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Borys v. Canadian Pacific Railway,

Borys (Plaintiff) Respondent v. Canadian Pacific Railway Company and Imperial
Oil Limited (Defendants) Appellants

Alberta Supreme Court, Appellate Division

O'Connor, C.J.A., Frank Ford, W. A. Macdonald, Parlee and Clinton J. Ford,
J.J.A.

Judgment: February 6, 1952

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Counsel: H. G. Nolan, Q.C., for defendant, appellant, Imperial Oil Limited.

S. J. Helman, Q.C., and R. R. Mitchell, Q.C., for defendant, appellant, Canadian Pacific Railway Company.

G. H. Steer, Q.C., H. W. Riley, Q.C., and D. R. Fisher, for plaintiff, respondent.

Subject: Natural Resources; Property

Mines and Minerals --- Miscellaneous definitions.

Oil and Gas --- Oil and gas lease -- Nature of lease.

Real Property -- Mines and Minerals -- Reservation of "Petroleum" -- Whether Natural Gas Included --
Governing Principles.

Evidence -- Limitation of Number of Opinion Witnesses -- Alberta Evidence Act, S. 10 -- Whether Testimony in
Question Opinion.

Costs -- Defendants' Successful Appeal Resulting in Divided Success in Action -- No Costs of Action.

The plaintiff (respondent) was the registered owner of a certain quarter section of land "reserving thereout all coal, petroleum and valuable stone." He sought a declaration that he owned all the natural gas within or under said land and an injunction restraining the defendants from removing, etc. said gas. The defendants counterclaimed for inter alia a declaration that the oil company had the right to remove and dispose of such natural gas as might be necessary or incidental to the working, winning and carrying away of the petroleum. Plaintiff's title was derived through intervening transfer from a transfer made by said railway company in 1918 in pursuance of an agreement

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for sale entered into in 1906. Said agreement and transfer and the certificate of title issued thereon contained said reservation. In 1949 said railway company leased to the defendant (appellant) oil company the petroleum within, on or under said land and "the right to work, win and carry away the same." The neat issue was whether said reservation included natural gas. From a judgment granting the plaintiff said declaration and an injunction (1951) 2 W.W.R. (NS) 145, the defendants appealed.

Held, W. A. Macdonald, J.A. dissenting, that the appeal should be allowed and the injunction be vacated; that plaintiff should be given judgment in the action and the defendants judgment on their counterclaim.

The mere reservation of mines and minerals implies the right to get them: *Rowbotham v. Wilson* (1860) 8 HL Cas 348; 30 LJQB 49, at 53, 11 ER 463. See also *Cardigan (Earl) v. Armitage* (1823) 2 B & C 197, 107 ER 356; *Hamilton (Duke) v. Graham* (1871) LR 2 Sc App 166, at 171.

Gas in the earth is likened to, and subject to principles of law like those that govern, subterranean waters.

The reservation of "petroleum" entitled the defendants (appellants) to use all reasonable means to extract the petroleum even if the doing so caused an interference with and a wastage of the plaintiff's gas, provided that modern methods of operation are reasonably used and the requirements of the relevant statutes and regulations are observed. *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37, 78 LJ Ch 63, applied. *Farquharson v. Barnard-Argue-Roth-Stearns Oil Co.*, [1912] A.C. 864, 82 L.J.P.C. 30; and *Fuller v. Garneau*, [1921] 1 W.W.R. 857 (S.C.C.), 27 Can Abr 16, distinguished.

The above conclusions were reached keeping in mind that at the time of said sale by the railway company and the transfer in pursuance of it neither party could have known that there was petroleum or natural gas on said land or in its vicinity and the court could assume that neither party was aware of the effect the drilling for petroleum would have on any natural gas encountered.

Even if there were more than three witnesses called by the plaintiff who gave opinion evidence no substantial wrong or miscarriage of justice was caused thereby.

Per W. A. Macdonald, J.A., dissenting:

The issue herein is one of fact. The question to be determined is what the words of the reservation meant at the relevant time in the vernacular of mining men, commercial men and landowners. See *Hext v. Gill* (1872) LR 7 Ch 699, 41 LJ Ch 761, and cases which followed it.

In determining what the parties to the agreement for sale in 1906 and the subsequent transfer intended to express by the words of the reservation regard must be had to the facts and circumstances then existing.

It is not shown that the parties to said agreement and transfer ever contemplated that their use of the "petroleum" would have any other meaning than its then popular sense, which the evidence shows meant the liquid phase of petroleum or natural oil and did not include natural gas. They were plain, blunt men, governed by the ideas of every-day life, engaged in a simple transaction concerning the sale and purchase of a quarter section of land and they used the plain language of their day and their station in life to express what they had in mind.

The right implied in the reservation to get the oil and to carry it away is subject to important limitations, e.g., the condition that its exercise will not prejudice the surface owner's natural right to support; see *Fuller v. Garneau*, supra (at p. 863). The theory that the protection afforded the surface owner was based on some right in the nature of an easement has long since been abandoned. For the true theory see *Backhouse v. Bonomi* (1861) 9 HL Cas 503, 11 ER 825, reiterated in a long line of cases. The surface owner's right to the ordinary enjoyment of his land free from interference by mining operations is really based on the principle that everyone must use his own

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property so as not to injure seriously or destroy the property of another. This governing principle may of course be affected by some provision in the instrument determining the rights of the parties which indicates, unequivocally, a contrary intention. Here, however, there is a bare reservation of petroleum or "all petroleum" without any express words conferring the right to win, work and carry it away, and an absence of any express arrangement under which the defendants might possibly justify their interference with the property rights of the plaintiff in his natural gas.

The plaintiff has never conceded that "petroleum" has or ever had a flexible or wavering meaning. There is nothing in The Land Titles Act, RSA, 1942, ch. 205, to preclude him from maintaining this position.

