1942

*May 12.
*Oct. 6.

THE ATTORNEY-GENERAL FOR ALBERTA (DEFENDANT) ..... APPELLANT;

AND

MAJESTIC MINES LIMITED (PLAINTIFF) ..... RESPONDENT.

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

Mines and minerals—Grant of lands by Dominion—Petroleum rights and royalties—Transfer of Natural Resources to provinces—Reservation of royalty—Rights of provinces.

In 1908, a patent from the Crown (Dom.) was issued to the predecessors in title of the respondent, granting them title to all minerals other than precious metals. At that time, there was a royalty on coal prescribed by regulation, but there was none in respect of petroleum. The contentions of the appellant are that, having in mind the provisions of the habendum clause and the regulations in force at the time of the issue of the patent, the Crown (Dom.) could have imposed a royalty on petroleum recovered from the land and that the Crown (Provincial) has succeeded to such rights by virtue of the agreement of transfer of the Natural Resources of 1930; and the appellant also contended that at the time of the grant royalties

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

were authorized in petroleum discovered by prospectors and that the language of the patent was wide enough to make such regulations applicable.

Held that the provisions of the patent were not such as to reserve to the Crown (Dom.) a right to impose new royalties in the future. If the Crown, like any other vendor, desires to reserve such rights, such reservations must be expressly stated.—The regulations do not prescribe any royalty in respect of the minerals granted by the patent in question and such being the case there was no royalty reserved by the Dominion which could pass to the province.—The rights acquired under a grant in freehold made for a definite purchase price, as in this case, are altogether different from rights which are acquired under a prospector's licence.

Judgment of the Appellate Division ([1942] 1 W.W.R. 321) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, O'Connor J. (2), which had declared that the province of Alberta was not entitled to petroleum rights in certain lands and not entitled to exact a royalty on petroleum produced from certain other lands.

W. S. Gray K.C. for the appellant.

S. W. Field K.C. for the respondent.

The judgment of the Court was delivered by

HUDSON J.—The question involved in this case is whether or not the province of Alberta is entitled to levy a royalty in respect of petroleum drawn from a parcel of land in that province.

On the 11th of March, 1908, a patent from the Crown in the right of the Dominion was issued to the predecessors in title of the plaintiff, granting them title to the minerals other than precious metals. The relevant provisions of the patent were as follows:

Now Know Ye that We do by these Presents grant, convey and assure unto the said The Canada West Coal Company, Limited, its successors and assigns all minerals other than gold and silver which may be found to exist within, upon or under the following lands, that is to say, all that Parcel or Tract of Land, situate, lying and being in the Ninth Township, in the Seventeenth Range, West of the Fourth Meridian, in the Province of Alberta, in Our Dominion of Canada and being composed of the Northeast quarter of Section Twenty-six of the said Township, containing by admeasurement One hundred and sixty (160) acres,

(1) [1942] 1 W.W.R. 321; [1942] 1 D.L.R. 474.
(2) [1941] 2 W.W.R. 353.

1942

ATTORNEY-GENERAL FOR ALBERTA v. MAJESTIC MINES LTD.

Hudson J.

more or less, together with full power to work the same and for that purpose to enter upon and use and occupy the said lands or so much thereof and to such extent as may be necessary therefor, or for the effectual working of the mines, pits, seams and veins containing such minerals, subject to the payment of compensation to the owner or occupant of such lands as provided by any regulations of Our Governor in Council in that behalf.

To have and to hold the said minerals and all such rights and powers as aforesaid unto the said The Canada West Coal Company, Limited, its successors and assigns forever: 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 application for the patent was for coal rights only but, as mentioned, the patent when finally issued granted all minerals, except gold and silver. At that time, there was a royalty on coal prescribed by regulation, but there was none in respect of petroleum.

The appellant contends that having in mind the provisions of the habendum clause and the regulations in force at the time of the issue of the patent, the Governor in Council could have imposed a royalty on petroleum recovered from the land, and that the Lieutenant-Governor in Council has succeeded to such rights by virtue of the agreement of transfer of the Natural Resources, which became effective on October 1st, 1930. *See* statutes of Canada 1930, chapter 3, and statutes of Alberta 1930, chapter 21.

It is urged on behalf of the appellant that the words "if any prescribed" in the habendum clause must refer to the future because the words "if any" would not be necessary if the royalties referred to were only royalties then prescribed, namely, coal royalties, and that the words to have any proper meaning must necessarily apply to the future. This argument to me is unconvincing. As pointed out by Mr. Justice Ewing in the court below,

> the grant includes all minerals other than gold and silver. One of these other minerals, viz., coal, was at that time subject to royalty, but the others were not so subject. In this situation the words "if any" may quite consistently be used.

It was further contended that at the time of the grant royalties were authorized on petroleum discovered by prospectors and that the language of the patent is wide enough to make such regulations applicable.

The regulation relied upon by the appellant is dated May 31st, 1901, and provides:

> Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including and surrounding the land upon which the discovery has been made, will be sold to the person or company making such discovery, at the rate of $1 an acre, provided such lands are available at the time application therefor is made.
>
> A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum. * * *

At the trial before Mr. Justice O'Connor, he held that this Order in Council had in effect been rescinded by subsequent Orders in Council.

In the Court of Appeal, Mr. Justice Clark said:

> My conclusion is that the regulations do not prescribe any royalty in respect of the minerals granted by the patent in question and such being the case there was no royalty reserved by the Dominion which could pass to the province.

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 only by the clearest and most definite authority from the competent legislative body.

It was argued by Mr. Gray on behalf of the appellant that the grant from the Crown must be construed favourably to the Crown. In so far as this is a rule of construction, it could only operate in a case of ambiguity and, in my opinion, there is no ambiguity here.

1942

ATTORNEY-GENERAL FOR ALBERTA v. MAJESTIC MINES LTD.

Hudson J.

Having arrived at this conclusion, it is unnecessary to consider the extent of the rights and powers transferred by the Dominion to the Province by the agreement of 1930.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. J. Frawley.*

Solicitors for the respondent: *Field, Hyndman & McLean.*