CANADIAN PACIFIC LIMITED v. PAUL ET AL.

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

Reported: (1983), 50 N.B.R. (2d) 126, 131 A.P.R. 126, 2 D.L.R. (4th) 22

New Brunswick Court of Appeal, Ryan, Stratton and La Forest JJ.A., September 28, 1983

Ray Dixon, for the appellant
Levi Clain, for the respondent, Canadian Pacific
Robert Hynes, for Her Majesty in Right of Canada
Adrian B. Gilbert, Q.C., for New Brunswick Railway

The respondent, Canadian Pacific Limited, brought an action for an injunction to restrain the appellants, who are members of the Woodstock Indian Band and Council, from interfering with its use of the railway right-of-way crossing the Woodstock Indian Reserve. The respondent, Canadian Pacific, alleged that it had legal possession based on an 1890 lease from the New Brunswick Railway Company. The appellants contended that the railway right-of-way was part of the reserve and had never been surrendered. They sought a declaration that Canadian Pacific trespassed on the land plus damages for trespass.

The Court of Queen's Bench, Trial Division ([1981] 4 C.N.L.R. 39) ruled against the Indian band, holding that New Brunswick legislation which authorized the building of the railway had the effect of extinguishing Indian title to the land. The railway had been built prior to New Brunswick entering Confederation. The court also dismissed the Indian band's claim for damages. The decision was appealed to the New Brunswick Court of Appeal.

Held: (La Forest J.A., for the Court)

1. It is not necessary to determine whether the Royal Proclamation of 1763 sets aside lands for the use of Indians in New Brunswick, as in this the case the court is dealing with reserve lands and New Brunswick courts have long held that lands reserved for Indians are governed by regimes similar to that which applied to lands reserved by the Royal Proclamation.

2. It is clear that Indian title continues until it is surrendered by Indians unless it is otherwise extinguished by the Indian Act, R.S.C. 1970, c.I-6 or by other federal statutes.

3. Prior to Confederation, the predecessor in title of Canadian Pacific, the Woodstock Railway Company, had, in addition to permission to use the land, acquired a statutory right to obtain a right-of-way over the Crown land through which the railway ran. While the statute intended that title to the land would be granted on completion of construction and other legislative requirements, no such grant was ever made. Therefore, title to the land in question remained with the Indian band.

4. There is a presumption both at common law and also under the Indian Act that vested rights will not be taken away without compensation.

5. Prescription or adverse possession cannot apply as time cannot run in favour of a person who is legally entitled to be on the land for purposes for which he uses it, for the owner has no right of entry or right of action in such a case.

6. Permission to use the land remained with the railway company. Therefore, the Indians cannot succeed in their counterclaim for trespass and damages.

7. The Indians by their counterclaim were not seeking relief against the Crown but rather to establish the Crown's title, and therefore the Court of Queen's Bench has jurisdiction to make an order involving the federal Crown.

8. Permanent injunction refused for two reasons: it was doubtful if the interference by the Indians would occur again; and, since the basis of the right-of-way was that of a temporary nature, a permanent injunction could have the effect, in practice, of making the Indians' claim for compensation dependent on Canadian Pacific seeking a permanent title that it

might have little interest in obtaining. The granting of a permanent injunction would therefore not be just or convenient.

9. An interim injunction of six months granted to prohibit the Indians from blocking the right-of-way. In addition to permitting Canadian Pacific to take steps to obtain a permanent right-of-way, this would afford the parties an opportunity to negotiate respecting compensation.

10. Appeal allowed in part. Permanent injunction vacated: interim injunction for six months granted to prohibit Indians from blocking the right-of-way. Counterclaim for trespass and damages dismissed.

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LA FOREST J.A.: This is an appeal from a judgment of a judge of the Court of Queen's Bench, Trial Division, in which he granted the plaintiff Canadian Pacific Limited a permanent injunction against the individual defendants, who are members of the Woodstock Indian Reserve Band, and the Council of that Band; see (1981), 34 N.B.R. (2d) 382, 85 A.P.R. 382 [[1981] 4 C.N.L.R. 39]. The injunction prohibits the defendants (to whom I shall for convenience collectively refer as the Indians) from interfering with Canadian Pacific's right-of-way known as the easterly crossing situated on the Woodstock Indian Reserve No.23, just south of the Town of Woodstock. The litigation was prompted by the fact that the individual defendants blocked the railway track running over the right-of-way, thereby preventing the operation of the railway. Shortly afterwards an interim injunction was issued to restrain the defendants from further interference with its operation. The present action followed.

