2, 1953

In the Privy Council.

UNIVERSITY OF LONDON
W.C. 1
12 NOV 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES
33546

No. of 1952.

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

BETWEEN

MICHEAL BORYS ... ... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED ... ... RESPONDENTS

— AND BETWEEN —

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED ... ... APPELLANTS

AND

MICHEAL BORYS ... ... RESPONDENTS.

(CONSOLIDATED APPEALS)

CASE FOR CANADIAN PACIFIC RAILWAY COMPANY

RECORD

1.—The Appeal by Michael Borys (herein referred to as the Appellant) from a Judgment dated the 6th February, 1952, of the Appellate Division of the Supreme Court of Alberta (O'Connor, C.J.A., Frank Ford, Parlee and C.J. Ford, JJ.A., Macdonald, J.A., dissenting) has been consolidated with a cross-Appeal by Canadian Pacific Railway Company (herein referred to as "Canadian Pacific") and another cross-Appeal by Imperial Oil Limited (herein referred to as "Imperial") from the same Judgment. The Appellate Division reversed in part a Judgment dated the 9th May, 1951, of the Trial Division of the Supreme Court (Howson, C.J.) which
10 the Appellant contends should be restored whereas the Canadian Pacific

pp. 748–772
p. 773
pp. 702–727

RECORD

and Imperial contend that the Judgment of the Trial Division should have been entirely set aside and the action brought by the Appellant dismissed with costs.

2.—The questions to be determined are :

(1) The true construction of the phrase " all petroleum " in a reservation in a certificate of title of the Appellant, as the owner of an estate in fee simple of land, issued under the Land Titles Act of Alberta which reserved to Canadian Pacific all coal, petroleum and valuable stone. If it is held that " all petroleum " as used in the reservation is a mixture of naturally occurring hydrocarbons existing in the solid, liquid or gaseous phases no other question arises. 10

(2) If, however, " all petroleum " is not given a comprehensive meaning but a limited one excluding natural gas then there remains for determination—

(a) what is natural gas, and

(b) what are the respective rights of the parties with relation to the natural gas.

3.—By Certificate of Title No. 165–N–120 dated 18th December, 1947, the Appellant was registered under the Land Titles Act of Alberta as the owner of an estate in fee simple of the North East Quarter Section Nineteen (19), Township Fifty (50), Range Twenty-six (26), West of the Fourth Meridian " reserving thereout all coal, petroleum and valuable stone " (hereinafter referred to as " the said lands "). 20

Canadian Pacific has been by Certificate of Title No. C.P.R. 2687 since 19th November, 1920, the registered owner under the Land Titles Act of Alberta of an estate in fee simple of all coal, petroleum and valuable stone under the said lands.

Imperial is, by virtue of a Lease between Canadian Pacific and Imperial dated 21st September, 1949, Lessee of the estate of Canadian Pacific to " all petroleum " which may be found within, upon or under the said lands. 30

4.—The Appellate Division held that although in common usage petroleum and natural gas are two different substances, petroleum includes oil and any other hydrocarbons and natural gas in solution or contained in the liquid existing in its natural condition in strata. The Appellate Division therefore held that such natural gas was the property of the Respondents, but the Appellant was entitled to the remaining gas in the reservoir. The reservoir consists of oil and gas in solution, with, in some formations, a gas cap of free natural gas resting on the oil. The Appellate Division further found that the Respondents were entitled to extract all of the 40

p. 752, l. 45–p. 753, l. 1

p. 751

p. 761, ll. 22–28

RECORD

substances belonging to them from the earth, even if there is interference with and wastage of the gas belonging to the Appellant, so long as in the operations modern methods are adopted and reasonably used.

5.—A right of entry to the said lands under the Right of Entry Arbitration Act was obtained by Imperial from the Board set up under that Act and a well was commenced by Imperial known as Imperial Leduc No. 250 which well had reached a depth a short distance above the D–3 producing horizon when an interim injunction obtained by the Appellant prevented Imperial from producing natural gas. It is impossible to produce oil without producing natural gas and drilling was therefore stopped at the position shown in Exhibit 98.

