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Sept. 29 & 30,
Oct. 1

Dec. 12

BETWEEN:

RICHARD L. REESE, CHARLES G. RENTON, JOHN LEWIS, WILLIAM J. HARPER, LUTHER A. LARSEN, Executor of the Will of Andrew Liddle, RODERICK LEWIS, PETER MacDONALD, LUTHER A. LARSEN, FLORENCE J. NICHOLAS, HARRY L. BAILEY, HELEN CHRISTINA BEATON, Executrix of the Will of Daniel Beaton, WILLIAM KERR and WILLIAM STOUTENBERG ..... SUPPLIANTS,

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—The Soldier Settlement Act, S. of C. 1919, c. 71 —Land purchased from Soldier Settlement Board—Action for declaration that suppliants entitled to transfer of mineral rights—No order-in-council authorizing transfer—Employee of Crown cannot bind Crown in absence of authority of order-in-council.

Suppliants purchased land from the Soldier Settlement Board and after payment for same received title to the land subject to a reservation of mines and minerals by the board. Title to such lands had been acquired by the board from the Bobtail Band of Indians and the land was known as the Bobtail Reserve. The order-in-council which ordered transfer of the land to the board made no reference to mineral rights being reserved. The letters patent conveying the land to the board contained no reservation other than that of water rights.

A news release issued by the Department of Veterans' Affairs stated that veterans under the Soldier Settlement Act of World War I who had completed or did complete their contracts would be granted mineral rights on their properties in all cases where the Soldier Settlement Board acquired those rights with title to the land.

Subsequent to this certain correspondence had between the suppliants and the solicitor for the board resulted in the suppliants filing with the solicitor completed application forms for the mineral rights and remitting to him a fee which he had stated was required. In no case did this result in mineral rights being conveyed and suppliants now ask a declaration of the Court that such mineral rights be conveyed to them.

Held: That since the board's solicitor had no authority to bind the Crown no contract to transfer mineral rights pertaining to the Bobtail lands resulted from his correspondence with any of the suppliants.

2. That regardless whether the mineral rights in question are vested in the board or some other agency of the Crown or whether any trust in favour of the Indians attaches there must be order-in-council authority for their transfer and since there is no order-in-council authorizing the grant of the mineral rights to any of the suppliants they are not entitled to the relief claimed in their petition of right.

PETITION OF RIGHT asking transfer of mineral rights in certain land to suppliants.

The action was heard before the Honourable Mr. Justice Ritchie at Edmonton.

G. H. Steer, Q.C., A. M. Brownlee and *G. C. A. Steer* for suppliants.

Frank J. Newson, Q.C. and *P. M. Troop* for respondent.

The facts and questions of law raised are stated in the reasons for judgment:

RITCHIE J. now (December 12, 1955) delivered the following judgment:

This action was commenced by a petition of right filed on March 23, 1953 by Richard L. Reese and the twelve other above-named suppliants, all of whom are resident in the province of Alberta.

The suppliants, with the exception of Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton, all served in Her Majesty's armed forces during the 1914-1918 World War I and are soldier settlers under the Soldier Settlement Act, originally enacted as chapter 21 of the Statutes of Canada, 1917.

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Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton are respectively the personal representatives of Alphonse Louis Nicholas, Ernest Stoutenberg and Daniel Beaton, all deceased, who also were Soldier Settlement Act settlers. Luther A. Larsen petitions in his own right and also as the personal representative of Andrew Liddle, who was one of the original petitioners but died before the trial.

For brevity, the suppliants, other than Florence J. Nicholas, William Stoutenberg and Helen Christina Beaton, will be referred to collectively as "the soldier settlers", which expression also shall include the deceased settlers Alphonse Louis Nicholas, Ernest Stoutenberg, Daniel Beaton and Andrew Liddle.

Each of the soldier settlers entered into an agreement of sale with the Soldier Settlement Board, hereinafter referred to as "the board", under which, on the terms therein set out, he agreed to purchase, and the board agreed to sell, lands described therein and situate in Alberta. In each instance the lands dealt with were formerly part of what is generally known as the Bobtail Indian Reserve.

The purpose of the action is to obtain for the suppliants title to the mineral rights pertaining to the lands which the soldier settlers have purchased or have agreed to purchase from the board.

