

CANADA / JUDGMENT

## Abbott v. Canada

2001 FCT 242

### COURT

Federal Court

### DECIDED

26 March 2001

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Abbott v. Canada

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Reported Decision

Decision Content

Federal Court Reports Abbott v. Canada (T.D.) [2001] 3 F.C. 342

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Docket: T-1168-96

Citation: 2001FCT242

BETWEEN:

ALLISON G. ABBOTT, MARGARET ABBOTT

and MARGARET ELIZABETH McINTOSH

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

CANADIAN PACIFIC HOTELS CORPORATION

Intervenor

REASONS FOR ORDER

MR. JOHN A. HARGRAVE,

## PROTHONOTARY

- [1] This action by representative Plaintiffs initially arose out of various leases granted to Riding Mountain National Park cottages owners. The Crown, to put the simplest face on the action, seeks to set aside as void various leases saying, in effect, that for some sixty years the Crown, mistakenly and improperly, granted leases with rights of renewal and thus, subject to the doctrine of severability, the leases are null and void.
- [2] The action took on a broader aspect with the intervention of Canadian Pacific Hotels Corporation ("CP Hotels"), who hold leases, some going back to the 1890s, with rights of renewal, at Lake Louise and in Banff National Park.
- [3] In the hope of avoiding an extensive trial, the Defendant seeks determination of two points of law:
1. Did the Defendant have legal authority to grant the Plaintiffs leases containing perpetual renewal clauses at the time such leases were granted?
  2. If the Crown had no legal authority to grant the Plaintiffs leases containing perpetual renewal clauses at the time such leases were granted, is there a basis at law as disclosed in the Amended Statement of Claim available to the Plaintiffs in relation to the perpetual renewal clauses as against the Defendant, based on the course of conduct of the parties in relation to the leases since their original granting?

The answer to these questions will also impact on the position of the Intervenor, CP Hotels, the holder of highly developed leased land at Banff and at Lake Louise. The determination begins with consideration as to precisely what legislation, acts, and regulations were in effect governing the lease granting powers of the Crown. However, before considering these questions, both of which I answer affirmatively, I will set out some of the background and touch upon some pertinent case law.

## BACKGROUND

[4] By way of background I will begin chronologically first referring to legislation affecting CP Hotels and then to legislation affecting both CP Hotels and the Plaintiffs. In 1892, 1893 and 1906, the Canadian Pacific Railway Company (The "CPR"), predecessor to the Intervenor, CP Hotels, entered into four leases of land. This land was part of an area which had been set aside as a "public park and pleasure ground", known as the Rocky Mountain Park of Canada, pursuant to the Rocky Mountain Park Act of Canada of 1887, 50-51 Victoria, c. 32. Regulations, pursuant to the Rocky Mountain Park Act of 1887 were adopted by Order in Council of 32 June 1890.[1]

[5] The Rocky Mountain Park Act of 1887, section 4, put the control and management of the park under the Minister of the Interior, with the Governor in Council to make regulations. Section 4(c) allowed the Minister of the Interior and the Governor in Council to make regulations for various purposes including, as set out in 4(c):

"The lease for any term of years of such parcels of land in the park as he deems advisable in the public interest, for the construction of buildings for the ordinary habitation and purposes of trade and industry, and for the accommodations of persons resorting to the park;"

[6] A 30 June 1890 Order in Council, being the regulations pursuant to the Rocky Mountains Park Act, provided, among other things, for leases not exceeding forty-two years, with the right of renewal, at rentals to be, from time to time, fixed by the Minister:

14. The Minister of the Interior shall have power to cause such portions of the Park as from time to time he may designate to be surveyed and laid out in building lots, for the construction thereon of buildings for ordinary habitation and purposes of trade and industry, and for the accommodations of persons resorting to the Park, and may issue leases for such lots for any term, not exceeding forty-two years, with the right of renewal, at rentals to be, from time to time, fixed by him; also to set apart such portions of the Park as he may think proper for the sites of market-places, jails, court houses, places of public worship, burying-grounds, benevolent institutions, squares and for other similar public purposes.

[7] The initial four leases entered into by the CPR, between 1892 and 1906, are referred to by the parties as group one leases. They were pursuant to the 30 June, 1890 Order in Council, which specifically provided for renewal of the leases.

[8] Group two consists of a 1 January 1911 lease granted to the Canadian Pacific Railway Company and is pertinent to the Lake Louise operation of CP Hotels. This lease was under the authority of the Dominion Forest Reserves and Parks Act of 1911, 1-2 Geo. V. c. 10. Earlier regulations of 1909, P.C. 1340, were re-established pursuant to an Order in Council of 6 June 1911, being the regulations under the Dominion Forest Reserves and Parks Act. Rather than set out this material, I will merely note that section 18(2) of the Dominion Forest Reserves and Parks Act and section 2 of Order in Council PC 1340 are essentially the same as set out in the Rocky Mountain Parks Act of 1887 and the related Order in Council of 30 June

1890. Thus, there was a right of renewal by regulation.

- [9] The third category consists of a lease of 2 April 1948, pursuant to the National Parks Act, S.C. 1930, c. 33, a lease that has been renewed and is still in force at the present time. A second lease in this group is that of 25 June 1952, when the National Parks Act of 1930 as amended, was in force. The National Parks Act of 1930[2] (the "Parks Act of 1930") allows the Governor in Council to make regulations for the granting of leases in town sites for the purpose of residence and trade. Order in Council PC 5045, of 8 December 1947, provides that leases may be issued by the Minister for any term not exceeding forty-two years. This lease relates to Banff and was initially in the name of Brewster Transport Company Ltd. as lessee.
- [10] There is a fourth category of CPR Lease, being one entered into 20 August 1956, to Canadian Pacific Railway Company, entered into while the National Parks Act, R.S.C. 1952 c. 189, as amended S.C. 1953 c. 6 was in force. The relevant Order in Council is PC 1954-1918, of 8 December 1954. The terms in the National Parks Act of 1952 are essentially those in the National Parks Act of 1930 and the Order in Council of 8 December 1947, PC 5045, with the 1952 Act and 1947 Regulations being slightly broader.
- [11] All of the leases in the foregoing four categories, which are presently held by CP Hotels, initially contained perpetual renewal provisions.
- [12] As to the leases referred to by the Plaintiff, leases in Riding Mountain National Park, all were granted between 1934 and 1959 each being for the forty-two years and each containing a perpetual renewal provision. The Plaintiffs submit that the first piece of legislation bearing on their claim is the Dominion Forest Reserves and Parks Act of 1911[3]. The applicable regulations under the 1911 Act are orders in council P.C. 2028 (8 August, 1913) amended by P.C. 1935 (20 April 1916), P.C. 675 (26 March 1918), P.C. 674 (29 March 1919), P.C. 1553 (11 August 1927) and P.C. 890 (29 May 1929). Also referred to, but irrelevant so far as the Plaintiffs are concerned, is P.C. 1340 of 21 June, 1909, being regulations passed under the Rocky Mountains Park Act. Finally, there is the Parks Act of 1930, section 9(1) of which continues all regulations made under the Dominion Forest Reserves and Parks Act, which would include P.C. 2028.
- [13] Section 7(1) of the Parks Act of 1930 provides that the Governor in Council may grant leases including those for the purpose of residence. Nothing in that Act prohibits the grant of a perpetually renewable lease.
- [14] P.C. 2028, referred to above and continued by the Parks Act of 1930, authorizes the Minister of the interior to lease summer resort lots and by section 64, subsection (c) of the Conditions governing leases, the Minister may grant leases of forty-two years duration, "...renewable in like periods at a rental to be fixed by the Minister". Subsequently, Order in Council P.C. 1452 of 23 June 1930, sought to harmonize the regulations in existence. P.C. 1452 rescinded or amended various Orders in Council, but does not refer to P.C. 2028 as either rescind or amended. Also important here is that P.C. 1452, enacted under the Rocky Mountain Parks Act and applicable only to Yoho Park, Glacier Park, Jasper Park and Elk Island Park, does not