Ex. 136
p. 372, ll. 12–18
p. 372, l. 23
Ex. 98, p. 809
p. 163, ll. 5–10
p. 256, ll. 18–20
p. 371, l. 30
p. 809
p. 724, ll. 39–41

6.—This interim injunction was made permanent by the learned Trial Judge, and although it was set aside by the Judgment of the Appellate Division, the Appellate Division has on a further application of the Appellant granted a stay of proceedings continuing the injunction until the final disposition of these proceedings.

p. 727, ll. 5–7
p. 762, ll. 40–41
p. 774, ll. 28–33
pp. 780–781

7.—The said lands are located in the Leduc-Woodbend oil field of Alberta and under the surface of the ground at various depths are various formations containing oil and natural gas. The D–2 formation contains oil with natural gas in solution with the oil in the formation. The D–3 formation contains oil with natural gas in solution and also contains an overlying gas cap. The said lands are surrounded on three sides by producing wells.

p. 348, ll. 10–13
Ex. 84, p. 799
p. 351, l. 42–p. 352 l. 9
p. 357, ll. 33–44
p. 361, l. 21
p. 365, l. 3
Ex. 85, pp. 349 & 800
Ex. 97, p. 808

8.—The Appellant commenced an action on 16th November, 1949, in the Supreme Court of Alberta against Canadian Pacific and Imperial. He alleged that he was the owner, and so registered under the Land Titles Act of Alberta, of an estate in fee simple of all mines and minerals except gold, silver, coal and petroleum and valuable stone within, upon or under the North East Quarter Section Nineteen (19), Township Fifty (50), Range Twenty-six (26), West of the Fourth Meridian. He admitted that Canadian Pacific is the owner of the petroleum reserved from his title. He alleged that under the existing facts and circumstances petroleum is a liquid and does not embrace or include natural gas, which he alleged is a separate and distinct substance from petroleum. The Appellant claimed a declaration that he is the owner of the natural gas, and an injunction restraining the Respondents from using, removing, wasting, interfering with or otherwise disposing of in any manner the said natural gas. Relief by way of damages was claimed, but this claim was abandoned at the trial.

pp. 1–3.
p. 1, ll. 36–46
p. 1, l. 46–p. 2, l. 1
p. 2, l. 44–p. 3, l. 4
p. 3, ll. 12–14
p. 3, ll. 16–22
p. 3, ll. 24–26
p. 60, ll. 43–44

9.—Canadian Pacific and Imperial, by separate defences, denied the allegations of the Appellant. Canadian Pacific pleaded that the Appellant

p. 4, l. 1–p. 6, l. 15,
p. 7, l. 34–p. 9, l. 45
p. 5, l. 29–p. 6, l. 6

p.10, ll. 24-26

is not by reason of its alleged ownership of the mines and minerals or otherwise the owner of the natural gas. Canadian Pacific in its defence alleged that—(a) petroleum includes natural gas (so-called) ; (b) Canadian Pacific is the owner of all petroleum in its gaseous phase ; (c) Canadian Pacific is the owner of the natural gas (so-called) which may be contained in solution in the petroleum in its liquid phase ; (d) that Canadian Pacific has the right, without any compensation to the Appellant, to remove, appropriate, convert and dispose of the natural gas or any other substance necessary to work, win and carry away the petroleum in its liquid phase. The defence of Imperial was substantially the same. There was a counterclaim by Canadian Pacific and a counterclaim by Imperial, whereby the foregoing allegations were made the basis of a claim for relief. Even if the Appellant's contention that he owned the natural gas were correct, the Respondents contended that they were entitled to produce and waste it to the extent necessary to recover all liquid and liquefiable products from the reservoir.

p. 6, l. 20
p. 10, l. 1

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10.—Canadian Pacific contends that the adjective " all " in the reservation " all coal, petroleum and valuable stone " must be read grammatically with the word " petroleum." The inquiry thus relates to a reservation of " all petroleum."

