Federal Court  Cour fédérale

Date: 20210929

Docket: T-1359-07

Citation: 2021 FC 1014

Toronto, Ontario, September 29, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

and

ATTORNEY GENERAL OF SASKATCHEWAN

Intervener

JUDGMENT AND REASONS

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I. Introduction

[1] This case is about whether the Plaintiff should be exempt from certain taxes due to a single clause in the contract that led to its formation over 140 years ago. That clause states:

> 16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

[2] In 1880, a railway syndicate was formed by George Stephen, who would become the first president of the Canadian Pacific Railway Company ("CPRC" or the "Company"), the Plaintiff in this action. Mr. Stephen's syndicate (the "Stephen Syndicate") signed a contract with the Defendant ("Canada" or the "Crown") to construct Canada's first cross-country railway (the "1880 Contract").

[3] The railway had been promised to British Columbia ("BC") under Term 11 of the *BC Terms of Union* (UK), 1871, reprinted RSC 1985, App II, No 10 [*BC Terms of Union*] the terms by which BC had joined Confederation nearly a decade earlier. Term 11 obligated Canada to construct a railway that would connect the BC seaboard with Canada's railway system within ten years of BC's entry into Confederation (the "BC Undertaking").

[4] Under the 1880 Contract, Canada offered a number of incentives to CPRC to fulfill the BC Undertaking, including grants of money and land, to name a few. One of these incentives was Clause 16 of the 1880 Contract ("Clause 16" or the "Exemption"), reproduced above, which lies at the heart of this action.

[5] The year after the parties signed the 1880 Contract, Canada enacted enabling legislation, *An Act respecting the Canadian Pacific Railway* (1881), 44 Vict, c 1 [*1881 CPR Act*]. The *1881 CPR Act* authorized the 1880 Contract's grants of money and land, the Exemption, and other incentives to the Company. It also adopted the planned route of the railway as it had been established in the earlier *Act to provide for the construction of the Canadian Pacific Railway Act, 1874*, 37 Vict, c 14 [*1874 CPR Act*]. CPRC and Canada (the "Parties") refer to this route, which was intended to satisfy the BC Undertaking, as the Main Line ("Main Line", a map of the Main Line is reproduced in Annex A to these Reasons).

[6] Parliament annexed the 1880 Contract and the Letters Patent dated February 16, 1881 (the "CPRC Charter"), which incorporated CPRC, to the *1881 CPR Act*. These three instruments – the 1880 Contract, *1881 CPR Act*, and CPRC Charter (the "CPRC Instruments") – provided the

terms and incentives that enabled CPRC to construct the transcontinental railway line to BC, thereby helping Canada fulfill the BC Undertaking.

[7] The Company completed construction of the Main Line in late 1885. This pivotal Canadian achievement was memorialized in the well-known photograph of Company Director Donald Smith driving in the last ceremonial spike on the morning of November 7, 1885, at Craigellachie, BC. The photograph retains an iconic status in Canadian history because it forever commemorates the central role that the transcontinental line played in Canada's nation building.

[8] The Plaintiff submits that Clause 16 imposed on Canada an obligation not to tax the Main Line. It contends that because Parliament enacted and ratified the 1880 Contract through legislation (the *1881 CPR Act*), Clause 16 not only has statutory force, but it also has constitutional status because of its role in fulfilling Canada's obligations under Term 11 of the *BC Terms of Union*.

[9] In this action, CPRC claims recovery of three taxes it alleges Canada collected in contravention of Clause 16: (i) income tax ("Income Tax"), (ii) large corporations tax ("LCT"), paid under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*], and (iii) fuel tax ("Fuel Tax") under the *Excise Tax Act*, RSC 1985, c E-15 [*ETA*] (collectively, the "Taxes").

[10] CPRC grounds its claim for recovery on a public law cause of action recognized by the Supreme Court of Canada ("SCC") in *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*]. In *Kingstreet*, the SCC removed certain barriers to restitutionary claims against public authorities.

[11] In addition to seeking *Kingstreet* restitution for the Taxes it claims were levied contrary to Clause 16, CPRC also seeks a number of forward-looking declarations relating to the Taxes and to Clause 16 generally. Specifically, it seeks declarations that:

a) any purported action that is inconsistent with Clause 16 is *ultra vires* and, to the extent of the inconsistency, of no force and effect;
b) the Defendant is not entitled to collect amounts under Part II of the *ETA* on diesel fuel purchased, consumed, or used in the operation of the Main Line; and
c) the Defendant is not entitled to collect these amounts under Part I of the *ITA* on income earned by CPRC in connection with the operation of the Main Line.

[12] As will be described later in these Reasons, the Plaintiff proposed revised wording of the first declaration in advance of an April 30, 2021 hearing, namely that any purported action of the federal Crown to tax or collect taxes on diesel fuel purchased, consumed, or used in the construction or working of the Main Line, or income earned by CPRC in connection with the operation of the Main Line, and on the capital stock of CPRC, is inconsistent with Clause 16 of the 1880 Contract, and therefore of no force or effect.

