2, 1953

In the Privy Council.

No. 18 of 1952.

ON APPEAL

FROM THE SUPREME COURT OF ALBERTA
(Appellate Division)

33547

BETWEEN

MICHEAL BORYS (Plaintiff) - - - - - - - - *Appellant*

AND

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED (Defendants) - - - - - - - *Respondents*

AND BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED (Defendants) - - - - - - *Appellants*

AND

MICHEAL BORYS (Plaintiff) - - - - - - - - *Respondent.*

(Consolidated Appeals)

CASE FOR MICHEAL BORYS

Record

1. This is an appeal from a Judgment of the Appellate Division of the Supreme Court of Alberta dated February 6th, 1952, which by a majority (*O'Connor, C. J. Frank Ford, Parlee and Clinton Ford, J J. A.*) reversed in part the Judgment of Howson, C. J. (*Trial Division*) dated May 9th, 1951 in favour of the Appellant. Macdonald, J. A., the other member of the Court dissented and would have dismissed the appeal. p. 773 p. 726

2. The Appellant is the owner of an estate in fee simple in the North East Quarter of Section 19, Township 50, Range 26, West of the 4th Meridian in the Province of Alberta. The title certifies him to be the owner: p. 68, 11.21-3(p. 793

"reserving thereout all coal, petroleum and valuable stone."

The land in question, with other lands, was acquired by the Respondent Railway Company by Letters Patent from the Crown, and with the reservation just quoted was purchased by Simon Borys, a predecessor in title of the Appellant. p. 66, 11.6-12 p. 66, 11.19-2 p. 67, 11.11-p. 1.2 p. 68, 11.21-3

3. On September 21st, 1949 the Respondent Railway Company leased to the Respondent Oil Company "the petroleum (*hereinafter referred to as the leased substance*) which may be found within, upon or under the said lands and the right to work, win and carry away the same". p. 68, 11.36-4

p. 67, 11.31-39 This right to work was not reserved to the Railway Company in its conveyance to Simon Borys.

p. 707, 11.40-47 The Respondent Railway Company was careful in the Master Agreement covering the lands in question to confine its grant to what it had reserved.

4. The question at issue is the meaning of the reservation quoted in paragraph 2 hereof.

p. 2, 1.43
p. 3, 1.4 The Appellant's position is that petroleum is a liquid, that it does not include natural gas, and that the natural gas underlying the land in question cannot be used without his consent.

p. 5, 1.20
p. 6, 1.8
p.9, 11.1-39 The Respondents' position is that petroleum includes natural gas, that the Railway Company is the owner of the gas whether existing underground as gas or in solution in the petroleum, and that by reason of such ownership and the lease in paragraph 3 above referred to, Respondent Imperial Oil has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum whether free or in solution. Alternatively, the Respondents plead a right without compensation to use and dispose of the natural gas to the extent necessary to produce the petroleum.

. 6, 1.20 - p. 7 .22; p. 10, 1.1 . 11, 1.12. These claims of the Respondents are also set up by counterclaim.

5. The Statement of Claim of the Appellant sets out the claims made by the Respondents and asks for a Declaration of Title and an Injunction. A claim for damages was abandoned at the opening of the trial.

. 2, 11.16-33
. 3, 11.10-22
. 60, 1.40
. 61, 1.4

. 747A An interim Injunction enjoining the Respondents from working the petroleum in such a way as to waste the Appellant's natural gas until trial or further Order was granted and though this Injunction was, by the Judgment under review, to be vacated, it was on special application continued by an Order of the Appellate Division until the final disposition of this Appeal and Cross Appeal to Her Majesty in Council.

. 762, 11.40-41
. 780, 1.1
. 781, 1.10

6. The action was tried by the Chief Justice of the Trial Division who decided
p. 702-725 that the Appellant was entitled to the declaration claimed that he was the owner of the natural gas underlying the lands in question and he made permanent the Interim Injunction. The counterclaims of the Respondents were dismissed.

In his Reasons the learned trial Judge first states the facts, the nature of
702, 1.23
706, 1.7 the claim, the defences and counterclaims and of the reply and then states the question for decision to be:

> "having regard to the time at which the documents between the parties were executed and the facts and circumstances then existing,
706, 11.8-18 what did the parties to the documents intend to express by the language which they have used, or in other words, what was their intention touching the substances to be excepted as revealed by that language"

The words in which the question is thus stated are those of Lord Atkinson in the case of *Barnard-Argue-Roth-Stearns Oil and Gas and others v. Farquharson* 1912 A.C. 864 at 869.