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p. 171, ll. 29–37
p. 267, l. 37–
p. 268, l. 5
p. 255, ll. 4–30
p. 541, l. 41–
p. 542, l. 45
p. 452, l. 24–
p. 453, l. 20
p. 409, l. 43–
p. 410, l. 10
p. 559, ll. 21–40
p. 582, ll. 23–40
p. 692, ll. 29–32
p. 284 p. 509 &
p. 823
p. 509, l. 26–
p. 512, l. 41
p. 513, ll. 21–31
p. 518 & p. 826
p. 419, ll. 5–24
p. 590, l. 2–
p. 600, l. 28
p. 600
p. 533, ll. 19–33
p. 151, ll. 11–32
p. 429, ll. 22–30

11.—The evidence showed that petroleum is a complex mixture of hydrocarbons which can and do exist in nature in solid, liquid and gaseous phases. Petroleum contains many constituents. Natural gas is the gaseous component of petroleum, although it may contain impurities. All the separate constituents contained in petroleum are also all contained in natural gas. Natural gas is a factor of considerable importance in the recovery of the liquid phase of petroleum commonly known as oil.

Ex 114, p. 826
Ex. 126 & 126,
p. 600

12.—All of the hydrocarbon constituents are common to both an oil reservoir and a gas reservoir so-called, and are also common to the well effluents obtained from so-called oil wells and gas wells, although present

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in different proportions. Although commonly referred to as oil wells, in fact all so-called oil wells produce both oil and gas, as oil cannot be recovered without gas. Again, all so-called gas wells produce the hydrocarbons found in so-called oil wells. If on its true construction the phrase " all petroleum " as used in the reservation has a limited or narrow meaning instead of the comprehensive meaning, then it is necessary to postulate arbitrary conditions upon which the separation between the liquid and gaseous phases of the hydrocarbons in the mixture produced by the well is to be made.

p. 163, ll. 5–10
p. 256, ll. 18–20
p. 419, ll. 3–12
p. 582, l. 42–
p. 583, l. 6
p. 538, ll. 21–24

13.—Separation of the ownership of the oil (liquid hydrocarbons) from the natural gas (gaseous hydrocarbons) must be on a scientific set of conditions. An expert witness for the Appellant said the basis for such a separation is atmospheric pressure and room temperature. While the Appellant took the position that the distinction between liquid petroleum and natural gas was such that it was understood by the common man and was known in the vernacular, when it came to arrive at a basis of separating liquid petroleum and natural gas the Appellant's experts resorted to an arbitrary scientific formula, namely,—atmospheric pressure and room temperature, which scientists set at 60° fahrenheit and 14.4 pounds per square inch. This must necessarily result in confusion, as atmospheric pressure and room temperature are variable factors, unless an arbitrary scientific basis of separation is accepted, and such a basis is obviously not one intended by ordinary usage.

pp. 166–167, l. 42

14.—Canadian Pacific contends that when a word of a phrase which is capable of a comprehensive meaning and a limited or narrow meaning is used in a reservation relating to land, the true construction of such a word or phrase is the comprehensive meaning. If a limited or narrow meaning is to be given to the word or phrase, clear words are necessary so to limit the word or phrase used. The evidence makes clear that the word " petroleum " is capable of a comprehensive and a limited meaning but no limiting words are to be found in the reservation.

p. 411, l. 7–
p. 414, l. 1
p. 446, l. 28–
p. 447, l. 37
p. 449, l. 22–
p. 451, l. 19
p. 459, l. 40–
p. 460, l. 32
p. 539, l. 6–
p. 556, l. 46
p. 583, l. 8–
p. 591, l. 19

15.—The document upon which the claim of the Appellant is based is his certificate of title, and it was submitted that documents precedent to it should not be resorted to for construction. In the Courts below, however, some weight was given to such precedent historical facts and documents existing prior to 1947, and the chain of title of the Respondent in the said lands was considered.