diminish the authority of the Minister granted by Order in Council 2028, promulgated under the Dominion Forest Reserves and Parks Act of 1911. P.C. 2028, which may have been repealed at a date after the last lease in issue was granted, is one foundation of the position of both Plaintiffs and Intervenor: as pointed out by Driedger on the Construction of Statutes, 1994, Butterworths, Toronto, and leaving aside for the moment the concept of implied repeal, "a statute is not repealed, nor does it expire, through the passage of time or lack of use or by reason of obsolescence." (page 492) and that "In other words, the repeal of an enactment does not destroy any right, privilege, obligation or liability arising under the repealed enactment..." (Page 526), referring to section 43 of the Interpretation Act.

[15] A more recent piece of legislation is P.C. 5045 of 8 December 1947, under the Parks Act of 1930. Section 6(1) of those Regulations provides that "leases for lots in town sites and sub-divisions may be issued by the Minister for any term not exceeding forty-two years". That section goes on to provide that "all lease and licence forms shall be approved by the Deputy Minister of Justice".

[16] The next legislation referred to is P.C. 1918 of 8 December 1954, which revoked P.C. 5045. Section 3(1) of P.C. 1918 provides that:

Where the value of a lot in a town site or sub-division is less than five thousand dollars, a lease of such lot for any term not exceeding forty-two years may be issued ... by the Minister; ...

All lease and licence forms are to be approved by the Minister: section 3(3). P.C. 1100, of 1958, amended section 3(1) of P.C. 1918 to make it clear that the value of \$5,000.00 referred to land value only.

[17] Here I would again note that the leases at issue, from the point of view the Plaintiffs, were made between 1934 and 1959. The final lease to the Canadian Pacific Railway Company was granted in 1956. Thus it is not necessary to consider regulations enacted after 1959, for the Supreme Court of Canada, in *The Queen v. Walker*[4], made it clear that Regulations passed after a lease has been granted cannot retroactively modify or take away terms already created and embodied in such a lease: see page 667 of *Walker*, where Mr. Justice Martland adopted a passage from *In re: Athlumney*[5]:

Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

Mr. Justice Wright, in *Athlumney*, went on to add:

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. (*loc cit*)

In *The Queen v. Walker*, Mr. Justice Martland went on to note that the Parks Act of 1930 and applicable Regulations did not purport to take away and ought not to be construed so as to take away rights which respondent lessees of parks land already held. I will now turn to my analysis, beginning with an overview of the position taken by the Crown as to its ability to enter into the leases with both the Plaintiffs and the Intervenor, CP Hotels: the Defendant says that it did not have the ability to enter it into leases with perpetual renewal clauses after 1930.

## ANALYSIS

[18] The Crown submits that regulations in force before 1930 provided for renewal terms, yet subsequent legislation limited the ability of the Crown to offer renewal terms and the regulations from time to time in force made no provision for granting renewal terms. Here I would note that neither the legislation nor the regulations prohibit renewal terms, but rather, contrary to earlier legislation and regulations, renewal was not touched upon in the Parks Act of 1930. Counsel for the Crown submits that the Parks Act of 1930 should be looked upon as purposive, restrictive and mandatory, requiring that park lands be left unimpaired and not disposed of, thus drawing the conclusion that perpetual renewal rights in leases of lands in National Parks is offensive to and outside the statutory restrictions on those lands and has been since 1930. The Crown conceded, during argument, that many may be prejudiced if the renewal provisions are held improper, however, in the Crown's view, there is no cure for this, not even a course of conduct. The leases, in the Crown's view, are null, void and of no force or effect. As we shall see this goes too far.

## First Question of Law

[19] Turning specifically to the first question, it is whether the Defendant had the legal authority to grant leases to the Plaintiffs which contained perpetual renewal clauses at the time the leases were granted.

[20] The leases in Riding Mountain National Park, which area had been proclaimed a Dominion Park in 1930, were made at various times between 1934 and 1959. Thus, in the view of the Crown, it is the Parks Act of 1930 which applies. Counsel refers to several passages from the Parks Act of 1930:

4. The Parks are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to the provision of this Act and Regulations, and such Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

6.(1) Lands within the Parks shall not be disposed of or be located or settled upon, and no person shall use or occupy any part of such lands, except under the authority of this Act or Regulations made here under.

7.(1) The Governor in Council may, from time to time as he deems expedient, make Regulations for, -

- (g) the granting of leases for lots in town cites for the purpose of residence and trade; the granting of licences for lands outside town cites only for the entertainment of persons visiting the Parks; ...

The Parks Act of 1930 did not consider the renewal of leases.

- [21] Next, counsel for the Crown submits that Order in Council, P.C. 1452 of 23 June 1930, replaces section 2 of P.C. 1340 of 1909, which clearly granted a right of renewal. Order in Council P.C. 1452 merely gave the Minister of the Interior the right to "...issue leases for such lots for any term not exceeding forty-two years..." This clearly overlooks the initial effect of Order in Council P.C. 2028 of 8 August 1913 and the continuing effect that Regulation had, bearing in mind that it was certainly not rescinded by Order in Council P.C. 1452 in June of 1930.
- [22] Next, the Defendant sets out a passage from Order in Council P.C. 5045 of 8 December 1947, which revokes P.C. 1340 which had been re-established by Order in Council P.C. 1336 of 1911 and amended by P.C. 1452. The passage, section 6(1), allows the Minister to lease lots and town sites and sub-divisions for a terms not exceeding forty-two years. The Defendant points out the obvious, that the amendment does not impact, one way or another, on the Crown's ability to enter into leases. Interesting is that fact that P.C. 5045 specifically revoked a number of Orders in Council, some pre-dating and other post-dating P.C. 2028, but did not revoke P.C.. 2028, the provision which allowed the renewal of leases.
- [23] The Crown referred to an Act to amend the National Parks Act, S.C. 1950, c. 45, which amends the Parks Act of 1930. The amending Act defines public lands and provides, in section 6(1) that:

Public Lands within the Parks shall not be disposed of or located or settled upon, and no person shall use or occupy any part of such lands, except under the authority of this Act or Regulations made hereunder.

The amending Act goes on to provide for the grant of leases in parks, but again does not touch upon renewability. The Crown makes the point that these amendments had no impact on continuing restrictions on the Crown's ability to enter into leases: the other side of the coin is that the restrictions, whatever they were, may not have been as extensive as the Crown would like to believe.

[24] In due course, P.C. 5045 was revoked, P.C. 1918 of 8 December 1954, providing in part that the Minister, or an officer of the Department of Northern Affairs and National Resources, on behalf of the Minister, might grant a forty-two year lease in a town site or sub-division where the value of the lot was less than \$5,000.00. This provision was clarified by Order in Council 1100, of 7 August 1958, which makes it clear that the \$5,000.00 restriction on leasing refers to the value of a lot, exclusive of buildings and improvements.