The learned Judge analyzes the evidence and finds that neither Simon Borys the predecessor in title of the Plaintiff (Appellant) nor the Defendant (Respondent) Railway Company intended the word "petroleum" to included natural gas. p. 706, l.44 p. 708, l.30

There follows a discussion of the word "petroleum" in common parlance or "in the vernacular of the mining world, the commercial world and land-owners" or in the "popular sense" or in the language of "plain man", an analysis of the different types of evidence adduced and a finding that it is proved in fact: p. 708, l.32 p. 720, l.43 p. 708, l.43 p. 716, l.19

(a) that petroleum does not include natural gas but is the equivalent of crude oil. p. 708, ll.32-3

(b) that natural gas is regarded as a distinct and different substance from petroleum. p. 708, ll.40-4 p. 716, ll.1-1

(c) that natural gas is found in the Leduc Woodbend field (the situs of the land in question) free of mineral oil. p. 718, ll.31-4

(i) in the Viking sand at a depth of some 1200 ft.

(ii) in the Basal Quartz sand at a depth of some 2000 ft.

(iii) in the D-1 formation between 2000 and 2500 ft.

(iv) in the D-3 formation at a depth of some 3000 ft. where there is a large gas cap.

(d) that gas is found in solution with the mineral oil in the D-2 formation and in the D-3 formation where it underlies the gas cap. p. 718, l.44 p. 719, l.8

(e) that a low estimate of the quantity of gas in question is 3 billion cu. ft. p. 719, ll.17-2

(f) that considering its value as a lifting agent for the oil it might have a chance of being economically as important as the oil. p. 719, ll.29-3

(g) that if the Respondents be permitted to produce the Appellant's gas the result will be its virtual destruction. p. 719, l.37 p. 720, l.43

The Reasons of the learned trial Judge then deal with two cases, viz., *Fuller v. Garneau,* 61 S.C.R. 450 and *Hext v. Gill,* (1872) L.R. 7 Ch. 699 for the purpose of determining the effect of the absence of the power to work the petroleum in the reservation under consideration; he points out that a reservation simpliciter of all mines and minerals does not carry with it any right to let down the surface and that in his opinion destruction of the Plaintiff's (Appellant's) estate in the natural gas may be likened to the destruction of the surface referred to in the cases under consideration. p. 720, l.43 p. 722, l.3 p. 721, ll.35-3

The learned trial Judge then points out that in the *Barnard-Argue* case (1912 A.C. 864) there was a broad power to work the oil which was not the case in the reservation under review. p. 721, l.38 p. 722, l.9

p. 722, 11.10-20 The learned Judge then finds as a fact that there was in this case a valid reservation of petroleum, i.e., mineral oil, but none of natural gas whether dry, p. 722, 11.21-47 wet or in solution, all of which he finds to be the property of the Appellant, and he finds this to be so whether the question is the word in 1906 (the date of the contract), 1918 (the date of the transfer), 1947 or today. The meaning of the word in Canada, viz., mineral oil is the same at all these times.

p. 723, 1.1 p. 725, 1.6 The learned trial Judge concludes his Reasons by examining the *Barnard-Argue* case (1912 A.C. 864) and pointing out wherein it supports the Appellant's claim.

7. In the Appellate Division the Reasons of the majority (*O'Connor, C. J., Frank Ford, Parlee and Clinton Ford, J J. A.*) for allowing the appeal in part p. 748, 1.20 p. 749, 1.23 were delivered by Parlee, J. A., who, after a brief analysis of the facts and the p. 749, 11.27-33 Judgment below, states the questions arising to be:

(i) What is the meaning that in this reservation should be given to petroleum?

