CANADIAN PACIFIC LIMITED v. PAUL, PAUL, PAUL, PAUL, PAUL, SAPPIER, POLCHIES, POLCHIES, SAPPIER, TOMAH and all members of the WOODSTOCK INDIAN RESERVE BAND and COUNCIL (Respondents) and ATTORNRY GENERAL OF CANADA (Respondent) and NEW BRUNSWICK RAILWAY COMPANY (Respondent) and ATTORNRY GENERAL OF ONTARIO (Intervenant)

[Indexed as: **Canadian Pacific Limited v. Paul et al.**]

Supreme Court of Canada, Dickson C.J., Beetz, Estey* McIntyre, Lamer, Wilson and Le Dain* JJ., December 15, 1988

J.L. Bowles, L.E. Clain, Q.C., and S.J. Hutchison, for the appellant
R.W. Dixon, Q.C., and A. Ruben, for the respondents Paul et al.
W.I.C. Binnie, Q.C., for the respondent Attorney General of Canada A.G.
Warwick Gilbert, Q.C. for the respondent New Brunswick Railway Company
J.T.S. McCabe, Q.C., for the intervener Attorney General of Ontario.

The appellant, Canadian Pacific Ltd., sought a permanent injunction to prevent the defendant members of the Woodstock Indian Reserve Band from interfering with the enjoyment by the appellant of its right-of-way across the Woodstock Indian Reserve. The band counter-claimed for a declaration that the lands were held by the Crown for the use and benefit of the band.

In 1851 certain lands were conveyed to the Crown in right of the province of New Brunswick for the use of the Maliseet Indians or other public purposes. Though no formal allotment was made the lands were, on acquisition, allotted *de facto* to ancestors of the Woodstock Band.

Under valid statutory powers, the Woodstock Railway Co. was given, *inter alia*, a right-of-way across the lands. Through a series of transactions the Canadian Pacific Railway, in 1890, came into a 990 year lease of the right-of-way. That lease was confirmed by federal and provincial legislation. In 1912 the CP was granted a freehold interest in other rights-of-way but not in the disputed right-of-way.

In 1908 the band surrendered a part of its reserve, including the pall through which the right-of-way passed but excepting from the surrender the CPR right-of-way The surrendered lands were subsequently granted to a private individual. In 1966 the Crown reacquired title to the lands and in 1976 they were set aside for the use and benefit of the band. In 1975 the band barricaded the right-of-way claiming the CP did not have a right to use the right-of-way.

The trial court judge ([1981] 4 C.N.L.R. 39) held that the band had no present interest in the land and granted a permanent injunction. The Court of Appeal ([1984] 3 C.N.L.R. 42) reversed, holding the land to be reserve land and granting a six month injunction to allow the parties to negotiate settlement of the band's interest.

*** Estey and Le Dain JJ. took no part in the judgment.**

Held: Appeal allowed, permanent injunction granted.

1. Even without a formal allocation, the lands did become part of the Woodstock Reserve.

2. The Woodstock Railway Co. was granted a statutory easement in the nature of a right--of-way. CP, by virtue of its lease, now has that interest.

3. CP has no title by adverse possession or prescription. It would be inconsistent to hold that possession through the Crown could be claimed to divest Indians of an interest which the Crown holds for their benefit. Furthermore, the possession of CP, being granted by statute, is not adverse. In addition, provincial prescription legislation would not apply to Indian lands. Federal limitation provisions are inapplicable.

4. Whether the provincial government failed in its duty to obtain the consent of the band to the grant of the right-of-way is a separate issue.

5. Whether the existence of the right-of-way extinguishes the Indian interest is not decided. The Indian interest is *sui generis.* The Crown continues to hold the fee for the benefit of the band unless the band's interest is only enjoyment and occupation. If the band's only interest is enjoyment and occupation, then it is arguable that the right- of-way is inconsistent with the continuing existence of the band's interest. It is left undecided whether the New Brunswick legislation granting the right-of-way indicates a "clear and plain" intention to extinguish the band's interest. Right to compensation or damages not decided.

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THE COURT: This appeal requires us to resolve the conflicting claims of a railway and an Indian band to the use of land being used as a railway right-of-way across a reserve and a claim by the railway for a permanent injunction to restrain the band from interfering with its enjoyment of the right-of-way.

