dated February 6th, 1901, and P.C. No. 552, dated May 19th, 1902, and applied to all patented grants referred to in Schedule " A " hereto annexed.

8.—It is further agreed that the following leases issued by the Crown in the right of the Dominion of Canada and the renewals thereof, if any, issued by the Crown in the right of the Dominion and the Crown in the right of the Province of Alberta and the Regulations attached to each of the said leases and renewals thereof are typical examples of all of the leases and Regulations with respect to the leasing of Crown lands which are involved in this action :

Type No.	*Original Lease No.*	*Renewal Lease No.*
1 ...	2440 ...	5585
2 ...	143 ...	2886
3 ...	350 ...	5040

9.—The relevant provisions of the original lease and the renewal lease, if any, of each type and of the Regulations governing each lease are as follows :

TYPE NO. 1.

DOMINION ORIGINAL LEASE NO. 2440 DATED MAY 6TH, 1925.

". . . . and also rendering and paying therefor unto His Majesty, " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands ". . . ."

SECTION 19 OF THE RELEVANT DOMINION REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of five cents per ton " of two thousand pounds, shall be levied and collected on the " merchantable output of the mine . . . ."

PROVINCIAL RENEWAL LEASE NO. 5585 DATED MAY 10TH, 1946.

". . . . and also rendering and paying therefor until His Majesty, " a royalty at the rate of five 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 two thousand " pounds on the saleable and merchantable output of coal taken out " of the said land . . . ."

SECTION 18 (A) OF THE RELEVANT PROVINCIAL REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of five cents per ton " of two thousand pounds, shall be levied and collected on the output " of the mine . . . ."

Supreme Court of Alberta. Trial Division.

No. 3. Agreement as to the facts, 21st February 1950— *continued.*

TYPE NO. 2.

DOMINION ORIGINAL LEASE NO. 143 DATED JUNE 28TH, 1909.

". . . . and also rendering and paying therefor unto His Majesty, " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands " . . . ."

SECTION 18 OF THE RELEVANT DOMINION REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of five cents per ton " of two thousand pounds will be levied and collected on the " merchantable output of the mine . . . ."

DOMINION RENEWAL LEASE NO. 2886 DATED MAY 1ST, 1930.

". . . . and also rendering and paying therefor unto His Majesty " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands " . . . ."

SECTION 19 (A) OF THE RELEVANT DOMINION REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of five cents per ton " of two thousand pounds, shall be levied and collected on the " merchantable output of the mine. . . ."

TYPE NO. 3.

DOMINION ORIGINAL LEASE NO. 350 DATED OCTOBER 22ND, 1910.

". . . . and also rendering and paying therefor unto His Majesty, " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands " . . . ."

SECTION 18 OF THE RELEVANT DOMINION REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of 5 cents per ton of " two thousand pounds will be levied and collected on the " merchantable output of the mine . . . ."

PROVINCIAL RENEWAL LEASE NO. 5040 DATED APRIL 30TH, 1934.

". . . . and also rendering and paying therefor unto His Majesty, " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands " . . . ."

SECTION 19 OF THE RELEVANT PROVINCIAL REGULATIONS IN EFFECT AT THE TIME THE LEASE WAS ISSUED.

" In addition to the rent, a royalty at the rate of five cents per ton " of two thousand pounds, shall be levied and collected on the " merchantable output of the mine . . . ."

10.—It is further agreed between the parties hereto that royalties were levied under the royalty clauses contained in Types numbered 1 and 2 on the lands referred to in paragraph 3 (a) hereof under the relevant Orders in Council and were paid by the Plaintiffs herein.

11.—It is further agreed that royalties were levied under the royalty clauses contained in Types numbered 1, 2 and 3 on the lands referred to in paragraph 3 (b) hereof under the relevant Orders in Council and that the said royalties were paid by the Plaintiffs herein.

12.—The parties hereto agree that subsequent to the execution, on the 14th day of December, A.D. 1929, by the Government of the Dominion of Canada and the Government of the Province of Alberta, of the Natural Resources Transfer Agreement, royalties have been paid by the Plaintiffs to the Province under the relevant Orders in Council and legislation referred to in the pleadings.

13.—It is further agreed that the Plaintiffs have not consented to the increase in royalty purported to be imposed by Chapter 36 of the Statutes of Alberta, 1948.

14.—It is further agreed that the Canadian Pacific Railway has entered into arrangements whereby coal lands were transferred and royalties were reserved. Such arrangements are in the form of Transfer No. 1299 E.O. and Encumbrance No. 1304 E.O., certified copies of which are exhibited.

15.—It is finally agreed that the foregoing Agreement is a summary of the facts of the case but does not preclude either party from referring to any relevant Dominion or Provincial enactment or Order in Council, after giving due notice to the opposite party.

DATED at the City of Edmonton, in the Province of Alberta, this 21st day of February, A.D. 1950.

H. S. PATTERSON,
Counsel for the Plaintiffs.

H. J. WILSON,
Counsel for the Defendant.

Supreme Court of Alberta. Trial. Division.

No. 4. Opening at Trial. 21st February 1950.

No. 4.

Opening at Trial.

H. S. PATTERSON, K.C., and H. S. PATTERSON, Jr., for the Plaintiffs.

H. J. WILSON, K.C., and W. Y. ARCHIBALD, for the Defendants.

Mr. PATTERSON, Sr.: My Lord, in this matter my learned friend, Mr. Wilson, and myself have agreed on a Statement of Facts which includes all the statutory provisions which we think are relevant and all the Orders-in-Council. We wish to reserve the right to refer to other Orders-in-Council or statutory provisions if we think any are relevant, and on notice.

Now, perhaps I should put on record just what the action is about. It involves the legality of Chapter 36 of the Statutes of Alberta, 1948, which in short was an Act which increased the royalties payable on government grants and leases; it increased the royalties on leases from five to ten cents and on grants from seven to fifteen.

Now, it does not involve all grants issued by the Dominion. It does not involve grants issued by the Dominion of minerals not reserving any royalty, and the grants which have been issued on a tract of land including all minerals; but it does include all those lands where the grant was given and the royalty reserves—if that is the correct term—and it involves all Dominion leases and renewals of those, where the same thing occurred.

Now, we say that this Statute of 1948 is contrary to the Natural Resources Agreement. Now, the section has not been fully interpreted by the Court although there are decisions that partially interpret it—but it is Section 2 of the Natural Resources Agreement, which provided that:

> "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 insofar 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."

Now, there is no doubt, of course, that the Province is bound by the Natural Resources Agreement, and it is also established, I think, by the cases, that there are no powers beyond the general powers under the B.N.A. Act, and those powers are found in the Agreement.

Now, to state our case very shortly, what we hope to establish: we say that when the Natural Resources Agreement was entered into, the royalties under a grant and the royalties under a lease were established, and they had been for many years: in the case of grants, seven cents per ton; and in the case of leases, five cents per ton, and that was the position

of the leases and the grants at the time. We say that the legislation of 1948 affects the letters and terms of the grants and the leases in that respect.

Now, then, what we say—if I may sketch the argument roughly—is this : that under Section 2 the Province had power to alter the agreements provided either one of two things existed : first, the consent of the parties. It is admitted in the Statement of Facts that there was no consent here, so that the legislation is not valid on that ground. The other alternative which would make the legislation valid is contained in the second part of Section 2 : it provides that the legislation must affect " all similar agree- " ments relating to lands, mines or minerals in the Province or to interests " therein, irrespective of who may be the parties thereto."

Now, if the legislation affects Crown lands, Crown grants and leases, and if it affects all other similar agreements such as C.P.R. agreements where royalties were reserved, then it would be valid ; but if it lacks consent and if it lacks applicability to other contracts, irrespective of who may be the parties thereto, then the legislation is void.

It does not contain the two elements required to make it valid, that is, the legislation in regard to the Dominion grants and leases requires consent, or, if there is no consent, requires applicability to all other similar agreements.

THE COURT : It lacks generality.

Mr. PATTERSON, Sr. : Yes, it lacks generality. That's very true. Then, that is where we start. Then, we say that, coming down more particularly to the grants and the leases, while we alleged the legislation is bad, it doesn't apply to grants and leases and we submit that we don't have to prove it is bad as to grants, and leases as well ; that is, supposing we prove only that it is bad as to leases : then, the question of severability comes in and then the Court must say whether it considers the legislation would have been passed or enacted if the Legislature had known it applied only to grants or only to leases. There is only one case, I think, where severability is mentioned : the *Grain Futures* case, and I am not going to worry you with it, but I am just going to refer Your Lordship to 1925 Appeal Cases at page 568, the judgment of the Privy Council :

> " In other words, if the statute is *ultra vires* as regards the " first class of cases, it has to be pronounced to be *ultra vires* " altogether. Their Lordships agree with Duff, J., in his view that " if the Act is inoperative as regards brokers, agents and others, " it is not possible for any court to presume that the Legislature " intended to pass it in what may prove to be a highly truncated " form."

There are some other cases, but there are not many actually where severability is considered.

So, we have the Agreement as to Facts which contains the relevant statutory provisions and Orders-in-Council, and I will ask leave to put that in—I suppose the Orders-in-Council should be marked as an exhibit—

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No. 4. Opening at Trial, 21st February 1950— *continued.*

THE COURT: Should the Agreement be in as an exhibit? Perhaps you better put the Agreement in as an exhibit.

Mr. PATTERSON, Jr.: I tender the Agreement, my lord.

THE COURT: Exhibit 1, the Agreement as to Facts. Let me see it. What next?

AGREEMENT AS TO FACTS, AS PRODUCED, PUT IN AND MARKED EXHIBIT 1.

Mr. PATTERSON, Jr.: Now, my lord, I tender the first Order-in-Council which has any application to the matter, which is Order-in-Council number 2167 of the 17th of September, 1889. This Order-in-Council fixed the upset price on coal lands at $20.00 an acre, if that included anthracite, and $10.00 for coal other than anthracite, and in this Order-in-Council there was no provision for a royalty. This applied to grants only, sir.

THE COURT: Are these Orders-in-Council part of the Agreement, Exhibit 1, or are they further to it?

Mr. PATTERSON, Jr.: They are recited in the Agreement.

Mr. PATTERSON, Sr.: Further amplification of the Agreement.

THE COURT: Exhibit 2.

ORDER-IN-COUNCIL NO. 2167 OF 17TH OF SEPTEMBER, 1889, AS PRODUCED, PUT IN AND MARKED EXHIBIT 2.

THE COURT: What's the next one?

Mr. PATTERSON, Jr.: The next one is Order-in-Council 235 of the 6th of February, 1901, and it is an amendment of Exhibit 2—Section 34 of Exhibit 2—and it provides for a royalty at such rate as may from time to time be specified by Order-in-Council.

THE COURT: Exhibit 3.

ORDER-IN-COUNCIL NO. 235 OF THE 6TH OF FEBRUARY, 1901, AS PRODUCED, PUT IN AND MARKED EXHIBIT 3.

Mr. PATTERSON, Jr.: The next one, my lord, is an un-numbered Order-in-Council of the 31st day of May, 1901, and this provides that the royalty shall be the rate of ten cents per ton of two thousand pounds.

THE COURT: Exhibit 4.

ORDER-IN-COUNCIL OF THE 31ST DAY OF MAY, 1901, AS PRODUCED, PUT IN AND MARKED EXHIBIT 4.

Mr. PATTERSON, Jr.: The next one is Order-in-Council number 552 of the 19th of May, 1902, which rescinds the previous Order-in-Council but as far as we are concerned republishes the applicable provisions regarding royalty at ten cents per ton.

THE COURT: Exhibit 5.

ORDER-IN-COUNCIL NO. 552 OF THE 19TH OF MAY, 1902, AS PRODUCED, PUT IN AND MARKED EXHIBIT 5.

Mr. PATTERSON, Jr.: The next is Order-in-Council number 430 of the 4th of March, 1907, and it provides that there will be no more outright grants of coal lands, no more coal lands will be disposed of under the regulations which we have just submitted.

THE COURT: Exhibit 6.

ORDER-IN-COUNCIL NO. 430 OF THE 4TH OF MARCH, 1907, AS PRODUCED, PUT IN AND MARKED EXHIBIT 6.

Mr. PATTERSON, Jr.: The next is Order-in-Council number 1059 of the 9th of May, 1907, and it sets forth the provisions for leases of coal lands from the Crown, and Section 18 of the Order-in-Council provides for a royalty at the rate of five cents per ton.

THE COURT: Exhibit 7.

ORDER-IN-COUNCIL NO. 1059 OF THE 9TH OF MAY, 1907, AS PRODUCED, PUT IN AND MARKED EXHIBIT 7.

Mr. PATTERSON, Jr.: The lease provided for in that Regulation were twenty-one year leases.

The next is Order-in-Council number 245 of the 16th of February, 1909, and that provides that the twenty-one year leases referred to in the previous exhibit will be renewable for a further term of twenty-one years.

THE COURT: Exhibit 8.

ORDER-IN-COUNCIL NO. 245 OF THE 16TH OF FEBRUARY, 1909, AS PRODUCED, PUT IN AND MARKED EXHIBIT 8.

Mr. PATTERSON, Jr.: The next is Order-in-Council number 186 of the 31st day of January, 1910, and this refers back to the Regulations regarding grants and the grants which have been already issued, and it provides that the ten cents per ton royalty shall be charged only on the merchantable output of the mine and will not include any tonnage which is used by the coal mine itself for generating steam and for the necessary operations of the mine.

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No. 4. Opening at Trial, 21st February 1950— *continued.*

THE COURT : Exhibit 9.

ORDER-IN-COUNCIL No. 186 OF THE 31ST DAY OF JANUARY, 1910, AS PRODUCED, PUT IN AND MARKED EXHIBIT 9.

Mr. PATTERSON, JR. : The next Order-in-Council number 729 of the 20th of April, 1910. It rescinds the previous Order-in-Council as regards leases, and as far as we are concerned in this action, re-enacts the relevant royalty provisions.

THE COURT : Exhibit 10.

ORDER-IN-COUNCIL No. 729 OF THE 20TH OF APRIL, 1910, AS PRODUCED, PUT IN AND MARKED EXHIBIT 10.

Mr. PATTERSON, Jr. : The next is Order-in-Council number 1793 of the 12th of August, 1911 ; and this rescinds previous orders regarding leases and re-enacts the Order-in-Council regarding leases—well, the one which I have just referred to is the 29th day of July, 1911—apparently there was some informality in connection with it.

THE COURT : Exhibit 11.

ORDER-IN-COUNCIL, AS PRODUCED, PUT IN AND MARKED EXHIBIT 11.

Mr. PATTERSON, Jr. : The next is Order-in-Council 1792 of the 12th of August.

THE COURT : 12th of August, 1911 ?

Mr. PATTERSON, Jr. : 1911, yes, my lord. I am sorry—which confirms the Order-in-Council previously put in regarding the royalty being payable only on the merchantable output of the mine and excepting its operation in connection with coal used by the operator for the purpose of generating steam and for mining operations.

THE COURT : Exhibit 12.

ORDER-IN-COUNCIL 1792 OF THE 12TH OF AUGUST, 1911, AS PRODUCED, PUT IN AND MARKED EXHIBIT 12.

Mr. PATTERSON, Jr. : The next is Order-in-Council number 103 of the 16th day of January, 1915, which reduces the royalty of ten cents per ton payable on grants to seven cents per ton.

THE COURT: Exhibit 13.

ORDER-IN-COUNCIL NO. 103 OF THE 16TH OF JANUARY, 1915, AS PRODUCED, PUT IN AND MARKED EXHIBIT 13.

Mr. PATTERSON, Jr.: The next is Order-in-Council 851 of the 27th of May, 1924. This Order-in-Council affects coal lands within the Rocky Mountain Parks of Canada, and this Regulation will be referred to by the Plaintiffs on the question of interpretation only.

THE COURT: Exhibit 14.

ORDER-IN-COUNCIL NO. 851 OF THE 27TH OF MAY, 1924, AS PRODUCED, PUT IN AND MARKED EXHIBIT 14.

Mr. PATTERSON, Jr.: Those are the Orders-in-Council which we have agreed are applicable, my lord, and we have prepared sample grants and sample leases which we have agreed are the various types which are affected by the action. I tender grant number R. I. 189, which is the grant referred to in the Agreement as to Contents, sample of grant type One.

THE COURT: Exhibit 15.

GRANT NUMBER R. I. 189, AS PRODUCED, PUT IN AND MARKED EXHIBIT 15.

Mr. PATTERSON, Jr.: I also tender grant number Q. V. 230, which is the sample agreed to as type Two.

THE COURT: Exhibit 16.

GRANT NUMBER Q. V. 230, AS PRODUCED, PUT IN AND MARKED EXHIBIT 16.