Those of the suppliants who have completed payment of the purchase price stipulated by their respective agreements of sale, have had title to the lands transferred to them but, in each case, subject to a reservation of mines and minerals by the board. All such transfers of title other than that to William Kerr have been registered in the appropriate Land Titles Office.

The Soldier Settlement Act, 1917, assented to on August 29, 1917 and hereinafter referred to as "the 1917 Act", was enacted by chapter 21 of the Statutes of Canada, 1917. The 1917 Act provided for the appointment by the Governor-in-Council of a board consisting of three commissioners, to be called "The Soldier Settlement Board." The 1917 Act did not contemplate the board acquiring land for resale to settlers but did provide for the board making loans to settlers so as to enable them, *inter alia,* to acquire lands

for agricultural purposes and for any settler recommended by the board receiving a grant of free entry to not more than 160 acres of Dominion lands reserved for the purposes of the Act.

Section 37 of the regulations, made under the 1917 Act, stipulated that a grant of soldier entry should not convey a right to salt, coal, petroleum, natural gas, gold, silver, copper, iron or other minerals within or under the land covered by such entry.

On February 11, 1919, the Governor-in-Council adopted P.C. 299, which, after reciting that many applications had been made and many others would be made to the Soldier Settlement Board for land for soldier settlement and that Dominion-owned lands available and suitable and within reasonable distance of marketing facilities would not be sufficient to satisfy the applications, authorized the board, for so long as, pursuant to the War Measures Act, 1914, the order might lawfully endure, or until the Parliament of Canada should otherwise provide, to acquire lands suitable for the purposes of soldier settlement and to sell to settlers any lands so acquired.

At the 1919 session of Parliament there was enacted The Soldier Settlement Act, 1919 (Statutes of Canada, 1919, chapter 71), hereinafter referred to as "the 1919 Act" and to which assent was given on July 7, 1919. Provisions of the 1919 Act which are relevant to the matters herein at issue are contained in sections 4(1), 4(3), 10, 16(*a*), 16(*b*), 20, 57 and 64.

4. (1) For the purposes of acquiring, holding, conveying, and transferring, and of agreeing to convey, acquire or transfer any of the property which it is by this Act authorized to acquire, hold, convey, transfer, agree to convey or agree to transfer, but for such purposes only, the Board shall be and be deemed a body corporate, and as such the agent of the Crown in the right of the Dominion of Canada. Any and all property acquired by the Board shall, upon acquirement, vest in the Board as such body corporate; but these provisions shall not in any wise restrict, impair or affect the powers conferred upon the Board, generally, by this Act, nor subject it to the provisions of any enactment of the Dominion or of any province respecting corporations, nor require of it, in the keeping of its records, any segregation of its corporate from its non-corporate acts.

(3) All documents which require execution by the Board in its corporate capacity shall be deemed validly executed if the seal of the Board is affixed, and the name of one of the commissioners is signed, by such commissioner thereto, the whole in the presence of one other person who has subscribed his name as witness; and every document which purports to be impressed with the seal of the Board and to be sealed and signed in

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the presence of a witness by a commissioner on behalf of the Board shall be admissible in evidence in all courts in Canada without proof of such seal or of such sealing or signing.

10. The Board may acquire from His Majesty by purchase, upon terms not inconsistent with those of the release or surrender, any Indian lands which, under the *Indian Act,* have been validly released or surrendered.

16. The Board may sell, or dispose of, and, upon full payment made, may convey, to settlers, any lands granted, conveyed or transferred to or acquired by it, or which it may have power to sell or dispose of, but subject in every case of sale of lands acquired by purchase, whether by agreement or compulsorily, to the following provisions:—

(*a*) Where the parcel to be sold has been separately acquired the sale price shall be the cost of the parcel to the Board;

(*b*) Where the parcel to be sold has been acquired as portion of one or more other parcels the sale price shall be such amount as in the opinion of the Board, bears the same proportion of the cost of the entire parcel or parcels so acquired as the value of the parcel to be sold bears to the value of the parcel or parcels so acquired;

20. Subject to the provisions of section fifteen of this Act as to soldier grants of Dominion lands, the Board shall deal with and dispose of all Dominion lands, Indian lands or school lands granted or otherwise conveyed or transferred to it pursuant to sections six, ten and eleven of this Act as nearly as may be as if such lands were private lands acquired by it by way of purchase, but the sale price of such lands shall be such as is approved by the Governor in Council.

