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Pasco v. C.N.R.

Pasco v. Canadian National Railway Co.

[1985] B.C.J. No. 2818

69 B.C.L.R. 76

[1986] 1 C.N.L.R. 35

Vancouver Nos. 850201, C851726

British Columbia Supreme Court

Macdonald J.

Oral judgment: August 19, 1985.

(14 pp.)

Injunctions -- Interlocutory injunctions -- Indians -- Indian band applying for interlocutory injunction to restrain C.N.R. from proceeding with twin tracking construction program along eight-mile stretch of river bed -- Riparian rights of band possibly not affected by grant to C.N.R. of right of way -- Entitlement of band to traditional fishing grounds -- Aboriginal title not ground for injunction -- Uncertainty with regard to existence of native rights to be resolved in favour of native people -- Expropriation Act, R.S.C. 1970, c. 16 (1st Supp.) -- Indian Act, R.S.C. 1970, c. I-6, s. 35 -- Navigable Waters Protection Act, R.S.C. 1970, c. N-19 -- Railway Act, R.S.B.C. 1970, c. R-2 -- Water Act, R.S.B.C. 1979, c. 429.

This was an application by a native band for an interlocutory injunction restraining the C.N.R. from proceeding with the construction of its twin tracking program along an eight mile stretch of the Thompson River in the vicinity of the band's reserve No. 5. In 1923 the C.N.R. was granted a right of way through the band's reserve No. 5 for railway right of way purposes. The right of way subsequently was the subject of a Crown grant to the C.N.R. in 1924. For most of its length one side of that right of way was formed by the high water mark of the river. The widening of the railroad bed in that stretch to accommodate a second track involved the replacement of rock fill between the existing mainline and the river. Since the fill would encroach upon the river bed in several

locations, the band contended that such encroachment would interfere with their traditional fishing methods and the supply of fish. The band opposed the C.N.R.'s construction on the ground that their property right in the river itself and the bed thereof would be affected, and that under the terms on which British Columbia joined Confederation it had been agreed that the customary fishing grounds of the natives would be preserved. The band also asserted aboriginal title to the river fisheries.

HELD: The application was allowed. The C.N.R. was restrained from conducting any further work in connection with the twin track system until the trial or other disposition of the action. Had the case of the native people been based solely upon the ground of aboriginal title, they would not be entitled to the injunction. Furthermore, the balance of convenience was against the band on the question of overall damage to the salmon industry since the proposed method of construction was designed to reduce the impact on the fishery to an absolute minimum. However, the band's contention that the riparian rights, which arose at the time of the establishment of band reserve No. 5, had not been affected by the Crown grant of the C.N.R. right of way, was not without merit. There was a serious question to be tried insofar as the claim of the band to riparian rights in the Thompson River was concerned. Because the right of the band sounded in property and a breach thereof would constitute a trespass by the C.N.R., the status quo should be preserved until trial. The need to proceed with the project was not so urgent as to demand that the work proceed before the nature and extent of their rights had been determined. Furthermore, any uncertainty as to the extent or existence of native rights should be resolved in favour of the native people.

Counsel:

L.J. Pinder and L. Mandell for Robert Pasco and the Oregon Jack Creek Indian Band.
E.C. Chiasson, Q.C., and P.G. Foy for the Canadian National Railway Company.

1 MACDONALD J. (orally):-- In each of these parallel actions an application for an interim injunction is before the court. The Indian people seek to restrain the C.N.R. from proceeding with its twin tracking construction programme along an eight-mile stretch of the Thompson River between Spences Bridge and Ashcroft in the vicinity of Oregon Jack Creek Indian Reserve No. 5. The C.N.R. seeks to restrain the Indian people from interfering with such works.

2 At the conclusion of argument it was agreed that the C.N.R.'s application would be adjourned to await the outcome of the other application.

3 The widening of the railroad bed in that stretch to accommodate a second track in accordance with the construction methods proposed by the C.N.R., and approved by the Canadian Transport Commission, involves the replacement of rock fill between the existing mainline and the Thompson River. That fill will encroach upon the river bed in many places at high water, and in several

locations at low or normal river levels.

4 Notwithstanding the environmental recommendations which have been taken into account in the planning process, the Indian people say that such encroachment will interfere with their traditional fishing methods and the supply of fish available to them.

5 As a result of negotiations between the parties, some 33 percent of the planned total length of rock fill was placed in April and May of this year in those areas where encroachment on the Thompson River was negligible or non-existent. With respect to the balance, consultants for the Indian people have proposed alternate construction methods employing bin and retaining walls which would add \$9 million to the cost of double-tracking this eight-mile stretch, an increase of 40 percent in the cost of the whole project and a 400 percent increase in the cost of placing the rock fill in the manner proposed and approved.