The trial judge also dismissed the defendants' counterclaim that claimed that the land used for the right-of-way was part of the reserved lands vested in Her Majesty for the use and benefit of the Woodstock Indian Band, and sought a declaration that Canadian Pacific is trespassing on those lands, as well as damages for such trespass. By an order dated the 30th day of April, 1976 the Attorney-General of Canada was added as a defendant to the counterclaim, but a conditional appearance only was entered on his behalf because, it was argued, any claim against him had to be brought in the Federal Court of Canada. By a further order dated the 14th day of May, 1976 the New Brunswick Railway Company was also added as a defendant to the counterclaim.

Background

The Woodstock Indian Reserve, on which the defendant Band of Maliseet Indians reside, consists of a long strip of land 360 chains (about 4½ miles) in length and 7½ chains (about 500 feet) in width running in an east-west direction from the westerly shore of the St. John River a short distance south of the Town of Woodstock. As will be seen with more particularity later, it has been owned by the Crown for the use and benefit of the Indians since 1851, some 15 years before the company through which Canadian Pacific traces its title acquired any interest in it.

The branch line of the railway operated by Canadian Pacific from McAdam through Debec to Woodstock (the Woodstock branch line), following what the trial judge described as a serpentine-like course to reduce the grades, crosses the reserve at three locations, the westerly crossing, the central crossing and the easterly crossing. The creasing closest to the river, the easterly crossing, is the only one in dispute here.

Canadian Pacific asserts it acquired a right-of-way over the easterly crossing under an agreement of July 11, 1890 by which the New Brunswick Railway Company leased to Canadian Pacific for a period of 990 years several railway lines, including the Woodstock branch line to which the New Brunswick Railway Company had, on July 1, 1882, acquired a lease for 999 years of all the interest once belonging to the Woodstock Railway Company which had originally constructed the line between 1865 and 1869. It is unnecessary to describe the series of transactions and statutory provisions by which the New Brunswick Railway Company acquired its interest; these are fully set forth in the trial judge's reasons for judgment and there is no dispute about them. Suffice it to say that by the 1890 agreement, Canadian Pacific acquired a lease of whatever interest the Woodstock Railway Company had in the Woodstock branch line, including the easterly crossing, and it is the interest once possessed by the latter company on which Canadian Pacific's case largely turns.

Before looking at the manner in which the Woodstock Railway Company acquired its interest, I shall, for clarity, examine the interest of the Indians, which antidates it, first. I might note in passing, however, that the 1890 agreement was confirmed by a provincial and a federal statute (S.N.B. 1981, 54 Vict. c.14; S.C. 1891, 54-55 Vict., c.74). The provincial statute confirms and declares the agreement valid in all respects, but this would not affect persons who were not parties

to the agreement any more than the federal statute which more carefully declared it "to be valid and binding on the parties thereto"

The Indian Title

The Indians' interest in the Woodstock Indian Reserve principally rests on a deed, dated May 22, 1851, between Beverley Robinson, executor of the estate of one Peter Fraser, as grantor to the Queen represented by the Lieutenant-Governor of New Brunswick. The deed, after reciting that the latter had agreed to purchase the land "for public uses: that is to say, for the use of the Malicette 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", goes on by the habendum clause to convey "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". While there was no evidence of any formal allotment of the lands for a reserve, the trial judge found that the lands so acquired were on acquisition de facto allotted to the Meductic Maliseet tribe, whose members, he further found, were the ancestors of the defendant Indians who now constitute what is known as the Woodstock Band. There are other cases where reserves have been created by deed (see for example Logan v. Styres (1960), 20 D.L.R. (2d) 416), and the fact that under the deed Her Majesty is authorized to alter the use of the Land makes no difference; the most important document afecting lands reserved for the Indians, the Royal Proclamation of 1763, itself reserves lands for the use of the Indians during Her Majesty's pleasure; see R.S.C. 1970, Appendices, p.123.

There was considerable discussion on the appeal regarding the nature of the interest or title of the Indians and their counsel stressed that the lands concerned were governed by the provisions of the Royal Proclamation of 1763 which, he argued, applies to New Brunswick. For this assertion he relies on the judgment of the Federal Court of Appeal in Government of Canada v. Smith, [1981] 1 F.C. 346, 34 N.R. 91, 113 D.L.R. (3d) 522 [sub nom. The Queen v. Smith, [1980] 4 C.N.L.R. 29] (now reversed by the Supreme Court of Canada though without reference to this point [[1983] 3 C.N.L.R. 161]) and the cases to which I shall presently refer. I would need more specific references to Indian policy in this province as revealed by other public documents than were presented in this case to persuade me of the general application of the Proclamation here, for the history of Indian relations in this province is vastly different from that of the central and western provinces.