Mr. PATTERSON, Jr.: Those, my lord, are the two types of grant which are in issue in the action; and then we proceed to the types of lease which are in issue, and I tender coal mining lease number 2440 as the first type of lease.

THE COURT: Exhibit 17.

COAL MINING LEASE NUMBER 2440, AS PRODUCED, PUT IN AND MARKED EXHIBIT 17.

Mr. PATTERSON, Jr.: And the renewal of that lease, Exhibit 17, which is a renewal by the Province of Alberta and which is lease number 5585.

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No. 4. Opening at Trial, 21st February 1950—*continued.*

THE COURT: Exhibit 18.

LEASE NUMBER 5585, AS PRODUCED, PUT IN AND MARKED EXHIBIT 18.

Mr. PATTERSON, Jr.: I tender, my lord, lease number 143, which is the type Two referred to, and the renewal thereof, which is contained in one document number 2886.

THE COURT: Of the Province of Alberta ?

Mr. PATTERSON, Jr.: No, my lord, it is a Dominion renewal of a Dominion lease.

LEASE NUMBER 2886, AS PRODUCED, PUT IN AND MARKED EXHIBIT 19.

Mr. PATTERSON, Jr.: I tender lease number 350, a Dominion lease that is Provincially renewed, Provincial renewal number 5040, which is type Three of the leases.

THE COURT: What is it ? Five—what ?

Mr. PATTERSON, Jr.: 5040, Provincial renewal of lease Number 350.

LEASE NUMBER 350 WITH RENEWAL 5040, AS PRODUCED, PUT IN AND MARKED EXHIBIT 20.

Mr. PATTERSON, Jr.: And that concludes the types of lease in issue in the proceedings, and I tender a certified copy of transfer instrument number 1299 E.O. registered in the South Alberta Land Registration District, which is a transfer of coal lands from the Canadian Pacific Railway to Lethbridge Collieries.

THE COURT: What is the number again ?

Mr. PATTERSON, Jr.: 1299.

INSTRUMENT NUMBER 1299 E.O., AS PRODUCED, PUT IN AND MARKED EXHIBIT 21.

Mr. PATTERSON, Jr.: I also tender with that, encumbrance number 1304 E.O. registered in the South Alberta Land Registration District, which is an encumbrance by the Lethbridge Collieries of the land concerned in the previous exhibit—encumbrance in favour of the C.P.R. Company.

ENCUMBRANCE 1304 E.O., AS PRODUCED, PUT IN AND MARKED EXHIBIT 22.

Mr. PATTERSON, Sr.: I think that completes the record, with the Agreement as to Facts.

Mr. WILSON: My lord, there is only one thing: I think with my learned friend's concurrence, we would like to amend paragraph 3 of the

Amended Statement of Defence starting at the bottom line on page 1 : " but the Defendant says . . . ." I don't know whether—

THE COURT : Got it.

Mr. WILSON : " But the Defendant says . . . .", then, on the next page, on the top of page 2,—" that this reduction applies only to those grants on which the royalty was imposed by Order-in-Council dated the 21st of May, A.D. 1901." I am applying to strike out those words.

THE COURT : Very well. Anything else ?

Mr. WILSON : Mr. Archibald has drawn to my attention something I should have mentioned : that is, in our counterclaim, paragraph 4 of the counterclaim, we claim a declaration, " that the said Section 8 of Chapter 36 " of the Statutes of Alberta, 1948, applies to any of the Plaintiff's land, the " title to which is held under lease from the Crown in the right of the " Dominion of Canada or in the right of the Province of Alberta." That should read, " Plaintiff's land or coal rights."

THE COURT : What paragraph ?

Mr. WILSON : Paragraph (a), my lord, of the counterclaim, of paragraph 4 of the counterclaim.

THE COURT : Of the Prayer for Relief ?

Mr. WILSON : Yes, we limit it to land but it should be land or coal rights.

THE COURT : The Plaintiff's land and coal rights ?

Mr. WILSON : Or coal rights—I think it should be ; and similarly in paragraph (e) : " A declaration that the said Section 8 of Chapter 36 of the " Statutes of Alberta, 1948, applies to any of the Plaintiff's land "—" or " coal rights " should be inserted—" the title to which is held in fee simple " or under agreement for sale from the Crown in the right "—and so on.

Mr. PATTERSON, Sr. : My lord, I have just noticed we didn't file a Defence to the Counterclaim, I suppose because all the matters in the Defence were in issue. I suppose if you take everything in the Counterclaim in that light, there is no necessity for it.

THE COURT : All right, that's it, eh ? You are going to let me have some help ?

Mr. WILSON : Pardon me ?

THE COURT : You are going to let me have some help in the form of written argument ?

Mr. WILSON : Yes, my lord.

Mr. PATTERSON, Sr. : Did you set a date to reconvene ?

THE COURT : Oh, I will get in touch with you.

Mr. WILSON : Very well, my lord.

Mr. PATTERSON : Very well.

(Whereupon Court adjourned and then resumed at 3.30 p.m. this same date.)

Mr. PATTERSON, Jr. : Two documents I overlooked, sir, I am tendering as Exhibit 23 a copy of a letter to the Attorney General for

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No. 4. Opening at Trial, 21st February 1950—*continued.*

Canada from Patterson, Hobbs and Patterson, enclosing a copy of the Statement of Claim and Statement of Defence.

THE COURT: Exhibit 23.

LETTER AS DESCRIBED PUT IN AND MARKED EXHIBIT 23.

Mr. PATTERSON, Jr.: And as Exhibit 24, my lord, I tender a letter of acknowledgement from the Department of Justice, from the Deputy Minister of Justice, stating he doesn't propose to apply for leave to intervene at this stage, and he wants a copy of your judgment.

THE COURT: Exhibit 24.

LETTER AS DESCRIBED PUT IN AND MARKED EXHIBIT 24.

(Whereupon Court stood adjourned *sine die.*)

No. 5. Reasons for Judgment. McLaurin, J. 16th March 1951.

No. 5.

Reasons for Judgment.

McLAURIN, J. The Plaintiffs are holders of leases of coal lands granted by His Majesty the King, represented by the Minister of the Interior of the Dominion of Canada, providing for the payment of a royalty of five cents per ton of merchantable coal mined in the lands covered by the said leases. The Plaintiffs are also the holders of lands granted by His Majesty the King in the right of the Dominion Government covering all coal within, upon or under the lands described in said grants. By an Order-in-Council dated the 21st day of May, 1901, the royalty payable for coal recovered from the granted coal lands was ten cents per ton, but by further Order-in-Council dated the 16th day of April, 1915, the royalty was reduced to seven cents per ton.

In 1870 the Dominion Government purchased Rupert's Land from the Hudson's Bay Company and created the Northwest Territories. This area roughly comprised the entire Prairie area of Canada, westward to the Rocky Mountains and extended northwards to the Arctic Ocean. In 1905 out of part of this area were created the provinces of Saskatchewan and Alberta. At the time of the formation of the provinces, the ownership and administration of natural resources were retained by the Dominion Government. In 1929 an agreement was concluded between the Government of the Dominion of Canada and the Government of the Province of Alberta whereby the natural resources were transferred to the Province, and the agreement was confirmed by statutes of each of the Governments; Chapter 3 of the Statutes of Canada, 1930; Chapter 21 of the Statutes of Alberta, 1930, and also by a statute of the Parliament of the United

Kingdom of Great Britain and Northern Ireland, cited as the British North America Act, Chapter 26, 1930. Section 2 of the agreement provided as follows :

" 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 with either 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."

Application of the agreement has arisen for consideration in a number of cases. *Spooner Oils Limited* v. *Turner Valley Gas Conservation Board*, 1932, 2 W.W.R. 454 ; 1932 3 W.W.R. 477 ; 1933, S.C.R. 629 ; *In re Timber Regulations*. 1933, S.C.R. 616 ; Privy Council, 1935, 1 W.W.R. 607 ; *Majestic Mines Limited* v. *The Attorney General for Alberta*, 1941, 2 W.W.R. 353 ; 1942, 1 W.W.R. 321 ; 1942, S.C.R. 402 ; *Anthony* v. *The Attorney General for Alberta*, 1942, 1 W.W.R. 833 ; 1942, 2 W.W.R. 554 ; 1943, S.C.R. 320.

The grants in question herein contained two types of royalty clauses, the material part for the matters in issue being :

" 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 . . . ."

" To Have and to Hold the same unto the grantee in fee simple. " Yielding and paying unto Us and Our successors the royalty, " if any, prescribed by the regulations of Our Governor-in-Council ". . . ."

All Dominion leases as to the royalty provision read as follows :

". . . . and also rendering and paying therefor unto His Majesty, " a royalty at the rate of five cents per ton of two thousand pounds " on the merchantable output of coal taken out of the said lands ". . . ."

Many Dominion leases have been renewed and in some of the Provincial renewals, provision has been made for a royalty other than at the rate of five cents as may from time to time be prescribed by order of the Lieutenant Governor-in-Council. The terms of such renewals might be challenged if renewal was obligatory under the original Dominion leases. However, the question does not present itself for determination in this litigation.

In 1948 by Chapter 36 of the Statutes of Alberta, Section 8, it was enacted as follows :

" Notwithstanding the terms and provisions of any certificate

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No. 5. Reasons for Judgment. McLaurin, J. 16th March 1951— *continued.*

" 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 Plaintiffs seek a declaration that the said Section 8 does not apply to land covered by Dominion grants or leases ; that the said Section 8 is *ultra vires* ; and that no monies are payable either by royalty or otherwise to the Department of Lands and Mines of the Province of Alberta beyond a royalty of five cents per ton in the case of leases and seven cents in the case of grants. No evidence was tendered, the parties filing an Agreement as to the Facts.

Having regard to the terms of Section 2 of the Natural Resources Agreement precluding the Province from affecting or altering any terms, contracts of purchase, leases or other arrangements, by legislation or otherwise, can the Province increase these royalties as it has purported to do ? The section permits alteration by consent or by legislation applying generally to all similar agreements relating to lands, mines or minerals in the Province irrespective of who may be the parties thereto. Here there is no consent, so there merely remains for consideration whether the legislation is of general application within the meaning of the section.

In the Spooner case, 1932, 3 W.W.R., Mr. Justice McGillivray, at page 501, made this reference to the legislation that might be contemplated by this section :

" In my opinion the intention of the law-making bodies " concerned has been expressed in Section 2 of the agreement in " language capable of only one meaning, namely, that subject to " the exceptions by way of consent or by way or legislation which " is of such a general character as to preclude discrimination, " the Province takes the place of the Dominion under the contracts " and arrangements that the Dominion has made and undertakes " to carry out such contracts and arrangements in accordance with " the terms thereof."

Section 1 of the Imperial Statute reads as follows :—

1. " The agreements set out in the Schedule to this Act " are hereby confirmed and shall have the force of law " notwithstanding anything in the British North America Act, " 1867, or any Act amending the same, or any Act of

" Parliament of Canada, or in any Order-in-Council or terms or " conditions of union made or approved under any such Act " as aforesaid."

In my view, if it had not been for this provision, the Province under its jurisdiction with respect to property and civil rights, Section 92, Sub-section 13, of the B. N. A. Act, 1867, could have arbitrarily disregarded the agreement with the Dominion and increased the royalties though perhaps lessees and grantees might have had recourse against the Dominion Government for indemnity.

The Imperial Statute, however, effected an amendment to the B. N. A. Act and with respect to the natural resources transferred to the Province, placed a limitation on the scope of legislation ordinarily falling within the property and civil rights provision.

The words " irrespective of who may be the parties thereto " must be given full recognition. The Plaintiffs placed in evidence a copy of an encumbrance covering coal lands executed by Lethbridge Collieries held in favour of the Canadian Pacific Railway Company providing for a royalty of fifteen cents a ton and submitted that the legislation lacked generality because it did not apply to lands of this character, and cited an observation of O'Connor, J. (now C.J.A.) in *Anthony* v. *Attorney-General for Alberta*, 1942, 1 W.W.R. 833, in support. At page 837, O'Connor said :

" The Order-in-Council fixing the timber dues are not " legislation applying generally to all similar agreements relating " to lands, mines or minerals in the Province. They do not apply " to timber licences granted by the Hudson's Bay Co., or others " of which many are outstanding."

The Province, of course, possesses no property rights in lands owned by the C. P. R., and could not by legislation collect a royalty as such. It might be able to tax coal output at a rate of a fixed number of cents a ton, but that would be by virtue of a power of direct taxation and perhaps such an impost might prove invalid as amounting to an indirect tax ; see *Rex* vs. *Caledonian Collieries Ltd.*, 1928, A.C. 358.

It certainly appears that the Province made the legislation as embracing as the circumstances permitted, and if general legislation under Section 2 must apply to everyone, that is to all coal lands, which would appear to be the case, then the Province has not brought itself within the exception.

It is inadvisable, at large, to speculate on or define the character of the general legislation within the scope of the exception, but an example perhaps is found in the Coal Mines Regulating Act, Chapter 8, Statutes of Alberta, 1945. It deals with fire protection, water accumulation, safety lamps and procedure on abandonment, accidents and safety precautions. Another example is found in the Mines and Minerals Act, Chapter 66, Statutes of Alberta, 1949, making provision for the establishment of party walls of at least 15 feet between workers on each side of the boundary, which may, under certain circumstances, be used in common by adjacent owners.

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No. 5. Reasons for Judgment. McLaurin, J, 16th March 1951— *continued.*

This provision has the effect of altering terms of the original grant or lease, as it takes away an owner's exclusive right to use 7½ feet of his property and gives the right of user to his neighbour in common with himself. However, these statutes apply to all mines, irrespective of the owners thereof, or the persons who may have royalties reserved for their benefit. It does not run counter to the agreement.

The Act of 1948, though applying to all Dominion and Provincial leases and grants, is directly aimed at increasing the royalties originally reserved by the Dominion, and in doubling the royalties, drastically alters the original arrangements, which is manifestly an infringement of Section 2 of the transfer agreement unless it can be said that it is operative irrespective of the parties. It may well be that such an increase in royalties was one of the acts that the Dominion anticipated and desired to prohibit, and yet recognized that there might be need from time to time of regulatory legislation which would greatly vary the arrangements, but which, if applying to everyone, would not be discriminatory or appear to put the Dominion in the position of having dishonoured its contracts. A great variety of circumstances can arise requiring legislation of a universal nature that would literally fall within the scope of the exception. The Oil and Gas Resources Conservation Act, Chapter 66, R.S.A., 1942, might be cited as an instance.

I am persuaded that the Statute of 1948 is not legislation permitted by Section 2 of the Natural Resources Agreement; accordingly, the Plaintiffs are entitled to the relief prayed for.

In argument much time was devoted to the consideration of the powers conferred on the Province to increase royalties apart from statute, upon the transfer of the resources. I question whether the Province can, at this stage, rely on such powers if they do exist, because the purported increases are flatly based on the statute, but in view of the argument I feel obliged to make a few observations. Apart from the legislation, and relying solely on the powers possessed by the Dominion and transferred to the Province, the latter cannot alter the royalties under the leases, which were for a fixed amount, and which the Dominion Government could not have disturbed. As to the grants, the recent decision of the Supreme Court of Canada in *Huggard Assets Ltd.* v. *The Attorney-General* is in point. There a grant of oil rights reserved the right to impose a royalty. No royalty was imposed at the time of the grant, and the reservation purporting to be made was held void for uncertainty.

Kellock, J., said :

> " It has been held that royalties of the nature of that here " in question are true rents ; *Reg.* v. *Westbrook*, 10 Q.B. 178, 203 ; " *Daniel* v. *Gracie*, 6 Q.B. 145 ; *Barrs* v. *Lea*, 33 Law Journal " Chancery 437 ; *Edmonds* v. *Eastwood*, 2 H. & N., 819 ; " Halsbury, 2nd Edition, 158. Being rent, it is essential in " every case that the element of uncertainty exist in order to its " enforcement. As stated in Halsbury, Vol. 20, 2nd Edition, " at p. 160 :

" ' The rent must be certain, or must be so stated that it
" ' can afterwards be ascertained with certainty. For this
" ' purpose it is sufficient if by calculation and upon the
" ' happening of *certain events* it becomes certain ; and
" ' provided it can be so ascertained from time to time, it
" ' is no objection that the rent is of fluctuating amount.'

" Apart from authority, it is difficult to see on principle
" how a rent, dependent upon nothing but the will of the grantee,
" can be said to be certain."

As to coal lands, the reservation of a royalty of ten cents per ton (later reduced to seven cents per ton) was fixed at the time of the grant so the necessary certainty as to the amount of royalty exists, but the logical result of the Huggard decision precludes the Crown from altering the fixed rate of royalty, otherwise, there would, at the option of the Crown as Grantor, be introduced that element of uncertainty which existed in the Huggard case

Furthermore, I think it is reasonable to assume that the various Dominion Orders-in-Council merely contemplated the fixing, once and for all, of a royalty at the time of making the grant, and that the language of the Orders-in-Council should not have been incorporated in patents.