p. 706, l. 45–
p. 707, l. 9
p. 708, l. 44–
p. 709, l. 14

16.—The Appellant did not purchase the said lands from Canadian Pacific. The contract for purchase was made with his father, Simon Borys, and is dated 13th September, 1906. It is stated to be a contract " with Settlement conditions " and contains provisions to ensure the settlement and farming of the lands. The contract provided that upon payment of the purchase price and " the surrender of this contract " the purchaser was to be entitled " to a deed or patent conveying the said premises in fee simple

p. 68
p. 102

reserving all coal, petroleum and valuable stone on or under the said lands." A transfer was obtained by Simon Borys dated 17th January, 1918, which was registered at the Land Titles Office on 19th November, 1920. This transfer excepted and reserved to Canadian Pacific " all coal, petroleum or valuable stone which may be found to exist within, upon or under the said land."

p. 102
p. 104
p. 68

17.—Simon Borys transferred the said lands to his wife and a new title was issued to her on 16th July, 1923. On her death it was transmitted to her executors who in turn transferred the said lands to the Appellant on 29th November, 1947. The Certificate of Title on which the claims of the Appellant are founded was issued to him on 18th December, 1947. 10

p. 411, l. 7–
p. 414, l. 1
p. 446, l. 28–
p. 447, l. 37
p. 449, l. 22–
p. 451, l. 19
p. 459, l. 40–
p. 460, l. 32
p. 539, l. 6–
p. 556, l. 46
p. 583, l. 8–
p. 591, l. 19

18.—The evidence indicates, and the Respondents do not dispute, that " petroleum " has both a comprehensive and a limited meaning. In some circumstances it refers to a liquid. Canadian Pacific, however, contend that this limited or narrow meaning and usage applies to petroleum only after it has been captured and brought to the surface and is being dealt with as a commercial product. With relation to the substances in the reservoir the word includes all the naturally occurring hydrocarbons whether gaseous, liquid or solid and therefore would include natural gas. In the present case the word is used in a reservation in a title to land, where 20 the meaning attached to liquid petroleum as an article of commerce has no application. Canadian Pacific contend that the " common usage " relating to the surface product is not the usage which is descriptive of petroleum in the reservoir.

Ex. 15–28,
pp. 111–129

19.—In the Courts below the Appellant emphasized and relied on various Statutes and Orders-in-Council. Canadian Pacific contend either that these Statutes and Orders-in-Council are particularly concerned with petroleum as a commercial product after it has been captured and are therefore of no assistance in determining the true construction to be given to the phrase " all petroleum " in a reservation, or that the word 30 " petroleum " was loosely used and cannot be interpreted so as to exclude natural gas. The same is true of the so-called " Petroleum and Natural Gas " leases.

Ex. 58–74,
pp. 310–329

20.—The document sought to be interpreted is a Certificate of Title issued under the Land Titles Act of the Province of Alberta, which is based on the Torrens System. Under this Act a certificate of title is " conclusive evidence " that the person described as owner is entitled to the land. The Act further stipulates (Section 53) that " no instrument shall be effectual to pass any estate or interest in that land . . . . unless the instrument is duly registered." Another fundamental Torrens provision is contained in 40 Section 189 of the Land Titles Act, which provides that no person dealing with land shall be bound to enquire into or ascertain the circumstances in which any previous owner obtained title.

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21.—Under the Alberta Land Titles Act the original contract of 1906 was not registered, the only registrations being the transfers commencing in 1920. Imperial, when registering its lease in 1949, would be entitled to rely on the title as it then existed.

22.—Under the Torrens System, it is submitted, title to an interest in land expressed in identical language cannot vary in meaning from title to title or from time to time or from place to place. The whole land registration system would break down if a person could not rely on the title without making inquiries as to the state of knowledge or usage at the time the reservation first arose and the intention of the parties many years previously. It is therefore submitted that the inquiry to be made is to consider scientifically what part of the substances in the reservoir is " petroleum." Any other course would violate the fundamental principles of the Torrens System.