(ii) What right, if any, have the Defendants (Respondents) to produce the oil if, in the process of extracting the petroleum reserved, they thereby use, waste or interfere with the natural gas, since the oil cannot be produced without doing so?

p. 749, 11.35-41 After pointing out that gas in solution and gas in the gas cap would be interfered with and wasted in producing the oil, the learned Judge then states p. 750, 11.1-40 p. 750, 1.41 the facts as to title, describes something of the geology of the area, the method p. 752, 1.35 of operating for oil and gas, considers the intention of the parties as to the reservation and concludes in this aspect of the case that:

752, 11.33-35 "The trial Judge found that petroleum and natural gas were by common usage two different substances and that conclusion ought not to be disturbed."

752, 11.36-38 Parlee, J. A., however, found himself unable to agree with the trial Judge that the reservation "petroleum" did not include gas in solution in the liquid as 752, 11.41-44 it exists in the earth; he was of the opinion that what was reserved to the railway company was petroleum in the earth and not a substance when it reached the surface. While admitting that changes in temperature and pressure will cause gas to be released from solution when the liquid is brought to the surface, his opinion was that such a change ought not to affect the original ownership 752, 1.45 753, 1.9 and the learned Judge in appeal concludes, therefore, that petroleum includes oil and any other hydrocarbons and natural gas existing in its natural condition 753, 11.10-11 in strata, and that gas not included in petroleum as indicated is the property of the Appellant.

753, 1.12 762, 1.30 753, 1.12 754, 1.2 754, 11.3-33 754, 1.35 The Reasons then deal with the question of the right of the owner of the petroleum to waste the Appellant's gas. They state the problem and discuss first the way in which petroleum is brought to the surface, and secondly, the legislation enacted by the Province to prevent waste. They then discuss the

principles of law applicable dealing first with *Fuller v. Garneau*, 61 S.C.R. 450, and *Hext v. Gill* (1872) L.R. 7 Ch. 699, relied on by the learned trial Judge. p. 762, 1.30 p. 720, 1.44 p. 722, 1.3

Parlee, J. A., states the case of *Fuller v. Garneau*, (61 S.C.R. 450), and quoting from the Judgments in both cases referred to by the learned trial Judge states his disagreement with the opinion expressed by him that destruction of the Appellant's gas may be likened to the destruction of the surface, but holding that the principles applicable to the support of the surface of land should not apply to the rights to underground property such as water, oil and gas. p. 755, 1.5 p. 756, 1.39 p. 756, 11.32-39 p. 721, 11.35-38 p. 756, 11.36-39

The Reasons of the majority base their disagreement with the learned trial Judge on this point on the following reasoning: p. 756, 1.41 p. 762, 1.30

(i) That oil and gas are fugitive minerals and that decisions as to mining for coal and other minerals cannot be applied to them without qualification. p. 756, 1.41 p. 757, 1.6

(ii) That the owner of the surface cannot complain of the drawing away of underground water. Such right to drain away is governed by different principles than those applicable to either surface streams or to mining operations. p. 757, 11.7-44

(iii) That the *Ballacorkish* case, (L.R. 5 P.C. 49) lays down that the owner of mines is not responsible for interference with underground water, that this principle is equally applicable to adjacent and subjacent parcels, and that *Whitehead v. Parks*, (157 E. R. 358), is distinguishable on the ground that in that case there was an express grant of the waters. p. 757, 1.45 p. 760, 1.8

(iv) That the mere reservation of mines and minerals implies the right to get them. p. 760, 1.9 p. 761, 1.3

(v) That the Appellant's contention that his gas must not be interfered with is answered by the principle of the *Ballacorkish case*, (L.R. 5, P.C. 49, which lays down that to give effect to the contention would lead to the owner of the mines being held at the mercy of the owner of the surface, and that the result in the case at bar would be to render the reservation ineffective and useless. p. 761, 11.5-12

On this line of reasoning the conclusion is reached that the reservation of the petroleum carries with it the right to use all reasonable means to extract it from the earth and so, if necessary, to waste the gas which may be likened to subterranean water and is governed by like principles of law. p. 761, 11.13-2

The Judgment of the majority ends with a discussion of the *Barnard-Argue* case, (1912 A. C. 864). The case is said to be distinguishable on the following grounds: p. 761, 1.35 p. 762, 1.29

(a) that the reservation is differently worded than the one in the case at bar.

(b) that it would not appear from the report of the case at the trial that gas was so essential to bring oil to the surface as in the case at bar.

(c) that the use of gas was not regulated by Statute.

(d) that the problem before the Court was not the same as that in the case at bar.