The plaintiff contended throughout the trial that the issue involved was one of fact, viz., what did "petroleum" mean at the relevant time in the common speech of mining men, commercial men and landowners. He was entitled to call any number of witnesses to prove that sense of the word. The testimony of the experts called by him was directed to this issue only and was not opinion evidence within the meaning of sec. 10 of The Alberta Evidence Act, RSA, 1942, ch. 106, which limits the number of witnesses that may be called to give opinion evidence.

Appeal from the judgment of Howson, C.J.T.D., (1951) 2 W.W.R. (NS) 145. Appeal allowed with costs, W. A. Macdonald, J.A. dissenting. Plaintiff given judgment in the action, the defendants given judgment on their counterclaim; the injunction granted the plaintiff by the judgment below vacated; since success was divided no costs of the trial were awarded.

O'Connor, C.J.A. and Frank Ford, J.A. concur with Parlee, J.A.:

W. A. Macdonald, J.A. (dissenting):

1 The respondent, Michael Borys, is the owner of an estate in fee simple, in the north-east quarter of sec. 19, tp. 50, rge. 26, west of the 4th meridian, in the province of Alberta, "reserving thereout all coal, petroleum and valuable stone." In this action he seeks a declaration that he is the owner of the natural gas within, upon or under this land, and an injunction restraining the appellants from using, removing, wasting, interfering with or otherwise disposing of said natural gas.

2 The chain of title of the respondent to this land may be traced briefly, as follows: On September 13, 1906, the Canadian Pacific Railway Company, one of the appellants, was the registered owner of the lands above referred to, and entered into an agreement for the sale thereof to Simon Borys, the father of the respondent, for \$1,280, payable by instalments. The agreement provided that, upon making the payments and performing the various conditions by him to be performed, the purchaser would be entitled to a deed or patent conveying this land to him, subject to the reservation above set forth.

3 On January 17, 1918, the railway company executed a transfer of this land "reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal, petroleum and valuable stone which may be found to exist within, upon or under the said land." On November 19, 1920, this transfer was registered and certificate of title to the land, subject to this reservation, was issued in the name of Simon Borys. Subsequent conveyances of the land were made, and on December 18, 1947, the respondent, Michael Borys, became the registered owner thereof subject to the above reservation.

4 On September 21, 1949, the Canadian Pacific Railway Company leased to Imperial Oil Limited "the petroleum (hereinafter referred to as the leased substance) which may be found within, upon or under the said land and the right to work, win and carry away the same." On December 15, 1949, this lease was registered in the land titles office as No. 7446 H.J.

5 The main question involved is: What is the true construction of the reservation? Did the Canadian Pacific Railway Company, when it sold the land to Simon Borys, reserve to itself the natural gas within, upon or under the

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said land? It did not do so expressly, but it takes the position that the petroleum reserved includes natural gas. It alleges that it owns all the petroleum and all the natural gas underlying this land, and that the Imperial Oil Limited, by virtue of its lease, is entitled to work, win and carry away the petroleum, including the natural gas. The Imperial Oil Limited asserts the same claim and, in the alternative, alleges that, if it has not the right to work, win and carry away the natural gas, it has the right to work, win and carry away the natural gas occurring in the same reservoir with the petroleum in its liquid phase, as well as the natural gas contained in solution in the petroleum; and, furthermore, it asserts the right, without compensation to the respondent, to use and dispose of such natural gas as may be necessary or incidental to its efforts to work, win or carry away the petroleum in its liquid phase.

6 In reply, the respondent alleges, *inter alia*, that, having regard to the time at which the railway company reserved the coal, petroleum and valuable stone, and the facts and circumstances then existing, it was not the intention of the parties to reserve the natural gas.

7 The action was tried by the learned Chief Justice of the Trial Division, who held that the word "petroleum" in the reservation did not include natural gas, that the natural gas under these lands was the property of the respondent, and that the interlocutory injunction granted in these proceedings on March 1, 1950, should be made permanent, (1951) 2 W.W.R. (NS) 145.

8 This appeal is from the whole of the judgment of the learned chief justice.

9 A great deal of evidence, largely of a technical and scientific character, was adduced on the trial in an effort to establish that the word "petroleum" in the reservation includes natural gas. Dr. Lewis, a consulting petroleum geologist and engineer, of Houston, Texas, says that those concerned with the production, origin and chemistry of oil and gas felt the need of a generic word which would include all the naturally occurring hydrocarbons of common origin, and the word adopted for this purpose was "petroleum." In his opinion, the correct meaning of "petroleum" in 1906 and today is the broad, generic meaning. He considers the restriction of the word to hydrocarbons in the liquid phase to be a secondary and incomplete use of the term. The evidence of Dr. Katz and Dr. Fancher, both consulting petroleum geologists of repute, is to the same effect. Mr. Davies, a petroleum engineer, who has been engaged actively with problems relating to petroleum in Alberta, says that to him the word "petroleum" means a mixture of hydrocarbons, gaseous, liquid and solid.

10 On the other hand, it should not be overlooked that admittedly the original meaning of the word "petroleum" was rock oil or mineral oil, and this original use of the word has not been superseded by the modern generic term, but has persisted and is still in common use at the present day. It may also be noted that the expert geologists from the United States had not examined our legislation, whether federal or provincial, dealing with petroleum or natural gas, or the regulations made pursuant thereto. They had not examined the regulations of the Canadian Pacific Railway Company, dating back to 1914, for the disposal of its petroleum rights, nor the forms of leases in common use by Imperial Oil Limited. In general, they were not familiar with Canadian literature on petroleum and natural gas in Canada. It is quite obvious that under the legislation, regulations and literature above referred to, the word petroleum was frequently used in its narrow, original sense, as meaning crude oil, and was dealt with as something different and distinct from natural gas. Any efforts to dovetail the term "petroleum" in its broad "inclusive" sense into sections of the legislation, regulations and forms above referred to were unimpressive.