[25] Finally, the legislation came full circle when, on 1 March 1962, the federal government enacted by Order in Council P.C. 268: P.C. 1918, as amended by P.C. 1100, was thereby further amended with various sub-sections of the National Parks general regulations being revoked and the Minister being allowed in certain circumstances, to grant an option to renew for a further 21 years:

1. Subsection (1) and (2) of section 3 of the National Park General Regulations are revoked and the following substituted therefor:

"3.(1) the Minister or an officer of the Department of Northern Affairs and National Resources authorized by the Minister may grant a lease for any term not exceeding forty-two years, with an option to renew for a further term not exceeding twenty-one years, of

- (a) a lot situate in a townsite for one or more of the purposes of residence, trade, schools, churches, hospitals or places of entertainment;
- (b) a lot situate in a subdivision other than a townsite for the purpose of residence during the period beginning on the first day of April and ending on the thirty-first day of October in each year; or

...

if the value of the lot or parcel of land, exclusive of buildings and other improvements, is less than five thousand dollars.

[26] The Crown submits that since 1962 there have been numerous regulations restricting the Crown's ability to lease lands and that none of these contained an express reference to a renewal period. However, I take it that none of these regulations, which were referred to in the abstract, specifically bars a renewal of a lease. The Crown makes the point that none of the post 1962 regulations cures what the Crown looks upon as an illegality in the granting of a perpetual renewal clauses.

[27] The Crown then continues with a submission that where legislation or regulation expressly or impliedly touches upon the Crown's power to contract, all of the statutory conditions must be observed, the power to contract being no broader than contemplated by the Statute: in effect, to paraphrase the Crown's position, a mere reference to leasing does not give authority to grant a renewal of a lease. The Crown refers to various authorities for this proposition. The first in time is *Montreal Trust Co. v. Canadian National Railway*[6], a decision of the Privy Council. That case involved a specific statutory prohibition rendering a

contract with the Crown void and of no effect. Important here is the fact of the explicit prohibition: in the present instance there is no specific statutory prohibition against granting a renewal of a lease.

- [28] The Crown also refers to *J.E. Verreault and Fils Ltée v. Attorney General of Quebec*[7]. There the legislation at issue was not restrictive, but rather it was an enabling statute. There being no prohibition providing that the Deputy Minister might not sign a contract on behalf of the Minister, the contract fell within the general principles of contract and was valid. If anything the case favours the present Plaintiffs, for none of the legislation referred to by the Defendant Crown in argument or in written material prohibits the granting of an extension to leases. But, important here, is that in *Verreault* the Supreme Court of Canada meant to depart from the conventional legal wisdom when it held that by general rules of mandate, including those of apparent mandate, a Minister had authority to bind the Crown in contract unless restricted by statute. The next case which touches this proposition is *The Queen v. CAE Industries Ltd.*[8]
- [29] In *CAE Industries* the Crown was held bound by a contract entered into by three Ministers who had either actual or ostensible authority to bind the Crown. Certainly in *CAE Industries* Mr. Justice Stone, writing for the majority, referred to a number of decisions supporting the proposition that where a statute regulates the power to make a contract, a contract does not come into existence unless the requirements of the statute are met. Yet the case was decided on the basis that there was no statutory restriction and thus the contract, which the Crown sought to set aside, was valid because the contract fell within the general responsibility of the Ministers in questions. Again, this case does not help the Crown in the present instance, for there is no express restriction on the ability, in signing a lease, to grant a right of renewal.
- [30] The final case which I will touch upon, also referred to by counsel for the Crown, is *The Queen v. Walker*[9], the issue being rights of renewal under leases of land in Jasper National Park. There the Crown took the position that since authority did not exist, by statute at the time of the renewal of the leases, the leases were void. Mr. Justice Martland, writing for the majority, noted that absence of any clear statutory authority by which to evade an obligation under the leasing contract. The Crown had apparently argued that while the initial leases were entered into at a time when renewals were the norm, it was not bound to renew when there was not specific authority to grant a renewal when the renewal was sought. Mr. Justice Martland, in writing for the majority, summed the matter up as follows:

...the appellant's submission in reality is that if the Crown enters an agreement, executed on its behalf by an agent, to do something in the future, the Crown ceases to be obligated to perform its covenant if, at the time of performance, the agent then lacks authority to do that which had been promised. In my opinion, such a contention cannot be sustained. The Crown, just as much as individuals, is obligated to perform its contracts, such obligation may be discharged by appropriate Statutory provisions, but in the absence of clear statutory authority, it cannot evade that obligation. The obligation is not to be avoided merely because the power of the Minister to

make new leases is less broad than it was when the original lease was made. (Page 665)

This, as we shall see, certainly assists the Plaintiffs and the Intervenor. However, Mr. Justice Martland, in Walker, also comments further:

In the present case there is no statutory prohibition which prevents the appellant from performing its obligation. The situation is only that, as to the granting of new leases, the powers of the Minister had been defined in terms less broad than before. (Page 666).

Indeed, Walker favours the Plaintiffs in that the majority felt that the Parks Act of 1930 and Regulations and limitations thereby imposed, ought not to be construed to apply retroactively or be construed so as to take away rights already granted to lessees (Page 667).

- [31] The Crown's submissions are to the effect that section 6 of the Parks Act of 1930 and the Regulations thereunder govern the disposition of parks lands, a lease being a disposition. The Crown then submits that such disposition must be, in the words of the various regulations since 1930, "...for a term not exceeding forty-two years". Further, the word "term" is said not to include a renewal term. The Crown then argues that the wording of the Parks Act of 1930 and contemporary regulations is restrictive and mandatory particularly in that the wording granting a lease for a term of forty-two years has changed from that in earlier legislation which clearly allowed renewals. Thus, it is said, that where Parliament is silent as to renewals, no renewal is intended to be available.
- [32] The Crown then goes on to say that a perpetual renewal situation is contrary to section 4 of the Parks Act of 1930, for all lands "shall be maintained and made use of so as to be them unimpaired for the enjoyment of future generations". The Crown emphasizes the word "impaired" and submits that a perpetual lease is not reconcilable with this requirement. While this requirement might also be interpreted to prevent the granting of any lease, the better view is that the Parks Act of 1930 and legislation sets out certain standards, the breach of which results in an impairment and which either requires rectification, or could result in a cancellation of a lease. In effect, the purpose of the parks legislation is sufficiently served by the provisions and penalties in the Statutes and Regulations, for example, the Regulations made under section 7 of the Parks Act of 1930, which provides for the administration, protection, control, management and protection of parks and their resources and the prevention of nuisance in the parks and by the penalty provisions in the Act. To borrow a concept from Lord Justice Devlin in *Archbolds (Freightage) Ltd. v. S. Spangle Ltd.*[10], a very appropriate concept in the present instance, "...the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute.": there he was of the view that the purpose of the statute was sufficiently served by the penalties prescribed in the Statute.
- [33] The Crown's argument concludes that since the issuing of leases with a perpetual renewal clause was contrary to statutory restrictions after 1930, accordingly these leases are null, void and unenforceable.