6 The C.N.R. takes the position that such an increase in cost is completely unjustified in the national interest, and in the light of the minimal effect which the rock fill encroachments will have on the fishery and the compensatory measures to which it is committed. The Indian people insist that there must be no further encroachment on the river. The C.N.R. maintains that it has the legal right to proceed with the work.

7 Efforts to reach a compromise between those positions have failed. In the time at my disposal I cannot review in detail the affidavit material filed in support and opposition to the applications now before the court; to say that it is voluminous would be an understatement. Counsel have reviewed it for me in the course of their able arguments. Lack of detailed comment does not indicate that I am not familiar with it. However, as is often the case in these matters, urgency exists. If the work is to proceed, it can be done only when river levels are low and there is no salmon spawning activity. No further work can be done after 10th September 1985, until December of this year.

8 Fisheries officials have reluctantly agreed, if necessary, to permit rock fill to be placed between December 1985 and May 1986, provided washed rock is used. Apart from the problems of washing rock fill and riprap during winter in freezing conditions, that requirement would add \$300,000 to the cost of the work.

9 We cannot recount with much pride the treatment accorded to the native people of this country. Fortunately, in recent years steps have been taken to avoid further erosion of their rights. In view of what occurred in the past, I consider that any uncertainty as to the extent or the existence of native rights should be resolved in favour of the Indian people.

10 I interpret the recent decision of our Court of Appeal in the "Meares Island" case in that light (MacMillan Bloedel v. Mullin; Martin v. British Columbia, 61 B.C.L.R. 145).

11 In *Nowegijick v. R.*, [1983] 1 S.C.R. 29, Dickson J., now Chief Justice of Canada, stated that: ". . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions

resolved in favour of the Indian".

12 He quoted with approval a statement in *Jones v. Meehan*, 175 U.S. 1, which held that: "Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians".

13 In their action against the C.N.R., the Indian people of the Thompson and Fraser River valleys maintain three separate rights, all related to the fishery in those rivers which they say will be affected by the work which the C.N.R. plans:

- (A) Where that work is adjacent to an Indian reserve such as the Oregon Jack Creek Indian Reserve No. 5, in the case of the eight-mile section in question here, the native people allege a property right in the river itself and the bed thereof. That right is a riparian right arising from the ownership by the federal government, in trust for that particular Indian band, of reserve land adjoining the river.
- (B) In addition to the reserves themselves, under the terms on which British Columbia joined Confederation it was agreed that the customary fishing grounds of the Indians would be preserved and they would be guaranteed the right to carry on their fisheries as formerly. That agreement was carried out by allotting specific fishing rights to each band. In the case of the Oregon Jack Creek Indian Band, for example, a salmon fishery commencing one-quarter mile above the mouth of Oregon Jack Creek and extending downstream on both sides of the river for a distance of two miles was reserved. The Indian people submit that such an allotment creates a proprietary right in the band in question.
- (C) Thirdly, the Indian people claim rights based on aboriginal title to the river fisheries similar to the claim which formed the basis for the granting of an interim injunction in the *Meares Island* case.

14 Counsel for the Indian people concedes that the third ground is their weakest. If they can establish vested property rights in the river bed of the reserve fisheries, the Indian people would have a much stronger right to seek an injunction against any further work by the C.N.R. pending trial. The question of the balance of convenience would assume much less significance. The situation is then more equivalent to a proposal by the C.N.R. to construct a second rail line through the middle of the reserve.

15 I have concluded that if the case of the Indian people was based solely on the third ground (aboriginal title), they would not be entitled to the injunction against the C.N.R. until trial which they seek.

16 There has been substantial environmental input into the present construction plan with particular reference to the salmon fishery. The method of construction and the times during which

construction work will be permitted are designed to reduce the impact on the fishery to an absolute minimum. Furthermore, the C.N.R. is committed to compensatory measures designed to offset what minimal impact the work will have.

17 Even assuming that the issue of aboriginal title is a "fair question", or a "triable issue" within the meaning of the cases, the balance of convenience is clearly against the Indian people on the question of overall damage to the salmon fishery.

18 However, the position with respect to the proprietary rights claimed by the Oregon Jack Creek Band (the "band") is otherwise. I turn now to an analysis of those claims.

19 The band submits that it is the beneficial owner of a reserve which fronts on the Thompson River in this eight-mile stretch and, as such, has property rights to the centre line of the river. They say that the placing of rock and the operation of the construction equipment by the C.N.R. below the natural high water boundary of the river is a trespass which the courts should restrain by interim injunction until the rights of the band can be determined at trial.

20 My function here is not to find and declare the property rights of the band in and to the bed of the river; that will be the task of the trial judge. The question before me is whether the status quo should be preserved until trial. I have decided that it should.