23.—The Respondents called as witnesses James O. Lewis, a consulting Petroleum Geologist and Engineer from Texas, Dr. Katz, a Professor of Chemical Engineering of the University of Michigan, and Professor Fancher, a Professor of Petroleum Engineering of the University of Texas, all of whom had extensive practical experience. These witnesses produced a considerable amount of literature and technical works from which, it is submitted, a dual meaning of the word " petroleum " from before 1906 up to the present time appears quite clearly. They testified that in their view the meaning of petroleum in 1906 and at present, where it refers to the reservoir, is the comprehensive meaning which includes the hydrocarbon gases as well as the liquids and solids. The narrow usage and limited meaning of petroleum relates to the liquid product as an article of commerce.

pp. 407–498
pp. 498–577
pp. 578–685
p. 411, l. 7–
p. 414, l. 1
p. 415, l. 15–
p. 416, l. 40
p. 446, l. 28–
p. 447, l. 37
p. 449, l. 21–
p. 451, l. 19
p. 459, l. 40–
p. 460, l. 32
p. 539, l. 6–
p. 556, l. 46
p. 583, l. 8–
p. 591, l. 19
p. 409, l. 43–
p. 410, l. 10
p. 507, l. 47–
p. 509, l. 12
p. 537, ll. 35–43
p. 582, l. 21–
p. 583, l. 30

24.—S. J. Davies, a Petroleum Engineer practising in Calgary, was also called by the Appellant. He received his education in Alberta and at the Royal School of Mines in London, England, from which he graduated as an Associate in the Technology of Oil. He has had a long and extensive experience in the industry. Mr. Davies testified that the word " petroleum " imports to him a mixture of hydrocarbons, liquid, gaseous and solid, and that his views go back to his early experience in the profession.

p. 691, l. 34–
p. 699, l. 20
p. 691, l. 44–
p. 692, l. 28
p. 692, ll. 29–32

25.—Dr. Katz testified that natural gas is not a distinct substance. It is a mixture of hydrocarbon gases. The composition of such natural gas depends upon temperature, pressure and source. Since natural gas constituents assist in the recovery of liquid from the reservoir, efficient production methods require a minimum withdrawal of gas until the oil has been recovered. He also stated that there is an interchange between the liquid phase and the gas phase of the constituents, and natural gas normally

p. 513, ll. 21–31
p. 526, ll. 20–40
p. 527, ll. 30–35
p. 533, ll. 19–33
p. 538, ll. 5–8
p. 505, ll. 23–31
p. 526, ll. 32–40
p. 528, l. 3–
p. 533, l. 6

RECORD

p. 513, ll. 21–31
p. 538, ll. 21–24
p. 538, ll. 15–19
p. 550, ll. 7–47
p. 690, ll. 37–43
p. 240, l. 34–
p. 241, l. 41

contains constituents which may be extracted and sold as liquids. No distinct division of a well stream can be made into gas or liquid short of an arbitrary specification of the separation process. The final products depend upon the final conditions of separation. Dr. Katz also stated, as did Mr. Nowers and Mr. Slipper, that in Alberta in 1906 natural gas was known to be valuable.

p. 591, ll. 1–19
p. 596, ll. 11–20
p. 594, l. 45–
p. 595, l. 13
p. 616, l. 40–
p. 617, l. 14
p. 618, ll. 40–48
p. 619, ll. 16–17
pp. 619–634
p. 637, ll. 30–35

26.—Professor Fancher testified that in 1900 as to-day it was established that petroleum consists of both oil and gas and that oil and gas are of common origin and occurrence. The anti-clinal theory of the occurrence of oil and gas had also been verified. He also testified that if 10 maximum recovery of oil is to be achieved, the production of natural gas must always be incidental to the production of oil. If this is not done, it produces irretrievable waste of a great natural resource.