11 It is urged that "all petroleum" is a technical and scientific term, and in this sense includes hydrocarbon gases as well as liquids and solids of similar origin. On this premise, the argument is advanced that technical or scientific words should be given their technical or scientific meaning, and that therefore the word "petroleum" in the reservation should be interpreted in its broad, scientific sense. The issue here, as I see it, is whether or not the word "petroleum" in the reservation includes natural gas, and until this issue is finally determined, all discussion with respect to the law applicable to the proper interpretation of technical and scientific terms is beside the point.

12 Scientists frequently differ sharply in their opinions, and that situation confronts us here. Dr. Nauss, a

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consulting geologist, familiar with the situation in this province, whose evidence impressed the trial judge very favourably, says that the technical meaning and the popular meaning of "petroleum" are one and the same. In his view, petroleum is crude oil and natural gas is not a part of it. He points out that, in proceedings before the Natural Gas Conservation Board in this province, all the expert witnesses included gas in solution as part of the natural gas reserves of the province. There is also the evidence of Mr. Slipper, a geologist and engineer, with long experience in natural gas and petroleum industries. He says petroleum means ordinary crude oil and does not include natural gas. If he sought a broad generic term to include hydrocarbons of common origin, he would use the term "natural hydrocarbons" and not petroleum.

13 In interpreting the language of the reservation, the learned trial judge adopts the language of Lord Atkinson in *Farquharson v. Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd.*, [1912] A.C. 864, at 869, 82 LJPC 30, as follows:

Having regard to the time at which the documents between the parties were executed and the facts and circumstances then existing, 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?

14 The issue involved is an issue of fact. The rule laid down by James, L.J., in *Hext v. Gill* (1872) LR 7 Ch 699, 41 LJ Ch 761, and approved and adopted in *Nor. Br. Ry. Co. v. Budhill Coal and Sandstone Co.* [1910] AC 116, 79 LJPC 31, and in *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.*, [1911] A.C. 290, 80 L.J.P.C. 128, applies here. The question to be determined in each case is what the words meant at the relevant time in the vernacular of mining men, commercial men and landowners.

15 It is true that in the *Budhill* case, *supra*, the question was whether or not sandstone was a mineral, and in the *Glenboig* case, *supra*, the question was whether or not fireclay was a mineral. But in *Atty.-Gen. for Isle of Man v. Moore*, 159 L.T. 425, [1928] 3 All E.R. 263, the sole issue in the argument before the Privy Council was whether or not *shale* was included in a reservation in favour of the crown of "flagg, slate or stone," and it was held that this was an issue of fact to be determined in accordance with the rule laid down in the *Budhill* and *Glenboig* cases.

16 Under the agreement for sale and the subsequent transfer, the proprietary right to the land involved was transferred to Simon Borys. The onus is on the transferor to show what the reservation includes, and the language of the reservation is to be construed strictly and not extended beyond what the words used clearly cover: *Nor. Br. Ry. Co. v. Budhill Coal and Sandstone Co.*, *supra*, at p. 126.

17 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 different and distinct from natural gas. The learned trial judge accepted this evidence in preference to evidence led by the appellants to show that the word had a broad generic meaning which included natural gas.

18 In determining what the parties to the agreement and the subsequent transfer intended to express by the language used in the reservation, regard must be had to the facts and circumstances then existing. Simon Borys is a Ukrainian whose knowledge of the English language was, at the date of the agreement, quite limited. Indeed, on the trial of this action he gave his evidence through an interpreter. There is no word in the Ukrainian language for petroleum, but it does contain a word which, when translated into English, means oil. Some years prior to this deal, Borys had purchased a quarter section from the Canadian Pacific Railway Company, through its station agent at Leduc and, in the contract covering the deal, it would appear that petroleum was not reserved. He purchased the land involved in these proceedings through the same agent, and he says the agent informed him that this contract was the same as the previous one, except the price, and the fact that the oil on this quarter belonged to the Canadian Pacific Railway Company. It seems to me it would be somewhat remarkable if, under these circumstances, Borys were to ascribe to the word "petroleum" the broad generic meaning, inclusive of natural gas,

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which appellants say it means in the reservation, a meaning which was rejected by eminent geologists on the trial, and one which the witness Garrett, a professional engineer and natural gas consultant, with over 27 years' experience in the industry, says he never heard of until this case arose. Furthermore, the trial judge finds that at all material times the Canadian Pacific Railway Company regarded petroleum as the equivalent of mineral oil, and regarded natural gas as a distinct and different substance. There is ample evidence to justify this finding.

19 Natural gas was known to exist in some sections of the province in 1906, and in Medicine Hat it was used commercially to a very limited extent. But it was a "waste dangerous product" then, according to Dr. Nauss (A.B. p. 182) and for many years thereafter. In the 1920's and 1930's measureless quantities of natural gas were burned and destroyed in Turner Valley because apparently no market for it existed, and its preservation would serve no useful purpose. It is significant that in the lease from the railway company to Imperial Oil Limited, dated September 21, 1949, there is a covenant by the lessee to protect the leased area from drainage of the leased substances, by drilling a well to offset a well on adjoining land; but if the drainage consists of gas only, the lessee is not obliged to drill an offset well unless an adequate and commercially profitable market for any gas which may be produced therefrom can be previously arranged.

20 I do not think the Canadian Pacific Railway Company was concerned in 1906 to retain to itself natural gas for which no commercially profitable market was then available, and which was wasted or destroyed as soon as produced. It was not until 1912 that it expressly reserved gas. Nor can I persuade myself that the parties to the agreement and the subsequent transfer ever contemplated the use of the word "petroleum" in any sense other than its usual and popular sense, which, on the evidence, meant the liquid phase of petroleum or mineral oil, and did not include natural gas. They were plain, blunt men, governed by ideas of every-day life, engaged in a simple transaction concerning the sale and purchase of a quarter section of land, and using the plain language of their day and their station to express what they had in mind.