21 In the Meares Island case, Seaton J.A. had the following to say on the subject of the law relating to interlocutory injunctions:

There is an almost unlimited supply of cases dealing with interlocutory injunctions . . . Each of the decisions represents an attempt on the part of the court to see that justice is done. Often it is an attempt to preserve property so that a claimant will not find at the end of a successful trial that the subject matter is gone, and always there is an attempt not to impede others unnecessarily . . .

An injunction is granted where "it appears to the court to be just or convenient that the order should be made" . . . All of the circumstances must be considered.

22 Thus, such factors as the apparent strength or weakness of the claim, the extent of possible harm to the property and the effect on the party who will be restrained must be weighed in the balance.

23 The band's reserve was originally bounded on one side by the Thompson River. *Rotter v. Can. Exploration*, [1961] S.C.R. 15, holds that a grant of land bounded by a river carries with it title to the centre line of the river.

24 On 10th December 1923 the C.N.R. was granted a right of way through the band's reserve No.

5, the one in question here, for railway right of way purposes. For most of its length one side of that right of way is formed by the high water mark of the river. That right of way was the subject of a federal Crown grant on 14th January 1924, which we eventually (in 1955) registered in the Kamloops land title office. A certificate of title was issued. The C.N.R. contends that it is the owner of the land fronting on the Thompson River, and that if the band had any riparian rights it lost them at the time of the 1924 Crown grant.

25 The band responds that its underlying riparian rights associated with the creation of its reserve No. 5 are in no way affected by the railway's right of way. On the basis of *Attorney General Canada v. C.P. Ltd.*, [1985] B.C.W.L.D. 911, Meredith J., Vancouver No. C812647, 12th February 1985, the band submits that where a railway acquires title to a portion of an Indian reserve, "for railway right-of-way purposes", that title is a qualified one which does not carry with it all the usual incidents of ownership.

26 Meredith J. was faced with a situation where a strip of an Indian reserve in Penticton had been acquired in 1927 by the Kettle Valley Railway in a manner identical to the acquisition by the C.N.R. of its right of way through the band's reserve No. 5. The C.N.R. was the successor in title to Kettle Valley Railway and decided to close the line. It purported to convey the right of way to Marathon Realty. It was held that such a transfer was illegal and that because the right of way was no longer necessary or used "for railway purposes", the land must be restored to the federal Crown in trust for the Indian band in question.

27 While here the C.N.R. is still using its right of way, that decision is strong support for the band's argument that its riparian rights arising at the time of the establishment of its reserve No. 5 were not affected by the Crown grant of the C.N.R. right of way.

28 I pause to comment that despite the 1961 decision of the Supreme Court of Canada in *Rotter v. Can. Exploration*, the existence of riparian rights in British Columbia as an adjunct to the ownership of land fronting on non-tidal waters is not a simple question. The Water Act of this province purports to vest such rights in the province rather than the upland owner. Decisions such as *Cook v. Vancouver*, [1914] A.C. 1077, have upheld the effect of that legislation. That argument raises a constitutional issue: does the province have the legislative competence to deny riparian rights to the federal Crown in connection with an Indian reserve and, if so, does that competence extend beyond the flow of water alone? Could such a provincial power impinge on federal rights in respect of Indians and fisheries?

29 At the end of the day, I am convinced that there is a serious question to be tried insofar as the claim of the band to riparian rights in the Thompson River is concerned.

30 The band's claim to a proprietary right in the river is strengthened by its fishing rights. In this province Indian reserves were reduced in size on the grounds that the Indian people did not rely on agriculture, and that so long as their fisheries were preserved their need for land was minimal. That philosophy is reflected in the Indian Affairs Annual Report, 1876, concerning British Columbia:

There is not, of course, the same necessity to set aside extensive grants of agricultural land for Coastal Indians; but their rights to fishing stations and hunting grounds should not be interfered with, and they should receive every assurance of perfect freedom from future encroachments of every description.

31 Fishing rights involve access to the fishery as well as preservation of the fish. While the latter has been the subject of extensive investigation in connection with C.N.R.'s twin tracking project through the Thompson and Fraser valleys, the effect on the traditional fishing methods of the Indian people of changes in the configuration of the river banks has not been so considered.

32 The band alleges that large riprap will hinder their access to the river. They say that their traditional spots for dip net and set net fishing will disappear, and that no substituted eddies or access rocks may take their place. They are unwilling to rely upon the assurances and undertakings of the C.N.R. that those concerns will be addressed and that compensatory and remedial measures will be taken.