Costs may be spoken to.

No. 6.

Formal Judgment.

1.—This action coming on for trial on the 21st day of February, 1950, before this Court at the Sittings holden in the City of Edmonton for trial of actions without a jury in presence of Counsel for all parties, upon hearing read the Pleadings and hearing the evidence adduced and what was alleged by Counsel aforesaid : this Court was pleased to direct this action to stand over for judgment, and the same coming on this day for judgment :

2.—This Court doth order and declare that Section 8 of Chapter 36 of the Statutes of Alberta, 1948, being an Act to amend the Provincial Lands Act, does not apply to the leases and grants referred to in the Plaintiffs' Statement of Claim.

3.—It is further ordered that the Plaintiffs be given costs which are hereby fixed at $2,500.00, including disbursements.

A. R. TURNER,
Deputy Clerk of the Court.

In the Supreme Court of Alberta. Appellate Division.

No. 7. Notice of Appeal, 19th April 1951.

No. 7.

Notice of Appeal.

TAKE NOTICE that the above-named Defendant proposes to appeal and does hereby appeal to the Appellate Division of the Supreme Court of Alberta at the sittings to be holden at the City of Edmonton on the 7th day of May, A.D. 1951, or at such other sittings as this application may be heard, from the judgment herein of the Honourable Mr. Justice Colin Campbell McLaurin delivered on the 16th day of March, A.D. 1951, and entered on the 16th day of April, A.D. 1951, whereby it was declared that His Majesty the King in the right of the Province of Alberta has no right to demand, impose or exact payment of any increased royalty on the coal owned or produced by the Plaintiffs in or upon the lands mentioned in the Plaintiff's Statement of Claim on the following grounds :

1. That the learned Trial Judge erred in declaring that Section 8 of Chapter 36 of the Statutes of Alberta, 1948, does not apply to the leases and lands held or owned by the Plaintiffs and in failing to declare that the said enactment was applicable to the grants and leases referred to in this action.

2. That the learned Trial Judge erred in holding that the Province of Alberta could not increase the royalty on coal produced from lands owned or leased by the Plaintiffs in accordance with the provisions of Section 8 of Chapter 36 of the Statutes of Alberta, 1948.

3. That the learned Trial Judge erred in holding that Section 8 of Chapter 36 of the Statutes of Alberta, 1948, is not legislation of general application of the kind and character to bring it within the exception contained in Clause 2 of the Natural Resources Transfer Agreement contained in Chapter 3 of the Statutes of Canada, 1930, and Chapter 21 of the Statutes of Alberta, 1930.

4. That the learned Trial Judge erred in failing to distinguish between leases Types Nos. 1, 2 and 3 and in failing to hold that where the Province has entered into a renewal of the Dominion leases there was a statutory novation and the Province had the right to determine the terms of the renewal lease including the amount of the royalty to be paid thereunder.

5. That the learned Trial Judge erred in holding that Clause 2 of the Natural Resources Transfer Agreement was in effect an amendment to the British North America Act and restricted the rights of the Province to legislate under head 13 of Section 92 of the British North America Act relating to property and civil rights.

6. That the learned Trial Judge erred in failing to hold that the exception contained in Clause 2 of the Natural Resources Transfer Agreement related to contracts to purchase or lease Crown lands and other arrangements and could not relate to agreements between parties other than the Crown.

No. 7.
Notice of Appeal, 19th April 1951—
continued.

7. That the learned Trial Judge erred in failing to hold that the exception contained in Clause 2 of the Natural Resources Transfer Agreement must be read in relation to the main part of the clause and could not be extended to apply to anything other than contracts to purchase, lease or other arrangements relating to Crown lands, and not to contracts, leases or other arrangements between private individuals.

8. That the learned Trial Judge erred in holding that in respect of Crown grants the royalty fixed by the Dominion Government was fixed for all time and could not be increased or lowered by action of the Province of Alberta thereafter.

9. That the learned Trial Judge erred in holding that the grants referred to in the Plaintiffs' Statement of Claim were affected or determined by the decision of the Supreme Court of Canada in the case of *Huggard Assets Limited* v. *the Attorney General of the Province of Alberta and the Minister of Lands and Mines of the Province of Alberta*, or that any uncertainty existed in respect of the royalty reserves by the said grants.

10. That the learned Trial Judge erred in failing to hold that the exception contained in Clause 2 of the Natural Resources Transfer Agreement was applicable to Crown grants as well as Crown leases and enabled the Province of Alberta to vary the royalty fixed under Dominion regulations.

11. That the learned Trial Judge erred in holding that the various Dominion Orders-in-Council merely contemplated the fixing, once and for all, of a royalty at the time of making the grant and in failing to hold that the royalty fixed could be varied from time to time.

12. That the learned Trial Judge erred in holding that the language of the Dominion Orders-in-Council should not have been incorporated in the patents.

13. Upon such further and other grounds as Counsel may be advised.

AND FURTHER TAKE NOTICE that in support of this appeal will be read the Agreement as to the Facts, the Reasons for Judgment of the Honourable Mr. Justice McLaurin, together with such further evidence as Counsel may advise and as the Appellate Division may order to be received.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of April, A.D. 1951.

H. J. WILSON,
Solicitor for the Defendant.

To Messrs. Patterson, Hobbs & Patterson,
Barristers and Solicitors, 204 Insurance
Exchange Building, Calgary, Alberta,
Solicitors for the Plaintiffs.

In the Supreme Court of Alberta. Appellate Division.

No. 8. Factum on behalf of the Appellant.

No. 8.

Factum on behalf of the Appellant.

I. Statement of Facts.

This is an appeal from the judgment of the Honourable Mr. Justice C. C. McLaurin, 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 Plaintiffs' Statement of Claim.

The Plaintiffs are 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 leases presently held by the Plaintiffs are with respect to lands and coal rights which were originally leased by the Government of Canada to the Plaintiffs or their 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. 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 Plaintiffs may be divided into three types of which the following are examples :

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.

TYPE No. 1.

Lease Number 2440, dated the 6th day of May, A.D. 1925 (Exhibit 17) 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.

The lease, after reciting that application had been made for a lease under the regulations for the disposal of coal mining rights, provided that it was issued in consideration of the rents and royalties reserved and 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 lease also stipulated that the royalty would be payable in the manner prescribed in the regulations and required the

lessee to perform and abide by all the obligations, provisos and restrictions imposed by the regulations.

Lease Number 2440 (Exhibit 17) was renewed by the Province on the 10th day of May, A.D. 1946, by the issue of Lease Number 5585 (Exhibit 18), 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 " . . . . 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 . . . ."

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.

TYPE No. 2.

Lease Number 143 (Exhibit 19), dated the 28th day of 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 . . . ."

The lease further stipulated that the royalty should be paid in the manner prescribed in the regulations and that the lessee observe, perform and abide by all the obligations, conditions, provisos and restrictions contained in the regulations.

Lease Number 2886 (Exhibit 19) dated the 1st day of May, A.D. 1930, was issued in renewal of Lease Number 143 by Canada, pursuant to the Dominion Lands Act and regulations made thereunder, a copy of which regulations was attached to and formed part of the lease. 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 lease also 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 by the regulations.

TYPE No. 3.

Lease Number 350 (Exhibit 20) dated the 22nd day of October, A.D. 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 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 . . . ." The lease stipulated that the royalty would be payable 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 by the regulations.

Lease Number 5040 (Exhibit 20) dated the 30th day of April, A.D. 1934, was issued in renewal of lease number 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 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 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.

The Dominion regulations, pursuant to which the Plaintiffs' lands were leased, at all material times contained the following provisions :

" 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 " 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 operations of coal mining rights " which may have been made from time to time by the Governor " in Council.

" 19. In addition to the rent a royalty at the rate of five " 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 "o perating 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.

" 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.

" 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."

The lands and coal mining rights presently held by the Plaintiffs in fee simple were originally granted by the Government of Canada to the Plaintiffs or their predecessors in title, as a result of applications made therefor, under the provisions of the Dominion Lands Act set out in the agreed Statement of Facts (Record pages 7 to 8) and the regulations made pursuant thereto, for the disposal of coal mining rights belonging to the Crown.

The patents issued with respect to the land and coal mining rights held by the Plaintiffs contained one of the royalty clauses set out in the agreed Statement of Facts (Record pages 9 to 10).

The patent containing royalty clause type No. 1 (Exhibit 15) shows that it was a coal land sale and after reciting that the grantee had applied for a grant of the lands, 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 " 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 " 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 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."

The patent containing royalty clause type No. 2 (Exhibit 16) shows that it was a mineral rights sale and after reciting that the grantee had applied for a grant of the mining rights, granted 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, " 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."

The Dominion regulations pursuant to which the Plaintiffs' lands were granted, until the 31st day of May, A.D. 1910, contained the following provisions :

" Lands containing anthracite coal may be sold at an upset 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.

" 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.

" 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.

" 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."

On the 31st day of May, A.D. 1901, by Order in Council of that date it was provided that ". . . . until further ordered, the said royalty shall be " and is hereby fixed at the rate of 10 cents per ton of 2,000 pounds." The governing Dominion regulation thereafter contained as paragraph two the following provision, ". . . . in addition to the above a royalty at the rate " of 10 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

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" the full quantity of coal mined and pay the royalty thereon at the above " rate."

The rate of 10 cents per ton remained in effect until Order in Council No. 103, dated January 16th, 1915, reduced the royalty on coal from 10 cents per ton to 7 cents per ton.

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 Chapter 3 of the Statutes of Canada, 1930, and 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 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.

" 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 legis- " lation 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.

" 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."

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 at Sub-section (1) as follows :

" 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 Sub-section (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 " provisions of any mineral lease or mineral sale for which a " certificate of title has been issued now subsisting whether made " by the Crown in the right of the Dominion of Canada or by the " Crown in the right of the Province, and which is subject to the " payment of a royalty on the minerals or any of them, the royalty " to be computed, levied and collected shall be as now prescribed " by the Lieutenant Governor in Council or hereafter from time " to time prescribed by him, and shall be payable on any mineral " when and where obtained, recovered or produced."

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 " 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."

It should be noted here that in The Provincial Lands Act, being Chapter 10 of the Statutes of Alberta, 1939, Section 80, Sub-section (2) provided as follows :—

" 80. (2) Notwithstanding anything contained in any lease, " license, permit, instrument, document or other arrangement " 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 lease, 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 83 of Chapter 62 of the Revised Statutes of Alberta, 1942, and as Section 7 of The Mines and Minerals Act, being Chapter 66 of the Statutes of Alberta, 1949.

Pursuant to the foregoing statutory enactments, Order in Council 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.

Order in Council 666/31 was amended by Order in Council 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 upon such terms and conditions as the Lieutenant Governor in Council should prescribe.

On 18th August, 1948, Order in Council 927/48 amended the regulations established by Order in Council 666/31 as amended, by increasing the royalty prescribed from 5 cents per ton to 10 cents per ton.

II. ARGUMENT.

1. Argument as to Leases.

In the Agreed Statement of Facts (Record page 9) there are set out three types of leases entered into between the Plaintiffs and the Dominion Crown with renewals thereof. In Types No. 1 and No. 3 there was a renewal

entered into with the Province, but in Type No. 2 the renewal was with the Dominion Government and no renewal has been entered into with the Province. The learned Trial Judge failed to distinguish between these three types of leases and treated them all as though they were not governed by the latter part of the exception contained in Clause 2 of the Natural Resources Transfer Agreement, but it is submitted that there is a very clear-cut distinction between Types Nos. 1 and 3 on the one hand and Type No. 2 on the other.

It is proposed in argument to present a general argument as to all three types of leases and then to present a special argument with respect to Types Nos. 1 and 3 respectively.

2. As to All Types of Leases.

The learned Trial Judge has held that the provincial legislation set out in Section 8 of Chapter 36 of the Statutes of Alberta, 1948, did not come within the exception contained in Clause 2 of the Natural Resources Transfer Agreement for the reason that the legislation referred only to Crown grants and leases and did not apply to grants of coal lands or leases between private individuals to which the Crown was not a party. At page 25 the learned Trial Judge states as follows :

> " It certainly appears that the Province made the legislation " as embracing as the circumstances permitted, and if general " legislation under Section 2 must apply to everyone, that is to " all coal lands, which would appear to be the case, then the " Province has not brought itself within the exception."

The learned Trial Judge appears to have followed an observation of O'Connor, J. (now C.J.) in *Anthony et al* vs. *Attorney General for Alberta and Minister of Lands and Mines* (1942) 1 W.W.R. 833 in support. At page 837 Mr. Justice O'Connor states :

> " The orders-in-council fixing the timber dues are not " legislation applying generally to all similar agreements relating " to lands, mines or minerals in the province. They do not apply " to timber licences granted by the Hudson's Bay Company or " others of which many are outstanding.
>
> " The order-in-council of July 25, 1940, prohibiting renewal " of timber licences for more than 10 years after the date of sale " affects or alters the Plaintiffs' licences which are renewable while " merchantable timber remains on the limits and is *ultra vires* as " being contrary to Section 2 of the Natural Resources Agreement " I declare the said provision in the order-in-council to be invalid " and *ultra vires* as against the Plaintiffs."

The first paragraph of this observation was *obiter dicta* the decision and it is submitted that in the final result the Court did hold that the legislation was of general character and was governed by Clause 2 of the Natural Resources Transfer Agreement.

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It is to be noted that this observation of Mr. Justice O'Connor was not dealt with in the case on appeal by reason of the fact that the Province did not see fit in this case to contest the question and therefore it was not argued. (See *Anthony et al* v. *Attorney General for Alberta and Minister of Lands and Mines* (1943) S.C.R. 320, per Hudson, J., at page 329).

It is suggested however that on appeal it was laid down that Clause 2 of the Natural Resources Transfer Agreement did effect a statutory novation. At page 561 Ford, J.A., states as follows :

> " As to the licences in existence at the time of the transfer
> " there was, by the statute giving the transfer agreement the force
> " of law, effected ' what may be called a statutory novation,' so
> " that the rights and obligations which before the transfer had
> " existed *vis-a-vis* the Dominion and the licensees now exist
> " *vis-a-vis* the provinces and the licences."

Apart from the provisions of Clause 2 of the Natural Resources Transfer Agreement, there is no doubt that the Dominion Government could have altered the rate of royalty under their regulations and after the Agreement, the Province being in the same position, could similarly alter the rate of royalty payable. (See *Anthony et al* v. *Attorney General for Alberta and Minister of Lands and Mines, supra.*) This fact is emphasized because it is of importance in construing the meaning of Clause 2 of the Natural Resources Transfer Agreement. It is not to be supposed that the Dominion Government intended by the Transfer Agreement to impose any restrictions on the Province which were not imposed upon the Dominion itself and that the Province was to be left free to alter the royalty payable if it did not discriminate between grantees and lessees of Crown lands. Clause 2 of the Natural Resources Transfer Agreement reads as follows :

> " 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."

It is submitted that this clause prohibits the Province from altering or affecting the terms of any contract to purchase, lease or other arrangement with respect to Crown lands, mines or minerals or to lands in which the Crown has an interest except by consent or by legislation of general application.

The question is as to what construction shall be placed on the exception referred to in this clause of the agreement.

There is no doubt that the main provision of this clause refers solely to lands purchased or leased from the Crown and does not apply to private individuals. The exception reads as follows :

> " except . . . . 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."

It is submitted that the word " similar " must be related back to contracts to purchase, lease or other arrangement with the Crown and also that the word " thereto " at the end of the clause must be related to similar agreements, and if that is the true interpretation the last words of the clause would mean irrespective of who may be the parties to the contract to purchase or lease or other arrangement with respect to Crown lands.

It is submitted that in construing the exception to Clause 2 one must consider it in its relation to the principal matter to which it stands as an exception.

Clause 2 can only refer to Crown grants.

See *Reference Concerning Refunds of Dues Paid Under The Terms of Section 47 (F) of the Timber Regulations, in Manitoba, British Columbia, Saskatchewan and Alberta* (1933) S.C.R. 616. Duff, J. (as he then was) referring to Clause 2 states at page 619 :

> " The general effect of the agreement, with Alberta (October 1, " 1930) with Saskatchewan (October 1, 1930) and with Manitoba " (July 15, 1930), is to provide for the transfer of the lands, mines " and minerals of the Crown in the right of the Dominion, in these several provinces, to the" provinces in which they are situate."

See also page 625 of this judgment.

