*Privy Council Appeal No.* 49 *of* 1951

**The Attorney General of the Province of Alberta - - - *Appellant***

*v.*

**West Canadian Collieries Limited and others - - - *Respondents***

*and*

**The Attorney General of Manitoba and another - - *Interveners***

FROM

**THE SUPREME COURT OF ALBERTA**

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

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*Present at the Hearing:*
LORD PORTER
LORD OAKSEY
LORD REID
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD ASQUITH OF BISHOPSTONE]

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This is an appeal by the defendants in the action from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of the Trial Division of that Court. The short point in the appeal is this:—

The plaintiffs were grantees or lessees of mineral lands and mining rights in the Province of Alberta (or in territories from which, in 1905, that Province was carved out). The grants and leases in question were originally made by the Crown in right of the Dominion, in which, in 1870, the parent territories had been vested. They were made under powers conferred by a series of Dominion Statutes called the Dominion Land Acts, and by Regulations and Orders in Council from time to time made in pursuance of those Acts.

In 1930, by three concurrent enactments, of the Province of Alberta (Cap. 21 Statutes of Alberta 1930); of the Dominion (Cap. 3 of the Statutes of Canada 1930); and of the Imperial Parliament (British North America Act, Cap. 26 of 1930) triple statutory force was given to a so-called "Transfer Agreement" concluded in the preceding year. By this agreement, which was in the nature of a novation, the mineral lands and rights situate in Alberta and theretofore vested in the Dominion, were transferred by the Dominion to Alberta; and the transferee Province undertook to carry out according to its terms every contract to purchase or lease any Crown lands, mines and minerals made with the Crown in right of the Dominion before 1930 (See Clause 2 of the Transfer Agreement; which, together with the other relevant statutory provisions, will be set out in full hereinafter. Similar transfer agreements were concluded with certain other Provinces and are scheduled, as is the Alberta agreement, to the British North America Act, 1930.)

In 1948 the Province of Alberta purported to pass a Statute (Cap. 36 Statutes of Alberta 1948), s. 8 of which fixes the royalties payable under such *leases* at 10 cents per ton on coal mined, and in the case of *grants*

*in fee simple* at 15 cents per ton on coal mined, "*notwithstanding the* terms . . . and provisions of any . . . agreement for sale or lease . . . 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."

The various mineral grants and leases held by the plaintiff are ranged in certain categories of each of which a "Type" is conveniently set out in the Agreed Statement of facts (Record pp. 9-13). Thus we have Grant Type I, Grant Type II, Lease Type I, Lease Type II, and Lease Type III. To these reference will be made later. The plaintiffs in the Prayer to their Amended Statement of Claim 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.*"

The Trial Division of the Supreme Court of Alberta awarded a declaration in terms of paragraph (*a*) of the prayer viz. that the section 8 of the 1948 Act "does not apply" to any of these five types of transaction. The Trial Judge did not expressly make the declaration prayed for under paragraph (*b*), but it would appear that he made the declaration under paragraph (*a*) because he considered that the impeached provision was in conflict with the 1930 legislation and consequently *ultra vires* and void (see e.g. the passage in Record, p. 26, lines 22-24).

The Appellate Division dismissed the appeal, but their reasoning was slightly different as it turned largely on the decision of the Supreme Court of Canada in *Huggard Assets Limited* v. *Attorney General for Alberta* from which decision, since, an appeal has been allowed by this Board.

Their Lordships proceed to set forth in detail the relevant statutory provisions and the effect of their interaction.

Sections 1 and 2 of the Transfer Agreement of 1930 are 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 Provinces otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada, whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this 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 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."

Section 8 of the 1948 Alberta Act is 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"

It may be said with sufficient accuracy for the present purpose, that the royalties imposed by section 8 of the 1948 Act in every case exceeded (indeed roughly doubled) the royalties payable under the terms of the typical grants and leases in question. Under the terms of these instruments 7 cents a ton were payable in respect of grants, and 5 cents a ton in respect of leases. At the time when each of the "Typical" Grants and Leases were made, these were according to the 'Agreed Statement of Facts' the rates of royalty specifically authorised by the Regulations in force at the time: subject to the qualification that in Grant Type I no specific royalty at so many cents per ton is provided for, but a royalty at such rate per ton . . . as may from time to time be specified by our Governor in Council.

Having regard however to the view which their Lordships take of the validity of section 8 of the 1948 Statute, the detailed terms of the five Types of Grant and Lease are not important.

That view may be stated succinctly in advance of the reasoning which appears to their Lordships to support it. It is that section 8 is in conflict with section 2 of the Transfer Agreement is wholly *ultra vires*, and null and void for all purposes.