57. From all sales and grants of land made by the Board all mines and minerals shall be and shall be deemed to have been reserved, whether or not the instrument of sale or grant so specifies, and as respects any contract or agreement made by it with respect to land it shall not be deemed to have thereby impliedly covenanted or agreed to grant, sell or convey any mines or minerals whatever.

64. (1) *The Soldier Settlement Act, 1917,* is repealed, but notwithstanding, all officers and employees of the Board are continued in office and employment as if such repeal had not been had, all entries granted and loans made pursuant thereto shall, unless otherwise determined by the Board, remain subject to the terms and conditions on which such entries or loans were granted or made, and the Loan Regulations and Regulations affecting Dominion Lands made and approved under the said Act, shall, respectively, remain operative until lawfully repealed or amended.

(2) All matters instituted or things done under authority of,—

(*a*) *The Soldier Settlement Act, 1917;* or,

(*b*) any regulations made thereunder; or,

(*c*) any order of the Governor in Council;

which might have been instituted or done under authority of this Act (though instituted or done before this Act was passed), shall, at the option of the Board, be deemed to have been instituted or done under authority of this Act, and any thereof which are now pending or in progress shall, at the option of the Board, be deemed to have originated under this Act and may be continued, completed and enforced hereunder.

While the 1919 Act, as carried into chapter 188 of the Revised Statutes of Canada, 1927, does not contain the section 64 wording above referred to, Appendix 1 to the 1927 revision, states at page 34, Volume 5, that section 64 of the 1919 Act had neither been repealed nor consolidated.

The Soldier Settlement Act is not contained in the Revised Statutes of Canada, 1952 but is shown in Appendix 1, at page 14 of Volume 6, as not repealed and not consolidated.

Because the lands which the soldier settlers agreed to purchase and which are involved in this section all are situate in the province of Alberta and all formerly formed part of an Indian reserve generally known as, and hereinafter referred to as, the Bobtail Reserve, reference is necessary to the procedure by which the board acquired title to such lands.

Under date of June 12, 1909, the Chief and Principal Men of the Bobtail Band of Indians, acting for and on behalf of the whole people of the Band in Council assembled, surrendered and conveyed the 31.5 square miles comprising the Bobtail Reserve to His Majesty the King,

in trust to dispose of the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people and upon the following conditions, viz:—

That ten square miles approximately shall be allotted to the Montana Band as a Reserve for the Band immediately South of the Battle River in the Eastern portion of the Reserve.

That the portion of the Reserve north of the Battle River contained in Township 44 in Range 24 and Township 43 in Range 24, West of the 4th Meridian, shall be joined to Samson's Reserve hereafter to form part of the said Reserve.

That the remainder of the Reserve shall be sold.

AND upon the further condition that all moneys received from the sale thereof shall be administered as follows:—

1. The usual percentage shall be deducted for management.

2. Twelve and a half per cent of the estimated value at Eight Dollars per acre shall be distributed share and share alike to ourselves and the members of the following Bands of Indians associated with us in the Hobbema Indian Agency, viz:—Samson's, Ermineskin's, Muddy Bull's, and Montana's, no member of the four last mentioned Bands to receive more than Twelve Dollars, and the sum remaining after such per capita division to be divided equally between us the members of Bobtail's Band.

3. The balance shall be placed to the credit of Samson's and Ermineskin's Bands' trust funds pro rata of our membership in the said Bands upon condition that we are received into full membership with the said Bands to share equally with them in their lands and moneys.

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4. That the interest on that part of the capital of Ermineskin's and Samson's Bands accruing from the sale of the said Reserve shall be paid in cash.

On July 29, 1909 by order-in-council P.C. 1674, the surrender of the Bobtail Reserve was accepted by the Governor-in-Council and authority given for the lands to be disposed of by the Superintendent General of Indian Affairs in the best interests of the Indians concerned, without reference to the Land Regulations of the Department of Indian Affairs, as established by order-in-council of September 15, 1888.