27.—It is submitted that all of the scientific evidence as to the inter-relationship between gas and oil in the reservoir and the behaviour of these two products at the surface is not in dispute.

p. 686, l. 1–
p. 691, l. 32
p. 686, ll. 23–29
p. 686, ll. 11–18
p. 687, ll. 17–24

28.—The Respondents also called E. B. Nowers, whose qualifications were recognized by the learned Trial Judge, to discuss the meaning of the word " petroleum " as a land owner. He has been a land agent since 1905, and in the course of his work encountered the word " petroleum " about the 20 year 1912. He testified that his understanding throughout the years has been that it includes natural gas.

29.—In the Courts below reference and reliance has been largely placed on the decision of the Privy Council in *Barnard Argue Roth Stearns Oil and Gas Company* v. *Farquharson* (1912) A.C. 864, affirming the Ontario Court of Appeal (1912) 25 O.L.R. 93, which had affirmed the Judgment of Chancellor Boyd at trial (1910) 22 O.L.R. 319. Canadian Pacific relies on the *Barnard Argue* case and submits that it supports the contentions advanced herein.

p. 724, ll. 1–5
p. 724, ll. 3–5
p. 724, ll. 39–41

30.—Howson, C.J. held that the terms " rock oil " and " mineral 30 oil " as used by the Privy Council in that case have the same meaning as the word " petroleum." It is to be noted that immediately after making this finding, the Chief Justice went on to state : " . . . . no valid distinction has been made between the case at bar and the *Barnard Argue* case." None the less he proceeded to grant an injunction prohibiting the Respondents from interfering with the Appellant's gas, a ruling which, as the Respondents submit, is in direct conflict with the decision of the Privy Council in the *Barnard Argue* case.

31.—The reasoning of all the learned Judges in the *Barnard Argue* case, at trial, in the Court of Appeal and in the Privy Council, is, it is 40 submitted, of interest in the present appeal with reference to the true

construction of the phrase "all petroleum" used in the reservation. On the point as to the true construction of the term "all petroleum," it is respectfully submitted that Howson, C.J., in applying the *Barnard Argue* case, misinterpreted the reasoning of the learned Judges in that case. It is submitted that the reasoning in that case clearly shows that if the phrase to be interpreted had been "all petroleum" rather than "springs of oil," the Court would have found that natural gas was included in petroleum. Chancellor Boyd, at 22 O.L.R., p. 335, stated: "While the scientific world is of disputatious mood as to the ultimate origin (i.e. genesis) of
10 petroleum, there is general consensus that its two valuablé products, gas and oil, are compounds in different proportions of hydro-carbon . . . . ", and there are many other statements to the same effect in his judgment. In a dissenting judgment, in the Ontario Court of Appeal, Meredith, J.A., at 25 O.L.R., p. 105, states clearly that in oil regions petroleum includes natural gas, and the majority of the Court agreed with Chancellor Boyd. In the Privy Council Lord Atkinson found that natural gas and oil are different products, although both products were hydrocarbons. In light of the fact that the phrase to be interpreted, however, was "springs of oil," he held that a reservation of "springs of oil" did not reserve natural gas.
20 In considering the *Barnard Argue* case and the present appeal, it should be also noted that the land registration system in force in Ontario at that time was not similar to the Torrens system which must be considered in this appeal.

32.—The judgment of Howson, C.J. may be summarized as follows: His judgment constituted a complete acceptance of the Appellant's claim. The evidence of Simon Borys as to his understanding of the meaning of the contract, which was objected to when introduced, was discussed and relied on. The learned Chief Justice held that in 1906, the date of the Land Contract between Canadian Pacific and Simon Borys, natural gas
30 was not regarded as a substance of commercial value, and the useful function of natural gas in the production of petroleum was not known in 1906.

p. 707, ll. 14–19
p. 708, ll. 1–11

33.—The learned Chief Justice discussed the meaning of petroleum, and concluded that petroleum does not include natural gas, and natural gas is regarded as a distinct and different produce from petroleum. He quoted from various dictionaries, all of which he said were authoritative, which he accepted. He stated that in no instance, even in the technical dictionaries, was petroleum defined so as to include natural gas, and also quoted as authoritative the definitions of the American Gas Association. He refused to accept definitions "appearing in a few only of the
40 encyclopedias" and in articles by petroleum engineers.