In truth, I must confess that I find the argument respecting the Proclamation of little relevance in this case. Whether or not it had the effect of setting aside lands for the use of the Indians in this province, as it did in some of the other provinces, the fact is that we are dealing with reserved lands and, though with divergent rationales, our courts have long held that lands reserved for the Indians here were governed by a regime similar to that which applied to lands reserved by the Proclamation; see Doe dem Burk *v.* Cormier (1891), 30 N.B.R. 142; Warman v. Francis (1960), 20 D. L. R. (2d) 627. The latter case, upon which counsel for the Indians heavily relied, does not in essence go beyond this. Nor does the Nova Scotia case of R. v. Isaac (1975), 13 N.S.R. (2d) 460; 9 A.P.R. 460.

At the time the predecessor of Canadian Pacific, the Woodstock Railway Company, acquired its interest in the easterly crossing there was, it is true, a provincial statute (R.S.N.B., 1854, c.85) which authorized the provincial government to sell or lease such reserves, but this power was subject to the conditions set forth in that statute including the 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. No such sale or lease was made in this case.

The foregoing is the regime against which any assertion by Canadian Pacific that the Woodstock Railway Company acquired its interest in its railway line free of the Indian title before Confederation must be assessed. However, as will be seen later, by the time title was to be granted to the Woodstock Railway Company under the provisions of the relevant railway legislation, Confederation had taken place and the federal Parliament had enacted provisions for the protection of Indian lands; see S.C. (1868), 30 & 31 Vict. c.42. That Act incidentally, by s.32, repeals (so far as it is within Parliament's power) the 1852 New Brunswick Act dealing with Indian reserves. Section 6 of the 1868 Act provides that reserved lands shall not be sold until surrendered by the Indians in the manner therein provided, and that when sold the proceeds are to be used for the benefit of the Indians. Similar provisions have appeared in succeeding Indian Acts to this day; see now R.S.C. 1970, c.I-6, s.37. This provision, too, underlines that it is unnecessary to pay undue attention to the Proclamation in this case. The applicable law since

Confederation makes it clear that the Indian title continues until it is surrendered by the Indians unless it is otherwise extinguished by the Indian Act or other federal statute.

There was, however, a provision in the Indian Act of 1868 governing railway rights-of-way. Section 25 provided that where a railway passed through an Indian reserve, compensation was to be paid therefor in the same way as was provided for in the case of lands of other persons, the Secretary of State to act for the Indians in any matter relating to such compensation, which was to be used for the benefit of the Indians. The same general concept has been continued to this day. Though by no means identical, s. 35 of the existing Indian Act provides a procedure for the transfer of Indian lands to railways when this is authorized by a federal or provincial statute. It further requires that monies received from such transfers are to be employed for the use and benefit of the appropriate Indians or Indian bands.

The Woodstock Railway Company Title

The interest of the Woodstock Railway Company in the Woodstock branch line arises out of its incorporating statute (S.N.B. 1864, 27 Vict., c.57), and An Act in aid of the construction of Railways (S.N.B. 1864, 27 Vict., c.3) enacted in the same session of the Legislature, indeed two days of one another. The company was incorporated for the express purpose of constructing a railway from Woodstock to the United States border to join the St. Andrew's line over such route as might be deemed most favourable by its directors (Preamble and s.3 of the incorporating Act). After empowering the company to hold land (s.3), the incorporating Act by s.24 went on to provide that

> . . . 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 . . . ; provided always that the said land so taken shall not exceed six rods in width, [with irrelevant exceptions] . . . ; 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; and in case the said parties should not agree, then it shall be lawful for the said company to apply to two of Her Majesty's Justices of the Peace in the County wherein the said land may be situate, [to set in motion a procedure therein described for assessing the damages].

Had the lands here in question been private lands, the company would by taking and using them have acquired a permanent right-of-way for which the owner would be entitled to compensation as provided in the Act; see Carr v. Canadian Pacific Railway Company (1912), 41 N.B.R. 225.

The lands concerned here, however, were not private lands, and s.24 of the incorporating Act expressly provides that the rights of the Crown in ungranted lands were not affected by the Act. Nor was the company authorized to enter or take possession of such lands without the permission of the government. The section concludes:

> . . . 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.

In sum, the company was permitted to enter and take possession of Crown lands so long as it had the permission of the government. But this did not affect the Crown's rights or title to these lands. In fact, other provisions were made for the permanent acquisition of Crown lands by the Act in aid of the construction of Railways already referred to. Section 9 of that Act reads:

> 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.

Included among the lines mentioned in the Act was the " Branch from the Town of Woodstock to connect with the present Saint Andrew's Line" (s.3), i.e. the Woodstock branch line.