A reference was made to the exception in the case of *Spooner Oils Ltd. and Spooner* vs. *The Turner Valley Gas Conservation Board and The Attorney General of Alberta* (1932) 3 W.W.R. 477. McGillivray, J.A., at page 501 states :

> " In my opinion the intention of the law-making bodies " concerned has been expressed in Section 2 of the agreement in " language capable of only one meaning, namely, that subject to " the exceptions by way of consent or by way of legislation which " is of such a general character as to preclude discrimination, the " province takes the place of the Dominion under the contracts " and arrangements that the Dominion has made and undertakes " to carry out such contracts and arrangements in accordance " with the terms thereof. I can not think that this interpretation " can conceivably involve the yielding up of legislative power " which the province enjoyed before the making of the " agreement."

It is clear that the principal matter in Clause 2 relates solely to contracts to purchase, lease or other arrangements in Crown lands, mines or minerals or in which the Crown has an interest and cannot possibly apply to

contracts, leases or other arrangements between private individuals in which the Crown has no interest whatsoever.

It is therefore urged that when the exception uses the words " similar agreements " it must relate back to contracts, leases or other arrangements relating to Crown lands or in which the Crown has an interest. Interpreted in this light, the Alberta legislation referred to in paragraph 5 of the Plaintiffs' Amended Statement of Claim comes squarely within the terms of the exception because it does apply generally to all contracts, agreements or leases where a payment of a royalty has been reserved to the Crown in the right of the Dominion or in the right of the Province.

In *Craies on Statute Law*, Fourth Edition, at page 196 it is stated as follows :

> " The effect of an excepting or qualifying proviso, according " to the ordinary rules of construction, is to except out of the " preceding portion of the enactment, or to qualify something " enacted therein, which but for the proviso would be within it ; " and such a proviso cannot be construed as enlarging the scope " of an enactment when it can be fairly and properly construed " without attributing to it that effect."

See *Duncan* v. *Dixon* (1890) 44 Ch.D. 211, 215, Kekwich, J.

Ex parte Partington 6 Q.B. 648, 115 E.R. 244, at page 246. *Rex* v. *Dibdin* (1910) P.D. 57, at pages 110 and 125.

In *West Derby Union* v. *Metropolitan Life Assurance Society* (1897) A.C. 647, Lord Watson at page 652 states :

> " . . . . I am perfectly clear that if the language of the enacting " part of the statute does not contain the provisions which " are said to occur in it, you cannot derive these provisions by " implication from a proviso. When one regards the natural " history and object of provisos, and the manner in which they " find their way into Acts of Parliament, I think your Lordships " would be adopting a very dangerous and certainly unusual " course if you were to import legislation from a proviso wholesale " into the body of the statute . . . ."

In re Brockelbank Ex parte Dunn & Raeburn 23 C.B.D. 461, at page 463.

If Clause 2 of the Agreement is read in the light of these decisions then it is clear that the exception cannot be read in a way that would enlarge the provisions of the enacting part of the section and the enacting part of the section does not relate to anything except property in which the Crown has an interest. Therefore the exception must relate to that property and not to property in which the Crown has no interest.

Counsel for the Respondents is asking the Court to give a meaning to Clause 2 which it is submitted would not be reasonable or justified. He argues that the Province could only alter the rate of royalty on leases or grants by altering the rate not only on Crown grants or leases but on grants or leases between private individuals and he placed in evidence Exhibits 21 and 22. Surely it cannot be contended that the Dominion and the Province

solemnly agreed that the Province must legislate to affect contracts between individuals. If a person by contract agreed to pay the C.P.R., a 25 per cent. royalty on coal the Province would necessarily have to cut this down to 15 per cent. in order to conform to provincial leases. Surely that was not the intention of the legislative bodies.

The Dominion Parliament would have no interest and in fact no jurisdiction to deal with the rights of parties in lands, minerals or other leases in which the Crown had no interest, as this would be a matter of property and civil rights solely within provincial jurisdiction and the sole interest of the Dominion would be to see that the rights of parties who have purchased, leased or made other arrangements with the Dominion in respect of Crown lands are protected against discrimination as between persons contracting with the Crown and once these lands had ceased to be Crown lands then the Dominion's interest no longer exists.

It is not reasonable to suppose that the Dominion Government intended to prevent the Province from ever changing the amount of royalty payable on Crown grants or leases regardless of economic conditions and it is therefore submitted that the real purpose of Clause 2 was to prevent the Province from discriminating in favour of or against individual grantees or leaseholders and that any legislation increasing the royalty or rent must be of general application as interpreted in the decisions previously mentioned.

If these principles are kept in mind then it will be seen that Section 8 of the provincial Act is legislation of general application coming squarely within the exception contained in Clause 2 of the Agreement and applicable to all contracts, leases or other arrangements affecting coal rights in which the Crown has an interest.

If this is the proper interpretation to be given to Clause 2 of the Agreement then it seems clear that the Province has the right by Section 8 of Chapter 36 of the Statutes of Alberta, 1948, to enact legislation of general application which affects all of the leases referred to in the Plaintiff's Statement of Claim.

It is to be noted that the Province had passed legislation of a general character applicable to these leases prior to the enactment of Section 8 of Chapter 36 of the Statutes of Alberta, 1948, by Section 80 of Chapter 10 of the Statutes of Alberta, 1939, and by Section 83 of Chapter 62 of the Revised Statutes of Alberta, 1942, which is now Section 7 of Chapter 66 of the Statutes of Alberta, 1949. See also Sections 263 and 264 thereof.

Reference might also be made to the terms of Order in Council 927 of 1948.

3. THE LEASES FROM THE CROWN ARE NOT VOID FOR UNCERTAINTY.

The case of Huggard Assets can have no application to the leases held from the Crown. That case dealt with a situation where land was deemed to be held by Huggard Assets in free and common socage subject to a condition that if a rent service was not paid, the land reverted to the Crown. The Court held that the principles of law and tenure of old common

law relating to land held in socage were applicable to the grant and that the reservation contained therein was void for uncertainty.

It is submitted that the decision cannot be applied to a straight rental agreement because the rent is not uncertain within the meaning of the numerous authorities relating to uncertainty. The rental was fixed by the terms of the lease and, although it could be increased or decreased, the fact that it may fluctuate does not make it uncertain. It has been repeatedly held that the maxim " Certum est quod certum reddi potest " govern the interpretation of such leases and if at any given time the rent can be ascertained, then it is not uncertain.

Clavering v. *Ellison*, 7 H.L. Cases 707, at page 725 ; 11 E.R. 282.

See *Daniel* v. *Gracie*, 6 Q.B. 145 ; 115 E.R. 56, at page 59.

20 Halsbury's Laws of England, 2nd Edition, page 160.

In re Knight Ex. parte Voisey (1882) 21 Ch. D. 442.

Kendale v. *Baker* (1852) 11 C.B. 842.

Attorney General for Ontario et al v. *Canadian Niagara Power Company* (1912) A.C. 852.

Re Talbot-Ponsonby's Estate (1937) 4 All E.R. 309.

Sifton v. *Sifton* (1938) 3 All E.R. 435.

It is further submitted that the Dominion leases or renewal of Dominion leases cannot be held to be void for uncertainty because the rental and other terms are fixed by statute and therefore the renewals of these leases are made under and by virtue of the statute.

See Sections 7, 263 and 264 of The Mines and Minerals Act, being Chapter 66 of the Statutes of Alberta, 1949.

4. Argument as to Type No. 1.

The learned Trial Judge failed to distinguish between the various types of leases and held that the Province could not increase the royalty because they did not come within the latter part of the exception contained in Clause 2.

It is submitted that in respect of Type No. 1 the learned Trial Judge ought to have held that the renewal entered into with the Province brings it within the first part of the exception reading as follows :

> " . . . . except either with the consent of all the parties thereto
> " other than Canada . . . ."

The parties entered into Provincial Renewal Lease No. 5585 dated 10th May, 1946, which contains the following provision :

> " . . . . and also rendering and paying therefor unto His Majesty,
> " a royalty at the rate of five 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 two thousand
> " pounds on the saleable and merchantable output of coal taken
> " out of the said lands . . . ."

It has been held that Clause 2 of the Natural Resources Transfer Agreement effects a statutory novation (see *Anthony et al* v. *Attorney General*

for Alberta and Minister of Lands and Mines (1942) 2 W.W.R. 554) and (see (1943) S.C.R. 320.)

The parties in this case have agreed to a royalty at the rate of five per centum or at such other rate as may from time to time be prescribed by order of the Lieutenant Governor in Council. While the enactment of 1948 is not strictly speaking an order of the Lieutenant Governor in Council, it is nevertheless a statutory increase authorized by the Government and is of course more effective than an order in council. In any event orders in council were passed (see Statement of Facts, Record page 9). It is pointed out that the Renewal Lease (Exhibit 17) contains the following clause :

" 2. That the lessee shall and will well and truly and faithfully " observe, perform and abide by all the obligations, conditions, " provisos and restrictions in or under the said regulations imposed " upon lessees or upon the said lessee."

Taking into consideration the terms of the Renewal Lease, I submit that it is clear that the lessee agreed to pay such increased royalty as may be agreed upon by the Lieutenant Governor in Council and therefore consented to a term in the lease which enabled the Government to increase or decrease the royalty from time to time.

5. Argument as to Type No. 3.

In the case of Type No. 3 Provincial Renewal Lease No. 5040 dated April 30th, 1934, was entered into and the only difference between this lease and Type No. 1 is that there was no specific agreement to a royalty at such other rate as may from time to time be prescribed by order of the Lieutenant Governor in Council such as was contained in Renewal Lease No. 5585. However Clause 1 of Renewal Lease No. 5040 reads as follows :

" 1. That the lessee shall and will well and truly pay or " cause to be paid to the Minister at Edmonton, the rent and " royalty hereby reserved, and shall and will make all returns at " the times and in the manner herein or in or under the said " regulations prescribed."

and then in the Coal-Mining Regulations which are attached to and form part of the lease it is provided 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."

While the right to impose an increased royalty is not as clear under Type No. 3 as under Type No. 1, nevertheless it is submitted that the

lessee has entered into a contract with the Province and by that contract has obliged himself to comply with any changes in the Coal-Mining Regulations. He therefore has consented to comply with any future legislation or regulations which apply generally throughout the Province. It is submitted that there is a clear-cut distinction between this case and a case where no renewal agreement has been entered into with the Province, and the decision of the Supreme Court in the *Anthony* case applies specifically to this type of lease.

6. ARGUMENT AS TO GRANT CONTAINING ROYALTY CLAUSE TYPE NO. 1.

The reservation contained in this grant is somewhat similar in terms to that contained in the grant dealt with in the case of *Huggard Assets Limited* vs. *Attorney General for Alberta and the Minister of Lands and Mines* (1950) 1 W.W.R. 69. However, there is one very important distinction in that the royalty on the coal granted had been fixed by regulation prior to the issue of the grant so that under the grant we have a royalty fixed but which by the terms of the grant may be varied from time to time.

It is pointed out that in the Judgment of Mr. Justice Rand and Mr. Justice Kellock, they referred to the fact that no royalty had been fixed by the regulations and it is submitted that fact had an important bearing on the result of the case because it was suggested that the lessee could not know what royalty might be imposed.

In the present case the royalty was fixed at 10 cents per ton and later reduced to 7 cents per ton. It is submitted that the reservation could not be held to be void for uncertainty merely because there was power to vary the rate from time to time. It is further submitted that the grant was made under and by virtue of the Dominion Lands Act and the regulations.

The regulations were authorized by statute and have a statutory effect.

Institute of Patent Agents v. *Lockwood* (1894) A.C. 347 at pages 355 to 358 inclusive.

Maxwell on Interpretation of Statutes, 9th Edition, page 305.

It is submitted that a grant of this nature where the royalty is to be fixed by statutory regulation cannot be held to be void for uncertainty. (See *Manchester Ship Canal Company* v. *Manchester Racecourse Company* (1900) 2 Chancery Division, 352.) In this case the Legislature authorized an agreement between the parties containing a clause whereby the Manchester Racecourse Company agreed with the Manchester Ship Canal Company that if it should be at any time proposed to use their racecourse for dock purposes, the racecourse company should give the canal company the first refusal thereof. It was stated that this clause except for the fact that it had been authorized by the Legislature would be void as offending against the Rule of Perpetuities and might also be void for uncertainty, but because the contract was authorized by statute the Court declared that it would not be held to be void on either ground. Farwell, J., at page 360

after stating that the Rule against Perpetuities could not apply to a contract authorized by statute, states as follows :

> " What I have said also extends to the case of voidness for " uncertainty. If the Legislature has declared the contract valid, " how can I declare it void ? "

On appeal the judgment of Farwell, J., was sustained.

(See (1901) 2 Chancery Division 37.) At page 50 Vaughan Williams, L.J., states :

> " It only remains now to deal with a few objections urged to " Farwell, J.'s judgment. First, it was urged before us that the " agreement in Clause 3 was void for remoteness or uncertainty. " We think, for the reasons given by Farwell, J., that every clause " of the agreement has statutory validity, and that no objection " can be taken on that score."

See also *Sevenoaks, Maidstone and Tunbridge Railway Company* v. *London, Chatham and Dover Railway Company* (1879) 11 Chancery Division, 625. Jessell, M.R., at pages 635 and 636.

Prestney v. *Mayor and Corporation of Colchester and The Attorney-General* (1882) 21 Chancery Division 111. Hall, V.C., at page 119.

It is further submitted that the grant and regulations which provide for a fluctuating royalty are necessary in dealing with the disposition of lands in a new country like Canada because when a grant of coal or any other mineral is made it is not possible to establish royalties at a rate which is reasonable as between the parties. The royalty to be fixed depends on the amount of mineral obtained, the cost of production and many other factors which necessitate some flexibility in the establishment of the proper royalty to be paid. In *His Majesty the King* v. *William Chappell* (1902) 32 S.C.R. 586, Davies, J., commenting on these provisions states at page 638 as follows :

> " Now the first thing which strikes one about the petitioner's " argument is that if successful it would practically defeat the whole " purpose and intent of the statute and the regulations made under " it. The 47th section of the Dominion Lands Act under which the " regulations were passed and the licence or grant to the suppliant " issued, I have already set out in full. We start, therefore, with " a statutory authority to the Governor in Council to dispose of " those lands containing gold in such manner and on such terms " and conditions as may from time to time be fixed by regulations " made in that behalf. No more effective or comprehensive " language could have been used by Parliament than has been used " in this section. The very nature of the subject matter to be " dealt with required that in the matter of framing regulations " the powers of the Government both as to its general policy and " as to all the necessary details should be unrestricted, and the " powers given in subsection (h) of Section 90 to make regulations " were as large as could possibly be given. Regulations suitable for

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" conditions existing when the population is sparse and mining is
" pursued on a very small scale may be found quite inadequate
" and unsuitable at a time when the mining population becomes
" congested and operations in the different kinds of mining are
" followed on a gigantic scale. The Government responsible for
" the peace, order and good government of a distant, vast and
" almost inaccessible territory might require to pass the most
" stringent regulations and as exigencies required from time to
" time to alter, relax and amend them. Why did Parliament
" expressly confer the power of making and amending these
" regulations from ' time to time ' if it was not to provide in the
" fullest and amplest way that changing conditions and circum-
" stances could always be adequately provided for ? "

See also *Cooper* v. *Stuart* (1889) 14 A.C. 286.

7. As to Grant No. 2.

With respect to Grant No. 2 the Appellant relies on Clause 2 of the Natural Resources Transfer Agreement.

By virtue of the decision of this Court and the Supreme Court of Canada in the case of *Majestic Mines Limited* v. *Attorney General for Alberta* (1941) 2 W. W. R. 353, and (1942) S. C. R. 402, it may be said that grant No. 2 has not a prospective effect but it is submitted that the 1948 legislation is of general application applying to grants and leases alike and for the reasons given in relation to the argument the Legislature of the Province is authorized to alter the royalty fixed by the Dominion Government because the legislation applies generally to all Crown grants whether made by the Dominion or by the Province.

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Counsel for the Appellant.

No. 9. Factum on behalf of the Respondents.

No. 9.

Factum on behalf of the Respondents.

1.—This appeal concerns the validity of Section 44c. of Chapter 36, Statutes of Alberta, 1948, which enacted as follows :—

" 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 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.' "

2.—The Attorney General supported the Act by arguing that the relevant Statutes and Orders-in-Council, Leases and Grants provided that the royalty reserved could be varied from time to time by the Dominion and that this right passed to the Province. The following are excerpts from his written argument in the Court below :—

" There appears to be no doubt that the Governor General " in Council could impose such royalty under this clause as he " deemed advisable and might vary or change the royalty from " time to time."