[13] Canada rejects the arguments and remedies sought by the Company. It argues that Clause 16 represents no more than a contractual right between the Company and the Crown under the 1880 Contract, and that neither Clause 16 nor any of the associated CPRC Instruments assumed a statutory or constitutional character. It submits that the *Kingstreet* remedy is not available on the facts of this dispute since Canada argues that no unconstitutional taxation arises.

[14] Moreover, although Canada accepts that the *1881 CPR Act* has never been repealed directly, it points out that CPRC has historically been a taxpayer, including on the Main Line. Canada submits that the Company is now precluded from recovery, having failed to invoke Clause 16 before this litigation, and thereby has lost its right to do so under the equitable defences of laches, estoppel, and waiver and acquiescence.

[15] Canada further asserts that Clause 16 was rescinded in the 1960s or, in the alternative, that it ceased to apply to CPRC upon the Company's continuance under the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*] in 1984.

[16] Finally, Canada also asserts that the Federal Court is not the proper venue in which to challenge the Taxes, noting that the governing tax statutes provide for mechanisms under the purview of the Tax Court of Canada ("Tax Court"), of which CPRC ought to have availed itself. In Canada's view, the limitation periods applicable to those mechanisms have now expired.

[17] CPRC served the Attorneys General with a Notice of Constitutional Question due to the constitutional issues raised. The Attorney General for Saskatchewan intervened, only making submissions with respect to the constitutional issue.

[18] Finally, in terms of the pleadings, prior to the issuance of the decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA References*] in March 2021, CPRC also claimed recovery of the charges it paid under the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*]. However, after the Supreme Court concluded in the

GGPPA References (at paras 5, 212-219) that the charges imposed under the *GGPPA* are regulatory charges rather than taxes, the Plaintiff withdrew its claim to recovery of *GGPPA* payments, as Clause 16 relates only to taxation. Following the *GGPPA References*, CPRC also withdrew a claim for declaratory relief in relation to the *GGPPA*.

[19] History permeates not only the factual context of this case, but the action itself. These proceedings originated at this Court in 2007. Several motions and procedural steps have taken place in the years since, resulting in various interlocutory decisions, which included an order to bifurcate the trial into two stages: (i) liability and (ii) damages. This decision concerns the liability phase of the trial. Hearings took place remotely first in October and November 2020 to hear the evidence. Legal arguments followed in February and March 2021, and post-hearing conference took place on April 30, 2021.

[20] This is not the only action scrutinizing Clause 16 and its impact on taxation. CPRC also has ongoing proceedings in Alberta, Saskatchewan, and Manitoba (the "Prairie Provinces"), through which it challenges provincial taxation. These actions are at various stages of litigation. This action, however, is the first of the four related matters to go to trial on its merits.

[21] After considering all of the arguments, and for the reasons that follow, CPRC has not persuaded me that Clause 16 has constitutional status. I also find that Clause 16 does not apply to Income Tax or Fuel Tax. It follows that no recovery or declaratory relief are warranted in relation to these two taxes.

[22] I do, on the other hand, find that Clause 16 applies to LCT. I am satisfied that Clause 16 benefits from a statutory character, that it has not been rescinded or repealed, and that it exempts the Company from taxation on its capital stock captured by LCT. However, I am also of the view that the *Kingstreet* remedy – which I find to be a means to recover taxes unlawfully levied only under an unconstitutional statute – does not apply to the facts of this case. Additionally, because Canada eliminated its LCT in 2006, a forward-looking declaration, being entirely hypothetical, is not warranted under the circumstances, for that tax, or for any other. Thus, the Plaintiff's cause of action fails, and no recovery or declaratory relief requested is available.

[23] The reasons for these conclusions follow. First though, a review of the background to this action provides the historical context that gives rise to the issues raised before this Court.

II. Background

[24] I note at the outset that while some of the statutes cited in this decision were adopted in both official languages and are equally authoritative in English and French, others, including the CPRC Instruments, were drafted exclusively in English, and the French text, where it is available, constitutes a translation. For consistency, and because this case concerns issues of contractual and statutory interpretation of the CPRC Instruments – thus the intention and the language chosen by the drafters being highly relevant – I include bilingual excerpts only where the statutes themselves were adopted in both official languages, and where both the English and the French text can therefore be considered equally authoritative.

[25] Prior to the start of trial, the Parties presented the Court with a Partial Agreed Statement of Facts ("PASF"); a non-disputed document that summarizes significant portions of the relevant history to this action. I reproduce the PASF below, with the Parties' permission. I have removed the portion related to the *GGPPA*. I have also removed defined terms from the PASF that have already been established above, included references to Annexes to these Reasons where appropriate, and added citations where missing.

III. Partial Agreed Statement of Facts

[26] CPRC is a business corporation originally incorporated by Letters Patent under the Great Seal of Canada dated February 16, 1881.

1. *Historical Background of the Construction of the Transcontinental Railway*

(a) 1871 *BC Terms of Union*

[27] British Columbia joined the Canadian Confederation on July 20, 1871, in accordance with the *BC Terms of Union*.

