

PAULETTE ET AL. v. THE QUEEN

(1976), 72 D.L.R. (3d) 161 (also reported: [1977] 1 W.W.R. 321, [1977] 2 S.C.R. 628, (1976) 12 N.R. 420)

Supreme Court of Canada, Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ., 20 December 1976

(On appeal from judgment of Northwest Territories Court of Appeal, reported sub nom. *Re Paulette and Registrar of Land Titles supra*, p.342)

Land titles -- Registration of caveats -- Aboriginal Indian title -- Whether registrable against unpatented land where no certificate of title issued or applied for -- Land Titles Act, R.S.C. 1970, c. L-4, ss. 2, 35, 48, 49, 54, 56, 95, 134(2) -- Land Titles Act, 1906 (Alta.), c. 24, s. 86 -- Land Titles Act, R.S.S. 1965, c. 115.

Having regard to the historical development of the *Land Titles Act*, R.S.C. 1970, c. L-4, it is impossible to file a caveat against unpatented land, on the basis of aboriginal title or otherwise. The sections of the Act that would appear to give such a right are referable to lands in respect of which a patent was issued before the introduction of the land titles system in the Northwest Territories in 1887 and which have not yet been brought under that system. Thus, s. 54 deals with land patented before 1887 and permits the owner to apply to have his title registered under the Act. Section 56 then directs the Registrar of Land Titles to grant a certificate of such title if no instrument or "caveat" affecting the title is recorded and if he is satisfied as to the applicant's title. Such cases fall within the terms of s. 134(2), which provides for entry in the day-book kept by the Registrar of a caveat "before registration of a title" under the Act. By contrast, ss. 50 and 95 contemplate the registration of "instruments" and mortgages and encumbrances respectively against unpatented land, but a caveat does not fall within the definition of "instrument" in s. 2 of the Act. Similarly, ss. 48 and 49 which concern post-1887 Crown grants, contemplate the registration of "encumbrances or other instruments" against unpatented land, but again there is no reference to caveats. The conclusion that the filing of such a caveat is impossible is supported by the fact that the Alberta and Saskatchewan Acts which derive from the federal legislation do permit such caveats to be filed prior to a Crown grant.

APPEAL from the judgment of the Northwest Territories Court of Appeal, *sub nom. Re Paulette et al. and Registrar of Land Titles*, 63 D.L.R. (3d) 1, [1976] 2 W.W.R. 193, allowing appeals from judgments of Morrow, J., the second and third of which were reported, 39 D.L.R. (3d) 45, [1973] 6 W.W.R. 97 and 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 115, respectively, holding that the appellants were entitled to file a caveat with respect to certain lands in which they claimed an interest on the basis of aboriginal title.

J. P. Brumlick, Q.C., and *C. G. Sutton*, for appellants.

G. W. Ainslie, Q.C., *Ivan Whitehall* and *T. B. Marsh*, for respondent.

The judgment of the Court was delivered by

LASKIN, C.J.C.:--The issue in this appeal is whether the provisions of the *Land Titles Act*, R.S.C. 1970, c. L-4, respecting the filing of caveats apply to unpatented Crown land so as to oblige the Registrar of Titles to accept for filing in his day-book a caveat claiming an interest in such land. Put another way, the question here

is whether unpatented Crown land in the Northwest Territories is subject to the *Land Titles Act* aforesaid so long as such land remains unpatented. It is common ground that any caveat touch-

ing unpatented Crown land could only be entered in the day-book which the Registrar is obliged to keep pursuant to s. 35. It could not be noted by way of a memorandum on a certificate of title as prescribed by s. 134(1) since unpatented Crown land is not the subject of any registered title.

The matter now before this Court, brought here by its leave, arose as follows. Sixteen Indian chiefs, acting for themselves and for other Indians in the Northwest Territories, presented to the Registrar of Titles for filing a caveat claiming an interest, by way of aboriginal rights, in some 400,000 square miles of land in those Territories. The Registrar, confronted with the twin problems of the interest of the persons making the application and of the duty, if any, cast upon him to accept the caveat and note it in his day-book, invoked s. 154(1) of the Act and referred them to the Supreme Court of the Northwest Territories in the following terms:

A question has arisen as to the legal validity, and the extent, right and interest of the persons making application, to forbid the registration of any Transfer and whether the Registrar has a duty conferred of imposed upon him, by the Land Titles Act, to lodge such a document, and enter same in the day book.