- [34] To espouse the Crown's view as to the leases of both the Plaintiffs and the Intervener, CP Hotels, are null and void, or that there is no right of renewal, leads to a commercially absurd result and indeed to a result which would deprive users of the parks including those members of the public who from time to time use the facilities at Banff and at Lake Louise, of the ability to enjoy the parks at all. This is because, if leases were for a term of only forty-two years, no substantial business enterprise would be interested in putting in facilities and amenities worthy of the parks in question and attractive to the public. In the result, if leases to responsible leaseholders were too short for economic viability, the Crown would not be fulfilling its mandate to make the parks available to the public for their benefit, education and enjoyment. Rather, the Crown would be maintaining the parks in a pristine state, undisturbed by either development of substance or the people of Canada, a result inconsistent with the Crown's mandate, and indeed an absurd result.
- [35] The modern view of avoiding an absurdity is summarized by Driedger on the Construction of Statutes, *supra*, at pages 85 and 86, however I will paraphrase Driedger's four points. First, is a presumption that legislation is not intended to produce absurd consequences. Second, absurdity includes violation of reasonableness, common sense and other public standards and includes not only the shocking or unthinkable, but also consequences judged unreasonable because they are contrary to what the Court believes are important values and principles. Third, one should prefer an interpretation of legislation which avoids absurd consequences, even to the extent of rejecting the ordinary meaning of words, if that route leads to absurdity. Finally, within the bounds of plausibility, the more compelling the reason for avoiding an absurdity, the greater the allowable departure from the ordinary meaning of words in a statute.
- [36] To these four principles I would add a general rule pointed to by Mr. Justice Martland in *The Queen v. Walker*, *supra*, at page 662: that the Crown may not impeach its own act where there are two sets of regulations, one proper and one improper, under which the Crown might have acted, for the Crown's honour and for the benefit of the subject, the applicable construction is the one which will uphold the Crown's intent to make a good and proper grant. Indeed, Mr. Justice Martland here refers to the case of the Churchwardens of St. Saviour in Southwark[11], a decision of Lord Justice Coke, at page 1027:

But if two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may be according to the rule of law be adjudged good, and by another it shall adjudged void: then for the King's honour, and for the benefit of the subject, such construction shall be made, that the King's charter shall take effect, for it was not the King's intent to make a void grant; and therewith agrees with Sir J. Molin's case in the Sixth Part of my Report.

The language used in this passage by Lord Coke, a learned and practical man whose influence has been enormous in establishing the form and development of the common law, is from the age of Shakespeare, but the concept is not dated.

- [37] There are two approaches by which I may confirm the legal authority of the Crown to grant the leases to the Plaintiffs containing perpetual renewal clauses. The first approach, suggested by the Plaintiffs, involves *The Queen v. Walker*, supra, and the regulations put into effect by P.C. 2028, which provides for forty-two year leases "renewable in like period".
- [38] While many of the regulations dealing with parks and forest reserves, promulgated in the nineteen hundreds, were shown to me as being specifically revoked, no one was able to refer me to anything which suggest that P.C. 2028, of 13 August 1913, pursuant to the Forest Reserves and Parks Act, c. 10, S.C. 1911, was ever revoked. I would specifically note that the Forest Reserves and Parks Act applied to various blocks of land, including what is now Riding Mountain National Park and to the Rocky Mountain Park of Canada and that by section 18(2)(section 21 of 1927 R.S.C. c.78) the Governor in Council was given authority to make regulations for leases for various purposes including for the construction of buildings for ordinary habitation, accommodation, trade and commerce. I would also repeat that regulations enacted after 1959, a date on which the last of the leases at issue was granted, have no bearing upon leases already granted, for the Parks Act of 1930 and regulations "...are not to be construed be as applying retrospectively so as to take away rights already created." (*Walker*; supra, at page 667).
- [39] I earlier referred to the concept of an implied repeal of a statute. This is an appropriate point at which to put that concept to rest. *Driedger on the Construction Statutes*, supra, points out that where there is subsequent legislation there is no implied repeal unless the continued operation of both provisions is judged to be impossible or otherwise unacceptable. While there may in some instances be a doctrine paramountcy, a ranking of legislation with subsequent legislation outranking earlier inconsistent provisions, the usual practice in Canada is to repeal legislation through the enactment of highly stylized provisions: "repeal by implication is wholly inconsistent with ...[Canada's] ... approach to statute law." (*Driedger*, supra, at 496). In the present instance, the legislation, statutes and regulations, past and present, are not incompatible. One set of legislation allows renewal of leases and the other is silent. Thus the operation of both provisions is neither impossible nor otherwise unacceptable[12]
- [40] The majority reasons in *The Queen v. Walker*, supra, are also on point and good authority for finding that P.C. 2028 of 1913, section 64 of which authorizes forty-two year leases with renewals for like periods, is applicable. P.C. 2028 authorizes the issuance of leases with continuous renewals and so provides the authority for the present leases to the Plaintiffs at least until 1947. Those leases granted between 1947 and 1959 are also valid because the regulations then in effect, P.C.5045, provided for ministerial approval of the form of the leases: there is no suggestion by the Crown that the leases granted during this period, containing perpetual renewal clauses, were not properly approved. All of this requires further explanation.

[41] The general starting point of the Plaintiffs rests upon the proposition that the Crown, subject to statute or regulation limiting its powers, has the power and capacity of a natural person and cannot, relying upon its status as the Crown, avoid liability under an otherwise valid contract: see *Bank of Montreal v. Attorney General of Quebec*[13]. This capacity and inability to void validly made contracts is accompanied by case-law to the effect that the Crown has a general authority to contract, unless that power is specifically limited by statute. This is the general proposition that comes out of *J.E. Verreault et Fils Ltée v. Attorney General of Quebec*[14] considered and commented upon, for the majority, by Mr. Justice Stone in *The Queen v. CAE Industries Ltd.*, supra, at 165:

I am satisfied that by its decision in *Verreault* the Supreme Court of Canada meant to depart from what been regarded as conventional legal wisdom, namely, that a Minister of the Crown has no authority to bind the Crown in contract unless the authority to do so exist under a statute or an order in council. I understand that case to hold that by the general rules of mandate, including those of apparent mandate, a Minister of the Crown as head of a government department has authority to bind the Crown in contract unless that authority is restricted by or pursuant to statute.

Thus, the present issue becomes whether there is any provision in the Parks Act of 1930, the legislation then in force, or under any regulations made under that Act, which limits the Crown's power to contract and specifically to grant perpetually renewable leases.

[42] The Parks Act of 1930 prohibits the disposition, locating on, settling upon or use or occupancy except pursuant to the Act and regulations. Section 7(1) provides, in part, that the Governor in Council may from time to time make regulations for:

(g) the granting of leases for lots in town cites for the purpose of residence and trade; ...

Particularly pertinent is section 9(1) of the Parks Act of 1930 which preserves former regulations, which would include P.C. 2028 of 8 August 1913:

All of the regulations made by the Governor in Council under the provisions of the Rocky Mountain's Park Act or the Dominion Forest Reserves and Parks Act in force at the time of the passing of this Act shall continue in force until repealed.

Here I would note that P.C.1340, referred to in the argument of the Defendant, from time to time and as amended, was issued not under the Dominion Forest Reserves and Parks Act, the relevant legislation so far as the Plaintiffs are concerned, but rather under the Rocky Mountain's Park Act. Thus, we are left with P.C.2028 to provide the operative regulations. Section 64 authorizes the Minister the lease lands for summer resort lots and specifically, by section 64(c), to grant leases for forty-two years with similar renewal periods:

Leases for building lots within duly established summer resorts, on such form as is approved by the Minister, may be granted for a period of forty-two years renewable in like periods at a rental to be fixed by the Minister.

This provision makes it clear that there may be more than one renewal.