" It is submitted that these words grant to the Governor " in Council the right to prescribe a royalty at any time and as " shown in the Argument as to Royalty Clause Type No. 1, a " royalty was prescribed on all coal lands and coal rights sold by " the Crown in the right of the Dominion at ten cents per ton " (Exhibit 4) and subsequently this royalty was reduced to seven " cents per ton (Exhibit 13). It is submitted that if the Dominion " had the right to decrease the royalty, it likewise had the right " to increase the royalty and the relevant Orders-in-Council " do not differentiate between the two types of royalty clauses, " indicating that the Dominion Crown considered that it had the " right to impose under the regulations a royalty from time to " time in such amount as was deemed advisable."

" Thus the Governor in Council could at any time under the " habendum clause change or alter the royalty and it is submitted " that this right passed to the Province under the transfer " agreement."

Obviously, if the Statute can be supported some such right must be in existence as the Statute purports to vary the royalties.

3.—The position of the Respondents, shortly, is as follows :—

(a) The Province has purported to vary the royalties. Under the judgment in the Huggard case, it could have no such powers regardless of the terms of the Grants.

(b) The Province, therefore, can vary the royalties only if the judgment in the Huggard case is overruled.

(c) If the Huggard case should be overruled, and the power to vary held permissible, the Respondents will contend that the

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royalties are actually fixed and the Province is bound by the Natural Resources Agreement and must carry out the provisions of the Leases and Grants.

4.—The following are excerpts from the majority judgments in the Huggard case (not yet reported) :—

Mr. Justice Kellock :

" I find nothing in the above legislation which contemplates " disposal of mineral lands so as to create estates therein of a " novel character. The question, therefore, in the case at bar " is as to whether the provision in the patent, authorizing the " grantor to exact ' such royalty . . . . from time to time " ' prescribed by regulations of our Governor-in-Council ' upon " the petroleum and natural gas, was a valid provision under " which an interest remained in the Dominion and passed to the " Province by virtue of the Natural Resources Act of 1930. The " case for the appellant is exclusively rested on this basis and " not upon any legislative jurisdiction in either the Dominion or " the Province apart from the terms of the patent. In my opinion, " the provision in question is not effective for such a purpose but " is void as repugnant to the Grant. In my opinion, therefore, " the provision here in question lacks the necessary certainty. " It is in effect a throw-back to the old days of tenures by knight " service which permitted rent services based on the ' arbitrary " ' calls of the Lord.' "

Mr. Justice Rand :

" The reservation here, by leaving the rate in money or in " kind at which the royalty from time to time should be levied, " in the discretion of the Crown embodies the essence of the evil " which led to the legislation of 1660."

" That conditions must be certain, precise and ascertainable " from the terms of the instrument is a rule with ancient roots " in the common law ; it was applied by this Court as late as " last year in *Noble* v. *Alley*, 1951, S. C. R. at page 64, and a " condition the substance of which lies within the will of the " grantor, is outside of that requirement."

It is submitted that the above considerations are sufficient to dispose of the appeal.

5.—The position taken by the Respondents in the Court below is, shortly, as follows :

LEASES.

There is nothing in Order No. 430 of March 4th, 1907 (Exhibit 6) ; Order No. 1059 of May 9th, 1907 (Exhibit 7) ; Order No. 245 of February 16th, 1909 (Exhibit 8) ; Order No. 729 of April 20th, 1910 (Exhibit 10) ;

Order No. 1793 of August 12th, 1911 (Exhibit 11) suggesting that the royalty under Leases should ever be anything but five cents per ton. The Leases are equally specific. Lease No. 2440, dated May 6th, 1925 (Exhibit 17), provides as follows:

> " And also rendering and paying therefor unto His Majesty " a royalty at the rate of five cents per ton of 2,000 pounds of " merchantable output of coal, etc."

Section 19 of the Order-in-Council (attached to Lease) is to the same effect. The renewal of this Lease (No. 5585, Exhibit 18) granted by the Province on May 6th, 1946, attempts to alter this, providing on page 2 for " a royalty of five cents or at such other rate as may from time to time be " prescribed by Order of the Lieutenant-Governor-in-Council." The matter is not in issue in this action, but the alteration of the term appears to be a breach of the Natural Resources Agreement.

Lease No. 143, dated June 28th, 1909 (Exhibit 19) provides on page 2 for " a royalty at the rate of five cents per ton of 2,000 pounds on the " merchantable output of the coal taken out of the said lands." Renewal of this lease (No. 2886) dated May 1st, 1930 (also Exhibit 19) provides for the proper royalty of five cents per ton.

Lease No. 350, dated October 22nd, 1910 (Exhibit 20) provides for a royalty of five cents as above, and the renewal of this Lease (No. 5040), dated April 30th, 1934 (also Exhibit 20) does likewise.

It is submitted that by the terms of the Orders-in-Council and the Leases, the royalty in respect of leased land was definitely fixed at five cents per ton.

GRANTS.

Section 100 of the Dominion Lands Act, Chapter 55 of R.S.C. 1906, reads in part as follows:

> " Dominion lands shall, except as otherwise herein provided, " be open for purchase, at such prices, and on such terms and " conditions as are fixed, from time to time, by the Governor in " Council."

The regulations relating to Grants are the following:

The first Order-in-Council of any application is No. 2167 of September 17th, 1889 (Exhibit 2). This Order contained regulations for the disposal of Dominion lands and Sections 34 to 43 inclusive deal with the disposal of coal lands, the property of the Dominion Government in Manitoba, North West Territories and British Columbia. Section 34 provides that lands containing anthracite coal may be sold at an upset price of $20.00 per acre, and land containing coal other than anthracite at an upset price of $10.00 per acre. No mention is made of the reservation to the Crown of a royalty.

Order-in-Council No. 235 of February 6th, 1901 (Exhibit 3) amends Section 34 of Order No. 2167 above referred to, and recites that in addition to the upset price of $20.00 and $10.00 per acre, there shall be a royalty at such rate as may from time to time be specified by Order-in-Council on the full quantity of coal mined.

Un-numbered Order-in-Council of May 31st, 1901 (Exhibit 4) recites Order No. 235 and provides that until further ordered the royalty referred to in Order No. 235 shall be at the rate of ten cents per ton.

Order No. 552 of May 19th, 1902 (Exhibit 5) re-publishes the above provisions regarding upset price and royalties in one Order and rescinds Order No. 2167, and amending orders.

Order No. 186 of January 31st, 1910 (Exhibit 9) refers to Grants and Orders that royalties be charged on merchantable output only, and that no royalty be charged upon coal taken from the mine which is used in appliances necessary for the operation of the mine.

Order No. 1792 of August 12th, 1911 (Exhibit 12) confirms No. 186 of January 31st, 1910, wherein in respect to Grants the royalty was charged only on the merchantable output and the coal used in the operation of the mines was excluded.

It is to be noted that the un-numbered Order-in-Council of May 31st, 1901 (Exhibit 4) provides that until further order, the royalty shall be at the rate of ten cents per ton.

Order No. 552 of May 19th, 1902 (Exhibit 5) rescinds Order No. 2167 as amended by subsequent Orders-in-Council and substitutes a new set of regulations. It provides, paragraph 2, that in addition to the purchase price " a royalty at the rate of ten cents per ton on 2,000 pounds shall be levied and collected on the output of the mine."

Order No. 103 of January 16th, 1915 (Exhibit 13) reduced the royalty on Grants from ten cents per ton to seven cents.

The Grants themselves are of 2 main types. Type 1 (Exhibit 15) provides for " a royalty at such rate per ton of coal taken out of the said land. " as may from time to time be specified by our Governor-General, such " royalty to be levied and collected on the gross output of any and all mines " in and upon the said lands." This is the same as the Canada West Reservation, referred to in the *Majestic Mines* case, 1942, 1 W.W.R., page 321, at page 324.

Type 2 (Exhibit 16) provides " yielding and paying unto us and our " successors the royalty, if any, prescribed by the regulations of our " Governor-in-Council it being hereby declared that this Grant is subject in " all respects to the provisions of any such regulations." This is the same as the second Grant considered in the *Majestic Mines* case at page 326.

Type No. 2 is the same as the Grant in the *Huggard* case where the provision reads " yielding and paying unto us and our successors such " royalties upon the said petroleum and natural gas if any from time to " time prescribed by the regulations of our Governor-in-Council." The expression is, no doubt, copied with a slight variation from the Order-in-Council of February 6th, 1901 (Exhibit 3) where the words are " a royalty " at such rate as may from time to time be specified by Order-in-Council."

The terms of both grants are discussed in the Judgment of this Division in the *Majestic Mines* case, 1942, 1 W.W.R., page 321. Clarke, J.A., says at page 328 :—

" I cannot think there was any intention of making a different

" reservation of a royalty in the case of 26 (our type 2) than in the " case of 25 (our Type 1)."

In the *Majestic Mines* case, the question was whether the Crown could provide for a royalty on petroleum taken from the lands by a regulation which came into effect after the Grant had been issued. This was discussed by O'Connor, J., in the Trial 1941, 2 W.W.R., page 353 at page 359 :—

" The next question for determination is whether ' the royalty " ' prescribed by the regulations ' means prescribed at the date of " the grant or prescribed ' from time to time.' Counsel for the " Plaintiff points out that the Crown grant of the other parcel, " Exhibit 2, which is dated five days earlier, expressly says ' as " ' may from time to time be specified by our Governor-in- " ' Council.' I interpret the words ' the royalty, if any prescribed " ' by the regulations,' as the royalty prescribed at the " date of the grant, and as no royalty on petroleum was then " prescribed I hold the lands are not subject to a royalty on " petroluem. I reach this conclusion on the principle that if the " grantor wishes to reserve any rights over the land granted he " must do so expressly."

On appeal to the Supreme Court of Canada, 1942, S.C.R. 402, Hudson, J., in giving the judgment of the Court agrees with the above. He says at page 405 :—

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

" The real question in the appeal is whether or not the " provisions of the patent were such as to reserve to the Crown a " right to impose new royalties in the future.

" I think that if the Crown, like any other Vendor, wishes to " reserve such rights, such reservations must be expressly stated.

" Parliament and the Legislature, within its jurisdiction of " course, have power to impose new taxes, but the imposition of a " royalty on lands or goods of a subject by Executive Order could " be justified by the clearest and most definite authority from the " competent legislative body."

It is submitted that in the result, *Majestic Mines* case decided that the Crown could not impose additional royalties after the issue of the Grant. The Grants in question here are not distinguishable from those considered in the *Majestic Mines* case, and it is submitted that the royalties applicable are those in effect at the time of the Grant. The difficulties in interpretation of the Grants have arisen because of the insertion in the Grants of the words of the Order-in-Council. These words are apt to describe a general scheme but misleading when used in reference to the specific exercise of a general power.

In the Supreme Court of Alberta. Appellate Division.

No. 9. Factum on behalf of the Respondents—*continued.*

DIFFICULTIES ARISING OUT OF THE HUGGARD CASE.

6.—The fact that one of the Grants (No. 2 above) considered in the *Majestic Mines* case is the same as the Grant in the *Huggard* case raises a difficulty because it might be suggested that there is a conflict between the two judgments of the Supreme Court of Canada. In effect, the Court held in the *Majestic Mines* case that the royalty was that in effect at the time of the Grant, but in the *Huggard* case, similar words were held to create a variable royalty. The following considerations may be relevant :—

(a) There was no royalty in existence at the time of the Huggard Grant. Mr. Justice Rand points this out. The field in the Majestic Mines Case is wider than in the Huggard Case where the Court held that the royalty was a variable one.

(b) The words " from time to time " in a general power might mean something different from the meaning in a specific Grant. The Huggard Grant standing alone would give to the words " from time to time " a specific meaning ; whereas, in a general scheme the intention might be to make grants at different times at different rates of royalties, but not intending that the royalty in any particular grant could be varied. In the present case, a royalty was imposed by the Order-in-Council of 19th May, 1902, and all grants are subsequent to that date.

7.—The following may also be relevant to the matters in issue :

(a) The lease rental is fixed and is not affected by the Huggard judgment.

(b) There may be a presumption that the intention was to fix the royalty on Grants as well. The Government would not likely have a different policy as between leases and grants.

(c) Where land is sold at a fixed price as in this case, one might expect a fixed royalty.

(d) As Mr. Justice Rand points out a variable royalty would embody the essence of the evil which led to the legislation of 1660. At the present time the evil would also be onerous. Companies like the Respondents are ordinarily financed by a bond issue, but if the royalty is variable, prospective bond purchasers would not be able to ascertain the amount of the Company's fixed charges.

(d) The rules of the common law approach the provisions of the 1660 Statute. One cannot abrogate from a Grant ; provisions must be strictly set out.

(f) It should not be presumed against the Government that its whole scheme of grants was a violation of the Statute of 1660. In the case of a single Grant, the illegality might be the result of a casual error.

(g) The Dominion Government did in some cases impose royalties subject to change.

The words used in the Timber Licenses, referred to in the *Anthony* Case, 1942, 2 W. W. R., page 554 at page 566-7, were as follows :—

" Such renewal being subject to the payment of such dues and " to such terms and conditions as are fixed by the regulations in " force at the time the renewal is made."

" Which rights shall nevertheless be subject at the time of " each yearly renewal to such changes in the regulations as are " made from time to time."

The document creating the licence itself had the following :—

" That such renewal shall be granted subject to any change " which may have been made in the regulations increasing or " altering the rental dues to be paid, or otherwise varying the " terms or conditions under which the licenses are granted."

The Appellant's argument is that these words mean the same as the words used in the grants now considered. If the Government intended to create similar rights, one would expect it to have used similar words. The Appellant's argument amounts to saying that the Dominion created like conditions but used words wholly dissimilar as to meaning.

In the result, royalties may be fixed and the Huggard Case may have no application.

THE NATURAL RESOURCES AGREEMENT.

8.—The Agreement is contained in the Statutes of Alberta, 1930, Chapter 21. Section 2 reads as follows :—

" 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 terms 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."

The Respondents say that Chapter 36 is a violation of the Natural Resources Agreement in that it affects or alters the terms of leases and grants, and was not passed with the consent of the parties, and was not general legislation applying to all similar agreements.

The Natural Resources Agreement provides that contracts, etc., may be altered—

(a) By consent, or

(b) By general legislation affecting all similar agreements, *irrespective of who may be the parties thereto.*

In the Supreme Court of Alberta. Appellate Division.

No. 9. Factum on behalf of the Respondents— *continued.*

The main purposes of the Agreement, it is submitted, are the following :

(a) To see that the Dominion contracts were carried out and to protect the Dominion against any claims which might arise from Lessees or Grantees in respect of any violations by the Province of any of the terms relating to the Leases or Grants. The contract, therefore, provides that the terms of the lease or grant should be carried out by the Province.

(b) To insure that there should be no discrimination by the Province as between the holders of Dominion leases and grants and others in similar positions. The Province might by legislation applicable only to interests of holders of other than Crown grants or leases, put the latter in a position of inferiority. The mere carrying out by the Province of the terms of the contracts might, therefore, not be sufficient. The Agreement in effect provided that the holders of interests from the Crown should be in a position of equality with others.

The Transfer from the C. P. R. to Lethbridge Collieries (Exhibit 21) and the encumbrance providing for royalties (Exhibit 22) have been put in to illustrate what may be meant by " similar agreements relating to " lands, mines, etc., irrespective of who may be the parties thereto."

There is no exhaustive interpretation of the Agreement attempted in any of the reported cases, but it is suggested that the above is a reasonable interpretation having regard to the position of the parties at the time of the transfer, and has considerable support.

See Ewing, J., in *Spooner* vs. *Turner Valley Gas Conservation Board*, 1932 Vol. 2, W. W. R., page 454, at page 467 :

> " The necessity for such a provision is not difficult to
> " understand. There were at the time of the agreement many
> " outstanding leases and contracts of purchase and other
> " ' arrangements,' and as the lessees and contractees were not
> " parties to the agreement (i.e. The Natural Resources Agreement),
> " it was necessary that the federal authority protect itself against
> " claims by the lessees or contractees for breaches on the part of
> " the Province of the terms of the leases or contracts. Then, too,
> " it may well be that the federal authority desired to protect its
> " lessees or contractees from any invasion by the Province of
> " their rights under the instruments or the arrangements."

McGillivray, J., on the appeal, 1932, 3 W. W. R., page 477, at page 501 :

> " In my opinion the intention of the law-making bodies
> " concerned has been expressed in Section 2 of the agreement in
> " language capable of only one meaning, namely, that subject to
> " the exceptions by way of consent or by way of legislation which
> " is of such a general character as to preclude discrimination, the
> " province takes the place of the Dominion under the contracts

" and arrangements that the Dominion has made and undertakes " to carry out such contracts and arrangements in accordance " with the terms thereof."