At the hearing, which first came on before Morrow, J., on April 3, 1973, and was then adjourned for argument to May 15 and 16, 1973, and continued on July 9, 1973, that learned Judge noted in a preliminary set of reasons which were issued on June 14, 1973 (and which were confined to the question of his jurisdiction), that the Crown conceded that the claim presented in the caveat was one asserting an interest in land [39 D.L.R. (3d) 45, [1973] 6 W.W.R. 97]. It was, however, the position of Crown counsel before this Court that the assertion could not be substantiated to support the lodging of a caveat under the *Land Titles Act*. It seems to me that this is an issue that would have to be fought out on a challenge to the validity or merit of the caveat and not on a challenge of the right to file it. No doubt, as Morrow, J., noted, the two questions would have come together if the caveat had been accepted and it had been left to the caveators, upon proper challenge, to establish the right claimed thereunder. The course of proceedings, both before Morrow, J., and before the Northwest Territories Court of Appeal, made it clear (and indeed counsel on both sides so affirmed) that it was unnecessary to determine the character or extent of the asserted aboriginal rights but only whether the *Land Titles Act* permitted the lodging of the caveat where, *ex facie*, an interest in land was claimed thereunder.

In lengthy reasons, delivered on September 6, 1973 [42 D.L.R. (3d) 8, [1973] 6 W.W.R. 115], and which carefully examined the novel issue presented by the Registrar's reference, Morrow, J., held that the Indian chiefs had standing to present the caveat, that their claim of an interest in the lands affected was a cognizable one

by reason of their aboriginal rights and that the *Land Titles Act* permitted the caveat to be filed in relation to unpatented Crown Land. This last-mentioned conclusion, which is the only one that the Northwest Territories Court of Appeal felt was at issue, was set aside by that Court on a four to one decision, Moir, J.A., being alone in dissent [63 D.L.R. (3d) 1, [1976] 2 W.W.R. 193].

Counsel for the appellants in this Court emphasized (as did Moir, J.A., in dissent) that a caveat does not create new rights but merely gives notice of a claim which may later have to be substantiated. This does not alter the fact that, so long as it remains on the register, it follows the title as a clog thereon. Since we are not

con- cerned here with whether the caveat could be maintained if prop- erly lodged, it is beside the point to contend that it asserts an exist- ing interest. That is the beginning of the problem in the present case and not its solution. Certainly, if there was a transfer of the registered title, followed by the issue of a new certificate of title to a transferee for value, any interest claimable against the trans- feror but not asserted by a caveat would be lost as against the transferee. The lodging of a caveat, its acceptance for filing and for notation on the register are, therefore, of significance in them- selves.

In his reasons, Sinclair, J.A., set out the history of land titles leg- islation affecting the Northwest Territories from the time such leg- islation replaced the pre-existing registry system on January 1, 1887. That historical examination led him to the conclusion that in general the legislation operated only in respect of land for which a certificate of title had been issued and in respect of land which had been the subject of a Crown grant and for which there had been an application for a certificate of title. I shall return later to this last- mentioned aspect, but I wish now to set out what I think are the relevant sections of the present Act which need to be considered on the issue before this Court.

The following provisions of the *Land Titles Act* should be noted:

2. I this Act

"grant" means any grant of Crown land, whether by letters patent under the Great Seal, a notification or any other instrument whether in fee or for years, and whether direct from Her Majesty or by or pursuant to any statute;

.....

"instrument" means any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or exemplification of probate of will, letters of administration or an exemplification thereof, mortgage or encumbrance, or any other document in writing relating to or affect- ing the transfer of or other dealing with land or evidencing title thereto;

(164) PAULETTE v. THE QUEEN 407

"notification" means a direction in a form prescribed by the Governor in Council pursuant to the *Territorial Lands Act* and issued pursuant to that Act;

.....

"registration" means

(a) the bringing of lands under the provisions of this Act; and

(b) the entering upon the certificate of title of a memorandum au- thorized by this Act, of any documents,

and "filing" means the entering in the day-book of any instrument;

.....