21 With the exception of the minerals reserved, the transfer to Borys conveyed to him all the interest of the Canadian Pacific Railway Company in this land, including the natural gas. Two separate and distinct estates, held by separate and distinct titles, came into existence. There is nothing in the record to suggest that the natural gas was subject to any servitude in favour of the oil or that it was to be held by the transferee subject to any use or enjoyment thereof by the transferor or its assigns. No express right to win, work or take away the oil is contained in the reservation. There is, of course, a right by implication to get it and to carry it away. But this implied right is subject to important limitations. As was pointed out in *Fuller v. Garneau*, [1921] 1 W.W.R. 857, 61 S.C.R. 450, it is always subject to the condition that its exercise will not prejudice the surface owner's natural right to support.

The surface cannot be destroyed however necessary it may be to do so for the practical working of the mines: Per Anglin, J., at p. 863.

22 At one time it was thought that the protection afforded the surface owner was based on some right in the nature of an easement, but this theory has long since been abandoned. The true position was laid down in *Backhouse v. Bonomi* (1861) 9 HL Cas 503, 11 ER 825:

I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighbouring property not to interrupt that enjoyment: Per Lord Wensleydale.

23 This view has been reiterated and affirmed from time to time in a large line of cases. Lord Selborne in *Dalton v. Angus* (1881) 6 App. Cas. 740, at 791, 50 LJQB 689, refers to the right of support as "a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle, *sic utere tuo ut alienum non laedas*." And subsequently, in *Love v. Bell* (1884) 9 App. Cas. 286, 53 LJQB 257, an *Inclosure Act* case, he says:

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I apprehend that before the inclosure, as much as afterwards, the lords, in the exercise of their powers as to the minerals, were subject to the principle '*sic utere tuo ut alienum non laedas.*' They had not a right of working paramount to the surface rights of the commoners, they had only a right of working subject to the surface rights of the commoners, and any working which would substantially interfere with those surface rights would have been an unlawful working, and might have been restrained at the suit of the commoners.

24 The nature of the right of the surface owner is discussed by Lord Macnaghten in *West Leigh Colliery Co. v. Tunncliffe & Hampson Ltd.*, [1908] A.C. 27, at 30, 77 LJ Ch 102. The claim was for damages for depreciation in the value of the property attributable to the risk of future subsidence, and Lord Macnaghten says:

If one examines this claim in respect of depreciation, and tries to investigate its origin, it will be found, I think, that it really depends upon a notion, which is now exploded, that the right of the surface owner is a right in the nature of an easement, or a right to have pillars of support left for his security, while, in reality, his right, as Lord Wensleydale observes, is merely the right of a landowner to the ordinary enjoyment of his land.

25 The right of the surface owner to the ordinary enjoyment of his land without interference by mining operations is based, in the final analysis, on the principle that every one must use his own property so as not to seriously injure or destroy the property of another. This principle governs unless one can find, in the instrument regulating the rights of the parties, some provision which indicates, unequivocally, a contrary intention. Here we have a bare reservation of petroleum or "all petroleum" with no express words conferring any right to win, work and carry away. There is a complete absence of any express arrangement under which appellants might possibly justify interference with the property rights of the respondent in his natural gas.

26 It is estimated that there are about three billion cubic feet of gas under this quarter section. The evidence for the appellants is that a large proportion, if not all, of this gas will be used up in the course of years in the production of the oil. I do not think there is anything either in the evidence or in law which would justify us in allowing this destruction of the respondent's property.

27 Imperial Oil Limited invokes the provisions of *The Land Titles Act*, RSA, 1942, ch. 205, and contends that it cannot be affected by the rule of interpretation laid down in the *Budhill* and *Glenboig* cases cited above. It is clear that when it entered into the lease, Ex. 6, full particulars of the title of the Canadian Pacific Railway Company were available to it, and the master agreement between these parties provides that Imperial Oil Limited can only acquire such interest as is possessed by the railway company. It is the appellant who takes the position that the word "petroleum," in comparatively recent times, has acquired a new usage. The respondent has never conceded that "petroleum" has or ever had a flexible or wavering meaning. He says it has always retained its original, popular and well-established meaning, without variation or change, and within the range of that meaning natural gas is not included. I do not think the respondent is precluded from maintaining this position by any provisions of *The Land Titles Act*.

28 Counsel also pointed out that under our *Evidence Act*, RSA, 1942, ch. 106, the number of witnesses entitled to give opinion evidence is limited to three on either side, and he argues that the respondent was allowed to call and examine more than three opinion witnesses.

29 During the whole course of the trial, the position which the respondent took was made quite clear. He asserted that the issue involved was one of fact -- that is to say, what did the word "petroleum" mean in the common speech of mining men, commercial men and landowners? He was entitled to call any number of witnesses to establish the sense in which the word was, in fact, used by the classes of persons referred to. It seems to me that the evidence of Droppo, O'Connor and Garrett was directed to this issue alone, and was not opinion evidence within sec. 10 of our *Evidence Act*. Dr. Fisher in her evidence merely produced a collection of authorities which might be conveniently referred to by the court. In my view, the evidence of the witness Harvey was not opinion

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evidence, but it is unnecessary to pursue the point so far as his evidence and that of the remaining witnesses is concerned.

30 The appeal should be dismissed with costs.

Parlee, J.A.:

31 The plaintiff is the registered owner of the north-east quarter of sec. 19, tp. 50, rge. 26, west of the 4th meridian, Alberta, containing 159 acres, more or less, "reserving unto the Canadian Pacific Railway Company all coal, petroleum and valuable stone."