On October 22, 1919, three months after the 1919 Act had been assented to, the Governor-in-Council adopted order-in-council P.C. 2168, which

(*a*) recites the Soldier Settlement Board has made application to the Department of Indian Affairs for the 6619.50 acres of the Bobtail Indian Reservation which had been surrendered for purposes of sale on June 12, 1909 and the surrender of which had been accepted by the Governor-in-Council on July 29, 1909;

(*b*) recites the Superintendent General of Indian Affairs had reported agreement on a valuation of $79,862 for the 6619.50 acres had been determined by the Department and the board and that the provisions of the Indian Act and of the Soldier Settlement Board had been complied with; and

(*c*) orders that the 6619.50 acres of the Bobtail Reserve be transferred to the board.

P.C. 2168 makes no reference to mineral rights being reserved.

Considerable time elapsed before implementation of the P.C. 2168 direction to transfer the Bobtail lands to the board. By letters patent dated and with effect as of December 8, 1920 (Exhibit 5) and bearing the Great Seal of Canada, His Majesty in consideration of $79,862 paid by the board conveyed to it part of the Bobtail Reserve. Registration of the letters patent was not effected until nineteen months after the date as of which they were executed. The letters patent bear three notations, one stating they were received at the Land Titles Office in the city of Edmonton on July 3, 1922, a second stating they were received on July 7, 1923, and a third stating they were duly

entered and registered in the Land Titles Office for the North Alberta Land Registration District at ten o'clock A.M. on July 7, 1923.

The habendum clause contained in the letters is:

> TO HAVE AND TO HOLD for the purposes of the Soldier Settlement Act, 1919, the said lands hereby granted, conveyed and assured, unto the said the Soldier Settlement Board of Canada, it Successors and Assigns, forever, Saving, excepting and reserving, nevertheless, unto Us, Our Successors and Assigns, the free use, passage and enjoyment, of, in, over and upon all navigable waters that shall or may hereafter be found on or under, or be flowing through or upon, the said land hereby conveyed.

The letters patent contain no exception or reservation other than that of the water rights.

The exhibits indicate that at some departmental level, through a misapprehension, the words "and for no other purpose" have been read into the habendum of the letters patent.

Exhibit 51, a letter from the Minister of Veterans' Affairs to the suppliant Peter MacDonald, suggests the inclusion in the letters patent of the words "for the purposes of the Soldier Settlement Act, 1919, and for no other purposes" have the same effect as the inclusion of a specific reservation of the mines and minerals in favour of the Crown in the Right of the Dominion.

Exhibit 64, a letter addressed by the Superintendent, Securities Section of the Department of Veterans' Affairs to the suppliant Charles Renton states, "The Patent issued in the name of the Soldier Settlement Board by the Department of Indian Affairs contained a clause reading 'for the purposes of the Soldier Settlement Act 1919 and for no other purposes'."

The procedure adopted by the board in carrying out the provisions of P.C. 299 and the 1919 Act in respect to selling to soldier settlers land to which it had acquired title was to have each applicant complete a printed form of application for a loan to enable him to purchase the land and then, following approval of the loan application, complete a printed form of agreement for sale of land under which the board would agree to sell the land to the soldier settler and the soldier settler would agree to purchase the land from

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the board at the price and on the terms set out in the agreement. This procedure was followed in the case of each of the thirteen soldier settlers involved herein.

Exhibits A to L inclusive are twelve loan applications made to the board "under the terms of the Soldier Settlement Act, 1917" by Luther A. Larsen Andrew Liddle, Alphonse Louis Nicholas, Harry L. Bailey, Ernest Stoutenberg, Peter MacDonald, Richard L. Reese, Charles Renton, William J. Harper, Roderick Lewis, Daniel Beaton and William Kerr. The applications state the loans are desired for the purpose, *inter alia,* of acquiring for agricultural purposes, lands forming part of the Bobtail Reserve.

All of the twelve above-mentioned loan applications, with the exception of those made by Nicholas, Reese and Roderick Lewis, are dated November 19, 1919, more than four months after the 1919 Act became effective. The Nicholas application is dated December 1, 1919. The Roderick Lewis application is not dated but bears a rubber stamp suggestive of it having been examined by an employee of the board on November 24, 1919. The Reese application, dated May 19, 1919, is the only one which preceded the 1919 Act. The application made by John Lewis was not filed as an exhibit.