35. The registrar shall keep a book called the day-book, in which shall be en- tered by a short description every instrument given in for registration relating to lands for which a certificate of title has issued or been applied for, with the day, hour and minute of its so being given in.

36. For the purposes of priority between mortgagees, transferees and others, the time entered in the day-book pursuant to section 35 shall be taken as the time of registration.

.....

38. Unless required so to do by order of a court or judge, the registrar shall not receive or enter in the day-book any instrument until the duplicate certificate of title for the land affected is produced to him so as to enable him to enter the proper memorandum on such duplicate certificate.

39. A duplicate certificate of title for the lands affected need not be produced in the case of

(a) executions against land, caveats, mechanics' liens, transfers by a sheriff or municipal officer or by order of a court or judge;

40. The registrar shall also keep a book or books which shall be called the register, and shall enter therein all certificates of title, and shall record therein the particulars of all instruments, dealings and other matters by this Act required to be registered or entered in the register and affecting the land included in such certificate of title.

.....

48. Whenever any land is granted in the Territories by the Crown, the letters patent or notification therefor, when issued, shall be forwarded to the registrar of the registration district in which the land so granted is situated, and the registrar shall retain the letters patent or notification in his office.

49. A certificate of title, as provided by this Act, with any necessary qualification, shall be granted to a patentee of a person named in a notification, and a duplicate of such certificate of title shall be issued to the patentee or person so named, free of all fees and charges, if at the time of the issue thereof there are no encumbrances or other instruments affecting the land registered in the land titles office.

.....

53. The owner of any estate for life or for a term of more than three years, in any land for which the grant from the Crown has been registered, may apply to have his title registered, and to have a certificate of title issued to him therefor under this Act.

54(1) The owner of any estate or interest in any land, whether legal or equitable, letters patent for which issued from the Crown before the 1st day of January 1887, or which otherwise had prior to that date passed from the Crown, may apply to have his title registered under this Act.

408 PAULETTE v. THE QUEEN (165)

(2) If at the time of the grant of the certificate of title, there are no registered encumbrances or conveyances affecting such land, the certificate may be granted to the patentee upon payment of such fees as are fixed by the Governor in Council, but no fees are payable therefor under the provisions of this Act relating to the assurance fund.

.....

56. Where the applicant is the original grantee of the Crown, and no deed, transfer, mortgage or other encumbrance, or instrument or caveat affecting the title appears to have been recorded; or where he is not the original grantee, and all the original title deeds are produced, and no person other than the applicant is in actual possession of the land, and no caveat has been registered, the registrar, if he entertains no doubt as to the title of the applicant, shall grant a certificate of title as herein provided.

.....

95(1) There may be filed in the office of the registrar any mortgage or other encumbrance created by any person rightfully in possession of land prior to the issue of the grant from the Crown on prior to the issue of the transfer from the Hudson's Bay Company or from any company entitled to a grant of such lands from the

Crown or to which letters patent from the Crown or a notification for such mortgaged lands have already issued, if there is produced to and left with the registrar along with the mortgage an affidavit made by the mortgagor in Form Q, and also, in the case of lands mortgaged prior to the issue of transfer as aforesaid, a certificate from the land commissioner or other proper officer of the company that the purchase price of such mortgaged lands has been paid and that the mortgagor is entitled to a transfer in fee simple therefor from the company.

(2) The registrar shall, on registering the grant of lands so mortgaged, enter in the register and endorse upon the duplicate certificate of title, before issuing it, a memorandum of the mortgage or encumbrances.

(3) When so entered the mortgage or encumbrance is valid as if made subsequent to the issue of the grant, or to the issue of the transfer as afore- said.

.....

132. Any person claiming to be interested in any land under any will, settle- ment or trust deed, or under any instrument of transfer or transmission, or un- der any unregistered instrument, or under an execution, where the execution creditor seeks to affect land in which the execution debtor is interested benefi- cially but the title to which is registered in the name of some other person, or otherwise, may lodge a caveat with the registrar to the effect that no registra- tion of any transfer or other instrument affecting the said land shall be made, and that no certificate of title therefor shall be granted, until such caveat has been withdrawn or has lapsed as hereinafter provided, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat.