32 The question for decision is the meaning and effect that should be given to the reservation of *petroleum*.

33 Shortly, the plaintiff claims that petroleum is a liquid as it exists in the earth and does not include gaseous hydrocarbons. The defendants, on the contrary, contend that petroleum embraces not only crude oil but includes all hydrocarbons whether liquid, solid or gaseous.

34 The plaintiff relies on the usage of the word petroleum and the defendants say that petroleum should be given its scientific meaning and is a generic and technical word. The above will serve as an introduction to the problems to be solved.

35 The learned chief justice of the trial division who presided at the trial found, and I will quote his words:

My conclusion is and I find as a fact that there is a valid reservation of petroleum, i.e., mineral oil, within, upon or under the said lands, but there is no reservation of natural gas, whether dry, or wet, or held in solution with the mineral oil, and the same is the property of the plaintiff.

The defendants have no right to possess and enjoy the petroleum at the expense of the plaintiff and by using, without the plaintiff's agreement, the plaintiff's natural gas.

36 His reasons are reported (1951) 2 W.W.R. (NS) 145.

37 The plaintiff was declared to be the owner of the natural gas within, upon or under the said lands and the interlocutory injunction granted by the chief justice on March 1, 1950, which enjoined the defendants from "using, removing, wasting, interfering with, producing or otherwise disposing in any manner whatever of the natural gas or any part thereof within, upon or under" the said land, was made permanent. The defendants' counterclaims were dismissed.

38 These particular questions thus arise:

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

40 (2) What right, if any, have the defendants to produce the oil if, in the process of extracting the petroleum reserved, they thereby use, waste or interfere with the natural gas?

41 It may well be stated now that if the plaintiff's contention should prevail that all natural gas whether wet, dry or in solution, is the property of the plaintiff, then the gas in solution and the gas in the gas-cap over the petroleum will be interfered with and used and some of it wasted in the process of extracting the oil.

42 Then there is a third question urged by the defendants: That there should be a new trial as the plaintiff called and examined as witnesses more than three persons who gave opinion evidence, contrary to sec. 10 of *The Alberta*

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Evidence Act, RSA, 1942, ch. 106.

43 Simon Borys, father of the plaintiff, purchased the quarter from the railway company in 1906. He had come to Alberta from Austria in 1897 and settled in the Leduc district and took up a homestead on which he still lives and had acquired, by assignment, an agreement for the purchase of a C.P.R. quarter, and in 1901 purchased another quarter directly from the C.P.R., which apparently only reserved to the railway company the coal and valuable stone. He bought this last-mentioned quarter from the railway's agent at Leduc, for a farm, and the agent told him that he had ten years within which to pay for the land and that the railway company was keeping the coal and some kind of stone. As Simon could not read or speak English any conversation with the agent was done by an interpreter. Simon purchased the quarter with which this action is concerned from the railway company in 1906. It was explained to him, also through the same interpreter, that there was a difference between this quarter and the one he had previously purchased as the company was keeping the petroleum in addition to the coal and oil. There being no word in the Ukrainian language for petroleum, it is likely the Ukrainian word "oliva" was used, meaning oil.

44 By the land contract Simon was to make certain agricultural improvements and pay \$1,280 and, upon this being done, to receive from the railway company a transfer of the land reserving unto the company all coal, petroleum and valuable stone.

45 He received a transfer with the above reservation in 1918 which transfer was registered in 1920. He subsequently transferred the quarter to his wife who died and her executors transferred the quarter to the plaintiff who was registered as owner on December 18, 1947.

46 In 1947, the Imperial Company brought in a producing well in the Leduc area and the reservation in the quarter in question became of importance.

47 The area within which the land here is situate is known as the Leduc-Woobdbend oil field and is a producing field. Many producing oil wells have been drilled by the Imperial Company and other oil companies.

48 Mr. Gustafson, the engineer in charge of all engineering in connection with Imperial Company drilling and development and production in the field, testified with respect to the development of the field to March, 1950. He produced charts showing the results of the development to that date and also the geological formations, that is, the rock strata, encountered at various depths.

49 There are two main producing horizons -- the first being Nisku (D-2) and the second Leduc (D-3), the latter being the more prolific of the two. Above the Nisku (D-2) horizon oil and gas may also be encountered.

50 The field has been tested and it may be concluded with certainty that on the plaintiff's land oil in paying quantities will be found in the Nisku (D-2) formation. The oil in this horizon will have gas in solution but without any gas-cap. Then, lower down, in the Leduc (D-3) formation will be found the more prolific horizon with gas in solution and with a gas-cap. A gas-cap is described as free natural gas, in contact with, resting on, or floating on, the oil beneath. It should be added that the oil and the gas, whether free or in solution, is while in the earth under great pressure.

51 The agreement with Simon Borys was merged in the transfer to him in 1918; still the agreement is admissible in evidence to show what the parties meant by the reservation. See the reasons of Frank Ford, J. (now J.A.) in *Knight Sugar Co. Ltd. v. Alta. Ry. & Irrigation Co.*, [1935] 3 W.W.R. 86, at 90 *et seq.* (affirmed [1936] 1 W.W.R. 416, and [1938] 1 W.W.R. 234). This agreement is not helpful.

52 There is a sharp contention between the parties as to the meaning to be ascribed to the reservation.

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53 Such being the situation we must ascertain the knowledge of the parties at the time of the original agreement and all the surrounding circumstances to determine, as best we may, what the parties to the agreement intended by the reservation. Scientific knowledge of petroleum Simon Borys evidently did not have and there is no sufficient evidence that the railway company intended any meaning different than the one in common use.