The appeal is by leave of this Court from the judgment of the New Brunswick Court of Appeal (Ryan, Stratton and La Forest JJ.A.) on September 28, 1983, 50 N.B.R. (2d) 126, 131 A.P.R. 126, 2 D.L.R. (4th) 22, [1984] 3 C.N.L.R. 42, allowing an appeal from the judgment of Dickson J. in the Court of Queen's Bench on April 28, 1981, 34 N.B.R. (2d) 382, 85 A.P.R. 382, [1981] 4 C.N.L.R. 39, which granted a permanent injunction against the Woodstock Indian Reserve Band ("the Band") to restrain it from interfering with the enjoyment by the appellant Canadian Pacific Limited ("CP") of its right-of-way across the Woodstock Indian Reserve No. 23. The trial judge dismissed a counterclaim by the Band for a declaration that the land used as the right-of-way is held by Her Majesty the Queen for the use and benefit of the Band and for damages for the alleged trespass by CP on the land. In allowing the appeal the Court of Appeal vacated the permanent injunction and replaced it by a six-month interim injunction to enable the parties to reach a settlement.

I. The Facts

The respondents are members of the Maliseet tribe resident on the Woodstock Indian Reserve, known as Reserve No.23 ("the Reserve"). ne Reserve comprises a long strip of land running east-west and is about 7 1/2 chains in width and about 360 chains in length. The Reserve is situated just outside the town of Woodstock. CP operates a railway which, in its winding course, crosses the Reserve at three locations which may be referred to as the western, central and eastern crossings. It is the eastern crossing which is in issue in this appeal. In 1975 the Indians who resided on the Reserve claimed the CP did not have a right to use the right-of-way and they barricaded it to prevent the passage of trains. CP commenced proceedings in trespass and sought a permanent injunction to enjoin any future trespass. The Indians counter-claimed for a declaration respecting title to the eastern crossing.

The Reserve lands, including the eastern crossing, were part of the estate of one Peter Fraser. By deed dated May 22, 1851 the land was conveyed by Beverly Robinson, executor of Peter Fraser's estate, to Her Majesty the Queen as represented by the Lieutenant-Governor of New Brunswick. The deed stated that:

> ... Whereas His Excellency Sir Edmund Walker Head Baronet Lieutenant Governor and Commander in Chief of the said Province for and on behalf of Her Majesty Queen Victoria hath agreed with the said Beverly Robinson for the purchase of the said tract of land for Public uses; that is to say, for the use of the Melicette Tribe of Indians at the Meductic in the County of Carleton during the [pleasure] of Her Majesty in Lieu of a Tract of land of which the said Indians have been wrongfully deprived as is alleged.

The land was to be held

> ... unto Her Majesty her Heirs and Successors forever for the uses and purposes set forth and explained in the above recital during the Pleasure of Her Most Gracious Majesty or for such other public uses and purposes as to Her Majesty her Heirs and Successors may be graciously pleased to apply the same anything in these presents contained to the contrary thereof notwithstanding.

The trial judge found that, while there is no evidence of any formal allotment of the lands, it appears clear that the lands so acquired were, on acquisition, allotted *de facto* to the Meductic Maliseet Tribe whose members were the ancestors of those Indians now comprising what is known as the Woodstock Band.

The CP line between Debec Junction and Woodstock, of which the eastern crossing forms a part, was laid out and constructed by the Woodstock Railway Company between 1865 and 1868. The Woodstock Railway Company was incorporated by the New Brunswick statute entitled *An Act to incorporate the Woodstock Railway Company,* S.N.B. 1864, 27 Vict., c.57 (the "1864 incorporating statute") for the express purpose of constructing a railway line between Woodstock and the Maine border. Section 24 of the 1864 incorporating statute provides:

> 24. The said Company shall be and are hereby invested with all the powers, privileges and immunities which are or may be necessary to carry into effect the intentions and objects of this Act; and for this purpose the said Company, their successors, deputies, agents, and assistants, shall have the right to enter and go into and upon the lands and grounds of all and every description lying on the said route and general direction as aforesaid, for the purpose of making surveys, examination, or other necessary arrangements for fixing the site of the said Railway; and it shall and may be lawful for the said Company and their successors to take and hold so much of the land and other real estate as may be necessary for the laying out, making and constructing, and convenient operation of the said Railway, and shall also have the right to take, remove, and use, for the necessary construction and repair of said Railway and appurtenances, any earth, gravel, stone, timber, or other material, on or from the land so taken, without any previous agreement with the owner or owners, tenant or tenants of the land, and upon which such survey, examination or other arrangements may be made, or through which the said Railway may be explored, laid out, worked, made, and constructed, or on which materials and other things shall be laid for the purposes of the said Railway; provided always, that the said land so taken shall not exceed six rods in width, except where greater width is necessary for the purpose of excavation or embankment; and when the said Railway shall pass through any wood lands or forests, the said Company shall have the right to fell or remove any trees standing thereon, to the distance of six rods from either side of the said Railway, which by their liabilities to be blown down, or from their natural falling might obstruct or impair said Railway; provided always, that in all cases the said Company shall pay for such lands or estate so taken and used, (in case the owner thereof demand it) such price as the said Company and the owner or respective owners thereof may mutually agree on; ... provided also, that nothing in this Act contained shall be construed to affect the rights of the Crown in any ungranted lands within this Province, or to authorize the said Company to enter upon or take possession of any such land without the previous permission of the Executive Government of the Province.