The different treatment accorded Crown lands was undoubtedly to ensure the completion of the work required to warrant payment of the subsidy under the Act in aid of the construction of Railways as well as the performance of other public duties, including those relating to Indians, to which topic I shall return presently.

There is no doubt that the government gave the company permission to enter the relevant land and take possession of it for such purposes (to use the language of the introductory part of s.24 of the incorporating Act) as "may be necessary to carry into effect the intentions and objects of this Act", a permission that has never been revoked. The trial judge has related at length the various activities of the company from 1865 onward in surveying and constructing the line. In particular, on March 7, 1866 the company and Her Majesty the Queen as represented by the Province entered into an agreement which recited that the company had entered into the contract for construction of the Woodstock branch line "upon the location approved of by the Government of the Province of New Brunswick and which contract has also been submitted to the said Government and approved of by them". By the agreement the company agreed with the Queen to build the railway in accordance with the contract or "upon such terms as may hereafter be approved by the said Government". It was also provided that the provisions of the Act in aid of the construction of Railways, "shall be taken to be part of this agreement".

All of this, it should be observed, occurred before Confederation when the Province had undivided jurisdiction to legislate "for the public peace, welfare and good Government of our said Province"; see Royal Commission to Thomas Carleton, reproduced in Collections of the New Brunswick Historical Society, No.6 (Saint John, 1905), p.394 at p.397. By this time the Legislature had acquired control over the Crown lands as well; see N.B. Stat. (1837), 8 Wm. IV, c.1; R.S.N.B., 1854, title 3, c.5. There can be no doubt that the provincial Legislature could at that time extinguish the Indian title. Though they disagreed on many issues, all the judges in Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, agreed that pre-Confederation provincial legislation could by apt words do so.

In short, before Confederation, the predecessor in title of Canadian Pacific, the Woodstock Railway Company 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 on fulfilling all necessary requirements on its part. It is true that not all the construction work was then completed, but a very substantial amount had been done. On May 31, 1867, the government inspector and engineer reported to the Provincial Secretary that the company had by then expended about $80,000.00 on construction, and by August 29, 1867, it had expended close to the $100,000.00 permitting it to obtain an advance of $25,000.00 on the subsidy to be paid by the government under the Act in aid of the construction of Railways. By that time the whole 12 miles of the line had been cleared, over seven miles had been graded and two miles of track had been laid. By January 8, 1868 the company's expenditures had grown to $180,000.00. By August 8 of that year all track had been laid and on September 16, 1869 the government engineer reported that the entire railway was "completed and ready for traffic". Confederation had, of course, already taken place on July 1, 1867.

Under the Act in aid of the construction of Railways, the Woodstock Railway Company appears, by September 16, 1869 at least, to have been entitled to obtain a grant of a permanent right-of-way over any Crown lands on which the line was built. Certainly the company would be entitled to it when the lines were first put in operation. At that stage there could be no doubt that, to paraphrase s.9 of the Act in aid of the construction of Railways, the line of railway would have passed through Crown lands. As will be observed, I do not agree with the trial judge's view that the land had vested in the company upon the laying out of the line which, he held, occurred in the years 1865 and 1866. The statute otherwise provides. It provides rather, by a provision apparently not brought to his attention, that the land is to be granted when the line has passed. The company had quite properly entered the land and had possession pursuant to government permission made in accordance with the statute. But it did not have title. However, it had, before Confederation, acquired the right, subject to its fulfilling its obligations, to have the land transferred both under statute and under the agreement with the province incorporating the provisions of that statute.

After Confederation the Woodstock Railway Company's interest continued as "a trust or other interest" in the land within the meaning of s.109 of the Constitution Act, 1867. This interest continued despite the transfer to the federal government in 1958 of the underlying title to Indian lands in the province; see S.C. 1958, c.47; S.N.B. 1958, c.4. In Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co. (1882), 7 App. Cas. 178, it was held that while s.108 of the Constitution Act, 1867 had the effect of transferring all railways belonging to Nova Scotia at Confederation, the federal government did not get anything more than the province possessed at the time. Accordingly, the federal government took the Windsor Branch Railway subject to the same obligation as the provincial government, in that case to enter into an agreement with the respondent company in accordance with an agreement confirmed by a pre-Confederation provincial statute.

Inter-Relation of the Rights

The effect of the railway legislation just discussed on the Indian title must now be examined. There is no doubt that the Woodstock Reserve is Crown land, even though it is held for the benefit of the Indians as a reserve. And it is equally obvious that the Legislature must have intended that, because of its location, the Woodstock branch line would pass through it; it could not easily be avoided if the railway was to be built. The contemporaneous actions of the provincial government in approving the location of the line confirms this position.