p. 708, ll. 33–43
p. 710, ll. 7–10
p. 712, ll. 40–43
p. 713, l. 34
p. 714, ll. 28–33

34.—The learned Chief Justice held that the case should not turn on any technical, chemical or scientific signification of the term "petroleum," but on the meaning used by ordinary persons concerned with the subject,

p. 716, ll. 13–19

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p. 716, ll. 21–30 and especially on the meaning understood and accepted by the parties. Since the reservation has been made by Canadian Pacific, it was to be p. 722, ll. 10–15 strictly construed against them. He concluded that there was no reservation of natural gas, whether dry or wet or held in solution with the mineral oil, and all such gas was therefore the property of the Appellant.

p. 722, ll. 17–20 35.—The learned Chief Justice held that the Respondents had no right to possess and enjoy the petroleum (oil) at the expense of the Appellant p. 721, ll. 35–38 and to use without the Appellant's consent his natural gas. He considered that the problem of the use of natural gas in the production of oil with separate ownerships in oil and gas was analogous to the destruction of the 10 surface by the owner of minerals without power to work the same, and found that " destruction of the Appellant's estate in the natural gas may be likened to the destruction of the surface estate."

pp. 748–763 pp. 763–772 36.—In the Appellate Division the majority Judgment was delivered by Parlee, J.A., and O'Connor, C.J.A., and F. Ford and C. J. Ford, J.J.A. concurred. Macdonald, J.A. dissented. The majority held that the finding of Howson, C.J. that petroleum and natural gas were, by common p. 752, ll. 33–35 usage, two different substances, ought not to be disturbed; but they reversed his judgment in that they held that what was reserved to Canadian p. 752, ll. 38–41 Pacific was petroleum in the earth and not a substance when it reached 20 the surface. The release of gas from the solution by change of pressure p. 752, l. 46– and temperature when the liquid is brought to the surface did not affect the p. 753, l. 1 original ownership. They held, therefore, that " petroleum includes oil p. 753, ll. 3–8 and any other hydrocarbons and natural gas existing in its natural condition in strata." Under the reservation all the petroleum, including all hydrocarbons in solution or contained in the liquid in the ground, was p. 753, ll. 10–11 the property of the Respondents. Gas not included in the reservation p. 761, ll. 22–28 of petroleum as above construed was the property of the Appellant, but subject to the rights of the Respondents to produce all of the substances belonging to them from the earth, even if there was interference with and 30 wastage of the gas belonging to the Appellant, so long as modern methods p. 752, ll. 19–24 were reasonably used. The learned Judges referred to The Oil and Gas p. 754, ll. 8–34 Resources Conservation Act, which is intended to prevent undue waste p. 754, ll. 40–42 and to enable maximum production of both oil and gas to be obtained, and also to the Order granted to Imperial under The Right of Entry Arbitration Act, which provides for the acquisition of such interest in the surface rights as may be necessary for the efficient and economical p. 756, l. 32 performance of producing operations. They disagreed with the finding of Howson, C.J. that the destruction of the estate in natural gas might be p. 760, l. 32– p. 761, l. 12 likened to destruction of the surface estate; and held that the mere 40 reservation of mines and minerals implied the right to get them, and the p. 761, ll. 14–28 owner of gas could not hold the owner of oil " at his mercy." The reservation of petroleum enables the Respondents to use all reasonable means to extract the petroleum from the earth.

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37.—The dissenting judgment of Macdonald, J.A., generally followed the reasoning of Howson, C.J. The learned Judge could not persuade himself that the parties to the agreement and the subsequent transfer had even contemplated the use of the word "petroleum" in any sense other than its usual and popular sense which on the evidence meant that the liquid phase of petroleum or mineral oil did not include natural gas.

p. 769, ll. 14–19

38.—Even if all petroleum does not include natural gas Canadian Pacific contends the reservation should be construed as a grant of all petroleum and that vis-à-vis the Appellant, the Respondents have the
10 exclusive right to all petroleum and the Appellant cannot derogate from such grant or exclusive right.