.....

134(1) Upon the receipt of a caveat, the registrar shall enter the caveat in the day-book, and shall make a memorandum thereof upon the certificate of ti- tle of the land affected by such caveat and shall forthwith send a notice of the caveat through the post office or otherwise to the person against whose title the caveat has been lodged.

(2) In the case of a caveat before registration of a title under this Act the re- gistrar shall on receipt thereof enter the caveat in the day-book.

135. So long as any caveat remains in force the registrar shall not enter in the register any memorandum of any transfer or other instrument purporting

(166) PAULETTE v. THE QUEEN 409

to transfer, encumber, or otherwise deal with or affect the land in respect to which such caveat is lodged except subject to the claim of the caveator.

136. The owner or other person claiming such land may, by summons, call upon the caveator to attend before a judge to show cause why the caveat should not be withdrawn; and the judge may, upon proof that such last-men- tioned person has been summoned, and upon such evidence as the judge re- quires, make such order in the premises as to the said judge seems fit.

137(1) Unless proper proceedings in a court of competent jurisdiction have been taken to establish the caveator's title to the estate or interest specified in the caveat, and an injunction or order has been granted restraining the regist- rar from granting a certificate of title or otherwise dealing with the land, a ca- veat may be disposed of by the registrar as lapsed after the expiration of three months from the day on which a notice in Form EE was served on the caveator or sent to him by registered mail to the address stated in his caveat.

The appellants found their right to lodge a caveat and to have it entered in the day-book on, in the main, two provisions of the Act, these being ss. 132 and 134(2). They invoke the words "or otherwise" in s. 132 as supporting their claim of an interest in un- patented Crown land through an assertion of aboriginal rights, and

they point to the words "before registration" in s. 134(2) as justifying their contention that the Registrar's day-book is open for the notation thereon of caveats in respect of unpatented land. The contentions so made are reinforced by reference to ss. 49 and 56.

I need not doubt, for the purpose of resolving the issue in this case, that a claim of an interest in land by way of aboriginal rights is a claim of an interest arising otherwise than through the instruments or documents listed in s. 132, and hence is covered by s. 132. The normal case of the assertion of an interest through a caveat would be as against an existing registered title, and s. 132 appears to envisage that in ascribing the effect of a caveat to be to prohibit the "registration of any transfer". The language of the section is, however, not so precise as clearly to exclude unpatented land. The precision is found, however, in s. 134(1); only land already the subject of a certificate of title is pointed to, and the reference to the entry in the day-book is simply for the purpose of eliminating any dispute as to priority among the competing claims, as is abundantly clear from a reading of ss. 35 and 36.

It is put against the appellants that they can draw no comfort from s. 134(2) and from its reference to the entry of a caveat in the day-book "before registration of a title under this Act" because (so it is argued) this phrase takes its meaning from s. 35, which establishes the day-book for entries in it of instruments respecting lands "for which a certificate of title has been issued or been applied for". Hence, the submission that "before registration" in s. 134(2) refers to cases where there has been a grant and a consequent application for registration of the title. If this is so, it does present a dilemma for the appellants in view of their apparent concession that if a grant was made by the Crown of any of the unpatented land

410 PAULETTE v. THE QUEEN (167)

sought to be included in their caveat they would lose any claimed interest therein. They would thus find themselves in the position of being unable to file a caveat before any Crown grant was made and would have no basis for one after any such grant was made to third parties without any qualification of the interest granted. They are not, however, precluded from proceeding in another way against the Crown if they wish to establish their claim to an interest in Crown Land.

It is also part of the respondent's position that s. 35 establishes the limits of authority to make entries in the day-book, and that to read s. 134(2) as the appellants would have it would give the day-book a character not authorized by the legislation under which the day-book is created. A question was raised during argument as to the administrative difficulties that would be created if caveats could be filed for entry in the day-book in respect of unpatented land, but I am satisfied, on the evidence in the record, that this would not be preclusive if statutory authority for such caveats existed. The record shows that it is within ordinary ingenuity to set up all indexing system that would identify the unpatented land to which a caveat was directed.