At the same time, it must be remembered that the Indian title cannot compulsorily be divested in the absence of a clear intention on the part of the **l**egislature. In the course of examining a series of statutes in Calder v. Attorney-General of British Columbia, supra, Hall J. (speaking for himself, Spence and Laskin JJ.), had this to say at p.404:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

This appears to be a special application of the general presumption that the Legislature does not, in the absence of clear words, intend to interfere with vested rights; see Re Estabrooks, Pontiac Buick Ltd.; Re Fisherman's Wharf Ltd. (1983), 44 N.B.R. (2d) 201, 116 A.P.R. 201, esp. at p. 212.

In this case, I am prepared to hold that the Legislature must have intended to displace the Indian title so far as need be for the construction and operation of the railway. The statute contemplated initial entrance by permission pursuant to the statute, but for long term interference it was intended that a grant would be obtained. But no such grant was ever made; nor was there any surrender made by the Indians. So the interference with the Indians' interest continued pursuant to the statutorily authorized permission.

One can only speculate why the matter was never regularized. It may be because no grant was required in the case of private lands. It may also have been owing to the fact that by the time the grant should have been issued, Confederation had intervened and there may have been some confusion about which government should issue it. Certainly, as we shall see, there was uncertainty about it in later years.

There is a further dimension to the problem. The presumption against interference with vested rights to which I have just referred goes further. When a taking is, in fact, authorized by statute, it is presumed that compensation will be paid; see the Fisherman's Wharf case, supra. This, like the presumption against taking, must apply with additional force to the taking of Indian lands because this affects the honour and good faith of the Crown. This presumption is reinforced here by the fact that the incorporating Act of the Woodstock Railway Company and the Act in aid of the construction of Railways of 1864; previously cited, and that of 1865 (S.N.B. 1865, c.12) made provision for compensating persons other than the Crown. It shows an intention to compensate persons other than the Crown whose interests were affected.

There is also the federal Act of 1868, enacted before the Woodstock Railway Company was entitled to a grant under the railway legislation. It provided, where a railway passes through an Indian reserve, for the payment of compensation for the benefit of the Indians in the same manner as is provided for with respect to the lands or rights of other persons. This general concept has been continued to the present day and now appears, we saw, in s.35 of the existing Indian Act. There is no evidence that the Indians were ever paid compensation in respect of the easterly crossing.

Subsequent Transactions

The Canadian Pacific Railways, as Canadian Pacific was then known, attempted to obtain documentary title to the rights-of-way in the Woodstock Reserve in the years 1908 to 1912. Several surveys were made and on December 13, 1911, order-in-council P.C. 2828 authorized the acquisition of the westerly and central crossings. Accordingly, by Letters Patent issued on February 12, 1912, the Crown granted the central and westerly crossings to the Canadian Pacific for the sum of $75.00, the Letters Patent reciting that the proceeds were to be applied for the benefit of the Indians.

These transactions were made under the authority of s.46 of the Indian Act of the time (R.S.C., 1906, c.81), the successor of s.25 of the 1868 Indian Act referred to earlier. It prohibited the

taking of any portion of a reserve for the purposes of a railway without the consent of the Governor-in-Council and further provided that if any railway passes through or causes injury to any reserve or if any damage to any reserves is done under the authority of a federal or provincial statute, compensation is to be made to the Indians of the Band in the same manner as is provided with respect to the lands or rights of other persons.

As will be observed, the crossings conveyed did not include the easterly crossing. The reason for this omission was that it appears to have been thought the land concerned was then or would soon be in private hands. While the land was, in fact, not yet in private hands, there had been negotiations for that purpose. Shortly before the negotiations with the Canadian Pacific Railways, the Indian Band and the federal Indian Affairs Office appear to have concluded that a portion of the reserve was surplus to the requirements of the Band and should be sold for the benefit of the Band to one Coster Wetmore who owned adjoining lands on the north side of the reserve. Accordingly, on March 13, 1908, the Band executed a surrender to the Crown of the land intended for sale, which was later approved by the Governor in Council following which Letters Patent of the land were issued to Mr. Wetmore. The land described in the surrender would without more have included the land under the easterly crossing but there was an express reservation from such land "excepting thereout and therefrom the Right of Way of the Canadian Pacific Railway . . .". The lands comprising the easterly crossing were, therefore, not surrendered.

Subsequently, the bulk of the surrendered land was granted to Mr. Wetmore by the federal government. I find it unnecessary to relate the negotiations and conveyances between the Crown and Mr. Wetmore or the various conveyances made within Mr. Wetmore's family before the Crown reacquired and reincorporated the land in the reserve in 1966 and 1972. These are described in detail by the trial judge. For present purposes, it is enough to note that the land was conveyed to Mr. Wetmore without reference to the exception for the easterly crossing and that a similar practice was followed by Mr. Wetmore and members of his family in granting the land. That, however, does not alter the fact that the Indians never surrendered their title as required by law.