33 I am unable to criticize the C.N.R. for refusing to accept the increased cost of the revised design suggested by the Indian people to avoid any further encroachment on the Thompson River for this eight-mile stretch. \$9 million might not be too high a price for the rest of this country to pay to meet the concerns of the Indian people, but this stretch is a small portion of the twin tracking project along these two major rivers. To accede to a non-encroachment rule would escalate the cost of the total project beyond all reason. Thus, negotiation has proved futile, and the rights of the parties must be resolved by this court.

34 The C.N.R. claims the legal right to place earth embankments and rock riprap along this eight-mile stretch of the Thompson River under an order of the railway transport committee of the Canadian Transport Commission, dated 29th March 1985. That order could not be made until a federal Order in Council under the provisions of the Railway Act and the Navigable Waters Protection Act was approved.

35 On 7th March 1985 the minister of transport advised that the government was prepared to approve such an order in council, but cautioned:

Since those legislative provisions deal solely with ensuring that any project poses no impediment to navigation, approving the Order-in-Council in no way signals carte blanche acceptance of the project's other implications. It is simply a technical regulation dealing with navigation, and its passage should be interpreted by all parties as no more or less than that.

36 Whether the minister was correct in that restricted view of the legal effect of the Order in Council, and the order of the railway transport committee which depended upon it, remains to be determined at the trial of this action. What is clear is that it is open to the C.N.R., under a combination of powers in the Railway Act, the Expropriation Act and the Indian Act, to expropriate

any proprietary rights which the band or the Indian people may have in the Thompson River. The Indian people cannot veto the project. Such a procedure involves the express consent of the federal cabinet under s. 35 of the Indian Act. That requirement would return this whole question to the political arena. As I understand the position of the Indian people, they would welcome that turn of events.

37 What they say here is that their case for proprietary rights in the river itself is, at best, a strong one and, at worst, a fair question. Because that right sounds in property and a breach thereof would constitute a trespass by the C.N.R., the status quo should be preserved until trial. They do not quarrel with the economic judgment of the C.N.R. and the government that the capacity of the railroad must increase in the national interest by the twin tracking project, but they maintain that the urgency is not so pressing as to demand that the work proceed before the nature and extent of their rights is determined at trial. I accept that position.

38 If the property rights contended for by the band in particular are established at trial, they will be entitled to a permanent injunction as a matter of course, subject only to the expropriation rights of the C.N.R. If the work has already been done, the band's success at trial would be an empty one. On the other hand, if the arguments of the C.N.R. prevail: that it has a specific and predominant right under the Railway Transport Committee order to do the work; that it has complied with the requirements of all regulatory agencies; that it has observed all the requirements which it accepted as a condition precedent to the government's approval of the 14th March 1985 Order in Council; that it, not the band, is the riparian owner; and that the Indian people cannot prove the allotment of the specific fishing rights which they allege, then the cost of the work need not escalate in the dramatic manner which the Indian people propose.

39 Whether or not delaying this particular work until trial will result in a lack of rail capacity in the interim has not been established to my satisfaction.

40 A consideration of all the circumstances has led me to the conclusion that it would be just to make the order which the band seeks. As that order is founded on the property rights which the band alleges in the river itself, it is limited to the band and relates only to the eight-mile section covered by Railway Transport Committee O.R-37924.

41 There will be an order in favour of the Oregon Jack Creek Indian Band, represented by Chief Robert Pasco, restraining the Canadian National Railway Company and its agents or employees until the trial or other disposition of action A850201 in the Vancouver Registry of this court from any further work in connection with the construction of a second track between miles 59.8 and 67.8 in its Ashcroft subdivision, by placing rock on the bed or banks of the Thompson River, or from otherwise interfering with the fisheries of that band, or the access of its members thereto.

42 As was done in the Meares Island case, the band will not be required to undertake to pay any damages that the C.N.R. may suffer as a result of this interim injunction. The costs of these proceedings will be costs in the cause.

43 THE REGISTRAR: In the matter of Pasco et al. and C.N.R.

44 THE COURT: Yes. Mr. Chiasson.

45 MR. CHIASSON: Yes, My Lord, I am sorry, I didn't get that letter to you before you began earlier. I was unable to. My friend, Ms. Pinder, and I are both here and I had sought a clarification and I understand that Your Lordship has given the clarification. I simply wanted to have it noted on the record so -

46 THE COURT: Fine.

47 MR. CHIASSON: - so I am clear as to exactly what the order means.

48 THE COURT: My order intended to restrain the C.N.R. with respect to the whole of the eight-mile section in question. I appreciate that the band's reserve fronts on only perhaps a quarter or half-mile section of that river but its grants of rights of fishing are substantially broader and I was unable and not prepared in any event to delineate between those two specific rights and the eight-mile stretch so that the injunction extends over the whole stretch.

49 MR. CHIASSON: Thank you, My Lord.

MACDONALD J.

qp/s/nmb