54 Both before and after Alberta was created a province in 1905, and until 1930, the public lands, including the minerals, belonged to Canada and were administered by Canada in accordance with the provisions of *The Dominion Lands Act*. Prior to 1906 various regulations were passed by order-in-council applicable to different minerals with particular reference to petroleum but until 1906 without any reference to natural gas. From 1906 onwards the regulations refer to petroleum and natural gas as if they were separate and distinct substances. For example, P.C. Order No. 2287 of December 26, 1906 (included in Ex. 26) provides that the regulations "for the reservation and sale of petroleum lands shall apply also to the reservation and sale of lands for natural gas purposes." From that date onward both petroleum and natural gas are referred to in relevant regulations.

55 Similarly, provincial statutes dealing with petroleum and associated hydrocarbons appear to treat petroleum and natural gas as different substances. Reference will be made, later, to *The Oil and Gas Resources Conservation Act, 1950*, ch. 46 (Alta.), where the distinction is clearly made.

56 The appellants' witnesses are no doubt eminent scientists. Their definition of petroleum, as a word which includes all associated hydrocarbons whether gaseous, liquid or solid, is a definition for use by scientists, and is not the meaning commonly given to it in this country.

57 The trial judge found that petroleum and natural gas were, by common usage, two different substances, and that conclusion ought not to be disturbed. I am, however, with respect, unable to agree with him that the reservation "petroleum" did not include gas in solution in the liquid as it exists in the earth. What was reserved to the railway company was petroleum in the earth and not a substance when it reached the surface. It is true that, by change of pressure and temperature, gas is released from solution when the liquid is brought to the surface but such a change ought not to affect the original ownership.

58 In other words, petroleum includes oil and any other hydrocarbons and natural gas existing in its natural condition in strata.

59 In my opinion, all the petroleum reserved, including all hydrocarbons in solution or contained in the liquid in the ground, is the property of the defendants who are entitled to do as they like with it, subject, of course, to the observance of all relevant statutory provisions and regulations.

60 All gas not included in the reservation of petroleum as indicated is the property of the plaintiff. These conclusions, however, do not dispose of the action. The defendants naturally wish to extract the petroleum from the earth and this cannot be done without interference with the plaintiff's gas and some of it would be wasted. To this interference and waste, the plaintiff objects.

61 To this objection the trial judge gave effect and enjoined the oil company from interfering with or wasting the plaintiff's gas. This aspect of the appeal will now be considered.

62 Before doing so, it is advisable to show why, in the extraction of petroleum from the earth, it is necessary to use and interfere with the gas above, and reference will also be made to the provincial legislation respecting the production of oil and gas.

63 The evidence shows that the petroleum in the reservoir is brought to the surface by the pressure or force of the gas in solution -- the downward pressure of the gas in the gas-cap which overlies the petroleum and the upward pressure of the water underlying the petroleum. It also shows that for the maximum production all three forces are

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necessary. The evidence is that these three different forces must be used in moderation and regulated and without undue force from any one of them. It should be added that the liquid is also brought to the bottom of the well stem by gravity, that is to say, the liquid will gravitate downwards from the upper portions of the reservoir as that in the lower part is withdrawn. This gravitation need not be considered further. It might well be stated that there is never a complete recovery of the liquid, some is always held by surface tension in the pores or openings in the rock constituting the oil-bearing formations, but, unless the forces of the various pressures are regulated, much more liquid is left in the reservoir and is lost.

64 The legislature of the province has enacted legislation for the maximum production and use of petroleum and gas and to prevent undue waste of both substances.

65 The present relevant legislation is *The Oil and Gas Resources Conservation Act, 1950, supra*. The object and application of the Act is stated in sec. 3:

3. The intent, purpose and object of this Act is, --

(a) to effect the conservation of the oil and gas resources of the Province; and

(b) to prevent the waste thereof; and

(c) to regulate the drilling, production and abandonment of wells and all other operations for the production of oil or gas; and

(d) to give each owner the opportunity of obtaining his just and equitable share of the production of any pool.

66 A board was constituted to effect the intent, purpose and object of the Act. This board with the approval of the Lieutenant-Governor in Council may make just and reasonable regulations as the board deems requisite. The Act and the regulations are clearly intended to see that every oil and gas well will be efficiently drilled and operated to carry out the object of the Act as set out in sec. 3, quoted above.

67 It being necessary to use and interfere with the gas in the extraction of the petroleum beneath, the question is: What are the principles of law applicable to the respective positions of the parties? No complaint is made with respect to the surface of the land and the Imperial Oil Company has an order given under *The Right of Entry Arbitration Act, 1947, ch. 24*, to enter upon and use such portion of the land as might be required for its purposes.

68 In support of his conclusion enjoining the defendants from interfering with the plaintiff's gas estate, the chief justice cited and relied upon *Fuller v. Garneau (Alta.)* [1920] 1 W.W.R. 154; on appeal [1920] 1 W.W.R. 619; and on appeal to the Supreme Court of Canada, [1921] 1 W.W.R. 857, 61 S.C.R. 450; and *Hext v. Gill* (1872) LR 7 Ch 699, 41 LJ Ch 761.

69 The former case is from the courts of this province. The question there was as between the effect in the patent from the crown of the reservation "reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under said lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof and to such extent as may be necessary for the effectual working of the said minerals" and a mere reservation of the mines and minerals without any provision to win, work and obtain the same as contained in the agreement for purchase by the plaintiff. The case was taken to the courts on the pleadings. Both the trial judge and the appellate division were of the opinion that both reservations were of equal import. The majority of the judges of the Supreme Court of Canada were of a different opinion. Duff, J. (later C.J. of Canada) said at p. 861:

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... I have come to a definite conclusion that the reservation of the right to work in terms of the patent confers wider rights than an exception in the more limited form. It is established doctrine that the right to work in such a way as to let down the surface does not arise under an exception of 'mines and minerals' unless there is something in the terms of the deed which expressly or by necessary implication gives such a right.