Lord Wright in *In re Timber Regulations of Manitoba*, 1935, A.C. 184, quoted in 1943, S. C. R. at page 330 :

" But their Lordships agree with the Supreme Court that in " the special circumstances of this case the Statute of 1930 did " effect such a novation. Under Clause 2 it is the Province to " which the lands have been transferred, that can alone as a matter " of law thereafter grant the patent to an entrant ; the agreement, " made law by the Act, of 1930, requires the Province to carry out " the various specified obligations in respect of the lands " transferred ; these obligations are now imposed on the " Province by law ; by the same reasoning they do not any " longer attach to the Dominion ; that implies that by law " the entrant must go to the Province to obtain the carrying out " of the various obligations which the Statute of 1930 by confirming " the agreement requires the Province to fulfil."

O'Connor, J., in *Anthony* vs. *Attorney General for Alberta*, 1942, 1 W.W.R., page 833 at page 837 :

" The Orders-in-Council fixing the timber dues are not " legislation applying generally to all similar agreements relating " to lands, mines or minerals in the Province. They do not apply " to timber licenses granted by the Hudson's Bay Co. or others of " which many are outstanding."

In the *Anthony* case, Mr. Justice O'Connor held (page 837) that the abolition by the Province of the terms of the licence providing for removal, after the 10th year from the date of sale " affected or altered " the Dominion contract, and consequently held this term to be invalid. In the appeal, 1942, 2 W.W.R. page 554, at page 565, it is stated that no question was raised as to this part of the judgment.

The matter proceeded to the Supreme Court of Canada on this basis. Hudson, J., says, 1943, S.C.R. page 320 at page 329 :

" The appellants appealed to the Appellate Division of the " Supreme Court of Alberta, and the respondents cross-appealed " with respect to such regulations as were found to be *ultra vires* " excepting the regulations providing that no licence for a timber " berth should be renewable after the tenth year from the date of " sale. The trial Judge's finding that the last-mentioned regulation " was *ultra vires* therefore stands."

The Agreement contemplates the power of the Province to enact such general legislation as is contained in the Coal Mines Regulation Act, Chapter 8, R.S.A. 1945. This Act deals with fire protection, water accumulation, safety lamps, procedure re abandonment, accidents, and safety, precautions and barrier pillars. Section 152 of The Mines and Minerals Act,

In the Supreme Court of Alberta. Appellate Division.

No. 9. Factum on behalf of the Respondents—*continued.*

Chapter 66, Statutes of Alberta, 1949, makes provision for the establishment of party walls of at least 15 feet between workers on each side of the boundary, which said area may in certain circumstances be used in common by adjacent owners. This provision has the effect of altering the Agreement as it affects the right of the actual owner, or lessee, to the exclusive right to use $7\frac{1}{2}$ feet of his property and gives the right of user to his neighbour in common with himself. As such legislation applies to all mines irrespective of who may be the owners, it does not run counter to the Agreement.

SEVERABILITY.

9.—The question of severability might arise if lease rentals are fixed and grant royalties are not. The intention of the Statute was to impose additional royalties on coal produced from Crown lands and consequently it might be assumed that the Act would not have been passed applying to the industry only in part. However, if the point arises it may be that further facts bearing on it should be before the Court. The following authorities are referred to :

Grain Futures case (*Attorney General of Manitoba* vs. *Attorney General of Canada*) 1925, A.C. 561 ; 1925, 2 W.W.R. page 60 at page 65.

In the Supreme Court of Canada, 1924, S.C.R. page 317 at page 323.

Carrick vs. *Point Grey*, 1927, 2 W.W.R., page 684 at page 686.

Royal Trust vs. *Attorney General*, 1937, 1 W.W.R., page 376. On appeal sub nom, *Credit Foncier* vs. *Ross et al*, 1937, 2 W.W.R. page 353.

Cooley on Constitutional Limitations, page 246.

Reference in Harvard Law Review—

Vol. 20 at page 495.
Vol. 31 at page 309.
Vol. 40 at pages 626–630.

H. S. PATTERSON,
Counsel for Respondents.

No. 10. Supplementary Factum on behalf of the Appellant.

No. 10.

Supplementary Factum on behalf of the Appellant.

The Honourable Chief Justice has requested the parties to file a Supplementary Factum with repsect to the question as to whether Order in Council No. 235, dated the 6th day of February, 1901 (Exhibit 3) was rescinded by Order in Council No. 552, dated the 19th day of May, 1902 (Exhibit 5) and what statutory authority there was for Patent Type No. 1 and Patent Type No. 2 and the authority of the Governor in Council to alter or vary the amount of royalty to be imposed.

Order in Council No. 235 (Exhibit 3) was passed on the 6th day of February, 1901, and provided for a variable royalty in these terms :

> " 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."

This Order in Council was passed under the authority of Section 47 of the Dominion Lands Act, being Chapter 54 of the Revised Statutes of Canada, 1886, as amended by Section 5 of Chapter 15 of 55–56 Victoria, which reads as follows :

> " 47. Lands containing coal or other minerals, including " lands in the Rocky Mountains Park, shall not be subject to the " provisions of this Act respecting sale or homestead entry, but " the Governor General in Council may, from time to time, make " regulations for the working and development of mines on such " lands, and for the sale, leasing, licensing or other disposal " thereof : Provided, however, that no disposition of mines or " mining interests in the said park shall be for a longer period than " twenty years, renewable, in the discretion of the Governor in " Council from time to time, for further periods of twenty years " each, and not exceeding in all sixty years."

and also under the authority of Section 90 (h) of the said Dominion Lands Act which reads as follows :

> " 90. (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 of 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 " :

The mineral sale as represented by Patent Type No. 1 (Exhibit 15) was made on the 9th day of September, A.D. 1901, under the authority of the 1901 regulations. Mineral sale Type No. 2 (Exhibit 16) was made on the 28th day of June, A.D. 1901, and was made under the regulations of 1901.

An examination of the minerals sales listed in Schedule A indicates that twenty-two of the mineral sales represented by grant Type No. 1 were made under and by virtue of the regulations as set out in Exhibit 3, dated the 6th day of February, 1901. As these regulations continued in existence until Order-in-Council No. 552 (Exhibit 5) became effective on the 21st day of June, 1902 (four consecutive weeks after the Order-in-Council was passed

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No. 10. Supplementary Factum on behalf of the Appellant—*continued.*

on the 19th day of May, 1902) it is obvious that a number of sales as represented by grant Type No. 2 of which Exhibit 16 was one, were also made under the 1901 regulations (Exhibit 3). The issue of the patent was merely a confirmation of the sale and in each case indicates that the patent was issued in conformity with the terms of the regulations which were in existence at the time the sale was made.

It is therefore clear that the Dominion Government had statutory authority for issuing the Patents in the form in which they were issued and likewise had the right to alter or vary the terms of the royalty at any time thereafter and the right to vary, being a term of the contract, there has been no variation in the terms of the contract and it is not necessary to consider the terms of Clause 2 of the Natural Resources Transfer Agreement in relation to such sales.

It is to be noted that Exhibit No. 13 referred to the regulations passed in 1901 and it is also to be noted that many of the sales referred to in Patent Type No. 1 and Type No. 2 were made under the provisions of the 1901 regulations (Exhibit 3).

Having regard to the facts as indicated by the Exhibits it is submitted that the argument made by counsel for the Appellant is substantiated by the records because the Governor in Council clearly had the right to alter or vary the royalty imposed in respect of all the sales made under the 1901 regulations.

It is indicated that some of the sales listed in Exhibit 1 (Schedule A) were made under the 1902 and subsequent regulations and if the Dominion Government had no specific authority to vary the royalty and as Exhibit 13 refers only to sales made under 1901 regulations (Exhibit 3) then the royalty remains unaltered and stands at 10 cents per ton in respect of these sales.

Having established the right of the Dominion Government to make these minerals sales under and by virtue of the statutory provisions of the Dominion Lands Act above referred to, it is submitted that the reasons of Mr. Justice Davies in the case of *Rex* v. *Chappell* (Record pages 47 to 48) are applicable to this case and his judgment was specifically endorsed by the Judicial Committee of the Privy Council on appeal. This principle was also set out in the judgment of Chief Justice Duff in *Spooner Oils Limited and Spooner* vs. *Turner Valley Gas Conservation Board and the Attorney General of Alberta*, 1933 S.C.R. 629, where he says at page 643 :

> ". . . . The Dominion Lands Act, and the Regulations
> " enacted pursuant to it, give statutory effect to plans for dealing
> " with Dominion public lands, including lands containing petroleum
> " and natural gas, which, it must be assumed, were conceived by
> " Parliament, and the authorities nominated by Parliament, as
> " calculated to serve the general interest in the development and
> " exploitation of such lands and the minerals in them. It is not
> " competent to a provincial legislature *pro tanto* to nullify the
> " regulations, to which Parliament has given the force of law in
> " execution of such plans, by limiting and restricting the exercise of
> " the rights in the public lands, created by such regulations in

" carrying the purpose of Parliament into effect. Indeed an " administrative order, which the legislature has professed to " endow with the force of statute, directed against a tract of public " land, the property of the Dominion, held by a lessee under the " Regulations of 1910 and 1911, and which professed to regulate " the exercise, by the lessee, of his right to take gas and petroleum " from the demised lands, would truly be an attempt to legislate " in relation to a subject reserved for the exclusive legislative " jurisdiction of the Dominion by Section 91 (1), ' The Public . . . " ' Property ' of the Dominion."

Our position is that relying on these authorities and others cited in our Factum the Dominion Government had, prior to the passing of the transfer agreement, the right to alter and vary the royalty provisions and that under the transfer agreement the Province is in exactly the same position and does not have to rely on Clause 2 of the transfer agreement.

Alternatively in respect of any sales as represented by grant Type No. 1 or No. 2, which were made after the rescission of the 1901 regulations the Appellants rely on the provisions of Clause 2 of the transfer agreement, this legislation being of general application and covering the grants as well as the leases in question in the action.

H. J. WILSON,
W. Y. ARCHIBALD,
Counsel for the Appellant.

No. 11.

Supplementary Factum on behalf of the Respondents.

Exhibit 3 provides for the sale of coal lands at $20.00 per acre for anthracite and $10.00 per acre for other coal lands. It rescinds Sections 34–43 of the regulations of September 17th, 1889, and substitutes new regulations which are different from the old ones only in providing that payment may be made in cash or scrip, and on time. It then provides " 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, etc."

Order-in-Council of May 31st, 1901, Exhibit 4, recites Exhibit 3 and provides that " until further ordered said royalty shall be and is hereby " fixed at the rate of 10 cents per ton of 2,000 pounds."

Exhibit 5 provides that the " regulations for the disposal of coal lands ". . . . established by the Order-in-Council of September 17th, 1889, and " amended by subsequent Orders-in-Council ' shall be and the same are " ' hereby rescinded and the following regulations substituted therefor.' " It then provides for the sale of anthracite and other coal lands at the above prices, for payment in cash or scrip and for time payments. Section 2

provides that in addition to the above " a royalty at the rate of 10 cents per " ton of 2,000 pounds will be levied and collected on the output of the " mine."

The effect of the above is that the general regulations of September 17th, 1889 (Exhibit 2) for the sale, settlement, use and occupation of Dominion lands and all amendments are rescinded.

The Regulations applicable to coal lands are 34–43 fixing the price providing that not more than 320 acres should be sold to an applicant and making incidental regulations. Section 34 was varied by Exhibit 3, which provided for purchase by scrip and for time payments. In form, Section 34 was rescinded, but in actual fact, it remained in force subject to the above. Exhibit 4 fixed the royalty at 10 cents per ton until further ordered. Exhibit 5 rescinded all previous orders. The effect of it was to make the following alterations :

(A) Interest was changed from 6% to 5% per annum.

(B) Scrip could only be accepted if full payment was made at the time of sale.

(C) A royalty of 10 cents per ton was to be chargeable on the output of the mine. This was substituted for the " time to time " clause in Exhibit 3.

(D) Regulations, largely procedural.

As to the meaning of " rescind," see the following :
Shorter Oxford Dictionary, Vol. 2, page 1712.
Words and Phrases Fifth Series, Vol. 5, page 90.
Primeau and Imperial Lumber Yards Limited v. *Meagher* (1923) 3 W.W.R. 1308 at 1312.

It may be noted that Exhibit 4 fixed the royalty at 10 cents " until further order." In Exhibit 5, any such reference is eliminated. Persons taking grants after September 17th, 1889, were in effect taking them under Exhibit 5 by which the royalty was stated to be at 10 cents per ton.

The Appellant submits that Exhibit 3 is still in force. If so, it should be interpreted so as to give it legal validity.

See Maxwell on Statutes, 9th Edition, page 86—

> " In construing the words of an Act of Parliament, we are " justified in assuming the legislature did not intend to go against " the ordinary rules of law, unless the language they have used " obligates the Court to come to the conclusion that they did so " intend."

Craes on Statute Law, 4th Edition, page 171, says—That the meaning of general words should be limited so as not to alter the common law.

Dow vs. *Parsons*, 36 D.L.R. 510 (C.A.)

> " Such an interpretation leading to invalidity ought not to be adopted."

If the words are to be interpreted as permitting the Department to change royalties at will, the *Huggard* case would apply and the grant would be valid, but the royalties would be eliminated.

It is submitted, therefore, that the better interpretation is that the Governor-in-Council by use of the expression " from time to time " intended only to reserve to themselves the right to issue grants at different times at different royalties, but did not intend to reserve the right to vary the royalties in every particular grant. If this is so, the royalty is 10 cents per ton.

It may be that some question arose as to whether Exhibit 3 was void for uncertainty. At any rate, it was rescinded, and the royalty fixed at 10 cents per ton. The omission of the words " until further order," contained in Exhibit 4, may have some significance. The grants in question herein were all issued in effect under Order-in-Council Exhibit 5. There was no suggestion in Exhibit 5 that any royalty should be collected other than 10 cents. As to the Appellant's suggestion that this argument leads to the result that Exhibit 13, by virtue of its reference to Exhibit 3, is of no effect and the royalty was not reduced, it is submitted that this is the not unusual case of a reference to a repealed enactment and is covered by Section 20 (b) of the Dominion Interpretation Act.

In any event, if the grant is made for valuable consideration it must be construed strictly in favour of the grantee for the honour of the King, and where two constructions are possible, one valid and the other void, that which is valid ought to be more regarded than his profit. Halsbury, Vol. 6, page 570–71.

However the matter is viewed, there is not that certainty or that clear vacation of common law principles that would support a variable royalty even if the *Huggard* case did not apply.

It was pointed out in the Court below that the Act of 1948 did not purport to proceed by virtue of any power reserved in the leases or grants but rather the contrary. It reads " notwithstanding the terms and " provisions of any certificate of title, agreement for sale or lease which " conveys coal," etc. In form it is not a carrying out of the terms of the leases, grants, etc., but an enactment regardless of the same. An Act may be interpreted having regard to what is stated therein as to its intention.

If the Dominion's position is as suggested by Counsel for the Appellant, and the grantor was entitled to change royalties at will it would seem that there was no necessity for the Natural Resources Agreement as far as grants were concerned. The terms of the grants were (1) a price per acre, and (2) a royalty. The price has already been paid and if the royalty could be changed at will, there was no object in providing that the Province should carry out " in accordance with the terms thereof every contract to purchase . . . . crown lands."

H. S. PATTERSON,
Solicitor for Respondents.

In the Supreme Court of Alberta. Appellate Division.

No. 12. Reasons for Judgment, 31st July 1951, Parlee, J. (concurred in by O'Connor, C.J.A., and Macdonald and Ford, J.J.A.).

No. 12.

Reasons for Judgment.

PARLEE, J. (concurred in by O'CONNOR, C. J. A. and MACDONALD and FORD, J. J. A.)

The sole question on this appeal is, has the Province of Alberta the legal right to increase the royalties on coal mined within the Province which royalties were originally payable to the Dominion of Canada and which became payable to the Province when the natural resources were transferred to the Province in 1930 ?

The Plaintiffs are lessees of coal lands originally leased by the Crown in the right of Canada subject to the payment of a royalty of five cents per ton and also grantees of coal mining lands granted by Canada subject to a royalty of ten cents per ton which was later reduced to seven cents per ton.

When Alberta was created a Province in 1905 the ownership of the natural resources within the Province was retained by Canada and were administered by Canada until 1930. In the last mentioned year these resources were transferred to and became the property of the Province subject to the terms of an agreement between the Dominion and Province dated the 14th day of December, 1929. By this agreement and the legislation enacted which made the agreement effective the royalties payable by the Plaintiffs to the Dominion became payable to the Province.

In 1948, The Provincial Lands Act, Chapter 62 of The Revised Statutes of Alberta, 1942, was amended by the Provincial legislature by Chapter 36 of the Statutes of Alberta 1948, Section 8 of which provides :

> " 8. The said Act is further amended by adding immediately " after Section 44b thereof the following new section :
>
> " 44.c. 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 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."