During the same sitting the New Brunswick legislature enacted *An Act in aid of the construction of Railways,* S.N.B. 1864, 27 Vict., c.3. The purpose of this statute was to provide provincial aid in the construction of certain railway lines, including that of the Woodstock Railway Company. Section 9 provided:

> 9. When any of the Lines of Railway in this Act mentioned, or the said Branches or Extensions, shall pass through Crown Lands, the Governor in Council shall grant, for the purposes of such Roads, necessary Crown Lands for tracks, sidings and stations.

Another statute, S.N.B. 1865, 28 Vict., c.12, entitled *An Act in addition to the Act in aid of the construction of Railways* empowered railways to enter upon private lands for the purpose of carrying on their works.

Various routes for the Debec-Woodstock branch line were proposed in 1865. By 1866, a line had been chosen and on January 11, 1866 the Woodstock Railway Company's engineer reported thereon to the Provincial Secretary. On March 7, 1866, the Company signed an undertaking which provided:

> That the said Woodstock Railway Company having agreed with Messrs. Whitehead and Rutherford to construct a Railway from the Debeck Station in the New Brunswick and Canada Railway to the south side of the mouth of the Madnyakik stream in the town of Woodstock, upon the location approved of by the Government of The Province of New Brunswick, and which contract has also been submitted to said Government and approved by diem. The said Railway Company do hereby agree with the Queen to build said Railway according to the terms of said contract, or if such contract should cease to make a contract for the construction thereof, upon such terms as may hereafter be approved of by said Government.

> And further, that said Company agrees to obey and observe such terms and conditions as may be directed and imposed upon them by the Government of the Province of New Brunswick for the protection of the public interests.
>
> That the provisions of the Act in aid of construction of Railways passed in the 27th year of the Reign of Her present Majesty shall be taken to be part of this agreement.

Work began right away and continued until, on August 8, 1868, the government engineer reported to the Provincial Secretary that the work had been substantially completed, with all track laid, and that permission had been given to open the line for traffic. On September 16, 1869 he certified that the total length of the branch line was eleven miles and that "it is completed and ready for traffic."

By a series of transactions the use of the operations, rights and assets of the Woodstock Railway Company passed to CP which has operated the branch line from 1891 until the present. In 1873, the Woodstock Railway Company was amalgamated with other companies to form the New Brunswick and Canada Railway Company ("NBCRC"). In 1882, the NBCRC leased all its railroad and assets to the New Brunswick Railway Company ("NBRC") for 999 years effective July 1, 1882. On July 1, 1890, the NBRC leased its railroad lines to the Canadian Pacific Railway Company for a period of 990 years. This agreement or lease was continued and ratified by the New Brunswick statute, S.N.B. 1891, c.14, and by the federal statute, S.C. 1891, c.74.

On March 13, 1908, the Woodstock Band resident on the Reserve surrendered by way of quit claim to His Majesty a certain portion of the Reserve intended for sale to one Coster Wetmore. The portion is described as:

> . . . all that portion of Lot Twenty-seven on the westerly side of the River St. John ... being the easterly end of the said lot, excepting thereout and therefrom the Right of Way of the Canadian Pacific Railway, the public highway and a road allowance sixty-six feet wide extending from the said public highway westerly through the said portion of lot twenty-seven to the west boundary of the said portion. The said west boundary is to be drawn at right angles to the north Emit of the said lot.

The purchase price received by the government was to be held in trust for the Indians. The trial judge found that the right-of-way expressly excepted from the quit claim was the eastern crossing. In 1908 and 1909 five survey plans were prepared with respect to the Reserve. One of these plans showed the eastern crossing which was described on the plan as "Can. Pac. Ry., Atlantic Divn., Woodstock Secn., right of Way across Indian Reserve." The trial judge was of the view that these plans were prepared as a result of efforts being made by CP to obtain or provide documentary title to the crossings on the Reserve.