I might mention in passing that, as the trial judge notes, the Letters Patent to Mr. Wetmore appear to have had no legal validity. The underlying title to the land at the time was in the Crown in right of the Province and it, not the Crown in right of Canada, had the right to convey the land; see Ontario Mining Co. v. Seybold, [1903] A.C. 73; Canada, Government of v. Smith (1983), 47 N.R. 132 [sub nom. Smith v. The Queen [1983] 3 C.N.L.R. 161] (S.C.C.). However, in view of the subsequent vesting of the property in the federal government, this would not seem to be of any importance. At any rate, it has no relevance to the facts of this case.

In conclusion, the Indian title in the easterly crossing was never surrendered by the Indians. Nor did the federal government transfer a right-of-way to Canadian Pacific under s.46 of the then existing Indian Act.

Prescription

Canadian Pacific argues, however, that the Indian title has been extinguished by prescription or lost modern grant. Though the trial judge accepted this contention, it should be observed that strong reasons have been advanced against the application of prescription to the Indian title in lands; see the unreported judgment of McKeown C.J., of the King's Bench Division of the Supreme Court of New Brunswick in Fahey v. Roberts, dated December 1, 1916; see also R. v. McCormick (1860), 18 U.C.Q.B. 131; for a different rationale see R. v. Smith, [1981] 1 F.C. 346, 34 N.R. 91, 113 D.L.R. (3d) 522 [[1980] 4 C.N.L.R. 29] (F.C.A.). These reasons appear to me to have considerable cogency especially as they relate to property vested in the Crown, and it must be remembered that the claim of the Indians here is against land so vested. It would seem odd if possession through the Crown could be claimed to divest the Indians of an interest in land the Crown holds for their benefit.

I am, however, relieved of the need to consider whether long adverse possession could give a prescriptive right against the Indian title to a private corporation like Canadian Pacific, even if it did not hold through the Crown, because in my view there was no adverse possession here. As I understand the law, time cannot run in favour of a person who is legally entitled to be on the land for the purposes for which he uses it, for the owner has no right of entry or right of action in such a case; see Payson v. Good (1846), 5 N.B.R. 272; and McVity v. Tranouth, [1908] A.C. 60. Here the Indians had no right to prevent the Canadian Pacific or its predecessors in title from using the land. For by statute, as we saw, the company to which Canadian Pacific traces its title, the Woodstock Railway Company, was, when permitted by the government pursuant to s.24 of its incorporating Act, entitled to "enter upon and take possession" of land and "to . . . hold so much of the land as may be necessary for the laying out, making and construction and convenient operation

of the operation of the railway", even though transfer of title to the land was, pursuant to the Act in aid of the construction of Railways, to await the issuance of a grant by the Crown.

Under these circumstances, I am not prepared to hold that the Indian title was extinguished by the doctrine of lost modern grant or other mode of prescription.

Jurisdiction of the Court

One further issue deserves comment. By order dated April 30, 1976, the Attorney-General of Canada was ordered to be added as a defendant to the counterclaim, but as mentioned earlier only a conditional appearance was entered by his counsel. At the hearing, counsel argued that while Canadian Pacific was entitled to attempt to establish a pre-Confederation title, it could not plead prescription because that defence affected the title of the federal Crown, a question that could only be dealt with by the Federal Court of Canada. On the appeal, however, his argument was that the court had no jurisdiction to deal with the counterclaim because the relief sought was a declaration that legal title to the land was in the federal Crown for the use and benefit of the Woodstock Indian Band, a question also exclusively within the jurisdiction of the Federal Court.

The stance adopted on behalf of the Attorney-General seems rather surprising in light of the federal Crown's obligations to the Indians for whose use and benefit it holds the lands. There is no problem about the Crown's being a plaintiff in the courts in the provinces. One would have thought the Crown has an honourable obligation to lend its name to the action in order to make certain the court could properly deal with the question of title, which after all was really raised, if only tangentially, by Canadian Pacific. The Indians did not begin the original action; it was Canadian Pacific that did so, not I might say, without reasonable grounds.

At the outset, it should be noted that Canadian Pacific's action was not primarily one of title. It sought an injunction to prevent the blocking of a right-of-way, an activity that was interfering with the operation of the railway. Counsel for the Attorney-General conceded that, in proving its case, Canadian Pacific could establish its pre-Confederation title. What counsel objected to at trial was proof of Canadian Pacific's title by prescription. The question of prescription that was seen as applying to the Crown's title does not, as I have noted, arise because Canadian Pacific's right to use the right-of-way was not referable to adverse possession but rather to pre-Confederation Crown permission given pursuant to statute. That being so, the Crown's title is not really raised at all. The real issue in Canadian Pacific's action, therefore, remains whether it can obtain an injunction to prevent the Indians from blocking its right-of-way.