(e) that there was some amicable arrangement between the parties to work the wells and adjust the returns where there was mixed oil and gas and each had a commercial value.

(f) that while it is true that there is in the case at bar no "win, work or carry away" clause as there was in the *Barnard-Argue* case, yet on the authorities referred to in the Reasons of the majority and from the statement of Anglin, J., in *Fuller v. Garneau*, (61 S.C.R. 450), the decision of the Judicial Committee in the *Barnard-Argue* case is applicable.

763, 1.18-764, 1.44 Macdonald, J. A., stated the facts as to title and analyzed the pleadings; he then dealt with the evidence relating it to the various contentions of

764, 1.45-767, 1.29 the Respondents, and cited the *Barnard-Argue* case, (1912) A.C. 864, at 869, the cases of *Hext v. Gill*, (1872) L.R. 7 Ch. 699, *North British Railway Company v. Budhill*, 1910 A. C. 116, *Caledonian Railway Company v. Glenboig*, 1911 A. C. 290, and *Isle of Man v. Moore*, (1938) 3 All E.R. 263, as authority for the principle that the question to be determined in such cases is what the words meant at the relevant time in the vernacular of mining men, commercial men and land-owners.

767, 11.19-29 The learned Judge then points out that in the *Budhill* and *Glenboig* cases respectively the questions were whether sandstone and fire-clay were minerals, but that in the case of *Isle of Man v. Moore*, 1938 3 All E. R. 263, the sole question before the Judicial Committee was whether or not "shale" was included in a reservation in favour of the Crown of "flagg, slate or stone", and that this question was decided on the principle of the *Budhill* and *Glenboig* cases.

767, 11.31-39 It is then pointed out that the onus is on the Respondent Railway

716, 11.21-30 Company to show what the reservation includes and that the words are to be strictly construed and not extended beyond what they clearly cover, for which the *Budhill* case, 1910 A.C. at p.126, is cited as authority.

767, 11.40-46 The learned Judge points out that there was a mass of evidence viva voce and documentary to indicate that at all relevant times petroleum was commonly known as crude oil and distinct from natural gas, and that this evidence was accepted by the trial Judge as against the evidence of witnesses who attempted to show that petroleum had a broad generic meaning which included natural gas.

Macdonald, J. A., then concludes that the appeal of the Defendants (Respondents) should be dismissed. His reasoning is:

768, 1.1-769, 1.24 (i) to interpret the reservation regard must be had to facts and circumstances existing when the words were used, and that there is ample evidence to justify the finding of the trial Judge that at all material

times the Respondent Railway Company regarded petroleum as the equivalent of mineral oil, and natural gas as a distinct and different substance.

(ii) the transfer of the land subject to the reservation brought into existence two separate and distinct estates held by separate titles, and there is nothing in the record to suggest that the gas was subject to any servitude in favour of the oil; there is no express right to work, win or carry away the oil, but nothing other than an implied right subject to important limitations one of which under the circumstances of this case is that the maxim "sic utere tuo ut alienum non laedas" applies so that the Respondents did not have a right to work the petroleum paramount to the rights of the owner of the gas. p. 769, 1.26 p. 770, 1.33

(iii) the rights of the owners of the natural gas and petroleum are the ordinary rights of enjoyment of property subject to the maxim just quoted, and since in the case at bar there is only a reservation of petroleum with no express words conferring any right to work, win and carry away, there would have to be some express agreement on the part of the Appellant to justify interference with his natural gas, and there is none. p. 770, 1.35 p. 771, 1.21

(iv) the 3 billion cubic feet of gas underlying the lands in question would be used up in the production of the oil, and there is nothing in the evidence and nothing in law which would justify the Court in allowing this destruction of the Appellant's property. p. 771, 11.23-30

(v) the position of the Respondent Imperial Oil Limited in this case is not different from that of the Respondent Railway Company and there is nothing in The Land Titles Act to prevent the Appellant asserting his claim that the word "petroleum" has its original popular and well established meaning which excludes natural gas. p. 771, 1.32 p. 772, 1.4

8. The Formal Judgment of the majority was settled by the Court and entered on the 10th day of March, 1952. The Appellant (Plaintiff) appealed and the Respondents (Defendants) cross-appealed. pp. 773-775