By Letters Patent issued on February 12, 1912 the Crown granted to CP, in consideration of $75.00 paid by CP to the Superintendent General of Indian Affairs, the freehold interest in the central and western crossings over the Reserve. There had never been any surrender by the Indians of the central and western crossing lands. The trial judge found that there was at no time any "formal grant" or "express formal conveyance" of the eastern crossing made by the Crown to CP. He concluded that the reason a formal grant was made of the central and western crossings but not of the eastern crossing was because the Crown thought either that the eastern crossing lands had been conveyed in the 1908 quit claim and the 1910 grant to Coster Wetmore which followed it or legal title to the eastern crossing had vested in CP's predecessors at the time of the construction of the line. The Wetmore grant included the lands surrendered by the Indians in 1908. These lands were eventually reacquired by the Crown in 1966 after various mesne conveyances (though there is some doubt that Wetmore had a valid tide). On June 1, 1976, an order-in-council was passed setting aside the lands for the use and benefit of the Woodstock Band of Indians as an addition to Woodstock Indian Reserve No. 23.

II. The Courts Below

A. *Court of Queen's Bench*

Dickson J. noted that no specific declaration as to title or even interest in the lands comprised in the eastern crossing was sought before him, but concluded, rightly in the view of this Court, that any adjudication of the issues before him would involve some degree of resolution of the question of title or interest in that crossing. The difficulty in making any final or absolute finding as to ownership or entitlement to use the land, he found, was occasioned by the absence as a party to

the litigation of the NBCRC, the head-lessor. The trial judge was unaware whether or not the NBCRC was still in existence.

Dickson J. found that the Band has no present claim to the land. Before Confederation the Crown, as it had every right to do, allocated all of the lands comprised in the Debec to Woodstock railway right-of-way, including the eastern crossing, to the Woodstock Railway Company under the 1864 and 1865 statutes. He found that upon the laying out of the lines, which occurred in the years 1865 and 1866 and was completed in the latter year, the fee simple title to the right-of-way vested in the Woodstock Railway Company. The fact that the surrender of 1908 included the words "excepting thereout and therefrom the Right of Way of the Canadian Pacific Railway" was merely a recognition of the fact that the railway company was already the owner and occupier of that right-of-way. He added that it was immaterial whether the Woodstock Railway Company took the fee simple or only an easement because even the more limited right would be sufficient for CP to maintain its action for an injunction.

B. *The Court of Appeal*

The Court of Appeal reversed the trial judge and held that the Reserve is Crown land held for the benefit of the Band. La Forest J.A. (as he then was) concluded that while s.24 of the 1864 incorporating statute permitted the Company to enter and take possession of Crown lands so long as it had the permission of the government to do so, this did not affect the Crown's right or title to these lands. Before Confederation the Woodstock Railway Company, by virtue of the various statutory provisions, had, in addition to permission to use the land, acquired a vested statutory right to obtain a right-of-way over the Crown lands through which the railway ran upon fulfilling all necessary requirements on its part. The Company did not, however, acquire title under these statutes but only a right to have the land transferred on fulfilment of the statutory requirements. Through some "unexplained inadvertence" no transfer was ever made. Nor was there any surrender by the Indians. Accordingly, the Company's interference with the Indians' interest continued pursuant only to the statutorily authorized permission. That permission has never been revoked. However, a permanent injunction should not be issued on the basis of a right in the Company which was intended to be merely temporary. Rather, a six month injunction should be ordered to give the parties an opportunity to negotiate a settlement of the Band's inter-est.

III. The Nature of CP's Interest

In order to define clearly the nature of the railway's interest in the eastern crossing, we must look to the language of the statutes, to any agreements between the original parties and to subsequent actions and declarations of the parties. CP claims any right it may have through its 990-year lease from NBRC dated July 1, 1890. NBRC's interest depends in turn on its 999-year lease from NBCRC dated July 1, 1882. Finally, any original grant of a fee simple or easement or other right was to the Woodstock Railway Company whose entire interest would have passed to NBCRC which was created by the amalgamation of the Woodstock and other railway companies in 1873. As the trial judge indicated, it is difficult to settle the title issue conclusively and authoritatively in the absence of NBCRC as a party. However, it is possible on the evidence available to the Court to reach a conclusion for purposes of this appeal as to whether CP has, by virtue of its long lease, a fee simple or an easement in the Reserve lands.

