

ATTORNEY GENERAL OF CANADA v. CANADIAN PACIFIC LIMITED AND MARATHON REALTY COMPANY LIMITED

British Columbia Supreme Court, Meredith J., February 12, 1985

W.B. Scarth, W.J. Worrall, and T.B. Marshall, for the plaintiff  
N.D. Mullins and M.G. MacDonald, for the defendants

The plaintiffs sought relief "directing the defendants to transfer the subject lands to Her Majesty the Queen in Right of Canada, or, alternatively, an order vesting the subject lands in Her Majesty the Queen in the Right of Canada". The plaintiffs also sought a declaration for the amount of damages suffered by them as a result of the actions of the defendants in failing to retransfer the subject lands and removing improvements therefrom.

The subject lands comprised a strip of the Penticton Indian Reserve and had been appropriated by Canadian Pacific Limited for railway purposes. As required by s. 48(1) of the Indian Act, R.S.C. 1927, c.98, the Governor in Council consented to the acquisition. Canadian Pacific subsequently conveyed the lands to Marathon Realty. At the time of the application the land was no longer used for railway purposes.

**Held: Order accordingly.**

- 1. The restraint against alienation is clearly set out in the Railway Act, R.S.C. 1927, c.170. The conveyance to Marathon Realty was therefore illegal.
- 2. As the lands were no longer necessary for the use of the railway and thus were not used for the purposes of the railway, the lands must be restored to the Crown.
- 3. The plaintiffs did not lose anything substantial by reason of the deprivation of the lands, therefore the declaration for damages is refused.

\* \* \* \* \*

**MEREDITH J.:** I conclude that the plaintiffs are entitled to the essential relief sought namely an order "directing the defendants to transfer the subject lands to Her Majesty the Queen in the Right of Canada, or, alternatively, an order vesting the subject lands in Her Majesty the Queen in the Right of Canada".

The "subject lands" comprise a strip of the Penticton Indian Reserve. The strip was appropriated by Canadian Pacific Limited ("CP") for a right-of-way on the Kettle Valley Railway, that is to say for railway purposes. As required by s. 48(1) of the Indian Act, R.S.C. 1927, c.98, the Governor in Council consented to the acquisition. The Railway Act, R.S.C. 1927, c.170, s.189 then: (1) prevented CP from alienating the lands so acquired; and (2) limited the acquisition to so much of the Crown property as was necessary for the railway and used as such. Thus the purported alienation of the lands by CP to Marathon is illegal as contrary to the Railway Act. And further because the lands are no longer necessary, and are thus no longer used, for the purposes of the railway they must be restored to the Crown. No point has been made in argument that the provisions of both the Acts above-cited have been changed since the date of the original acquisition of the land.

That the land was acquired for railway purposes, and only for railway purposes, and was acquired under the authority of s.48 of the Indian Act is evident from the form of the Order-in-Council by which the Governor in Council consented to the sale of the land to CP. The Order-in-Council reads (and I underline the words by which the purpose is made evident) as follows:

AT THE GOVERNMENT HOUSE OF OTTAWA

WEDNESDAY, the 15<sup>th</sup> day of DECEMBER, 1948.

PRESENT:

HIS EXCELLENCY

THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS the Canadian Pacific Railway Company requires the land herein described for a railway right of way through Penticton Indian Reserve No. 1;

AND WHEREAS the Railway Company has agreed with the individual Indian owners on compensation of Five Hundred Dollars per acre amounting to Six Thousand, Five Hundred and Sixty Dollars, payment of which amount has been received from the Company;

AND WHEREAS the Indian Commissioner for British Columbia and the Director of Indian Affairs advise that the land be sold to the Company for Six Thousand, Five Hundred and Sixty Dollars;

THEREFORE His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources and under the authority of section 48 of the Indian Act, is pleased to consent to and doth hereby consent to the sale of the land herein described to the Canadian Pacific Railway Company for Six Thousand, Five Hundred and Sixty Dollars without any terms or conditions other than the payment of the said sum of money.

DESCRIPTION

All that portion of Penticton Indian Reserve Number One, in Similkameen (formerly Osoyoos) Division of Yale District in the Province of British Columbia, required as a right of way by the Canadian Pacific Railway, as said portion is shown coloured red on a plan thereof signed by W. Humphreys, Dominion and British Columbia Land Surveyor on the twenty-third day of February, nineteen hundred and forty-eight, of record number R.R. three thousand two hundred and sixty in the Indian Affairs Survey Records, Department of Mines and Resources, Ottawa, said portion containing by admeasurement an area of thirteen acres and twelve hundredths of an acre, more or less.

Section 48(1) read (and I again underline the relevant words) as follows:

48. No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

Section 189 of the Railway Act then became operative (again I underline the relevant words):

189. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.

2. Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making, completing and using its said railway and works.

3. The company may not alienate any such lands so taken, used or occupied.

4. Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust. 1919, c.68, s.189.

The restraint against alienation is clear. The conveyance to Marathon is thus, as I say, illegal.

And I think, by necessary implication, that as the lands are no longer necessary for the use of the railway, and thus are not used for the purposes of the railway, the land must be restored to the Crown.

The argument advanced by Mr. Mullins for CP and Marathon is that CP comes within the second part of s.48(1), that is to say that it is a company having statutory power "for taking lands" without the consent of the owner (that power is conceded) and thus that although it did not become necessary to exercise the statutory power, that it acquired the property with the consent of the Governor in Council. And, as the Governor in Council did not subject the acquisition to any terms and conditions, CP held the property without any qualification. The argument is that CP was accordingly entitled to alienate the property. But, in my judgment, it was not necessary for the Governor in Council to attach terms and conditions to the acquisition of the property. Those terms and conditions were already contained, and clearly set forth, in the provisions of the Railway Act to which I have referred.

The plaintiffs claim a declaration of the amount of damages suffered by them as a result of the actions of the defendants in failing to retransfer the subject land and removing improvements therefrom. As I am not persuaded that the plaintiffs have lost anything substantial by reason of the deprivation of the lands, the declaration sought is refused.

There will be an Order accordingly.