39.—Canadian Pacific contend that the reservation of "all petroleum" by necessary implication includes the right to win, work and carry away such mineral. At all relevant times it was known that, in a reservoir of petroleum within land, gas always accompanied oil, that gas was dissolved in oil, and that gas was a propulsive force bringing oil to the surface. Oil cannot be produced without the natural gas associated with the oil in the reservoir. The reservation of "all petroleum" would not be effective unless natural gas is used in the production of the oil, and in such
20 circumstances, it is submitted, the law presumes that the reservation is to be effective.

p. 182, l. 42–
p. 183, l. 4
p. 637, ll. 41–47
p. 163, ll. 5–10
p. 256, ll. 18–20

40.—The Appellant cannot complain of any damage to the surface as Imperial Oil has, under The Right of Entry Arbitration Act, in addition to its implied rights, authority to enter upon and use such portion of the surface of the lands of the Appellant as might be required for its purposes. The Act provides for the acquisition of such interest in the land as is set out in the Order and as may be necessary for the efficient and economical performance of producing operations.

Ex. 136, p. 700

41.—Where both oil and gas exist, as in the Leduc-Woodbend oil field,
30 the Respondents submit that they are entitled to drill a well and, in order to be able to obtain the maximum recovery, so as to prevent waste, as required by The Oil and Gas Conservation Act of Alberta, to operate any such well. They contend that they are entitled without compensation to use in the production of liquid hydrocarbons any gaseous hydrocarbons to which the Appellant may be entitled.

42.—Canadian Pacific respectfully submit that the appeal ought to be dismissed and the cross-appeal ought to be allowed for the following (amongst other)

REASONS

40 1. BECAUSE the reservation of "all petroleum" includes natural gas.

2. BECAUSE the question for decision is as to the true construction of "all petroleum" in a title under the Land Titles Act which cannot vary from title to title, or from place to place, or from time to time.

3. BECAUSE the evidence of Simon Borys as to the meaning attributed by him to the words "all petroleum" was inadmissible and irrelevant.

4. BECAUSE the words "all petroleum" are not to be interpreted by common usage but are a generic and/or technical term and refer to petroleum in the ground, and therefore have a comprehensive meaning which includes both oil and natural gas. 10

5. BECAUSE "all petroleum" includes petroleum in accordance with every meaning or usage, whether generic, technical, scientific or common.

6. BECAUSE even if petroleum does not include natural gas, the reservation is to be construed as a grant and the Appellant cannot derogate from such grant or interfere with the exclusive right of the Respondents to such petroleum.

7. BECAUSE even if petroleum does not include natural gas, the Appellant is not possessed of any such ownership of the natural gas as to enable him to maintain this action. 20

8. BECAUSE to permit natural gas to be produced before the liquid petroleum would constitute waste contrary to law.

9. BECAUSE in any event as the Appellate Division held the Respondents have the right to work, win and carry away the petroleum in its liquid phase, including all hydrocarbons in solution or contained in the liquid.

10. BECAUSE as the Appellate Division held the Respondents are entitled to extract all their substances from the earth, so long as modern methods are adopted, notwithstanding consequential interference with any gas owned by the Appellant; and the Respondents are not liable for any inconvenience or loss caused thereby. 30

11. BECAUSE as the Appellate Division held the reservation should be given such a construction as will make it effective.

ANDREW CLARK.

S. J. HELMAN.

FRANK GAHAN.

J. G. LE QUESNE.

In the Privy Council.

No. 17 of 1952.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA

(APPELLATE DIVISION).

BETWEEN

MICHEAL BORYS ... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED RESPONDENTS

— AND BETWEEN —

CANADIAN PACIFIC RAILWAY COMPANY and IMPERIAL OIL LIMITED APPELLANTS

AND

MICHEAL BORYS ... RESPONDENT.

(CONSOLIDATED APPEALS)

CASE FOR CANADIAN PACIFIC RAILWAY COMPANY

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