Having regard to the vast tracts of land in the Northwest Territories which are unpatented Crown lands, there is substance in the contention that if such land was to be brought within the ambit of the *Land Titles Act* for all purposes or even for a specified purpose, it could reasonably have been expected that the statute would say so. Without recanvassing all the history set out in the reasons of Sinclair, J.A., I do wish to refer to it in so far as it has a bearing on ss. 48, 49 and 56. These three provisions appear to me to be the main ones, although some support is also drawn from s. 95, upon which the appellants rely to fortify the implication that they would draw from s. 134(2) as to the right to file a caveat against unpatented land.

It appears to me to be relevant to look to the Land Titles Acts of Alberta and Saskatchewan to gain some additional perspective on the issue in this case. Those two Provinces, which became such in 1905, were previously parts of the Northwest Territories and as such governed by the Acts of 1886 and 1894. Each enacted its own Land Titles Act in 1906 which, as would be expected, bore considerable similarity to the Act of 1894. There were, however, some differences and a chief one in the Alberta *Land Titles Act*, 1906

(Alta.), c. 24, was in its s. 86 which was as follows:

86. Upon the receipt of a caveat the registrar shall enter the same in the day book and shall make a memorandum thereof upon the certificate of title of the land affected by such caveat and shall forthwith send a notice of the caveat and of the interest claimed thereunder through the post office or otherwise to the person against whose title the caveat has been lodged; but in case of a

(168) PAULETTE v. THE QUEEN 411

caveat before registration of title under this Act the registrar shall on receipt thereof enter the same in a book to be kept by him in which shall be entered all instruments affecting land as to which no title has yet issued.

The concluding words of this section, not found in the federal Act --the relevant provision is s. 134(2)--bear on the question which is at issue here. There is no similar provision in the original Saskatchewan Act which is the *Land Titles Act*, 1906 (Sask.), c.24, and s. 138(2) thereof is in the same words as s. 134(2) of the federal Act. However, the Saskatchewan Act was changed in this respect by 1932 (Sask.), c. 19, s. 14, and it is now provided by s. 155(2) of the *Land Titles Act*, R.S.S. 1965, c. 115, that "a caveat may be filed against land for which no transfer or grant from the Crown has issued".

Section 48 as it now stands is substantially in the same form as it was in s. 39(1) of the *Land Titles Act*, 1894 (Can.), c. 28 (which replaced the original Act, the *Territories Real Property Act*, 1886 (Can.), c. 26), save for an amendment by 1967-68 (Can.), c. 32, s. 7, to include within it a person named in a notification (which as made under the *Territorial Lands Act*, R.S.C. 1970, c. T-6, has the effect of a Crown grant). The comparable section in the original Act, the *Territories Real Property Act*, was s. 44 which was as follows:

44. Whenever any land is granted in the Territories by the Crown, the letters patent thereof, when issued, shall be forwarded from the office whence the same are issued to the registrar of the registration district in which the lands so granted are situated, and the registrar shall retain the letters patent in his office and bind the same, and a certificate of title, as provided by section fifty-four of this Act, with any necessary qualification, shall be granted to the patentee.

This provision dealt with prospective Crown grants and was followed by s. 45 of that Act, which dealt with Crown grants already made, and was in these terms:

45. The owner of any estate, or interest in any land, whether legal or equitable, letters patent for which have already issued from the Crown, may apply to have his title registered under the provisions of this Act.

When the *Territories Real Property Act* was replaced by the *Land Titles Act* of 1894, s. 45 of the former was replaced by s. 40 of the latter which took account, of course, of the in force date of the original Act in referring to Crown grants previously issued. That s. 40 was in these words:

40. The owner of any estate or interest in any land, whether legal or equitable, letters patent for which issued from the Crown before the first day of January, one thousand eight hundred and eighty-seven, or which otherwise had prior to that date passed from the Crown, may apply to have this title registered under the provisions of this Act.

2. If at the time of the grant of the certificate of title, there are no registered encumbrances or conveyances affecting such land, the certificate may be granted to the patentee upon payment of such fees as are fixed in that behalf by tariff made from time to time by the Governor in Council, but no fees shall be payable therefor under the provisions of section one hundred and fifteen of this Act.