The 1864 incorporating statute clearly provides in s.24 that the Company and its successors have the right "to take and hold so much of the land and other real estate as may be necessary for the laying out, making and constructing, and convenient operation of the said Railway." The taking, holding and using of the land authorized in s.24 is made conditional on the provision "that in all cases the said Company shall pay for such lands or estate so taken and used, (in case the owner thereof demand itj such price as the said Company and the owner or respective owners thereof may mutually agree on. . . ." Section 24 concludes by saying that "nothing in this Act contained shall be construed to affect the rights of the Crown in any ungranted lands within this Province, or to authorize the said Company to enter upon or take possession of any such land without the previous permission of the Executive Government of the Province." The language of s.24 is such that the railway company may "take and hold" Crown land with the Crown's permission. There is no requirement that a special form be used for such permission or that the permission is only temporary until some sort of formal document is drawn up. The section also makes a clear distinction between the *owner* of the land, i.e., the party who holds the fee simple and the Company. For example, s.24 permits the Company, for the purposes of construction and repair of the railway to remove and use any earth, gravel, stone and timber "without any previous agreement with the owner or owners, tenant or tenants of the land." Such a provision regarding

permission would of course be meaningless if the Company itself had the fee simple. Furthermore, the railway company is to pay compensation for the lands taken or used to the person who is referred to as the "owner," not the "previous owner."

The Woodstock Railway Company could point to a number of sources in support of the position that it had the permission of the Crown to take and use the lands. First, there is s.9 of *An Act in aid of the construction of Railways* which states:

> 9. When any of the Lines of Railway in this Act mentioned, or the said Branches or Extensions, shall pass through Crown Lands, the Governor in Council shall grant, for the purposes of such Roads, necessary Crown Lands for tracks, sidings, and stations.

With great respect to La Forest J.A.'s opinion to the contrary, this Court finds that it is the preferable interpretation of s.9 that completion of the line was not a prerequisite to the grant of some proprietary interest in the land. The prerequisite was that the land be needed for the construction of the line. There is nothing to suggest that completion must precede the grant. The significance of the lack of such stipulation is highlighted by use of the term "completion" in several other sections of the same Act. For example, s.5 states:

> 5. No agreement shall be entered into for the completion of a Line to connect with the Province of Nova Scotia, until satisfactory arrangements are made with the Government of that Province for the completion of the connection with the Nova Scotia Railways.

Similarly, s.6 provides that the Governor in Council shall pay a yearly sum of money to the Company "upon the completion of such Line of Railway" and s.10 includes the pronouncement that "on the completion of the Road according to the terms of the agreement, such mortgages or first charge shall cease and determine." The specific reference to completion in other sections of the same Act leads us to conclude that had completion been necessary in order that s.9 come into play, there would have been an express indication to that effect. Furthermore, a contrary construction would entail a two-step procedure for the acquisition of the required lands involving, perhaps, a licence initially followed by a grant of easement or the fee simple. Such a two-step procedure is not contemplated by s.9. La Forest J.A. in the Court of Appeal construed the words "when any of the Line ... shall pass. . ." to mean "when the line has passed." With all due respect, we do not think the section envisages that no interest in the land will be granted until after completion of the work.

The March 7, 1866 undertaking provides some further support for the position that the Crown gave the Woodstock Railway Company permission to take and hold the lands of the eastern crossing. That undertaking states that a contract to build the railway had been made "upon the location approved of by the Government of the Province of New Brunswick, and which contract has also been submitted to said Government and approved of by them." By the terms of this undertaking the Company agreed to build the railway in accordance with the contract or "upon such terms as may hereafter be approved of by the Government." The wording of the undertaking indicates that the Government approved the Company's plans for the location of the railway and that this approval involved permission to take and hold the lands identified in the plans. There is no indication that this permission was temporary. Furthermore, in 1891 both the New Brunswick legislature and the federal Parliament enacted legislation to confirm and ratify CP's lease of the right-of-way from NBRC. Such confirmation and ratification must amount to an acknowledgement that permission had been given for the railway to be built where it was. It follows from s.24 of the 1864 incorporating statute that in light of this permission the Woodstock Railway Company was entitled to take and hold the land it used.

On the other hand, the intent behind and effect of the 1908 surrender by the Band remains unclear. The Band expressly excepted CP's right-of-way from its quit claim. The trial judge concluded that this was a recognition by the Band of CP's legal entitlement, that it, the Band, no longer had any interest in that land to quit claim. A contrary inference may, however, just as readily be made. The Band may have been seeking through the express exception of CP's right-of-way to achieve the very opposite, to retain its rights over the eastern crossing. This Court favours the latter view and concludes therefore that if CP has a fee simple or easement in the eastern crossing, it does so independently of the terms of the 1908 surrender. It does so by virtue of the way in which the Crown has dealt with its freehold interest, i.e., by negotiating the particular undertaking it did with the Woodstock Railway Company.