70 And on p. 863, Anglin, J. (later C.J. of Canada) said:

The implication in the mere reservation of them [mines and minerals] in a grant of land of the right to win, get and take away the minerals is recognized by a long series of authorities. The powers which this implied right gives are well stated by Kekewich, J. in *Marshall v. Borrowdale Plumbago Mines & Mfg. Co.* (1892) 8 T.L.R. 275. They may be formulated in terms not dissimilar to those above extracted from the Crown grant.

71 And:

But that the right so implied is always subject to the condition that its exercise shall not prejudice the surface owner's natural right to support is conclusively established by many authorities in English courts
....

72 To the like effect are the conclusions of Mignault, J. It will be observed that these judgments refer only to a subsidence of the surface. I am not overlooking the headnote [in (1909) 1 Ch] quoted at p. 866 by Mignault, J. to *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37, 78 LJ Ch 63, "that the owner of the surface or of the higher seam intends to reserve his common law right of support."

73 A case is only an authority for what is necessary for the decision and no more. *Fuller v. Garneau* decides only what has been first quoted from the observations of Duff, J. The authorities referred to only serve to illustrate that a mere reservation of a mineral does not give the mine operator permission to cause a subsidence of the surface.

74 In *Hext v. Gill*, *supra*, the decision there was and I quote from the headnote, pp. 669-70:

The surface-owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface.

75 I am not in agreement with the trial judge when he says at p. 163 of his reasons:

In my opinion destruction of the plaintiff's estate in the natural gas may be likened to the destruction of the surface estate referred to in the foregoing authorities.

76 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.

77 The remarks of White, J. (later Chief Justice of U.S.) in *Ohio Oil Co. v. Indiana* (1900) 177 US 190, at 200, 44 Law Ed 729, are pertinent. Justice White points out that oil and gas are commingled and contained in a natural reservoir and are capable of flowing from place to place and are susceptible of being drawn off by wells from other points provided they penetrate into the reservoir. The effect of his judgment is this, that gas and oil are substances of a peculiar character and decisions in cases of mining for coal and other minerals cannot be applied to them without qualification and that water and oil and still more strongly gas may be classed by themselves.

78 In *Acton v. Blundell* (1843) 12 M & W 324, 152 ER 1223, where Tindal, C.J. held that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain

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an action against a landowner who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner and lays his well dry. The chief justice held that the law governing running streams on the surface did not apply to springs or water beneath the surface of the earth. He said at p. 1234:

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

79 In *Humphries v. Brogden* (1850) 12 Q.B. 739, 116 ER 1048, an action against the operators of a mine the working of which let down the surface of the land above, and the defendant operator sought to apply the reasoning of Tindal, C.J. in *Acton v. Blundell*, *supra*, Campbell, C.J. in refusing to apply the principles governing the effect of mining operations to running water said at 1053:

But the right to running water and the right to have land supported are so totally distinct, and depend on such different principles, that there can be no occasion to shew at greater length how the decision is inapplicable.

80 Counsel for the plaintiff, respondent, cited and relied upon *Whitehead v. Parks* (1858) 2 H & N 870, 157 ER 358. Lord Derby had granted to the plaintiff's assignor several parcels of land and it was found as a fact that he had granted specifically all streams and springs of water in or under four of these parcels, reserving however to himself the mines and minerals under all of the demised land. Subsequently to the above demise, Lord Derby leased to the defendant certain mines under the land. It was found that the mining operations either caused the water from the streams or springs to disappear or to be so impregnated with iron as to be unfit for use in the plaintiff's bleaching business. The court was unanimously of the opinion that the plaintiff must succeed as Lord Derby, having made a demise of these streams or springs, could not derogate from his own grant. It was under these facts and circumstances that Martin, B. made the observation in his reasons, "It is not material to inquire whether Lord Derby and his lessees may not be able to get the coal under the land," which was referred to by counsel for respondent. It should be observed, however, that Lord Derby had specifically and *eo nomine* granted the springs and streams of water and could not therefore later derogate from his own grant. This was the view of the Privy Council in its consideration of the case in *Ballacorkish Mining Co. v. Harrison* (1873) LR 5 PC 49, 43 LJPC 19.

81 Before discussing this authority it might not be amiss, no doubt unnecessarily, to observe that at the time of the sale by the railway company to Simon Borys, and at the time of the transfer to him by the company, neither party could have had knowledge of the existence of petroleum or of natural gas on the land or within its vicinity, and the court may assume that neither party was aware of what effect the drilling for petroleum would have on any natural gas encountered.

82 In *Ballacorkish Mining Co. v. Harrison*, *supra*, the headnote [in LR 5 PC] in part reads:

The holder of a mining lease from the Crown is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land.

83 The reasons of the Board were given by Lord Penzance. The defendants admitted their liability for any damage to the surface. It followed that, p. 60:

The question, therefore, is narrowed to the point whether, upon the general principles of law applicable to their respective positions, or upon the custom of the island, the appellants are responsible for the damage

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done to the springs.

84 The legal rights of the parties were considered independent of any custom. His Lordship points out that *Acton v. Blundell*, *supra*, is conclusive authority for the proposition that the disturbance or removal of the soil of a man's land which results in the drying up of his neighbour's spring or well or interferes with the water percolating away so that it ceases to flow along channels as it formerly did or, having found its way to the spring or well, ceased to be retained there, do not constitute an invasion of a legal right and will not sustain an action. He held that the principles applicable to laterally adjacent properties (as was the case in *Acton v. Blundell*) are equally applicable to vertically adjacent properties. At p. 62 the legal effect of the reservation is defined:

The legal effect of such an exception is undoubted; it was commented on by Lord Hatherley in the case of *Proud v. Bates* (1865) 6 New Rep 92, 34 LJ (NS) Eq 406, at 411. 'There is no doubt,' he says, 'but that the mines are altogether out of the demise; and never having been demised or parted with at all, the defendants are at liberty to use them as they think fit.' ...