There is no doubt that the individual Indians can sue and be sued and while this may not always have been the case (see Fahey v. Roberts and R. v. McCormack, supra), it has now been held in several cases that an Indian Band may also sue and be sued; see for example, Mintuck v. Valley River Band No. 63A (1977), 75 D.L.R. (3d) 589 (Man.C.A.). In particular, it has been held that an Indian Band may also sue for trespass to property reserved for its use; see Joe v. Findlay, per Berger J. (1978), 87 D.L.R. (3d) 239; per Wallace J., (1980), 109 D.L.R. (3d) 747 [[1981] 2 C.N.L.R. 58], the latter being affirmed though without discussion of this point by the British Columbia Court of Appeal, [1981] 3 W.W.R. 60 [[1981] 3 C.N.L.R. 58]. So the counterclaim, too, was properly brought.

The foregoing being established, if I were to come to the conclusion that a declaration of title should not be made because it raises questions about the Crown's title, I could still deal with the major issues. For as the trial judge said in speaking of his difficulty in dealing with Canadian Pacific's title owing to the absence of a party, "the principal question must be as to whether or not title has at some time passed so as to render void any claim by, or on behalf of the Indian Band to the disputed strip of land at the present time". That question could, I suppose, be dealt with in any event, but the argument made by counsel on the appeal that the Indians must pursue their claims in the Federal Court must nonetheless be faced frontally. To this I shall now turn.

First of all, I am in agreement with the trial judge that s.31 of the Indian Act merely has the effect of affording the Indians a complementary remedy in the Federal Court, and it is unnecessary to discuss it further. In this court, counsel for the Attorney-General principally relied for his contention on s.17 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c.10, which gives exclusive original jurisdiction to the Trial Division of the Federal Court "in all cases where relief is claimed against the Crown", the term "relief" being defined to comprise every species of relief including a declaration.

It should first be observed that the Indians by their counterclaim were not seeking relief against the Crown but against Canadian Pacific. At least as long ago as Hodge v. Attorney-General (1839), 3 Y.& C. Ex. 342, 160 E.R. 734, the courts were prepared to declare that a person was an

equitable mortgagee of land, though the Crown held the legal estate and could not be compelled to convey that estate; see also Dyson v. Attorney-General, [1911] 1 K.B. 410. In Re Attorney-General of Ontario and Canadian National Railway (1977), 14 O.R. (2d) 95, Osler J., held that the Ontario Supreme Court had jurisdiction, notwithstanding the Federal Court Act, to entertain an application under the Ontario Quieting of Titles Act even though one of the possible claimants to the title was the Crown in right of Canada.

The situation here is, if anything, stronger. The Indians, as part of their case, seek, not relief from the Crown, but to establish the Crown's title. The Crown is a defendant in name only. It was joined, as Berger J., put it in Joe v. Findlay, supra, at p.243, "simply . . . for the purposes of having all parties before this court and avoiding a multiplicity of proceedings".

Counsel for the Attorney-General also relied on the Crown Liability Act, R.S.C. 1970, c.C-38, especially ss.3(1) and 7(1), but I would dispose of this contention on the simple ground that these sections are aimed at proceedings seeking damages against the Crown and no such claim is made here.

As earlier mentioned, counsel did not press the argument made at trial that Canadian Pacific could not raise the question of prescription in defending its title, a question which I noted earlier did not in any event arise. Had this issue become relevant, it might well have raised the constitutional question whether a federal statute can validly interfere with the power of a provincial superior court to consider such a defence to an attack against a person's title to land; see Jabour v. Law Society of British Columbia et al. (1982), 43 N.R. 451, 137 D.L.R. (3d) 1 (S.C.C.); McEvoy v. Attorney-General of New Brunswick and Attorney-General of Canada (1983), 48 N.R. 228, 4 C.C.C. (3d) 289 (S.C.C.). However, it is unnecessary to pursue this question further.

Conclusion

From the foregoing, I have concluded that Canadian Pacific has the right by virtue of government permission given pursuant to statute before Confederation to enter onto, construct and operate the railway line over the easterly crossings. It was contemplated that this right would in itself be for a temporary period; permanent rights were to be accorded by Crown grant when the work was completed. Through some unexplained inadvertence, that grant was never made, but by the same token the permission was never revoked. Under these circumstances I do not see how the Indians can succeed in their counterclaim for trespass and damages.