In the opinion of this Court, the proper conclusion to be drawn is that the Woodstock Railway Company obtained the permission of the Crown to take and hold the land over which the railway

passed including the eastern crossing. The right to take and hold land for the construction and operation of a railway seems to us to involve the grant of some kind of proprietary interest in the land. There is no requirement that a grant from the Crown be in some special form. Statutory authorization for a taking is certainly sufficient. There is nothing in the relevant statutory provisions or in the 1866 agreement to indicate that the permission given to the Woodstock Railway Company was in any sense intended to be temporary. Although it is not strictly necessary for the disposition of this case to define the precise nature of the interest acquired by the Woodstock Railway Company, we think it desirable to say something on the subject given the trial judge's finding that the Woodstock Railway Company acquired the fee simple to the eastern crossing. If the trial judge was wrong on this, the possibility of a residual Indian interest in the land may arise.

We have already expressed the view that the wording of s.24 of the railway company's incorporating statute militates against there having been a grant of the fee simple. The "owner" of the land is distinguished from the railway company itself. Furthermore, in 1912, as mentioned above, the Crown granted the CP Letters Patent for the freehold interest in the central and western crossings in consideration of the sum of $75.00. If the Crown had granted the fee simple to the Woodstock Railway Company in the 1860s, it would be strange indeed if the Crown could grant the freehold interest to a sub-lessee of the Woodstock Railway Company's successor in 1912.

It appears, in our opinion, that what the Woodstock Railway Company had, and what CP now has by virtue of its lease, is a statutory right-of-way i.e. an easement. In his text entitled *The Law of Easements and Profits* (1978), Paul Jackson writes that: "A right of way granted by virtue of statutory provisions is not necessarily limited to the purposes for which the dominant tenement was used at the time of the grant. Nonetheless the limits within which a grant can be made are determined by the construction of the relevant statute . . . " (p. 143). Jackson goes on to say: "The phrase 'statutory easement' is not a term of art but it provides a convenient label under which to discuss various types of rights which owe their origins to statute and can be conveniently described as easements - whether because of their more or less close resemblance to easements arising from the acts of parties or because they are, whatever their lack of such resemblance, called 'easements' by the statutes which create them." (p. 189)

The essential qualities of an easement were succinctly stated by Lord Evershed, M.R. in *Re Ellenborough Park,* [1956] Ch. 131 at 163:

> They are (1) there must be a dominant and a servient tenement; (2) an easement must "accommodate" the dominant tenement; (3) dominant and servient owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.

In the present case the dominant tenement - the lands held outright by the railway - are benefitted by the right-of-way across the servient tenement of the Crown. The right-of-way accommodates the dominant tenement. It is evident that the dominant and servient owners are different persons. The interest of the railway is certainly capable of forming the subject matter of a grant. Thus, we conclude that the interest granted to the Woodstock Railway Company from which CP now derives any benefit it might have is a statutory easement in the nature of a right-of-way. The nature and extent of a right-of-way depends on the proper construction of the language of the instrument creating it: *United Land Co. v. Great Eastern Railway Co.* (1875), L.R. 10 Ch. App. 586; *Cannon v. Villars* (1878), 8 Ch. D. 415.

The foregoing discussion of the nature of the railway's interest is, we believe, consistent with earlier authority on the interpretation of railway interest. In City *of Vancouver v. Canadian Pacific Railway Co.* (1894), 23 S.C.R. 1, this Court considered s.18 of the *Canadian Pacific Railway Act,* S.C. 1881, c.1, which gave certain statutory rights to the Railway over designated lands. When the City of Vancouver began works which interfered with CPR's use of the land, Gwynne J. held that on the true construction of the statute the Company's rights superseded the public right of access claimed by the City.

Similarly, in *Canadian Pacific Railway Co. v. Toronto Corporation and Grand Trunk Railway* Co., [1911] A.C. 461 (P.C.), where the appellant contested the order of the Railway Committee to CPR and the Grand Trunk Railway to carry a bridge over their lines at Yonge Street in Toronto, Ontario, the Privy Council held that public rights of user along the route took precedence over the railroad interest and were entitled to protection. The Judicial Committee was impressed by the statutes and agreements involved in the case which clearly indicated that public rights were to be saved. The *City of Vancouver v. Canadian Pacific Railway Co.* case was distinguished as being "based on the

terms of a particular statute differing entirely from those contained in the statutes referred to in this case. . . " (p.477). The key factor, then, must be the interpretation of the relevant piece of legislation. The Supreme Court of Canada reached the same conclusion as the Privy Council when it considered the above case *(sub nom. Grand Trunk Railway Co. of Canada v. City of Toronto* (1910), 42 S.C.R. 613). (Compare also the *Attorney-General for British Columbia v. Canadian Pacific Railway Co.,* [1906] A.C. 204 (P.C.).)