- [43] I would again note that regulations, contemporaneous with the Parks Act of 1930, being P.C. 1452, rescinded or amended various Orders in Council, but P.C. 2028 was neither rescinded nor amended. However, Order in Council P.C. 1452 is pertinent to some degree.
- [44] Order in Council P.C.1452 of 23 June 1930, after rescinding various sets of regulations, added to the general regulations under the Parks Act of 1930 a provision allowing the Minister of the interior to "...issue leases of such lots for any term not exceeding forty-two years...". This amendment does not diminish the authority of the Minister under P.C.2028, for those regulations were pursuant to the Dominion Forest Reserves and Parks Act, which applied to all parks, while the general regulations, Order in Council P.C. 1452, were pursuant to the Rocky Mountain's Parks Act and had effect, according to the preamble of that Order in Council, only as to the Rocky Mountain's Park of Canada, Yoho Park, Glacier Park, Jasper Park and Elk Island Park.
- [45] To sum up the situation at this point, as of the Parks Act of 1930 and continuing at least until the enactment of regulations in 1947, P.C. 2028 remained in force and authorized multiple terms of renewal of forty-two years. Further, nothing in the Parks Act of 1930 prevented the Crown from granting perpetually renewable leases.
- [46] P.C. 2028 was perhaps never rescinded. However counsel for the Plaintiff, quite properly, brings to my attention P.C. 5045 of 8 December 1947, regulations pursuant to the Parks Act of 1930, which again revokes various other regulations and goes on to provide in section 6(1) that the Minister may lease lots and town cites and sub-divisions "...for any term not exceeding forty-two years". Under section 6(3) of that regulation the form of leases are to be approved by the Deputy Minister of Justice. This regulation was in turn rescinded in 1954 by P.C. 1918 which touched upon leases of lots in town cites or sub-division of a value less than five thousand dollars, which may be leased by the Minister, or an officer of the Department of Northern Affairs and National Resources on behalf of the Minister pursuant either to general or specific authority, with lease forms to be approved by the Minister: see sections 3(1) and (3).
- [47] As already noted, the leases to the Plaintiff were made between 1934 and 1959 and to the Intervenor as late as 1956: the Supreme Court of Canada, in *The Queen v. Walker*, supra, made clear that regulations passed after the granting of a lease do not retroactively modify the terms of such leases. Thus, I do not need to consider the effect of the 1962 amendments embodied in P.C. 268, amending P.C. 1918, to allow a 21-year renewal of a lease.
- [48] The Plaintiffs and the Intervenor point out that from the plain language of P.C.2028 it is clear that the Minister had express authority to lease lands and that the leases could be renewable. Even if one looks at subsequent regulations, there is authority to the Minister to lease lands, with the form of the leases to be approved by the Deputy Minister of Justice, however nothing in the Parks Act of 1930 or any later relevant regulations indicate what specific provisions must or must not be included in such leases. Here I return to the modern

rules as to absurdity, as promulgated by Driedger on the Construction of Statutes and referred to earlier, and to the St. Saviour's decision referred to in *The Queen v. Walker*, supra. The absurdity rules caution against interpreting legislation so as to produce an absurdity, noting that absurdity may include consequences which are felt to be undesirable because they contradict values or principles considered important by the Courts. By the St. Saviour's decision, I may look at two constructions, one for and one against granting renewal leases, and pick the interpretation that upholds the Crown's intent and benefits the subject, for I may not take it that the Crown's intent was to make a void grant.

- [49] To recapitulate, at least until 1947, perhaps until 1962 when a 21-year renewal term appears in regulations pursuant to the Parks Act of 1930 and even perhaps subsequently, P.C. 2028 allowed the Minister to grant leases containing a provision for renewals. Such renewable leases are, by *The Queen v. Walker*, supra, valid renewable leases under P.C. 2028 and here I would refer to a passage from *The Queen v. Walker* at pages 661-662:

The situation is, therefore, that the Crown has granted the two leases in question relying upon the 1913 regulations which provide adequate authority. Having done that, is it now open to the Crown to contend that such leases should have been issued under the earlier 1909 regulations and that they are valid only to the extent that they comply with those regulations? In my opinion, the Crown, having purported to act under the authority of one set of regulations cannot impugn the authority of its agent so to act unless it can be established that the regulations here relied upon do not give the requisite authority to act. The Crown is not entitled to impeach its own act because the agent could have acted, more properly, under another set of regulations, if he did not elect so to do.

- [50] The question then may be whether a perpetually renewable lease might be void. The editors of Williams & Rhodes on the Canadian Law of Landlord & Tenant, 6th Edition, at page 14-26 set out the proposition that "a provision for perpetual renewals is not void", the editors also setting out that while the Courts are against such a construction, they will recognize the concept of a perpetually renewable lease if it is properly expressed, going on to refer to *The Queen v. Walker*, supra, as an example.
- [51] All of this considered and particularly the statement made by Mr. Justice Martland, in *The Queen v. Walker*, supra, at pages 661-662, that the Crown may not impeach its own Act, there are two valid propositions. First, while P.C. 2028 of 8 August, 1913, remained in effect it is plain, given the decision in *The Queen v. Walker*, that the Crown had the authority to grant leases with a covenant of perpetual renewal. Second, the regulations which came along in 1947, beginning with P.C. 5045, and the subsequent regulations and the years following, all set out that the form of the lease is subject to the approval of the Deputy Minister of Justice. There is no indication that the forms used during the years after 1947, until the legislation again allowed for a renewal of leases, were not vetted by the Deputy Minister of Justice, who would have seen the right of perpetual renewal being clearly expressed. It is not now opened to the Crown to impeach the acts of its officers in using and issuing leases on those forms. I will look further at this impeachment proposition.

- [52] The Crown, having utilized leases with rights of renewal between 1930 and 1959, for the Crown to assert that the forms were incorrect, or that its officials had no authority to issue leases with perpetual renewal provisions, is a sort of impeachment which Mr. Justice Martland repudiated in *The Queen v. Walker*. Equally relevant is the concept at page 665 of *The Queen v. Walker* that the Crown, just as with individuals, must perform its contracts unless there be clear statutory authority by which it may evade that obligation. Indeed, general principles of agency apply to the Crown, its Ministers and officials. The Crown is bound by the acts of its agents acting within their ostensible authority: See Verreault, (supra) and specifically, the head note at page 42 and the adoption of the passage from Griffith and Street on Administrative Law, 3rd Edition, 1963, at pages 46 and 47.
- [53] Dealing further with the period between 1947 and 1959, the latter date being the date of the last of the Plaintiffs' leases, the regulations provided for the grant of leases for up to forty-two years and on such other terms as approved by the Minister or the Deputy Minister of Justice. None of those regulations expressly preclude the granting of leases renewable in perpetuity or, conversely for the renewal of any lease. However, at various times, the Crown issued leases renewable for one or more terms. There is nothing to suggest that leases containing perpetual renewal provisions were not approved as required by the legislation and might thus be invalid. All of this leads to a conclusion that the first question should be answered affirmatively both in the case of the Plaintiffs, and, bearing in mind that P.C. 2028 was enacted under the Forest Reserves and Parks Act, an Act, applicable to the Rocky Mountain Park of Canada, in the case of CP Hotels. However, I should look further at the case of CP Hotels whose leasehold of tenure began under the Rocky Mountains Park of Canada Act, 1887, 50-51 Victoria, c. 32 (the "Rocky Mountains Park Act, 1887"). Section 4 of this Act places the park under the control and management of the Minister of the Interior. It allows the Governor in Council to make regulations for various purposes including the lease of parcels of land in the park.
- [54] By Order in Council of 30 June 1890, the Governor in Council enabled the Minister of the Interior to, from time to time, grant leases of land in the park "...for any term not exceeding forty-two years, with the right of renewal..." (Section 14).
- [55] Similarly, by the Dominion Forest Reserves and Parks Act, of 1911, 1-2 George V, c. 10, the Parks Act of 1930 and the National Parks Act of 1952, R.S. c.189, the Governor in Council is authorized to make regulations for the leasing of land for the purposes of industry and trade. In each instance the relevant regulations allowed the Minister to enter into leases for a specific term of years, however there is no mention of a renewal term. The question becomes whether, in the absence of a clause allowing perpetual renewal, the Minister might make leases with whatever additional terms might be reasonably necessary for the purposes of trade and commerce, including, so as to encourage substantial investment, long term rights of renewal. One might argue that if legislation must contain an express provision for perpetual renewal, then the legislation should contain express provisions authorizing all relevant terms of a lease. The position of CP Hotels is that since the regulations do not