A printed form of application for loan was completed by each of the twelve above-named applicants. The reference to the loan applications being made under the 1917 Act is contained in the printed part of the form and, except in the case of Reese, is, in my opinion, a clerical mistake occasioned by use being made of a form prepared in use prior to the 1917 Act being repealed.

After the loan application of each of the thirteen soldier settlers was approved the board entered into an agreement of sale with each of them providing for sale by the board and purchase by the soldier settler of land which formerly had formed part of the Bobtail Reserve. The Reese agreement of sale was not filed as an exhibit so it is not apparent to me whether it, as well as his application for loan, antedated the 1919 Act.

Counsel for the Crown conceded the agreements of sale entered into between the board and all of the soldier settlers

concerned herein, with the exception of Ernest Stoutenberg and John Lewis, contained a paragraph numbered 13 and reading as follows:

13. This agreement of sale is given and received under the provisions of the Order in Council of the 11th of February, 1919, P.C. 299, and all the provisions of the said Order in Council and the Soldier Settlement Act, 1917, and any amendments now made or which may hereafter be made thereto, and of any Soldier Settlement Act of Canada hereafter passed which can or may be applicable hereto, shall apply to and form a part hereof as if actually incorporated and embodied herein and the Board and the Purchaser shall be entitled to the benefits and privileges conferred and subject to the duties and liabilities imposed by the said Order in Council, the Act and amendments thereto, or by any subsequent Act supplanting or supplementing the said Act.

This paragraph for convenience shall sometimes be referred to hereinafter as "paragraph 13".

The agreements for sale executed by Ernest Stoutenberg on May 29, 1920 and by John Lewis on April 24, 1922 in lieu of the wording contained in paragraph 13 of the eleven other agreements have a paragraph numbered 14, reading:

14. This agreement of sale is given and received under the provisions of The Soldier Settlement Act, 1919, and any amendments now made or which may hereafter be made thereto, and of any Soldier Settlement Act of Canada hereafter passed and of any regulations made or which may be made under any Soldier Settlement Act of Canada which can or may be applicable hereto, shall apply to and form a part hereof as if actually incorporated and embodied herein and the Board and the Purchaser shall be entitled to the benefits and privileges conferred and subject to the duties and liabilities imposed by the said Act and amendments thereto, or by any subsequent Act supplanting or supplementing the said Act or by any regulations made under such Act.

As in the case of the forms used for the loan applications, it is my opinion inclusion of paragraph 13 in eleven of the agreements of sale was a clerical mistake occasioned by use being made of a form which had become obsolete.

In late December, 1948 or early January, 1949 the Department of Veterans' Affairs issued News Release No. 321, (Exhibit 43), which was carried in a number of Canadian newspapers. The news release was to the effect that the Honourable Milton F. Gregg, V.C., then Minister of Veterans' Affairs, and the Honourable J. A. MacKinnon, then Minister of Mines and Resources, had announced that veterans settled on the land, under the Soldier Settlement Act of World War I, who had completed or did complete their contracts would be granted mineral rights on their properties in all cases where the Soldier Settlement Board

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acquired those rights with title to the land. The news release stressed that a somewhat lengthy search of title would be involved before the matter of sub-surface rights could be finally determined.

Subsequent to the public announcement by the two Ministers of the Crown that mineral rights were to be conveyed to the soldier settlers, L. S. Cutler, the district solicitor for the board at Edmonton, addressed letters to the soldier settlers in that area who had paid out their loans and to whom transfers of title had been made.

Mr. Cutler's letters advised the soldier settlers that "a recent order-in-council" provided for them obtaining title to such mineral rights as were vested in the Directors of Soldier Settlement and advised that if the soldier settler wished to apply for such mineral rights an enclosed form of application should be completed and a fee of $25 remitted. In some of his letters Mr. Cutler indicated the addressee was entitled to the mineral rights.

Most of the suppliants completed the form of application for mineral rights with which Mr. Cutler furnished them and remitted the $25 fee. In no case, so far as the record herein shows, did the filing of the application form result in mineral rights being conveyed to any soldier settler who had purchased Bobtail lands.

In view of the stress which counsel for the suppliants placed on the correspondence conducted by Mr. Cutler with the soldier settlers or their representatives, I shall deal with it in more detail than is necessary to dispose of the petition.