The jurisprudence makes it clear that resort must be had to the relevant statutes and documents in order to determine the nature and extent of a railway company's interest in land. We are in full agreement with that approach. Our conclusion for purposes of this appeal, based on an interpretation of the relevant statutes and documents, is that the Woodstock Railway Company acquired a statutory easement in the nature of a right-of-way in the eastern crossing. CP's interest in the eastern crossing is derived from that original acquisition

IV. Title by Prescription or Adverse Possession

In light of our conclusion that CP derives its interest in the eastern crossing through the Woodstock Railway Company, it is clear that CP cannot have acquired title by prescription or adverse possession. There are, in fact, several reasons why CP cannot have acquired title this way. First, as La Forest J.A. noted, it would be inconsistent to hold that possession through the Crown could be claimed in order to divest the Indians of an interest in land which the Crown holds for their benefit. Further, we have noted above that s.24 of the 1864 incorporating statute granted permission to the Railway Company to enter and take possession of the land. Because this permission has never been revoked, the Company had a legal right to be on the land and the time period for *adverse* possession never began to run. Finally, it seems that as a constitutional matter provincial prescription legislation would not apply to Indian lands: see *The Queen v. Smith,* [1981] 1 F.C. 346, [1980] 4 C.N.L.R. 29 (C.A.) (overturned on other grounds, [1983] 1 S.C.R 554, [1983] 3 C.N.L.R. 161) and *Derrickson v. Derrickson,* [1986] 1 S.C.R. 285 at 296, [1986] 2 C.N.L.R. 45 at 55. Federal limitation provisions are inapplicable here. Section 38 of the *Federal Court Act,* R.S.C. 1970 (2nd Supp.), c.10, applies to actions in the Federal Court and proceedings brought by or against the Crown. For all of these reasons, it is clear that CP cannot claim title by way of prescription or adverse possession.

V. Has the Band's Interest Been Extinguished?

The issue in this case is whether a permanent injunction should be awarded against the respondents. CP, in our view, has either a leasehold interest in the head lessor's right-of-way or an absolute interest in the right-of-way if a 990-year lease can be viewed as tantamount to a transfer. Generally speaking, an injunction will issue to restrain an interference or anticipated interference with a person's rightful enjoyment of the use of his land. Robert Sharpe has noted in his book entitled *Injunctions and Specific Performance* (1983), at p.180 that "The discretion in this area has crystallized to the point that, in practical terms, the conventional primacy of common law damages over equitable relief is reversed. Where property rights are concerned, it is almost that damages are presumed inadequate, and an injunction to restrain continuation of the wrong is the usual remedy." However, if it is found that the Band also has an interest in the land comprising the eastern crossing, then a court may be more reluctant, depending upon the nature of the Band's interest, to grant a permanent injunction against them.

Dickson J. found at trial that the 1844 statute on the *Management and Disposal of Indian Reserves,* S.N.B. 1864, 7 Vict., c.47, gave the Crown an unfettered right to deal with reserves, particularly where the development of the colony was concerned. Indeed, he concluded that the land in question had not been formally allocated as a reserve prior to Confederation. He also held that the vesting of the land in the Woodstock Railway Company could not be defeated by any failure to pay compensation, if indeed no compensation was paid, because under the relevant statutory provision the entitlement to compensation was entirely dependent on a claim for such compensation being made. In any event, the compensation provision would at best have created an obligation of debt which would have been unenforceable by application of successive Statutes of Limitation. Dickson J. also noted that the land around the eastern crossing had been owned for a time by Coster Wetmore so that the eastern crossing was remote from the remaining lands of the Band. Furthermore, there was no assertion of title by or on behalf of the Band for several decades. Dickson J. treated these factors as significant in reaching his conclusion that the Band now had no interest in the eastern crossing.

The New Brunswick Court of Appeal found that, even if the Reserve lands were not subject to the *Royal Proclamation of 1763*, they were at least governed by a similar regime. LaForest J.A. noted that the provincial statute, R.S.N.B. 1854, vol. 1, c.85, authorized the provincial government to sell or lease reserves, but included requirements that the sale or lease be made at a public auction and that the proceeds therefrom be applied for the benefit of the Indians. He noted that Indian title cannot be compulsorily divested in the absence of a clear intention to that effect on the part of the legislature. In this case, the legislature, he concluded, must have intended to displace the Indian title so far as need be for the construction and operation of the railway. However, the Indians never surrendered their title as required by law. La Forest J. concluded therefore that Indian title in the crossing subsists at the present time, although it could be surrendered or overridden by s.35 of the *Indian Act, R.S.C.* 1970*,* c.I-6, upon payment of compensation.