curtail the power or authority conferred by the Act, and in the absence of express prohibitions, the Minister may choose terms and conditions as are reasonably dictated by the circumstances. In effect the submission is that the Minister may include in a lease any term or condition which is not specifically precluded, in order to effectively carry out the purpose of statute and regulation in leasing land in parks.

- [56] None of the relevant statutes or regulations expressly precludes the Minister from issuing leases containing perpetual renewal provision. Certainly, section 6 of the Parks Act of 1930 limits disposition of lands within parks, unless it is done under the authority, the Act and regulations:

6.(1) Lands within parks shall not disposed of or be located or settled upon and no person shall use or occupy any part of such lands except under the authority of this Act or regulations made hereunder.

The National Parks Act of 1952 contains, in section 6, a similar provision. Here I would note that a lease is in fact a form of disposition of lands and section 6 of both the Parks Act of 1930 and the Act of 1952 authorize disposition of park lands as permitted under the authority of the Act or the regulations. Both in the Parks Act of 1930 and National Parks Act, 1952, at section 7, allow the Governor in Council to make regulations as to the granting of leases. Thus the terms of section 6 are satisfied by the expressed provisions of the Acts.

- [57] As I have noted earlier the regulations allow the issuance of leases for the term of forty-two years. So far, except as to the renewal provision, the leases held by CP Hotels accord with the relevant Acts and regulations, yet the Crown submits that a right of perpetual renewal is the equivalent of permanent alienation and thus inconsistent with section 4 of the Parks Act of 1930, which requires that parks be made use of so as to leave them unimpaired for the enjoyment of future generations and which I will again set out for convenience:
4. The parks are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to the provisions of this Act and regulations, and such parks shall be maintained and made use of so as to leave unimpaired for the enjoyment of future generations.

I agree with the intervenor that the impairment, sought to be avoided by the legislation, includes industrialization and overdevelopment of park lands, but the legislation does allow development as regulated by the Act and Regulations. Here I accept the affidavit evidence of Mr. Woods, to the effect that CP Hotels has made large investments and re-investments in respect of its hotel and facilities and that such commercial enterprise is for the benefit of the public visiting the park and using the facilities. Even without the affidavit evidence provided by CP Hotels, one can easily conclude that a factor in the substantial investment and re-investment in quality facilities is the right of perpetual renewal, for people in business who make substantial investment must take a long view.

- [58] At this point, consideration is due as to whether the perpetual lease might constitute a final disposition or alienation of the land which might impair the enjoyment by future generation, a suggestion made by the Crown. An appropriate answer to this is that rights of renewal are expressly contingent upon strict compliance with the provisions of the lease. Should there be a breach the Crown might, at its option, re-take possession of the lands and make the lease invalid or ineffectual, a concept already explored. The Crown's options preclude there being any real ownership of the land in the hands of a lessee. Here I would refer to Black's Law Dictionary, 5th Edition, 1979, which defines ownership in terms "a complete dominion, title or proprietary right in a thing or claim." and goes on to further define it as "the exclusive right of possession, enjoyment and disposal: involving as an essential attribute the right to control, handle and dispose". The right in the Crown to re-take possession precludes any exclusive right of possession, enjoyment and disposal by the lessee, those rights being the hallmark of ownership.
- [59] Counsel for the Intervenor goes on to point out that the regulations in force between 1930 and 1962, while not containing an expressed provision for renewal, do not preclude the ability to offer certain renewal of leases entered into between 1930 and 1962. Here counsel refers to the commercially absurd result if such were the case. I have already noted that the categories of absurdity are not closed and may include any consequences judged undesirable because they contradict values or principles that are important. To decide that the leases entered into between 1930 and 1962 could not contain a provision for renewals, thus bringing to a premature end the establishments of CP Hotels, would be absurdity in that the whole purpose of commercial leases, to provide amenities for the use of the public in the parks, would be defeated. I have in mind, by way of example, *Lyons et al v. The Queen*[15], a decision in which Mr. Justice Estey wrote the majority judgment. There, in order avoid absurdity, that of supposing Parliament had decided to give powers to investigating agencies that had no practical use, Mr. Justice Estey, concluded that a portion of the Criminal Code, by reason of necessary implication, authorized the entry of private property in order to install telephone tapping devices. At page 527, Mr. Justice Estey wrote:

When seeking the proper interpretation of these provisions one should ask if Parliament must be taken as intending to give an authority to the investigating forces which could not be put to use. The invocation of powers granted under Part IV.1 in aid of crime detection serves no purpose if the authorization granted relates only to isolated pieces of equipment without any direction or authorization that it would be employed in association with authorized devices for interception either by wire-tapping or for electronic or acoustic surveillance. It is one thing to leave too much to the discretion of the investigative agency but quite another to stultify the whole undertaking.

To deny that Parliament must have intended leases to contain a renewal clause, a practical necessity in large scale long term quality commercial development, would be, in the words of Mr. Justice Estey, "to stultify the whole undertaking".

[60] Counsel for the Intervener suggest a slightly different approach to the absurdity concept. He points a portion of Driedger on the Construction of Statutes, the 1983 Butterworths Edition:

In general a change in language on re-enactment of a provision must be presumed to have some significance. Thus, in *Bathurst Paper Ltd. v. Minister of Municipal Affairs* Laskin J. said that "legislative changes may reasonably be viewed as purposive, unless there is internal or external evidence to show that only language polishing was intended". However, as Laskin J. indicates, it does not necessarily follow that a change in substance was intended. In *Ouellette v. Canadian Pacific Railway Co.* an argument was based on an earlier form of a section of the Railway Act, which in re-enactment had been shortened somewhat by the omission of certain phrases. Lord Shaw remarked that:

The omission having been taken place, the section is less cumbrous, and effects the very same object...just the same as before.

### **He dismissed any presumption**

that because there was a difference of expression, therefore it must necessarily follow that there was meant to be a difference of the law. The words actually employed must stand for interpretation as they are found unaffected by any such presumption. [Pages 127-128]

Not only is there no presumption affecting the plain statutory wording, as pointed out by Driedger's reference to the speech of Lord Shaw at pages 575 and 576 in *Ouellette v. Canadian Pacific Railway Co.*[16], but also reference to express previous statutory wording as an aid to interpretation need only be resorted to when the wording to be construed is ambiguous and doubtful as set out in *Canadian Pacific Railway Co. v. The King* [17]:

It is, therefore, argued that the change of language indicates a change of intention and that the dropping of these words shows Parliament intended their cost should be added to the cost of the line in estimating the subsidy payable.

