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**Canada (Attorney General) v. Canadian Pacific Ltd.
(B.C.C.A.)**

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Between

The Attorney General of Canada on behalf of Her Majesty The Queen in right of Canada; and Morris Kruger, Emory Gabriel, Gregory Gabriel, Joseph Pierre and Louis Eneas, suing on their own behalf and on behalf of all the members of the **Penticton Indian Band, Plaintiffs, (Respondents), and **Canadian Pacific Limited and Marathon Realty Company Limited**, Defendants, (Appellants)**

Vancouver Registry: CA003686

[1986] B.C.J. No. 407

British Columbia Court of Appeal

Carrothers, Macfarlane and McLachlin JJ.A.

May 14, 1986

(6 pp.)

(On appeal from the judgment of Meredith, J.)

Bernard Hoeschen, Esq., appearing for the Appellants.

W.B. Scarth, Esq. Q.C., appearing for the Respondent, The Attorney General of Canada

W.J. Worrall, Esq. and T.B. Marsh, Esq., appearing for the other Respondents.

1 CARROTHERS J.A. (orally):— Mr. Scarth, it will not be necessary to hear from you.

2 This is an appeal from the judgment of Meredith, J., pronounced February 13, 1985, ordering the defendants, who are the appellants here, **Canadian Pacific** Limited and Marathon Realty Company Limited, to transfer certain lands to Her Majesty the Queen, in right of Canada, and dismissing the plaintiff Indian Band's claim for damages flowing from deprivation of those lands.

3 In 1947 **Canadian Pacific** Limited required land for additional trackage and an ice house for use in connection with its railway operations at Penticton, British Columbia. The only suitable land available was Indian Reserve property adjacent to **Canadian Pacific's** Kettle Valley line trackage. This reserve land was occupied by the **Penticton Indian Band**.

4 **Canadian Pacific** entered into negotiations with the Indian Affairs Branch of the Federal Department of Mines and Resources to secure the necessary lands. A transfer was arranged under which **Canadian Pacific** was granted by the Federal Crown 13.12 acres of land within the Reserve in return for payment of a sum of \$500 per acre. The aggregate price was \$6,500 approximately.

5 It appears that the Federal Crown effected the land transfer by means of s. 48 of the Indian Act, R.S.C. 1917, Chap. 98. The section reads as follows:

"48.(1) 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 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."

- 6 The Letters Patent issued by the Federal Crown were issued on June 8, 1949, and were registered in the appropriate Land Registry office on September 21, 1949. A certificate of indefeasible title in the name of **Canadian Pacific** issued under date of September 21, 1949.
- 7 From 1948 until 1976 **Canadian Pacific** used the lands for its railway operations, at which time **Canadian Pacific** ceased using the lands entirely for any railway purpose.
- 8 On January 29, 1979, **Canadian Pacific** purported to convey the lands to Marathon Realty Company Limited, which is a subsidiary of **Canadian Pacific** Enterprises Limited, which in turn is a subsidiary of **Canadian Pacific**. A certificate of indefeasible title issued under date of March 6, 1979, in the name of Marathon Realty Company Limited.
- 9 The Band filed a caveat against this title and on June 18, 1981, issued a Writ claiming damages for deprivation of the lands and for their recovery.
- 10 By judgment pronounced February 12, 1985, Meredith, J., gave judgment ordering the defendants to transfer the land to the Crown and dismissing the Band's claim for damages.
- 11 From this judgment **Canadian Pacific** and Marathon have appealed. The Band and the Federal Crown cross-appealed, but that cross-appeal has been abandoned.
- 12 On this appeal **Canadian Pacific** and Marathon take the position that the land in question was conveyed absolutely and unqualifiedly and was not restricted to use or alienation. We are asked to ignore words of limitation contained in the description of the parcel of land which is the subject of this appeal.
- 13 The Letters Patent conveying the parcel to **Canadian Pacific** describes the property being conveyed as being conveyed as:

"All that portion of Penticton Indian Reserve Number 1, Similkameen (formerly Osoyoos) Division 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 23rd of February, 1948, of record under R.R. 3260, in the Indian Affairs Survey Records, Department of Mines and Resources, Ottawa said portion containing by admeasurement an area of 13.12 of an acre, more or less a duplicate of the aforesaid Plan having been deposited under Plan No. "A"1133.

Penticton Assessment Area"

- 14 That precise description of the land conveyed appears not only in the Letters Patent from the Crown to **Canadian Pacific**, but in the certificate of indefeasible title issued to **Canadian Pacific** and in the certificate of indefeasible title issued to Marathon. I understand that in making its application for that certificate of indefeasible title Marathon applied for it using that precise legal description.
- 15 The trial judge held, on the basis of the statutory authority providing for the conveyance, that the conveyance was for the limited purpose of a railway. With respect, I agree with his interpretation of those statutes, particularly of s. 189 of the Railway Act. This result becomes abundantly clear when one examines precisely what it was that the Crown conveyed to **Canadian Pacific**, what the Land Registry office showed on the certificates of indefeasible title in the name of both **Canadian Pacific** and Marathon. It is clear from this that the Crown gave a qualified consent for a limited conveyance to the taking by the railway of the parcel in question. That qualification took the form of a limited conveyance,

that is, a conveyance for railway right-of-way purposes. This qualification, as I have said, appears as a thread throughout the conveyancing and title documents. There is no basis upon which the clear and unambiguous words of this qualification and the subject of the conveyance can be ignored; certainly not on the basis that they did not form part of the actual conveyance as found being in the operative part of the conveyancing documents. I consider that the legal description of the subject of the conveyance is clearly part of the operative part of the conveyance.

16 In short, I agree with the conclusions of the trial judge and for his reasons, together with what I have said, I would dismiss this appeal.

MACFARLANE J.A.: I agree.

MCLACHLIN J.A.: I agree.

CARROTHERS J.A.: The appeal is dismissed.

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