9. The Appellant submits that the reasoning of Howson, C.J.T.D., and of Macdonald, J.A., is sound throughout and that the reasoning of the majority is sound in holding that petroleum and natural gas are separate substances, but that otherwise the majority reasoning is fallacious in the following respects: p. 774, 11.1-2 p. 708, ll 32-42 p. 752 ll 33-35

(i) in holding that petroleum includes oil and any other hydrocarbons and natural gas in solution or contained in the liquid existing in its natural condition in strata. p. 774, 11.3-5 p. 752, 1.45 p. 753, 1.9

(ii) in holding that the petroleum reserved, including all hydrocarbons in solution or contained in the liquid in the ground is the property p. 774, 11.8-1

p. 761, 11.14-28 of the Respondents and that they are entitled to do as they like with it subject to the observance of the Law.

p. 774, 11.14-17 (iii) in holding that this Appellant's rights to gas were subject to the foregoing or any limitations.

p. 774, 11.20-26 p. 761, 11.22-28 (iv) in holding that the Respondents observing the law and following modern methods are entitled to extract from the earth petroleum as defined even if the result is interference with and wastage of the gas of the Appellant.

p. 756, 11.32-39 (v) in holding that the learned trial Judge was wrong in likening the destruction of the Appellant's gas to the destruction of the surface in mining cases.

p. 756, 1.41 p. 757, 1.6 (vi) in holding that oil and gas are fugitive minerals instead of holding that they are stationary when in place underlying the surface.

p. 761, 11.5-12 (vii) in holding that the Ballacorkish case (L.R. 5 P.C. 49) governs the case at bar.

p. 757, 1.45 p. 760, 1.7 (viii) in failing to hold that the principle on which Whitehead v. Parks, 157 E.R. 358, was decided, viz. that a grantor is not allowed to derogate from his grant, is applicable.

p. 762, 11.24-29 (ix) in reading the Judgment of Anglin, J., in Fuller v. Garneau, (61 S.C.R. 450), as justifying the working of the petroleum in this case to the detriment of the Appellant's gas.

p. 762, 11.24-29 (x) in holding that the Barnard-Argue case applies so as to lead to a judgment in favour of the Respondents.

10. Accordingly the Appellant submits that his appeal ought to be allowed and the cross-appeal of the Respondents dismissed so as to restore the Judgment of the learned trial Judge for the following amongst other

REASONS

(1) Because by the learned trial Judge and by all five of the Judges of the Appellate Division the fact is found that petroleum and natural gas are separate mineral substances.

(2) Because the Appellant owns an estate in fee simple absolute in possession in and to the North East Quarter of Section 19, Township 50, Range 26, West of the Fourth Meridian, reserving to the Respondent Canadian Pacific Railway coal, petroleum and valuable stone, and therefore owns the natural gas in all its forms as it exists in the ground.

(3) Because the reservation of petroleum was not accompanied by a right to work, win or carry away the same, and therefore neither of the Respondents has any right to work the petroleum to the injury of the Appellant's property in the natural gas.

(4) Because the reasoning of the majority is based on an analogy be-

tween water and petroleum and natural gas and that analogy is false since:

(a) Petroleum and natural gas are in law minerals and water is not;

(b) Petroleum and natural gas as minerals in the Province of Alberta are owned in fee simple in place, and Certificates of Titles evidencing such ownership are granted under the Land Titles Act, R.S.A., Chapter 205 (*The Torrens System*).

(5) Because it should be held that the reasons for holding that a landowner has no property in percolating water do not apply to petroleum and natural gas.

(6) Because the principle that a grantor will not be allowed to derogate from his grant should be applied in this case, and if so, results in success for the Appellant.

(7) Because the principle "sic utere tuo ut alienum non laedas" should be applied in this case, and, if so, results in success for the Appellant.

(8) Because the Reasons of the majority where they differ from those of Howson, C. J., and Macdonald, J. A., are unsound.

(9) Because the rights of the owners of two mineral substances found in the same land are reciprocal rights and reasoning applied to the production of petroleum and its effect on natural gas is equally applicable to the production of natural gas and its effect on petroleum.

G. H. STEER

H. W. RILEY

D. R. FISHER

Edmonton, Alberta,

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(Consolidated Appeals)

CASE FOR MICHEAL BORYS

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