I am utterly unable to adopt the argument. The rule invoked respecting the construction of statutes is only invoked where the language to be construed is ambiguous and doubtful. As said by Mr. Hardcastle in his third edition, at page 119:

Sometimes if an enactment is not plain, light may be thrown upon it by observing that certain words "have been" as Brett L.J. said in *Union Bank of London v. Ingram* (1882) (1) "designedly omitted".

Just so, but there it cannot be successfully contended that the language of the Act is not plain; it does not require any light to be thrown upon it in order to understand its meaning. The words may have been designedly omitted by the draftsman, but it was probably because they were unnecessary. [Pages 142-143]

The Supreme Court of Canada, in *Canadian Pacific Railway v. The King*, supra, rejects the idea that previous legislation be looked to as an aid to construction where the language in subsequent legislation is clear. Applying this concept to the regulations which were enacted between 1930 and 1962 the language clearly states that the Minister may issue leases for a term not excess of forty-two years. But notably the regulations do not set any other terms and conditions to be included in the leases of land, yet from a practical and business perspective, there must additional terms and conditions to give any lease effect. Indeed, the regulations do not prohibit additional terms and conditions from being included by the Minister in order to make an effective lease the Minister ought to be entitled, by the regulations, to exercise discretion in respect of all practical terms which the leases must contain. The clause allowing perpetual renewal, set forth in the leases, could well have been an exercise of Ministerial discretion. This leads to the topic of the authority of the Crown.

[61] To begin, the Crown is subject to all of the general rules of common law and of equity, unless varied by prerogative rules or by statute: this is set out in the Supreme Court of Canada's decision in *Bank of Montreal v. Attorney General of Quebec*[18]:

Even when the rights and prerogatives of the Crown were much more extensive that [sic] they now are, it was recognized that the Crown was bound by the contracts it had entered into (*Banker* decision, 14 How. St. Tr. 1). In 1886, in *Windsor & Annapolis r. Co. v. The Queen et al*, 11 App. Cas. 607, Lord Watson said at pp. 613-4:

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown ...

In a recent decision (*J.E. Verreault & Fils Ltee v. A.-G. Que.* 91975), 57 D.L.R. (3d) 403, [1977] 1 S.C.R. 41, 5 N.R. 271 & 8 N.R. this court held the Crown liable in damages as the result of the breach of a building contract.

The principle of the Crown's contractual liability is thus no longer open to dispute.

I have already referred to *Walker v. The Queen*, supra, at pages 665 and 666 for the proposition that the Crown, just as an individual, is bound to perform its contract, absent any clear statutory prohibition.

[62] While the Crown is the lessor in the case of each of the leases held by CP Hotels, it was a Minister of the Crown who prescribed and settled the form of the lease. The Minister executed the leases on behalf of the Crown, the Minister's role being that of agent. The Crown, as principal, must fulfill its contractual obligations. Here I would refer to a passage from *The Queen v. Walker*, at page 664, which begins with a proposition which the Court refuted and then goes on to set out the role of a Minister including a Minister's role as agent:

The appellant states his position in this way, i.e. that a person in the position of the Minister, who contracts to renew a lease in effect contracts to exercise his authority to issue a lease in the future and such a contract is always subject to the continuing existence of such authority. If such authority does not exist at the time, the contract is to be performed the Minister is discharged from his obligation.

This submission overlooks the fact that the leases here in question were not made with the Minister, but were made with the Crown. A Minister prescribe the form of the lease and the lease that were executed on behalf of the Crown by the Deputy Minister of the Interior, but the Minister's role was not that of principal. He was only an agent.

... In my opinion such a contention cannot be sustained. The Crown, just as individuals, is obligated to perform its contracts. Such obligation may be discharged by appropriate statutory provisions, but in the absence of clear statutory authority, it cannot evade that obligation. The obligation is not be avoided merely because the power of the Minister to make new leases is less broad than it was when the original lease was made. [Pages 664-665]

[63] This authority of a Minister, as an agent, to bind the Crown subsists even though there may be neither specific legislative authority nor an Order in Council, so long as there are not statutory restrictions of the Minister's authority. This is set out, with reference to a number of cases, which I have omitted from the quotation, in *Somerville Balkin Industries Ltd. v. Government of Manitoba*[19], a decision of the Manitoba Queen's Bench which was affirmed by the Manitoba Court of Appeal[20]:

In the absence of any expressed statutory restriction, the authority of a servant of the Crown to make contracts binding upon the Crown is determined by the general law of agency: ...

Accordingly, apart from statute, a contract made by a Crown servant will bind the Crown if the making of the contract is within the scope of the servant's authority.

The authority may be either specific or apparent or as it is also called ostensible authority, a point made by Mr. Justice Stone of the Federal Court of Appeal in *The Queen v. CAE Industries Ltd.* There Mr. Justice Stone referred to the *Verreault* case, *supra*, in the Supreme Court of Canada and went on to say:

I understand that case to hold that by the general Rules of mandate including those of apparent mandate, a Minister of the Crown as head of a government department has authority to bind the Crown in contract unless that authority is restricted by or pursuant to statute. [page 513]

This point, the requirement of restriction by statute, is reinforced by the Alberta Court of Appeal decision in *Re Public Utilities Act*[21]:

It would seem very strange indeed, if the Legislature had intended to give the Board the right to set aside the terms of contract, that it would not have said so in plain words. [Page 37]

The Court of Appeal's decision was upheld by the Supreme Court of Canada[22].

[64] From this I conclude that the Federal Crown may not avoid its obligations under the leases held by CP Hotels, even where the Minister is not authorized by statute or by regulation to issue lease with perpetual renewal clauses, there being no express statutory restriction on the Minister's authority. Thus, for the purposes of both the Plaintiff and the Intervener, CP Hotels, the first question is answered in the affirmative.

## The Second Question

[65] The second question is an interesting one. It asked whether, if the Crown had no legal authority to grant to the Plaintiffs leases containing perpetual renewal clauses at the time such leases were granted, is there a basis at law as disclosed in the Amended Statement of Claim available to the Plaintiffs in relation to the perpetual renewal clauses as against the Defendant, based on the course of conduct of the party in relation to the leases since their original granting. Of course, the Intervenor, CP Hotels, has an interest in this question as well.

[66] Strictly speaking, having answered the first question in the affirmative, it may be unnecessary to deal with the second question. However, it deserves at least a brief answer. Moreover, an answer may become useful in the event of a review of my decision.

[67] The Crown suggested, during argument, that there had been a mutual mistake as to the availability of a perpetual renewal of the leases and thus the leases were void: on a narrow view of mutual mistake that can, on occasion, be the situation, but often, "... from the whole of the evidence, where a reasonable man would infer the existence of a contract in a given sense, the court, notwithstanding a material mistake, will hold a contract in that sense is binding upon both parties.": *Cheshire & Fifoot on Contract*, London, Butterworths, 1986 at page 236. *Cheshire & Fifoot* here refer to various authorities, including a passage from *Cornish v. Abington* (1859) 4 H. & N. 549 at 556, 157 E.R. 956 at 959. The fuller passage, from *Cornish*, a decision of Pollock, C.B. is as follows:

If a party uses language which, is in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by of course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.