Thus, the royalty on coal held under lease was increased from five cents to ten cents per ton and on granted rights from seven to fifteen cents per ton. The Plaintiffs challenged the legal right of the Province to increase the royalty payable by them whether held by them either under lease or by grant.

The trial judge agreed with the Plaintiffs' contention and the formal judgment declared " That Section 8 of Chapter 36 of the Statutes of Alberta, " 1948, being an Act to amend The Provincial Lands Act, does not apply to " the leases and grants referred to in the Plaintiffs' Statement of Claim."

The reasons for judgment of the trial judge are reported in (1951) 1 W.W.R. 622.

In 1905 Alberta was established as a Province by " The Alberta Act," Chapter 3 of the Statutes of Canada, 4–5 Edward VII, being " An Act to establish and provide for the Government of the Province of Alberta." The Province was created from a part of what prior thereto comprised The Northwest Territories.

The Northwest Territories was a substantial part of Rupert's Land originally granted by His Majesty King Charles the Second to " The Governor and Company of Adventurers of England trading into Hudson's Bay " (commonly now called The Hudson's Bay Company).

In pursuance of " Rupert's Land Act, 1868," 31-32 Victoria, Chapter 105, an Act of the Parliament of the United Kingdom of Great Britain and Ireland, the Dominion of Canada purchased Rupert's Land from the Hudsons Bay Company in accordance with a deed of surrender by the Company to Canada dated November 19th, 1869. The land so acquired by Canada was by The North-West Territories Act constituted a part of the Dominion and subject to the provisions of the said Act. Rupert's Land Act, 1868, and the Deed of Surrender with the various addresses relevant thereto will be found beginning at page 4279 of Volume 4 of the Revised Statutes of Alberta, 1942.

When the Province was created the natural resources were specifically retained by the Dominion. Section 21 of The Alberta Act provides :

> " All Crown lands, mines and minerals and royalties incident " thereto, and the interest of the Crown in the waters within the " Province under The North-West Irrigation Act, 1898, shall " continue to be vested in the Crown and administered by the " Government of Canada for the purposes of Canada . . . "

These public lands were administered by Canada in accordance with the provisions of " The Dominion Lands Act," Chapter 54 of the Statutes of Canada, 1886, 46 Vict., as amended from time to time, until these lands were transferred to the Province.

The agreement between Canada and the Province dated the 14th day of December, 1929, was approved by the legislature of the Province by " The " Alberta Natural Resources Act," Chapter 21 of the Statutes of Alberta, 1930, and by Canada and confirmed by the Parliament of the United Kingdom by The British North America Act, 1930, 20–21 George V. Chapter 26, which last Act in part provided—

> " (1) The agreements set out in the Schedule to this Act are " hereby confirmed and shall have the force of law notwithstanding " anything in The British North America Act, 1867, or any Act

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" amending the same or any Act of Parliament of Canada or in any " order in council on terms or conditions of union made or approved " under any such Act as aforesaid."

This appeal involves a consideration of (*a*) relevant sections of The Dominion Lands Act, (*b*) the orders in council authorizing the leases and grants of coal mining rights and the regulations governing the same, (*c*) the terms of the leases and grants to the Plaintiffs, and (*d*) the effect of the agreement between the Province and Canada transferring the natural resources to the Province.

There is no dispute with respect to the evidence, the parties having agreed on a statement of facts which is made a part of the record. It was agreed that the Plaintiffs have not consented to the increase of the royalty purported to be imposed by Chapter 36 of the Statutes of Alberta, 1948.

The statement of facts sets out the various provisions of The Dominion Lands Act and amendments applicable. The act, Chapter 54 of the Revised Statutes of Canada, 1886, contained this provision :

" 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 condi- " tions as are from time to time fixed by the Governor in Council, " by regulations made in that behalf."

This section was amended from time to time as set out in the statement of facts but such changes are not important so far as this appeal is concerned. In 1892 the above section was amended by Section 5 of Chapter 15 of 55–56 Victoria and the language respecting the powers of the Governor in Council to make regulations in that section reads :

". . . . the Governor General in Council may, from time to time, " make regulations for the working and development of mines on " such lands and for the sale, leasing, licensing or other disposal " thereof . . . ."

In 1914 Section 8 of Chapter 27 of the Statutes of Canada 4–5 George V provided in effect that coal mining rights could only be disposed of by lease although this method had been approved of by P.C. 430, March 4th, 1907, and the appropriate regulations adopted by P.C. No. 1059 of May 9th, 1907. Both of these orders and the regulations will be discussed later.

Admittedly, the Governor in Council had authority to adopt the various regulations to be considered and that such regulations were administrative with a legislative character.

The relevant orders in Council and regulations are admitted and made exhibits.

Regulations authorized by order in council 2167 of 17th September, 1889, provided, by Section 34 (a), that lands containing anthracite coal may be sold at $20.00 per acre and other coal at $10.00 per acre. On February 6th, 1901, Section 34 was rescinded by Order 235 and it was provided that in addition to the prices fixed above of so much per acre. " 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." On May 31st, 1901, by order in council (without number) the royalty was fixed at ten cents per ton. Order in council 552 of May 19th, 1902, rescinded all previous regulations respecting the disposal of coal but provided for the same price per acre and for a royalty of ten cents per ton.

On March 4th, 1907, the Minister of the Interior recommended to council that no more coal should be disposed of under the then existing regulations and recommended that coal lands thereafter should be dealt with under provisions of new regulations which he considered necessary to be established in lieu of the regulations in force above referred to. This recommendation was approved of by P.C. No. 430, Exhibit 6.

On the 9th of May, 1907, by P.C. Order No. 1059 the new regulations were established. These regulations provided that all coal mining rights should be leased for twenty-one years at an annual rental of $1.00 per acre and in addition to the rent a royalty at the rate of five cents per ton of 2,000 pounds should be levied and collected. Order in council 245 of February 16th, 1909, provided that " provision should be made for a " renewal of the lease for a further term of twenty-one years provided that " the lessee had complied with the terms of the lease and the regulations."

It is the contention of the appellant that the Crown in the right of the Dominion had a right to increase the royalty payable with respect to any coal mined either granted or leased and the Crown in the right of the Province would have a similar right and the Province is not restricted in so doing by any limitation provided in the transfer agreement. It is therefore necessary to see if the Dominion had any such right.

From the agreed admission of facts it appears that there are involved in this action (1) grants from the Crown in the right of the Dominion, of lands including under rights, and of under rights only and (2) coal mining rights originally leased by the Crown in the right of the Dominion and some of which were renewed by the Dominion and some others by the Province. All of the leases from the Dominion were for twenty-one years with a right of renewal for a further period of twenty-one years.

With respect to the grants it is agreed that there are two types of clauses providing for the payment of the royalty and an example of each is marked as an exhibit.

In type one the clause reads :

> " 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 " collected on the gross output of any and all mines in and upon " the said lands . . . . "

And in type two :

> " Yielding and paying unto Us and our Successors THE " ROYALTY, IF ANY, PRESCRIBED BY the regulations of our

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" Governor-in-Council, it being hereby declared that this grant is " subject in all respects to the provisions of any such regulations " with respect to royalty upon the said minerals or any of " them . . . . "

It is stated in respondents' factum that all grants are subsequent to order in council 552 of May 19th, 1902. This statement does not appear to be quite accurate as in the Schedule attached there are grants listed as prior to May, 1902. They are so few in number and it may be thought they might be disregarded on this appeal.

By that order P.C. 552, as already stated, all previous regulations were rescinded and the royalty fixed at ten cents per ton until reduced to seven cents by order P.C. 103 on January 16th, 1905.

I agree with the trial judge when he said that the grant was subject to the royalty provided by the regulations at the time of the grant and such royalty was not liable to be increased by any future regulation and that it was never intended that the language of the regulation should be incorporated in the patent.

Thus, in grant, type one, where the grant provides for " a royalty of " 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 . . . . ," it means only that this grant was subject to the payment of the royalty fixed by Order in Council at the time of the grant and was not liable to be increased later.

It is true that the regulations P.C. No. 235 of February 6th, 1901, provided that in the case of grants that the grantee should pay a " royalty " at such rate as may from time to time be specified by Order in Council will " be levied and collected." However, on May 19th, 1902, by P.C. 552, all prior regulations, which would include the above order P.C. No. 235 of February 6th, 1901, were rescinded, and it was provided that lands containing coal would be sold at the upset price, and Section 2, " In " addition to the above a royalty of ten cents per ton of 2,000 pounds will " be levied and collected on the output of the mine . . . . " and Section 4, " The patent which may be issued for coal lands will be made subject to the " payment of the above royalty . . . . "

It is significant that the expression " from time to time " or any like expression so far as I am able to discover was never again used in any relevant order in council or regulation and it is not suggested that the Dominion ever made any attempt to increase the royalty.

An important point in the argument for the appellants was that the regulations, under which the grants and leases were made by the Dominion had statutory effect as by Section 47 of Ch. 54 of The Dominion Lands Act, (quoted above) it was thereby provided that coal could 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 by Section 90 (h) of the same Act it was provided that the Governor in Council may

> "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

> "to make any regulations which were considered necessary to "give the provisions in this clause contained full effect and from "time to time to alter or revoke any such orders or regulations "and make others in their stead."

The same section is also contained in the same Act in the Revised Statutes of Canada, 1906, Ch. 55, Section 6 (i).

It is said that as such regulations had a statutory effect that the Dominion would have the right at any time to pass regulations which would subject the coal mined, either under a grant or a lease, to the payment of a royalty if none provided or to increase any royalty if one was provided in the lease or grant.

In support of this contention the appellant cites an argument *The King* v. *William Chappelle and others*, 32 S.C.R. 586, an appeal from a judgment of the Exchequer Court, *William Chappelle* v. *His Majesty the King*, 7 E.C.R. 414. The case was one respecting a royalty which was imposed by regulations on placer mines in the Yukon Territory and being administered by the Dominion by regulations passed in pursuance of the same section of The Dominion Lands Act as on this appeal, the regulations, of course, being different and which were considered appropriate to placer mining.

Particular attention was called to the remarks of Davies, J. (later C.J. of Canada) at pp. 638 and 639, who, after referring to the provisions of Section 47, Dominion Lands Act (quoted *supra*) said :

> "No more effective or comprehensive language could have "been used by Parliament than has been used in this Section. "The very nature of the subject matter to be dealt with required "that in the matter of framing regulations the powers of the "Government both as to its general policy and as to all necessary "details should be unrestricted and the powers given in sub-"section (h) of Sec. 90 to make regulations were as large as could "possibly be given . . . . Why did Parliament expressly confer "the power of making and amending these regulations from 'time "'to time' if it was not to provide in the fullest and amplest way "that changing conditions and circumstances could always be "provided for."

I would digress here to say it is not disputed that the Governor in Council under the provisions of the Act quoted, had the authority to pass, from time to time, adequate and appropriate regulations. The question on this appeal is, did the Governor in Council adopt any regulation which would permit an increase of the royalty fixed at the time of the grant or to

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increase the royalty provided in a lease during the term of the lease or of any renewal (for which provision was made in the original instrument), and could any executive order be made under the terms of the Act to increase such royalty at will ?

Returning to a further consideration of the Chappelle case, the facts are shortly these. Chappelle held placer mining licences, leases or grants (they are indifferently so-called) on the Yukon River or on a tributary, one of which expired September 9th, 1897, and another December 7th, 1897, which were issued to him in the year prior " for the term of one year from the " date hereof, the exclusive right of entry upon the claim." The complete form is set out at p. 430 of the Exchequer Court Reports. At the time of the issue no royalty was imposed or provided for. In July 1897, new regulations were directed by order in council and a royalty imposed for the first time and became effective September 11th, 1897.

The Court unanimously agreed with the Exchequer Court judge that the regulation which became effective September 11th did not apply to the new license issued to Chappelle on September 9th, 1897. In other words, the royalty imposed did not apply to an existing license. The only difference of opinion arose as to whether the royalty imposed applied to the license issued to Chappelle December 7th, 1897. The question was whether the license issued on that date was a new license or a renewal of the one just expired. The Exchequer judge considered the new license was in effect a renewal and held at that the royalty was not imposed on the new license Mr. Justice Sedgewick agreed and was emphatic in holding that the new license was a renewal. At p. 614 he said :

> " To my mind, a perusal of the 1889 regulations will clearly
> " indicate the renewable character of the 1896 grants now under
> " consideration. The general policy of the regulations as indicated
> " by many of their provisions, affords cogent evidence that the
> " grantee was entitled to renew his grant."

Mr. Justice Davies was equally emphatic that the license issued on December 7th, 1897, was not a renewal and was subject to the payment of the royalty. At page 642 he says :

> " If he (Chappelle) possessed the legal and indefeasible right
> " contended for by the suppliants *cadit quaestia*, the royalty was
> " wrongfully exacted. If he did not, but only had, as I hold, a
> " preferential claim to a renewal on the terms and conditions of
> " then existing legal regulations, the money sought to be recovered
> " back was legally payable and the action must fail."

The conclusions of Mr. Justice Davies were upheld on an appeal to the Privy Council (1904) A.C. 127. Lord MacNaghten, who gave the judgment for the Board, agreed with Davies, J., and puts the point at issue in one short paragraph. At p. 132 he said :

> " The main contention on behalf of the suppliants was that a
> " placer miner had an absolute right to the renewal of his grant for

" a term of five years on the conditions of the original grant, and " subject only to the regulations in force when that grant was " obtained."

I am unable to find in the reasons of Mr. Justice Davies any statement that supports the appellant's contention in the instant case. It is plain that if the licence issued to Chappelle on December 7th, 1897, was a renewal license of the license issued to him in 1896, Mr. Justice Davies would have held that the regulations did not apply to such renewal.

In *Majestic Mines Limited* v. *Attorney General for Alberta* (1941) 2 W.W.R. 353 ; (1942) 1 W.W.R. 321 ; (1942) S.C.R. 402, the Crown in the right of the Dominion on March 11, 1908, made a grant of all minerals other than gold and silver of a quarter section, the grantee to yield and pay to the Crown " THE ROYALTY, IF ANY, PRESCRIBED BY THE REGULATIONS of our Governor in Council it being hereby declared that this grant is subject in all respects to royalty upon the said minerals or any of them."

The trial judge, O'Connor, J. (now C.J.A.) stated at p. 359 (1941) 2 W.W.R. :

" The next question for determination is whether the royalty " ' prescribed by the regulations ' means prescribed at the date of " the grant or prescribed ' from time to time ' . . . ."

and he held :

" I interpret the words ' the royalty if any prescribed by the " ' regulations ' as the royalty prescribed at the date of the grant ". . . . I reach this conclusion on the principle that if the grantor " wishes to reserve any right over the land granted he must do so " expressly."

On appeal the judgment of the trial judge was upheld and was sustained on a further appeal to the Supreme Court of Canada. At p. 405, of the S.C. Reports, Hudson, J., said :

" The real question on the appeal is whether or not the provi- " sions of the patent were such as to reserve to the Crown a right " to impose new royalties in the future. I think that if the Crown, " like any other vendor, wishes to reserve such rights, such " reservations must be expressly stated."

" Parliament and the legislature within its jurisdiction, of " course, have power to impose new taxes but the imposition of a " royalty on lands or goods of a subject by executive order could be " justified only by the clearest and most definite authority from the " competent legislative body."

This latter paragraph is quoted as the effect of the argument for the Appellant would appear to run counter to that observation of Mr. Justice Hudson.

The Respondents rely upon the judgment of the Supreme Court of Canada in *Attorney General of Alberta et al* v. *Huggard Assets Ltd. et al* as decisive in their favour. This was an appeal from this Division reported

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(1950) 1 W.W.R. 69 and 1 D.L.R. 823, and in the Supreme Court (1951) 2 D.L.R. 305. The following statement of the facts are found in the head note of the W.W.R. :

" The Province of Alberta claimed the power to levy and collect a " royalty on all petroleum and gas produced in commercial quantities from " certain lands in which the Plaintiff held the petroleum and natural gas " rights. The Plaintiff sued for a declaration that the Province had no such " power. The Plaintiffs title stems from a patent issued by the Crown in " the right of Canada dated August 25th, 1913, to the Northern Alberta " Exploration Company Limited, which included the surface rights to " 1,296.3 acres and the under rights to 1,320.5 acres reserving thereout all " mines and minerals except petroleum and natural gas. The habendum " clause read : ' 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 ' . . . . Admittedly, no royalty had been ' prescribed ' " at the time of the grant."

It was held by a majority of the Supreme Court of Canada that the purported reservation was void for uncertainty and the grant was absolute. Mr. Justice Rand at p. 319 of the D.L.R. reports, one of the majority said : " Interpreting the patent then in the light of that law, I am forced to the " conclusion that the reservation of royalties purporting to be made is void " for uncertainty," and Mr. Justice Kellock at p. 325 likewise holds that the reservation of royalty is void and " the grant is absolute in the hands of the grantee."