Section 40(1) is substantially s. 54 of the present Act which I quote here for convenience of reference which I shall make to s. 56. (I need not quote S. 55 of the present Act which is simply a machinery section respecting the making of an application pursuant to s. 54). Section 54 is as follows:

54(1) The owner of any estate or interest in any land, whether legal or equitable, letters patent for which issued from the Crown before the 1st day of January 1887, or which otherwise had prior to that date passed from the Crown, may apply to have his title registered under this Act.

(2) If at the time of the grant of the certificate of title, there are no registered encumbrances or conveyances affecting such land, the certificate may be granted to the patentee upon payment of such fees as are fixed by the Governor in Council, but no fees are payable therefor under the provisions of this Act relating to the assurance fund.

Section 40(2) of the Act of 1894, above-quoted, is the forerunner of the present s. 49 and I quote it again at this point, also for convenience of reference. It is as follows:

49. A certificate of title, as provided by this Act, with any necessary qualification, shall be granted to a patentee or a person named in a notification, and a duplicate of such certificate of title shall be issued to the patentee or person so named, free of all fees and charges, if at the time of the issue thereof there are no encumbrances or other instruments affecting the land registered in the land titles office.

Coming now to s. 56, its forerunner was s. 47 of the *Territories Real Property Act* of 1886, reading as follows:

47. Upon the filing of such application, if the applicant is the original grantee of the Crown of the land, and no deed, mortgage or other encumbrance, or instrument, or caveat affecting the title appears to have been registered, or, if not such original grantee, all the original title deeds are produced and any person other than the applicant is in actual occupation of the land in question, and no caveat has been registered, and if, in every case where any other person is admitted to be interested in the land, whether as mortgagee or otherwise, such person is a consenting party to such application, the registrar, if he entertains no doubt as to the title of the applicant, shall, on payment of the fees prescribed, register the said land under this Act

This provision was carried into the Act of 1894 as s. 42(1), (5). It has been carried forward in successive revisions of the statutes of Canada, and as s. 56 (being in substance s. 42(1) of the Act of 1894) it reads as follows (and I reproduce it again also for convenience of reference):

56. Where the applicant is the original grantee of the Crown, and no deed, transfer, mortgage or other encumbrance, or instrument or caveat affecting the title appears to have been recorded; or where he is not the original grantee, and all the original title deeds are produced, and no person other than the applicant is in actual possession of the land, and no caveat has been registered, the registrar, if he entertains no doubt as to the title of the applicant, shall grant a certificate of title as herein provided.

What then ought to be gathered from the foregoing history? In his book on *The Canadian Torrens System*, 1st ed. (1912), Thom is in no doubt, although the only authority he invokes are the various

statutory provisions above-mentioned, that "it is...sufficient in Saskatchewan and Alberta and the Dominion to file a caveat in the ordinary way in the only registry office existing, even though there be no registrations under the Acts" (at p. 358). In his view (at p. 360):

The Acts themselves ... recognize the propriety of filing a caveat before the issue of any certificate of title, and as the filing of the caveat is not actually dealing with land, but rather a restriction upon dealing, there seems no objection in principle to such filing, and certainly where there is no other possibility of registration, the protection of the public demands it.

The second edition of this book, edited by DiCastrì, maintains this position: see 2nd ed. (1962), pp. 604-5. Of course, at the time of the first edition of Thom, only the Alberta Act was express on the issue in this case. At the time of the second edition, the Saskatchewan Act had covered it expressly. I do not think that the federal Act can be swept into the same category as those Acts without express provision.

I read the federal Act as drawing a distinction in respect of grants of unpatented Crown land between situations (1) where such grants were made before January 1, 1887, and not yet translated into certificates of title under the Act of 1886 and its successors, and (2) where such grants were made subsequent to January 1, 1887, and where, pursuant to s. 48, the patent goes directly to the Registrar of Titles. Prior to the Act of 1886, there was in force a document registration system under which it was open to register documents for what they were worth. When it was supplanted by a land titles system, it obviously became necessary to consider how interests in land should be brought under the new system. Section 4 of the Act of 1886 provided that "from and after the commencement of this Act, all lands in the Territories shall be subject to the provisions hereof". Although this section is not found in subsequent Acts, it can be regarded as a spent section once it had operative force, as it had before being replaced by the Act of 1894. This does not mean, as indeed it could not, that there would not be land, unpatented or not, which would not be shown on the title register, but only that the Act was the means by which interests could thereafter be protected according to its terms if invoked by any claimant of an interest. Persons could deal with land outside the Act and would take the risk of such dealing.