The 2nd section of that agreement falls into two compartments (1) a substantive provision extending up to the words "by legislation or otherwise"; and (2) a proviso, beginning with the word "except" and occupying the rest of the section.

The question whether section 8 of the 1948 Act conflicts with this provision, and if so to what extent, depends on the true construction of each of these compartments and it will be convenient to deal with them separately and seriatim.

As to the first portion of section 2 whereby the Province "agrees to carry out . . . contracts 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": the appellant has argued that the contracts etc. here referred to are limited to executory agreements or arrangements and do not include conveyances or grants which, it is said, absorb and merge the contracts which lead up to them; but where a conveyance—and even a lease is a conveyance—has been executed but is subject to outstanding obligations of an executory nature, such as an obligation to pay royalties or rent, their Lordships entertain no doubt that such a state of affairs is covered by the words "contract to purchase or lease Crown Lands . . . and every other arrangement. . . ."

If therefore the section ended there—before the exception or proviso which occupies the last five lines of the section—it would be in flat contradiction of section 8 of the 1948 Alberta Act. Section 2 of the Transfer Agreement, which has the force inter alia of Imperial legislation, provides that the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the Province after the transfer of mineral rights to the latter. Section 8 of the Provincial Act of 1948 is a naked assertion that the terms of such instruments can be wholly disregarded. This, and nothing less, is what the word " notwithstanding " in its context, necessarily implies. Unless therefore there is something in the exception to section 2 of the Transfer Agreement to save section 8 of the Act of 1948, section 8 is *ultra vires* the Transfer Agreement, and the only question would be whether it is void in whole or only in part.

Before however embarking on that question their Lordships must consider the effect of the " exception " within one or other limbs of which the defendant contends that section 8 falls, and by so falling is saved.

(1) One limb excepts cases where all the parties other than Canada consent. This can be disregarded for by Clause 13 of the Agreed Statement of facts (p. 13 of the Record) it is admitted that there was no such consent.

(2) A second limb of the exception excuses compliance with the enacting words in so far as the exempting 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 contended by the defendant that section 8 of the 1948 Act is legislation " applying generally " etc. This contention cannot in their Lordships' view be sustained. Section 8, assuming it to apply to " all similar agreements ", is not legislation " applying generally " to such agreements " irrespective of who may be parties thereto " ; for it only applies to agreements to which the Crown (in right whether of the Dominion or a Province) is a party : it does not apply when the agreement is between a private grantor or lessor -such as the Canadian Pacific Railway or the Hudson Bay Company—and a private grantee or lessee: a distinction recognised and applied in cf., *Anthony* v. *Attorney General for Alberta* 1942 1 W.W.R. 833 · Record p. 25.

The objection that the scope of an exception is presumed not to exceed, or broaden, the scope of the substantive provision to which it is an exception, gives way when the words used in the excepting provision are sufficiently clear, as their Lordships consider that, in this passage, they are.

It follows that section 8 of the Act of 1948 is *ultra vires* section 2 of the Transfer Agreement and is invalid ; and the next question is whether it is void in whole ; or severable ; valid in part and void in part. It is suggested that it is valid in part, namely that part which refers to " contracts " etc. made by the Crown in right of the Province, though not in respect of that part which refers to contracts made by the Dominion. Their Lordships are of opinion that it is wholly *ultra vires* and wholly void. The test is very clearly laid down by Lord Haldane in the *Grain Futures* case (*Attorney General of Manitoba* v. *Attorney General of Canada*) 1925 A.C. 561 at p. 568:

> " If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a Court of law to make the exhaustive partition required. 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."

If these tests, especially that embodied in the last four lines, be applied, it is plain that section 8 is wholly void, notwithstanding that if the portion which relates to royalties reserved on coal from land leased by the Crown in right of the Province stood alone, it might be valid. If the latter provision stood alone and the rest were excised, the Clause would be not only truncated but reduced to a shadow.

Their Lordships have not been asked for a declaration as to the validity vel non of the five typical transactions but only for declarations (1) that section 8 of the Alberta Statute does not apply and (2) that it is *ultra vires*. Their Lordships are of opinion that it is *ultra vires*.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed but that the Order of the Trial Judge should be varied by substituting declaration (*b*) for declaration (*a*). The appellants must pay the costs of the appeal.

(18118) Wt. 8267—24 125 5/53 D.L./P.T./2

In the Privy Council

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THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA

*v.*

WEST CANADIAN COLLIERIES LIMITED AND OTHERS

*and*

THE ATTORNEY GENERAL OF MANITOBA AND ANOTHER

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DELIVERED BY

LORD ASQUITH OF BISHOPSTONE

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