That decision is binding on this Court and unless the case can be distinguished from the present case it is decisive on the point under consideration.

The Appellant seeks to distinguish the two cases on the ground that here in the instant case a royalty had been fixed whereas in the *Huggard* case no royalty had been prescribed at the date of the grant, and in particular, reference is made to an observation by Mr. Justice Rand at p. 318 where he says after quoting from the reddendum clause with respect to the royalty :—

> " I construe that language to describe a royalty that from " time to time after the issue of the patent might be prescribed " by regulations : there was no specific royalty so existing at the " time of the grant."

Mr. Justice Rand was merely stating a fact that no royalty had been prescribed. In the *Huggard* case there was no royalty and the Province is seeking to impose one, here there is a royalty which the Province seeks to increase. I am unable to see that the distinction advanced by the appellant is of any importance, or what bearing the difference had on the reasons given by the Court in the *Huggard* case. There still remains that element of uncertainty which was the gravamen of the decision. To repeat the words of Mr. Justice Kellock at p. 323, " it is difficult to see on principle

" how a grant dependent upon nothing but the will of the grantee can be " said to be certain."

It would be appropriate here to refer to the argument of the appellant that the regulations were of a legislative character and thus had the effect of a statute and as the subject matter was within the legislative jurisdiction of Parliament the provision under discussion must be given effect to even if such provision would be invalid but for the provision. This contention was advanced before the Supreme Court in the *Huggard* case without avail and, of course, could not prevail here.

Mr. Justice Rand at p. 318 and 319 addressing himself to the nature of these regulations said :

> " They (the regulations) were intended, clearly, to be adminis-
> " trative and so far legislative in character, but in relation to
> " grants, I am unable to discover any power to introduce by them
> " new incidents of land ownership by reservation or otherwise in
> " the ordinary instrument of conveyance . . . . Nor could any
> " such sub-legislation authorize grants creating reservations which
> " under the existing law of real property, would be invalid."

and Mr. Justice Kellock at 321 put the matter shortly :

> " I find nothing in the above legislation which contemplates
> " disposal of mineral lands so as to create estates therein of a novel
> " character."

Counsel for the appellant bases his argument largely on the remarks of Farwell, J., in *Manchester Ship Canal Company* v. *Manchester Racecourse Company* (1900) 2 Ch. D. 352 where that learned judge is reported to have said at 360 :

> " What I have said also extends to the case of voidness for
> " uncertainty. If the Legislature has declared the contract
> " valid, how can I declare it void ? "

This observation epitomizes the argument for the appellant. Mr. Justice Farwell was discussing the effect and result of a definite provision contained in the statute itself and not a regulation, rule or sub-legislation (as it was called by Mr. Justice Rand).

Here we are considering not a provision of an Act but a regulation and the statute did not declare that such rule or regulation " should have the force of law " or " shall have force or effect as if they formed part of this Act," or some like expression. It will be unnecessary to discuss this argument further except to say that both on principle and authority there is a distinction between a provision of a statute and a rule or regulation authorized to be adopted from time to time by executive order with power to alter, revoke and make others in their stead. It will be sufficient if reference is made to the observation of Mr. Justice Sedgewick in the *Chappelle* Case at 622 and 623 of the Supreme Court Reports where he said, " Where the statute does not contain this or a similar provision the Court " can canvass a regulation and can determine whether or not it was within

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" the power of those who made it," and to a like discussion by Lord Herschell, L.C., in *Institute of Patent Agents* v. *Lockwood* (1894) A.C. 347, where at 360 the Lord Chancellor said :

" But there is this difference between a rule and enactment, " that whereas apart from some such provision as we are con- " sidering, you may canvass a rule and determine whether or not " it was within the power of those who made it, you cannot " canvass, in that way, the provisions of an Act of Parliament."

It was in connection with this argument that I quoted (*supra*) from the remarks of Hudson, J., at the conlusion of his reasons in the *Majestic Mines* Case and which were referred to by my brother Mr. Justice W. A. Macdonald in support of his view in that case.

The Alberta natural resources agreement will next be considered. This agreement provides :

" 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 " 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."

The Parliament of the United Kingdom by The British North America Act, 1930, 20–21 George V, Chapter 26, confirmed the agreement and provided that the agreement should have the force of law.

The agreement has been subjected to judicial consideration in several cases.

In re Timber Regulations ; Attorney General for Manitoba v. *Attorney General for Canada* (1935) 1 W.W.R. 607, (1935) A.C. 184, at p. 198 of the Law Reports, Lord Wright, speaking for the Board said that the agreement " effected by force of the law what may be called a statutory novation," and earlier on the same page, " The agreement made law by the Act 1930

" (referred to above) requires the Province to carry out the various specified " obligations in respect of the lands transferred, these obligations are now " imposed on the Province."

In Spooner Oils Limited and Spooner v. *Turner Valley Gas Conservation Board and Attorney General for Alberta* (1932) 3 W.W.R. 477, the judgment of this Court was given by McGillivray, J.A., who at p. 501 said :

> " In my opinion, the intention of the law-making bodies " concerned, has been expressed in Section 2 of the agreement in " language capable of only one meaning, namely, that subject to " the exceptions by way of consent or by way of legislation which " is of such a general character as to preclude discrimination the " province takes the place of the Dominion under the contracts " and arrangements that the Dominion has made and undertakes " to carry out such contracts and arrangements in accordance " with the terms thereof . . . . "

And on appeal to the Supreme Court of Canada (1933) S.C.R. 629, Duff, C.J., discusses the same section at p. 648. At the trial of the action (1932) 2.W.W.R. 454, at 467, after quoting Section 2, Mr. Justice Ewing, the trial judge, said :

> " The necessity for such a provision is not difficult to under- " stand. There were at the time of the agreement many " outstanding leases and contracts of purchase and other " ' arrangements ' and as the lessees and contractees were not " parties to the agreement it was necessary that the federal " authority protect itself against claims by the lessees or " contractees for breaches on the part of the province of the terms " of the leases or contracts. Then, too, it may well be that the " federal authority desired to protect its lessees or contractees " from any invasion by the Province of their rights under the " instruments or the arrangements."

Ewing, J., has here expressed, in clear and concise language, my view of the section.

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.

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There are, however, some of the Plaintiff's original leases that have been renewed by the Province and contain this provision, ". . . . and also " rendering and paying therefor unto His Majesty, a royalty at the rate of " five 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 . . . ." The Appellant says that the Plaintiffs have consented to their lease being so affected. The Plaintiffs were entitled to a renewal lease on the same terms as the one being renewed so far as the royalty was concerned. In any event, the provincial renewal contains the phrase which is void for uncertainty for the reasons already discussed.

The rate of ten cents per ton on coal mined from grants was by P.C. 103 of date January 16th, 1915, reduced to seven cents per ton. This Order in Council states that the reduction was made " in view of the conditions under " which coal mining operations are carried on, it is deemed expedient to " reduce the said royalty." Apparently, the grantees themselves had made requests for a reduction and probably the Plaintiffs were among those seeking relief. In any event, the reduction was an advantage to the grantees which need not be accepted, and is quite different from the assertion of a right to increase.

In view of what has been said it will be unnecessary to discuss at any length the right of the Province to increase royalties payable with respect to the Plaintiffs' leases. Neither the regulations nor any of the leases contain any provision which suggests that the Dominion reserved any legal right to increase the royalties fixed by the existing regulations or by the leases. In my opinion, the Dominion had no such right.

As the trial judge has said in his reasons, it would be idle to speculate with respect to what legislation the province would be at liberty to enact but he suggests such legislation as the Coal Mines Regulation Act, Chapter 8, Statutes of Alberta, 1945, and The Mines and Minerals Act, Chapter 66 of the Statutes of Alberta, 1949. As he points out, this legislation applies generally to all mines in the Province.

In *Anthony* v. *Attorney General for Alberta* (1942) 1 W.W.R. 833, O'Connor, J. (now C.J.A.) at 837 said:

> " The Orders-in-Council fixing the timber dues are not " legislation applying generally to all similar agreements relating " to lands, mines or minerals in the Province. They do not apply " to timber licenses granted by the Hudson's Bay Company or " others of which many are outstanding."

Here there is no consent by the Plaintiffs to the legislation challenged and there is no suggestion that such legislation applies to all mines in the Province.

For these reasons the appeal fails.

Nothing having been said as to costs, the same may be spoken to.

No. 13.

Formal Judgment.

IN THE SUPREME COURT OF ALBERTA.

APPELLATE DIVISION.

Between

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)*

and

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

Dated at the Court House, Calgary, Alberta, the 8th day of August, A.D. 1951.

Present

The Honourable G. B. O'CONNOR, Chief Justice of Alberta.
The Honourable Mr. Justice W. A. MACDONALD.
The Honourable Mr. Justice H. H. PARLEE.
The Honourable Mr. Justice C. J. FORD.

This Appeal having come on for hearing the 6th and 7th days of June, A.D. 1951, AND UPON HEARING Counsel for the Appellants as well as Counsel for the Respondents, and it pleasing this Court that this Appeal do stand over for judgment and the same coming on this day for judgment, IT IS ADJUDGED :

1. That the appeal be and the same is hereby dismissed.
2. That nothing having been said as to costs, the same may be spoken to.

A. R. TURNER,
A/Registrar.

Approved as to form :

H. J. WILSON,
Counsel for the Appellant.

Entered this 31st day of August, 1951.

W. K. JULL,
Registrar at Calgary.

In the Supreme Court of Alberta. Appellate Division.

No. 14. Formal Judgment as to costs, 18th September 1951.

No. 14.

Formal Judgment as to Costs.

THIS APPEAL having come on for hearing the 6th and 7th days of June, A.D. 1951 ; AND UPON HEARING Counsel for the Appellants as well as Counsel for the Respondents, and it pleasing this Court that this Appeal do stand over for judgment and the Appeal having been dismissed on the 8th day of August, A.D. 1951, with the question of costs being reserved to be spoken to ; AND UPON HEARING Counsel for the Appellants as well as for the Respondents therein,

IT IS ADJUDGED : 10

1. That the Appeal be and the same is hereby dismissed.

2. That the Appellants do pay to the Respondents their costs in this Appeal which are hereby fixed at Two Thousand ($2,000.00) Dollars including disbursements.

MICHEL DUBUC,
A/Registrar.

APPROVED as to Form

H. J. WILSON,
Counsel for the Appellant.

ENTERED this 20th day of September, A.D. 1951. 20

W. K. JULL
Registrar at Calgary.

I hereby certify this to be a true copy of the original Judgment as to Costs of which it purports to be a copy, entered as App. 3676.

Dated this 20th day of Sep. 1951.

W. K. JULL,
Registrar at Calgary of the Appellate Division of the Supreme Court of Alberta.

No. 15.

Order granting Conditional Leave to Appeal to His Majesty in Council.

In the Supreme Court of Alberta. Appellate Division.

No. 15. Order granting Conditional Leave to Appeal to His Majesty in Council, 18th September 1951.

UPON THE APPLICATION of the Defendant (Appellant) for leave to appeal to His Majesty in Council from the judgment of the Appellate Division of the Supreme Court of Alberta, pronounced this 18th day of September, A.D. 1951 : AND UPON HEARING what was alleged by Counsel for the Defendant (Appellant) and by Counsel for the Plaintiffs (Respondents) ;

IT IS ORDERED that the Defendant (Appellant) have leave to appeal to His Majesty in Council from the judgment of this Court herein pronounced this 18th day of September, A.D. 1951, upon condition of the Defendant (Appellant) within three (3) months from the date hereof entering into good and sufficient security to the satisfaction of the Court in the sum of Two Thousand ($2,000.00) Dollars for the due prosecution of the appeal and the payment of all such costs as may become payable to the Plaintiffs (Respondents) in the event of the Defendant (Appellant) not obtaining an Order granting final leave to appeal, or of the appeal being dismissed for non-prosecution or of His Majesty in Council ordering the Defendant (Appellant) to pay the Plaintiffs' (Respondents') costs of this appeal, as the case may be, and upon the further condition that the Defendant (Appellant) procure preparation of the Record and dispatch thereof to England within the period of four (4) months from the date hereof ;

AND IT IS FURTHER ORDERED that the costs of this Order and the application therefor shall be costs in the cause in the said appeal to His Majesty in Council.

MICHEL DUBUC,
A/Registrar.

APPROVED as being the Order made :

H. S. PATTERSON & SON,
Solicitors for the Plaintiffs (Respondents).

ENTERED this 20th day of September, A.D. 1951.

W. K. JULL,
Registrar at Calgary.

In the Supreme Court of Alberta. Appellate Division.

No. 16. Registrar's Certificate, 26th October 1951.

No. 16.
Registrar's Certificate.

In pursuance of the Order of this Honourable Court dated the 18th day of September, A.D. 1951, and entered on the 20th day of September, 1951, granting the Appellant conditional leave to appeal to His Majesty in Council, I beg to report that I find as follows :—

The Appellant has deposited in this Honourable Court to the credit of this action the sum of $2,000.00 for the due prosecution of the appeal herein by the Appellant to His Majesty in Council, from the Judgment of this Court pronounced on the 18th day of September, 1951, and entered on the 20th day of September, 1951, and for the payment of all such costs as may become payable to the Respondents in the event of the appellant not obtaining an order granting him final leave to appeal or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be).

All of which I humbly certify to this Honourable Court.

DATED at the City of Calgary, in the Province of Alberta, this 26th day of October, A.D. 1951.

W. K. JULL,
Registrar of the Appellate Division of the Supreme Court of Alberta, at Calgary, Alberta.

No. 17.
Order granting Final Leave to Appeal to His Majesty in Council.

No. 17. Order granting Final Leave to Appeal to His Majesty in Council, 26th November 1951.

IN THE SUPREME COURT OF ALBERTA.
APPELLATE DIVISION.

Between

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)*

and

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

Before

The Honourable Chief Justice G. B. O'CONNOR
The Honourable Mr. Justice Frank FORD ...
The Honourable Mr. Justice W. A. MacDONALD
The Honourable Mr. Justice H. H. PARLEE ...
The Honourable Mr. Justice C. J. FORD ...

Calgary, Alberta, this 26th day of November, A.D. 1951

In the Supreme Court of Alberta. Appellate Division.

No. 17. Order granting Final Leave to Appeal to His Majesty in Council. 26th November, 1951.

UPON THE APPLICATION of Counsel for the Attorney General of Alberta, Defendant (Appellant) for a Final Order for leave to appeal to His Majesty in Council from the judgment of this honourable court pronounced the 18th day of September, A.D. 1951, and entered on the 20th day of September, A.D. 1951 ;

AND UPON it appearing that by an Order made by this honourable court dated the 18th day of September, A.D. 1951, and entered on the 20th day of September, A.D. 1951, the Appellant the Attorney General of Alberta, was granted conditional leave to appeal to His Majesty in Council from the judgment of this honourable court, dated the 18th day of September, A.D. 1951, and entered the 20th day of September, A.D. 1951 ;

AND UPON it appearing that the terms and conditions of the said Order granting conditional leave to appeal have been complied with ;

AND UPON reading the certificate of the Registrar of this honourable court, dated the 13th day of November, A.D. 1951, of compliance with the said Order and it being shown that the preparation of a copy of the Record is being proceeded with ;

AND UPON it further appearing that counsel for the Respondents have consented to this Order ;

THIS COURT DOTH ORDER that the Appellant the Attorney General of Alberta, be granted final leave to appeal to His Majesty in Council from the judgment of this honourable court dated the 18th day of September, A.D. 1951, and entered on the 20th day of September, A.D. 1951 ;

AND it appearing that the printing of the Record is to be proceeded with in England ;

THIS COURT DOTH FURTHER ORDER that the Defendant (Appellant) do complete the copying of the said Record and instruct the Registrar of the Appellate Division of the Supreme Court of Alberta, at Calgary, to transmit to the Registrar of the Privy Council, one certified copy of such Record on or before the 31st day of March, A.D. 1952.

W. K. JULL,
Registrar of the Appellate Division of the Supreme Court of Alberta, Calgary.

ENTERED this 26th day of November, A.D. 1951.

W. K. JULL,
Registrar, Appellate Division.

Approved and consented to :

H. S. PATTERSON,
Counsel for West Canadian Collieries et al.

In the Privy Council.

No. 49 of 1951.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA. APPELLATE DIVISION.

BETWEEN

THE ATTORNEY GENERAL FOR 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.*

RECORD OF PROCEEDINGS

LAWRENCE JONES & CO.,
Winchester House,
Old Broad Street, E.C.2,
Solicitors for the Appellant.

WHITE & LEONARDS,
4 St. Bride Street, E.C.4,
Solicitors for the Respondents.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4.
(A57858) Cursitor Street, Chancery Lane.