On behalf of six of the suppliants, MacDonald, Larsen, Nicholas, Bailey, Stoutenberg and John Lewis, it was contended, with special emphasis, by counsel for the suppliants that there could be no doubt the correspondence with Mr. Cutler had resulted in the formation of contracts calling for conveyance of the mineral rights to them.

[The learned judge here refers to the correspondence and continues:]

Nine principal submissions were made on behalf of the suppliants:

1. That the letters patent (Exhibit 5), issued under date of December 8, 1920, conferred on the board title to the mineral rights pertaining to the lands surrendered

by the Bobtail Indians and that such title is absolute and not subject to any trust in favor of the Indians.

2. That there is nothing in the 1917 Act nor in the Order in Council P.C. 299, adopted on February 11, 1919, which precludes the board from purchasing mines and minerals nor from selling mines and minerals.

3. That the 1919 Act contemplates the board acquiring title to mines and minerals as otherwise there would be no reason for including wording such as contained in section 57, which states that from all sales and grants of land made by the board all mines and minerals shall be deemed to have been reserved.

4. That the agreements of sale entered into with eleven of the soldier settlers are expressed to be under the provisions of P.C. 299 and the 1917 Act which contain no provision calling for an exception or reservation of mines and minerals on a sale to a soldier settler so that, under the terms of their agreements of sale, the mineral rights should be transferred to those eleven settlers.

5. That the 1919 Act has no application to the eleven agreements of sale expressly stated to have been entered into pursuant to P.C. 299 and the 1917 Act.

6. That Mr. Cutler's letters to the soldier settlers were offers to convey mineral rights to them and that delivery of the completed application forms and the remittances of the $25 fee by the settlers were, in the cases of Larsen, MacDonald, John Lewis, Nicholas, Bailey and Stoutenberg, acceptances of the offers and so resulted in the creation of binding contracts.

7. That in respect to Ernest Stoutenberg and John Lewis, whose agreements of sale are expressly stated to be under the 1919 Act, the board, under section 16(*b*) of the 1919 Act has authority to convey, and should convey, the mineral rights to them.

8. That the suppliant Kerr, who refused to register his transfer, is entitled under the terms of the agreement of sale and the letter (Exhibit 86) which Mr. Cutler addressed to him on October 13, 1953, to have the mineral rights conveyed to him.

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9. That the references by Mr. Cutler in his letters to the soldier settlers to "a recent order-in- council" which provided that soldier settlers could obtain title to the mineral rights if vested in the Director of Soldier Settlement was proof of the existence of such an order-in-council.

The fact that eleven of the agreements of sale executed by the soldier settlers are expressed to have been given and received under P.C. 299 and that all of the provisions of P.C. 299 and the 1917 Act and any Soldier Settlement Act passed after the date of any such agreement does not preclude the application of the provisions of the 1919 Act to those agreements.

The authority of the board under P.C. 299 to acquire lands for the purpose of re-sale to soldier settlers endured only until such time as "the Parliament of Canada should otherwise provide." Parliament did, on the enactment of the 1919 Act, otherwise provide. The authority conferred on the board by P.C. 299 lapsed on the 1919 Act coming into effect.

Section 64 of the 1919 Act which repealed the 1917 Act did not give the board an option to elect to proceed under the 1917 Act notwithstanding the enactment of the 1919 Act. Section 64 did provide that matters which had been instituted or done by the board prior to the 1919 Act coming into effect, under either the 1917 Act or under any order-in-council could, at the option of the board, be deemed to have been instituted or done under the authority of the 1919 Act, if the 1919 Act contained authority for the instituting or doing of such matters. The board had the right to bring under the 1919 Act matters which had been instituted or done under the 1917 Act or under P.C. 299. After the 1919 Act was effective the board could not elect to do or institute any matter under the 1917 Act or under P.C. 299.

Use by the board in dealing with eleven of the soldier settlers, of an obsolete printed form of agreement of sale containing paragraph 13 did not revive the 1917 Act and P.C. 299.

The agreements of sale executed by all thirteeen soldier settlers are subject to section 57 of the 1919 Act. The board

cannot be deemed to have impliedly covenanted or agreed to grant, sell or convey mines or minerals to any of the suppliants.