At the same time, I do not see that Canadian Pacific should be granted a permanent injunction. I am aware, of course, that ordinarily where a person establishes that his proprietary rights are being wrongfully interfered with by another and that other intends to continue his wrong, then the owner of the proprietary right should be granted an injunction as a matter of course. See Pride of Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd., [1953] Ch. 149, at p.181, per Evershed M.R.; for more detail, see I.C.F. Spry, Equitable Remedies, pp.365 et seq. But the granting of an injunction is always a matter of discretion; in the words of the Judicature Act, R.S.N.B. 1973, c.J-2, s.33, it may be granted whenever it appears to the court "to be just or convenient" to do so. The courts have, therefore, refused to grant an injunction for the benefit of a proprietor even when the above conditions were met where special circumstances existed, such as when substantial hardship or injustice would accrue to the person against whom the injunction is sought; see the remarks of Evershed, M.R. and Spry, just cited. Here there are strong reasons militating against the granting of a permanent injunction.

In the first place, I am by no means certain we can sssume that under the changed circumstances resulting from the decision in this case, the Indians would again attempt to block the crossing. It must be remembered that when they blocked it in October, 1975, they had reason to doubt that Canadian Pacific had any right to be on the land and their own interest was being categorically denied by Canadian Pacific. Indeed, the federal Crown to whom the Indians would ordinarily turn to protect their rights appears to have had so little faith in their claim that the Attorney-General refused to allow them to add his name as a plaintiff in their counterclaim for a declaration of title.

Secondly, granting a permanent injunction to Canadian Pacific on the basis of a right that was really intended to be of a temporary nature could have the effect, in practice, of making the Indians' claim for compensation dependent on Canadian Pacific seeking a grant of a permanent title that it might have little interest in obtaining. Canadian Pacific, we saw, has the right to obtain a grant of a right-of-way over the land within the easterly crossing for the duration of its lease, because the railway line passed there as required by statute well over a hundred years ago. But the Indian title in the crossing nonetheless subsists at the present time. It can be surrendered, or perhaps more appropriately, overridden by s.35 of the Indian Act. But either mode contemplates compensation.

The question of compensation was rightly not raised before this court. This is obviously a matter that should be settled by negotiations as contemplated by the Indian Act. So long as Canadian Pacific does not seek a permanent title, however, the issue of compensation can be delayed. To grant Canadian Pacific a permanent injunction on the basis of its temporary right of occupation could well mean that compensation could be indefinitely put off, thereby eroding the Indians' bargaining position. This would be neither just nor convenient. The permanent injunction should, therefore, be vacated.

But I do not think the matter can be left there. The trial judge had reason to think the Indians would continue to block the railway line and while conditions may have changed, that apprehension may not be totally without foundation. Moreover, Canadian Pacific cannot be expected to take the necessary steps to obtain a permanent grant overnight. Accordingly, I think it would be just and convenient to grant an interim injunction of six months to prohibit the Indians from blocking the right-of-way. In addition to permitting Canadian Pacific to initiate steps to obtain a permanent right-of-way over the easterly crossing, this would also afford all the parties an opportunity to re-assess their positions and consider the nature of the negotiations that should take place regarding compensation. I am aware that this course is rather unusual, but so are the circumstances.

I am not so sanguine as to think the period of six months will be adequate to settle the issues, but it does provide the parties with some breathing room. If at the end of six months, the Indians should again decide to block the crossing, application could be made to a judge of the Court of Queen's Bench, who could in his discretion grant an injunction for such time and subject to such terms and conditions as would appear just or convenient in the circumstances. In exercising his discretion, the judge would, of course, assess what steps Canadian Pacific had taken to obtain a permanent grant, the reasonableness or unreasonableness of the parties in seeking a settlement and so on. A court of appeal is not the proper forum to consider these circumstances, particularly where they may change from time to time and require changing the terms of, or dissolving the injunction.

In the result, I have come to the conclusion that the appeal should be allowed, and that the judgment appealed from should be set aside and the permanent injunction vacated. The action should be dismissed insofar as it seeks a permanent injunction, but the claim to such other relief as the court may deem just should be allowed by granting an injunction against the Indians restraining them, substantially in the same terms as the injunctions issued by the trial judge, from blocking the Woodstock branch line for a period of six months from the date hereof. I would allow the counterclaim insofar as it claims that the legal title to the easterly crossing is vested in Her Majesty for the use and benefit of the Woodstock Indians, but that claim is subject to the rights thereto acquired by the Woodstock Railway Company now under lease to Canadian Pacific. I would dismiss the counterclaim for trespass and damages. Success being divided, there will be no *order* as to costs.