If, then, the lord is thus possessed of the mines as of his own original title in the soil, he has all the rights incidental to that ownership, and among others he has the right to the use of all waters found thereon and percolating by natural process into the mines when opened. He may apply such waters too in any way he pleases, or he may simply remove them and cast them away.

85 As his Lordship points out at 63:

To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless.

86 Reference was also made to *Whitehead v. Parks*, *supra*, relied upon by counsel for the plaintiff, but as Lord Penzance points out:

... in that case there was a lease and a distinct grant of the injured springs *eo nomine*, and the injury was the act of one who claimed under the lessor, so that the question resolved itself into the meaning and construction of the words used in the lease, and did not depend on the rights to be assigned by the law to persons standing in certain relations of title to one another

87 Returning to *Fuller v. Garneau*, *supra*, where at 863 Anglin, J. cites with approval the remarks of Kekewich, J. in *Marshall v. Borrowdale Plumbago Mines & Mfg. Co.* (1892) 8 T.L.R. 275, respecting the implied rights of the grantor in a mere reservation of mines and minerals: It is stated by Kekewich, J.:

A grant of minerals ... necessarily implies a right to dig and carry away; and so the Crown grant, which does not express this privilege, is equivalent to the later deeds which do. What else is implied in such a grant according to the authorities and the ancient maxim on which they are all founded? Something; nay, it may be said, much more. Claiming under such a grant you are at liberty to use all reasonable means for realizing that which has been granted to you ... Further you are at liberty to do whatever is reasonably necessary for the use of these means, even though it involves temporary disturbance of the surface. Destruction or permanent disturbance of the surface is unreasonable

88 The mere reservation of mines and minerals implies the right to get them. So said Lord Wensleydale in *Rowbotham v. Wilson* (1860) 8 HL Cas 348, 30 LJQB 49, at 53, 11 ER 463. He states the law in these words:

As they [mines and minerals] were to be enjoyed, a power to get them was a necessary incident to such a grant. *Shep. Touch.* put that instance, declaring that by grant of mines was granted the power to dig them;

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and a similar presumption arose that the owner of the mines was not to injure the owner of the soil above if it could be avoided.

89 The language of Lord Wensleydale is somewhat different in the report of the case in 11 ER 463, at 468. To like effect are *Cardigan (Earl) v. Armitage* (1823) 2 B & C 197, 107 ER 356, and *Hamilton (Duke) v. Graham* (1871) LR 2 Sc App 166, at 171.

90 The plaintiff here says that notwithstanding the reservation the defendants must not interfere with his gas rights and thus the reservation becomes ineffective and useless and as Lord Penzance says in *Ballacorkish Mining Co. v. Harrison, supra*, and which has been quoted, "the owner of the surface would hold the owner of the mines at his mercy," which precisely is the result here if the plaintiff's contention should prevail.

91 From these authorities these conclusions follow, that the reservation of the petroleum in the grant of the land enables the appellants to use all reasonable means to extract the petroleum from the earth; that gas in the earth may be likened to subterranean waters and they are subject to like principles of law.

92 In my opinion, the defendants are entitled to extract all the petroleum from the earth, even if there is interference with and a wastage of the plaintiff's gas, so long as in the operations modern methods are adopted and reasonably used and the provisions of the relevant statute and regulations are observed which, of course, must be observed.

93 This conclusion is in accordance with the views expressed by Cozens-Hardy, M.R. at p. 46 and Farwell, J. at 53 in *Butterley Co. v. New Hucknall Colliery Co., supra*.

94 *Farquharson v. Barnard-Argue-Roth-Stearns Oil and Gas Co.*, 22 O.L.R. 319 (trial); 25 O.L.R. 93 (on appeal); and [1912] AC 864, 82 LJPC 30, was cited and relied upon by both parties and is referred to by the chief justice in his reasons. The reservation in that case is different from the reservation here; and it would not appear from the report of the case at the trial that gas was so essential to bring the oil to the surface as here nor was its use regulated by statute. The problem before the court in that case is not the same as the problem here. Further there was some amicable arrangement between the parties, where there was mixed oil and gas and each had a commercial value, to work the wells and adjust the returns. There is no such arrangement here.

95 The Chancellor does comment on some characteristics of gas and oil and at p. 337 says:

They resemble water in this, that they will, under pressure, rise and flow and spread, and may be drawn away from one well to another miles off.

96 In the Privy Council, Lord Atkinson, who gave reasons for the Board, does make an important observation; at p. 871 of the P.C. report, he says, and I will quote his words:

The company are clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. While the point does not arise in this appeal for decision, their Lordships think that the company would not be responsible for any inconvenience or loss which might be caused to the respondent or to the owners of the estate of the grantee in the conduct of their operations in the manner mentioned.

97 True, there is here no win, work or carry away clause, as in the *Barnard* case, *supra*, but from the authorities referred to and from the statement of Anglin, J. in *Fuller v. Garneau, supra*, Lord Atkinson's remarks would apply to the extraction of petroleum under a mere reservation as is the case here.

98 It is not necessary to consider whether the plaintiff called and examined more than three witnesses who gave

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opinion evidence. Even if such was the case I am of opinion that there was no substantial wrong or miscarriage of justice occasioned thereby.

99 The appeal should be allowed. The plaintiff will be entitled to judgment in the action and the defendants entitled to judgment on their counterclaims, as indicated in these reasons. The injunction should be vacated.

100 The appellants will have the costs of the appeal. As success is divided there will be no costs of the trial.

Clinton J. Ford, J.A. concurs with Parlee, J.A.:

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