I shall deal next with the submission that binding contracts for the transfer of mineral rights arose from the Cutler correspondence.

In *Mercereau* v. *Swim* (1) White J. said at page 523:

> I know of no mode, apart from special statutory authority, by which the Crown can convey land otherwise than by its grant under the Great Seal. By statute in this province, the Minister of Lands and Mines may grant license to cut timber, and may, in some other respects, deal with Crown land, but I know of no authority which would authorize either the Minister, or his Deputy, to alienate property of the Crown, as it is claimed has been done, by the writing of this letter.

The words of White J., though spoken in respect to lands held by the Crown in the right of a province, seem particularly applicable to the submission in respect to the Cutler correspondence.

Another case that has particular application to the Cutler correspondence and other happenings upon which the suppliants found their petition is that of *Fitzpatrick* v. *The King* (2), in which Mulock C.J.O., delivering the unanimous judgment of the court, said at page 340:

> Crown lands can be alienated only with the approval of the Lieutenant-Governor, usually signified by his signing his name to an instrument which later becomes the patent. The decision of the Minister in favour of the issuing of a patent to Crown lands is merely an intimation that he will recommend such issue, but it does not bind the Crown. If, in the meantime, it should appear to the Minister to be in the public interest to withhold his recommendation, it is his duty to do so: thus his decision is a qualified one.
>
> In the present case, after the Minister's decision, the Department realised that a valuable water-power was appurtenant to the lands in question, whereupon the Minister deemed it in the public interest to reserve the water-power.
>
> Whether the Crown was entitled to reserve it after admitting Dempsey and Ferguson as locatees is a question on which it is unnecessary here to express an opinion. All I am here determining is that the decision of the Minister in favour of the issue of the patents was not a final adjudication as to the rights of the applicants against the Crown.

Because Mr. Culter had no authority to bind the Crown no contract to transfer mineral rights pertaining to the Bobtail lands resulted from his correspondence with any of the soldier settlers. Opinions expressed by Mr. Cutler in

(1) 42 N.B.R. 497. (2) 59 O.L.R. 331.

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good faith may have misled the suppliants but did not bind the Crown nor the board, as an agent of the Crown. Mr. Cutler could recommend, not contract. Any assurance by Mr. Cutler was subject to review by higher authority.

The conveyance of the Bobtail lands to the board was expressed to be "for the purposes of the Soldier Settlement Act, 1919." The board, in dealing with the Bobtail lands must have regard to the 1919 Act.

That the vesting of mineral rights in the board was contemplated by Parliament can be inferred from the inclusion in it of section 57, which requires that from all sales and grants of land by the board mineral rights shall be deemed to be reserved whether or not the instrument of grant or sale so expressly specifies. Section 57, however, prohibits the board disposing of any mineral rights vested in it.

Because the 1919 Act makes no provision for transfer of mineral rights by the board any such rights acquired by it remain vested in the board as an agent of the Crown until such time as the Crown otherwise directs. My attention has not been directed to any provision in the law or any order-in-council governing the disposition of mines and minerals vested in the board.

If the minerals still are subject to a trust in favour of the Indians their disposal, under the judgment of the Supreme Court in *St. Ann's Island Shooting and Fishing Limited* v. *The King* (1), can be only as the Governor-in-Council directs.

The manner of disposing of mineral rights, whether vested in the board or other agency of the Crown and whether or not charged with a trust in favour of the Indians, is governed, in the absence of any other provision in the law, by the Public Lands Grants Act, R.S.C. 1952, chapter 224. Section 4(*a*) provides that in the case of public lands for which there is no other provision in the law, the Governor-in-Council may authorize their sale or other disposition.

Because I have reached the conclusion that, regardless of whether the mineral rights are vested in the board or some other agency of the Crown or whether any trust in favour of the Indians attaches, there must be order-in-council

(1) [1950] S.C.R. 211.

authority for their transfer and, notwithstanding that the Registrar of the North Alberta Land Registration District has issued certificates showing as vested in the board the mines and minerals to which the suppliants seek title, I will refrain from any finding as to whether the letters patent of December 20, 1920 vested in the board the mineral rights pertaining to the Bobtail lands or as to whether any trust in favour of the Indians still attaches to those mineral rights.