It is clear that by virtue of the 1851 deed the land in question was vested in the Crown. Shortly thereafter it became an Indian reserve. The trial judge placed some importance on the fact that there was no formal allocation of the land as a reserve prior to Confederation. It seems to us, however, to be somewhat inconsistent to demand such formality for allocation as a reserve while at the same time accepting the lack of a "formal grant" of land to the Woodstock Railway Company. We are of the view that it can be accepted that the land in question was part of the Woodstock Reserve before Confederation.

The courts below were both of the view that the New Brunswick government was entitled to deal with the land before Confederation. In the statutes of 1844 and 1854 the method by which reserve lands could be disposed of was set out. The method by which the Woodstock Railway Company could take and hold lands was set out in the 1864 incorporating statute. Compensation was to be paid only if the owner demanded it. The owner, i.e., the Crown, did not demand payment. In our opinion, the Woodstock Railway Company did all it was required to do in order to obtain its interest in the lands comprising the eastern crossing. That interest was obtained prior to Confederation and so was subject only to the legislation of New Brunswick. Whether the government of the day carried out its obligations to the Band is a separate question which does not, in our view, affect the proprietary interest of CP in the land.

The question whether the government of New Brunswick failed to carry out its obligations to the Band and whether the Band is entitled to damages or compensation as a consequence does not arise in this appeal. Those remain open questions. In this regard, we note the words of Dickson J. (as he then was) in the case of *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 376, [1985] 1 C.N.L.R. 120 at 131:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians, This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty, it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

Dickson J. continued at p.379 [p.134 C.N.L.R.]:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada,* [1921] 1 A.C. 40 1, at pp. 410-411 (the *Star Chrome* case).

As indicated above, we have concluded that the Crown retained the fee simple in the lands comprising the eastern crossing. What the Woodstock Railway Company acquired was an easement or right-of-way. CP can claim no greater interest.

Before turning to the jurisprudence on what must be done in order to extinguish the Indian interest in land, the exact nature of that interest must be considered. Courts have generally taken as their starting point the case of *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), in which Indian title was described at p.54 as a "personal and usufructuary right." This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status or a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. That this was so was

recognized as early as 1921 in *Attorney-General for Quebec v. Attorney-General for Canada,* [1921] 1 A.C. 401 (P.C.), where Duff J., speaking for the Privy Council, said at p.408 "that the right recognized by the statute is a usufructuary right only and a personal right *in the sense that it is in its nature inalienable except by surrender to the Crown."* (Emphasis added.) This feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions. In *Guerin,* supra, this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them. On the nature of Indian interest Wilson J. noted at p.349 [p.152 C.N.L.R.] that:

> The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.

In that same case Dickson J. elaborated on the nature of Indian title at p.382 [pp. 135-36 C.N.L.R.]:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui *generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.

The statements of Judson J. in *Calder v. Attorney- General of British Columbia,* [1973] S.C.R. 313 at 328 are also helpful:

> . . . when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right."

The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis.* It is more than the right to enjoyment and occupancy although, as the Chief Justice pointed out in *Guerin,* it is difficult to describe what more in traditional property law terminology.

How then is Indian title to land extinguished? In *Calder,* supra, two views were expressed as to what was necessary to show that the sovereign intended to extinguish Indian title. Judson J. (speaking for himself and Martland and Ritchie JJ.) thought that alienation and other acts inconsistent with the existence of an aboriginal title was sufficient (p.337). Hall J. (speaking for himself, Spence and Laskin JJ.) was of the view that such an intention must be "clear and plain" (at p.404). Did the Woodstock Railway Company's acquisition of an easement or right-of-way over the land extinguish the Band's interest in the underlying fee which continued to be held by the Crown? There seems to be no doubt, having regard to the fact that a right-of-way is itself a limited interest in land, that the Crown continued to hold the fee for the benefit of the Band unless it can be said that the Band's only interest was to the enjoyment and occupation. If its only interest was to the enjoyment and occupation, then it is clearly arguable that the Woodstock Railway's right-of-way was inconsistent with such an interest continuing in the Band. On the other hand, can it be said that the New Brunswick legislature's intention to extinguish the Band's interest in the underlying fee remaining in the Crown was "clear and plain"? Fortunately, we do not have to answer this difficult question because it is enough for purposes of this appeal to find that CP has a valid easement or right-of-way over the eastern crossing sufficient to support the award of a permanent injunction.

VI. Disposition

We allow the appeal, set aside the decision of the Court of Appeal and uphold the exercise by the trial judge of his discretion to issue a permanent injunction. The appellant is entitled to its costs in this Court.