One important change made by the Act of 1886 and following Acts was to oblige the Crown, when making a grant, to send the letters patent or notification to the Land Titles Registrar who was directed to retain them and to issue a certificate of title to the Crown patentee. This provision is now in s. 48. A duplicate certificate was to be issued without fee to the patentee, as provided by s. 49, if at the time of issue thereof there were no encumbrances or

414 PAULETTE v. THE QUEEN (171)

other instruments affecting the land registered in the Land Titles Office; and s. 50, which I have not hitherto quoted, goes on to say that if there are any instruments registered that encumber or affect the title, a duplicate shall be issued only upon payment of certain fees.

In view of this provision, I am unable to appreciate how it can be said that there could be no instruments affecting unpatented land registered (or filed) before the issue of a certificate of title. This does not, however, conclude the question at issue which concerns the filing of a caveat, which is not within the definition of "instrument" under the Act.

Section 54 of the present federal Act deals with situations where a patentee received a Crown grant before January 1, 1887, and hence before the requirement that the patent must go directly to the Land Titles Office. Provision is made for the patentee to apply to have his title registered and s. 54(2) envisages that there may be registered encumbrances or conveyances affecting the land prior to the grant of the certificate of title. I think it reasonable to conclude from the words "registered encumbrances or conveyances" that the reference is to documents registered in respect of such land prior to the introduction of the land titles system and operating under the previous system. Section 56, however, goes much further. In context, it deals with patents granted before January 1, 1887, and envisages an application for registration and the grant of a certificate of title "where no deed, transfer, mortgage or other encumbrance or instrument or caveat affecting the title appears to have been recorded". The following sections envisage other situations where there may be either a grant of a certificate of title by the Registrar or the matter goes to a Judge for approval of the applicant's title.

I am satisfied, therefore, that so far as ss. 54 and 56 are concerned, relating to Crown grants issued before

January 1, 1887, and which envisage an application for registration, they fall within s. 134(2) in the literal sense of a contemplated registration of title under a pre-existing Crown grant.

In the present case, where there has been neither a Crown grant before or after January 1, 1887, it is not enough to support the contention of the appellants that the Act under review appears to envisage that there may be "instruments" recorded against unpatented land, as indicated by s. 50 or that a mortgage or encumbrance may be filed in respect of unpatented Crown land by a person in possession thereof, as indicated by s. 95 which it is unnecessary to reproduce again. Although ss. 48 and 49, which deal with Crown grants made after January 1, 1887, envisage that there may be "encumbrances or other instruments" affecting the previously unpatented land, those sections do not speak of a "caveat", as

(172) PAULETTE v. THE QUEEN 415

does s. 56 which, as I have already indicated, relates to land for which a Crown grant was made before January 1, 1887. In short, there is no indication in ss. 48 or 49, nor anywhere else in the Act, that a caveat can be filed in respect of unpatented Crown land. In my opinion, a grant thereof made by the Crown cannot be affected by a caveat purportedly filed before the grant is made. Such a caveat should not be accepted for filing by the Registrar of Titles, and, if accepted, would be of no effect.

I have already pointed out that a caveat is not an "instrument" as defined in the Act, nor is it an "encumbrance" within the definition of that term in the Act. Again, only the terms "encumbrances" and "instruments" are mentioned in s. 49, which relates to the making of Crown grants; and, moreover, the term "caveat" is mentioned separately from the terms "encumbrance" and "instrument" in s. 56. In these circumstances, and in the absence of any such provision in the federal Act as there was in the original Alberta Act of 1906 and as there is in the present Alberta *Land Titles Act*, R.S.A. 1970, c. 198, s. 141, and as there now is in Saskatchewan, for the filing of a caveat against unpatented Crown land, the contentions of the appellants on the matters in issue are untenable.

In the result, I would dismiss the appeal. This is not a case for costs either here or in the Courts below.

Appeal dismissed.