Mr. Cutler's statement in some of his letters that "a recent order in council provided that soldier settlers under the Soldier Settlement Act of Canada who had repaid their loans could obtain title to such mineral rights as were vested in the Director of Soldier Settlement" cannot be accepted as proof that such an order-in-council was adopted.

The question of proof of an order-in-council having been made was dealt with by the Privy Council in 1919 in *The King* v. *Vancouver Lumber Company* (1). An indenture varying its terms had been endorsed on a lease made pursuant to an amendment to The Dominion Lands Act enacted by chapter 26 of the Statutes of Canada, 1894 and providing that "The Governor in Council may authorize the sale or lease of any lands vested in Her Majesty which are not required for public purposes, and for the sale or lease of which there is no other provision in the law." An order-in-council was necessary to vary the terms of the original lease. Viscount Haldane, delivering the judgment of the Privy Council, said at page 8:

> An indenture containing the amended terms was endorsed on the old indenture. It was under seal like the original document, and it proceeded on the recital that it was deemed advisable to modify the original lease by removing the proviso giving power to determine it by notice in writing, and by adding a provision that "the said lease, at the expiration of the first term of 25 years, and from time to time at the end of each renewal term of 25 years, shall be renewed for a further term or terms of 25 years," at a rental for each renewal term to be determined in case of difference by arbitration.
>
> Sir Frederick Borden as Minister appears to have executed the indenture thus endorsed, and to have affixed to it his seal as Minister of Militia and Defence, and Col. Macdonald witnessed it.
>
> The question is whether there actually was made an Order in Council authorising these new terms which embodied very substantial concessions to the appellants. Their Lordships have quoted the statements of *Mr. Macdonell,* the legal adviser of the appellants, as to what he alleges

(1) (1919) 50 D.L.R. 6.

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to have been said by Sir Frederick Borden and the two officials who took part in the discussions on behalf of the Government of Canada. The deed was duly executed by Sir Frederick Borden. But that is obviously not sufficient in the absence of the Order in Council that was requisite. It is impossible to speculate as to what really happened. He may have executed the deed before any Order in Council had actually been obtained, anticipating wrongly that this would prove to be a mere formality. Was such an Order actually passed? *Mr. Macdonell* says that Sir Frederick Borden told him so, but his statement as to what Sir Frederick Borden and also the other two officials said is obviously not evidence, especially in the absence of proof that they could not be called as witnesses. Now no such proof was offered. So far as appears there is therefore no evidence that the Order in Council was ever made. No doubt there is the fact that the second indenture was duly executed. But although that would afford some ground for presuming that the Minister had authority, it is not conclusive.

However the matter does not rest here. For the Crown important evidence was called to shew that no Order-in-Council was ever made. The Clerk of the Privy Council of Canada, Rudolph Boudreau, was called. He swore that there was no record in the office of such an Order. He was not cross-examined on behalf of the appellants. Again the Secretary of the Department of Militia and Defence, Ernest F. Jarvis, was called for the Crown. He said that any modification of the original Order-in-Council would be based on a recommendation from the Department, and that there was no record of any such recommendation. Upon this point he was not cross-examined. Coupling the evidence so given with the fact that the appellants did not call as witnesses either Sir Frederick Borden or the two officials who are said to have taken part in the transaction, their Lordships are unable to come to any other conclusion than that the appellants have wholly failed to prove that the Order-in-Council in question ever existed. They regard this issue of fact, moreover, as one on which there is a concurrent finding by the two Courts below. There is no other point of substance in the case, and their Lordships only desire to add the observation that the question on which the appeal turns is of such a nature as to render the opinion arrived at by the Courts in Canada an opinion from which they would be reluctant to differ.

Michael W. Cunningham, who since July 1, 1948 has assisted the assistant clerk of the Privy Council in the preparation and recording and general custody of orders-in-council, testified he had searched the Privy Council records and found no order-in-council authorizing a grant of mineral rights to any of the suppliants.

I accept Mr. Cunningham's evidence as proof of the non-adoption of any order-in-council authorizing the grant of mineral rights to any of the suppliants. In the absence of such an order-in-council the suppliants cannot succeed.

There must be judgment that the suppliants are not entitled to any of the relief sought in their petition.

The respondent is entitled to the costs of the petition, to be taxed.

Judgment accordingly.