The Crown has the onus of proving mutual mistake going to voiding the contract, but has not satisfied that onus. Here a reasonable man would infer the existence of a contract. This was not fully argued, however counsel thoroughly canvassed estoppel

[68] The affirmative answer to the second question is based on equitable estoppel. In the case of the Plaintiffs and the Intervenor, CP Hotels, the submissions were to the effect that there are several aspects of estoppel. First, the Crown, having issued leases with a right to renew, is

now estopped from denying it had authority. Second, it is not open to the Crown to make a term of approving an assignment of lease that the perpetual renewal provision be surrendered. Third, the Crown asked and CP did, at various times, being in 1922, 1947 and 1958 surrender leases and enter into new leases to facilitate better sub-division and to add to a fish hatchery, the replacement leases containing the same perpetual renewal clause. Here I would note that the Crown conceded, during argument, that its position may be unjust and that it does not come to court with clean hands. Rather, the Crown says it mislead itself by thinking perpetual renewal clauses might be included in leases of park land: by the same token the Crown then mislead both the Plaintiffs and the CPR.

[69] A doctrine relied upon by the Plaintiffs and CP Hotels is that of equitable estoppel, also called estoppel in pais, an estoppel by deed. A little more broadly the elements of estoppel in pais are first, a representation intended to induce a course of conduct by the person to whom the representation was given; second, as a result of that representation, an act by the person to whom the representation was made; and third, detriment to such person by reason of his or her actions. This is clearly set out by the House of Lords in *Greenwood v. Martins Bank*[23]:

**A representation factors is giving rise to an estoppel are I think:-**

(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission.[Page 57]

[70] This equitable doctrine of estoppel by deed applies against the Crown. Here I will refer to *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.*[24], a decision of the Ontario Court of Appeal, for the basic proposition and substantial authority:

That the doctrine of estoppel in pais operates even as against the Crown is well-established: vide *Attorney-General to the Prince of Wales v. Collom*, [1916] 2 K.B. 193; *Attorney-General for Trinidad and Tobago v. Bourne*, [1895] A.C. 83; *Plimmer v. Mayor etc. of Wellington*, 9 App. Cas. 699. [Page 68]

Further authorities for the proposition that the Crown is bound by estoppel in pais are set out in *Lordon on Crown Law*, Butterworths, 1991, at page 321. The entry in *Lordon* goes on to note that no estoppel arises where the representation is clearly in contravention of a statutory provision, however, that is not the case here. *Lordon* sets out a number of substantial reported cases as authority for these propositions. Further, while it is trite law to say that the Crown cannot be estopped from applying the law to a subject in terms of enforcing regulatory or taxing provisions, there is no reason why the Crown is immune from an estoppel arising out of commercial activity and the general law of contract, and here I would refer generally to *Queen Victoria Niagara Falls*

Park Commissioners, *supra*.

[71] In the present instance, dealing first with the Plaintiffs and their leases in Riding Mountain National Park, the Crown, between 1934 and indeed until about 1965, took a position reflecting an intention to lease land on terms that would permit the lessees, so long as they complied with the terms applicable to their leases, to renew in perpetuity. In the result, and given the absence of any clear prohibition, the Crown is now estopped from denying it had authority to issue leases containing perpetual renewal provisions.

[72] Counsel for CP Hotels puts the matter slightly differently, for the estoppel bears on different circumstances. Counsel for CP Hotels submits that the Crown and its Ministers had a positive duty to act in accordance with its statutory and regulatory authority and not to exceed such authority to a detriment of Canadian Pacific. Counsel also notes that the original Canadian Pacific leases, now held by CP Hotels, were renewed on many occasions in accordance with the clauses for perpetual renewal.

[73] Counsel for the Intervener then submits and I agree with the submission that:

It is submitted that if the Crown did not have the authority to grant perpetual renewal clauses in any or all of the original Canadian Pacific Leases, it was under a duty to inform Canadian Pacific of such inability or, alternatively, to assert its right to sever or disavow the perpetual renewal clause on the renewal of the Canadian Pacific Leases. The Crown did not do so and Canadian Pacific has, in the century since it first leased land in the Rocky Mountains, dedicated considerable resources to its property held under the Canadian Pacific Leases in reliance upon its ability to perpetually renew its leases. [Section 48 of the Intervener's Brief]

This may be summarized by saying that Canadian Pacific and CP Hotels have, in over a century on the leased land in the Rocky Mountains, invested substantially in their property, relying on perpetual lease renewals, yet the Crown either failed to inform either Canadian Pacific or CP Hotels of the Crown's inability to grant perpetually renewable leases, or to advise that the Crown might disavow the leases.

[740 More specifically, the Intervenor also provides evidence that Canadian Pacific, at the request of the Crown and to ensure a more artistic layout of a sub-division, surrendered its renewable in perpetuity 2 April 1906 lease to enter into a new lease, 2 April 1922, which contained a right of renewal in perpetuity. Subsequently, in 1947, Canadian Pacific surrendered leased land and obtained a replacement lease with similar renewal rights from the Crown in connection with land needed by the Crown for a fish hatchery. Most recently, in 1952, there was flooding which necessitated a new sub-division of Canadian Pacific lands. The Crown asked Canadian Pacific to surrender its existing leases and enter into new leases containing the same terms and conditions, including as to perpetual renewability. In all of these instances, Canadian Pacific says and it is not seriously contradicted, that the surrender of existing leases was on the basis that replacement issues would contain the same terms and conditions. In the result and here I agree, the Crown is estopped from denying the existence of a perpetual renewal right.

[750 The consideration of estoppel is brief, however, as I pointed out, the decision on the estoppel issue, the second question, is not entirely necessary given the affirmative answer to the first question and thus the reasoning to reach the affirmative answer to the second question is abbreviated.

[760 I thank counsel for the effort that they put into the material and into their presentations.

(Sgd.) " John A Hargrave"

Prothonotary

Vancouver, British Columbia

March 26, 2001

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1168-96

STYLE OF CAUSE:ALLISON G. ABBOTT, MARGARET ABBOTT

and MARGARET ELIZABETH McINTOSH

v.

HER MAJESTY THE QUEEN (et al.)

PLACE OF HEARING: Winnipeg, MB

DATE OF HEARING: May 11, 2000

REASONS FOR ORDER OF HARGRAVE, P.

DATED: March 26, 2001

APPEARANCES:

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Mr. Paul Edwards FOR DEFENDANT

Mr. Judson Virtue FOR INTERVENOR

SOLICITORS OF RECORD:

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Duboff, Edwards, Haight & Schachter

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[1] The early legislation is explored more fully by Mr. Justice Martland in *The Queen v. Walker*, [1970] S.C.R. 649.

[2] [1930] S.C. c. 33

[3] 1911 (Can), c. 10, as amended: for a more accessible version see the 1927 version, R.S. 1927, c. 78.

[4] [1970] S.C.R. 649

[5] [1898] 2 Q.B. 547 at 551-552

[6] [1939] 3 D.L.R. 497

[7] [1977] 1 S.C.R. 41

[8] [1986] 1 F.C. 129 (F.C.A.)

[9] [1970] S.C.R. 649

[10] [1961] 1 Q.B. 374, at 390

[11] (1613) 77 E.R. 1025

[12] See Driedger, *supra* at pages 493 through 496

[13] [1979] 1 S.C.R. 565

[14] [1977] 1 S.C.R. 41

[15] (1985), 14 D.L.R. (4th ) 482

[16] [1925] A.C. 569 P.C.

[17] (1907), 38 S.C.R. 137

[18] (1979), 96 D.L.R. (3rd) 586

[19] [1987] 5 W.W.R. 553

[20] [1988] 3 W.W.R. 523

[21] [1920] 1 W.W.R. 31

[22] [1921] 1 W.W.R. 655

[23] [1933] A.C. 51

[24] (1928) 63 O.L.R. 49

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