[28] Under Term 11 of the *BC Terms of Union*, the Federal Government undertook to secure the commencement, within two years, and the completion, within ten years from the date of the union, of a railway that would connect the seaboard of British Columbia with the railway system of Canada. (The full text of Term 11 is reproduced in Annex B to these Reasons.)

(b) Initial Attempts to Construct Transcontinental Railway

[29] In June 1872, Parliament passed legislation to facilitate the construction of the transcontinental railway by private enterprise: *An Act Respecting the Canadian Pacific Railway* SC 1872, 35 Vict, c 71 [*1872 CPR Act*] (reproduced in Annex C to these Reasons).

[30] Among other things, the *1872 CPR Act* authorized the Federal Government to grant a subsidy of up to $30 million and up to 50 million acres of land on either side of the Main Line of a future railway, and additional land subsidies for branch lines.

[31] Parliament passed two additional acts in 1872:

a) *An Act to incorporate the Canada Pacific Railway Company*, SC 1872, 35 Vict, c 73 a different company from the Plaintiff, led by Hugh Allan; and
b) *An Act to incorporate the Inter-oceanic Railway Company of Canada*, SC 1872, 35 Vict, c 72 a syndicate led by David MacPherson.

[32] The private sector railway construction efforts outlined in the *1872 CPR Act* did not begin because of the "Pacific Scandal" of 1873, which involved allegations of political kickbacks to the Conservative government of Prime Minister John A. Macdonald.

[33] The Liberal government that came to power in 1873 was unsuccessful in attracting private capital to build the transcontinental railway and subsequently decided to build the railway as a government enterprise.

[34] In 1874, the Parliament of Canada passed the *1874 CPR Act* (reproduced in Annex D to these Reasons). Among other things, the *1874 CPR Act* repealed the *1872 CPR Act*, noted the failure of construction of the railway in private hands, and authorized construction of the transcontinental railway as a public enterprise of the Federal Government. The *1874 CPR Act* also provided a definition of the "Canadian Pacific Railway" by reference to its physical location and the branch lines to be included therein.

[35] In 1878, the Conservatives were re-elected to power, and continued to build the transcontinental railway as a government enterprise. However, progress was slow and the national treasury was being depleted by the expense of the project. With the ten-year period referenced in the *BC Terms of Union* approaching, the Federal Government again decided that the railway should be constructed and operated by private enterprise.

[36] In 1880, the Stephen Syndicate was formed for the purpose of constructing and operating the transcontinental railway. The syndicate was composed of George Stephen and Duncan McIntyre of Montreal, John S. Kennedy of New York, Richard B. Angus and James J. Hill of St. Paul, Minnesota, Morton, Rose & Co. of London, England, and Kohn, Reinach & Co. of Paris, France.

(c) 1880 Contract

[37] The 1880 Contract for the transfer of the existing portion, construction of the remaining portion, and perpetual operation of the "Canadian Pacific Railway" was entered into between the Stephen Syndicate and the Federal Government on October 21, 1880. (An original copy of the

1880 Contract is reproduced in Annex F to these Reasons, as well as in the Schedule to the *1181 CPR Act* found in Annex E.)

[38] The 1880 Contract was signed by the Minister of Railways and Canals, Sir Charles Tupper, on behalf of the Federal Government, and the members of the Stephen Syndicate.

[39] Clause 16 contains the tax exemption at issue in this claim:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

[40] Clause 1 describes the two parties to the 1880 Contract (the Company and the Federal Government), and further states that the railway would be referred to as the "Canadian Pacific Railway" as defined in the *1874 CPR Act* (*i.e.*, Main Line).

[41] Under clause 7:

a) the Federal Government agreed to transfer to the Company certain portions of the line already constructed or to be completed; and

b) the Company was required to "forever efficiently maintain, work and run" the Main Line.

[42] Under clause 9, the Federal Government granted the Company a subsidy of $25 million and 25 million acres of land.

[43] Under clause 10, the Federal Government agreed to grant lands required for the railway construction, including “the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock grounds and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land shall be vested in the Government”, and permitted the admission of materials into Canada free of duty where intended for use in the original construction of the Railway.

[44] Clause 14 granted the Company the power to construct additional branch lines.

[45] Clause 15 provided the Company with a 20-year exclusive right to operate a railway in the region.

[46] Schedule A of the 1880 Contract prescribed the form of an act of incorporation, or draft charter, to be granted to the Stephen Syndicate and incorporating the “Canadian Pacific Railway Company”.

[47] On December 10, 1880, the Federal Government tabled the 1880 Contract in the House of Commons and introduced resolutions to appropriate the $25 million and the 25 million acres

of land. The resolutions were debated by the Parliament of Canada and the Senate, and adopted on January 27, 1881.

(d) *1881 CPR Act*

[48] The *1881 CPR Act* (which includes the text of the 1880 Contract, as reproduced in Annex E to these Reasons) was then introduced in and enacted by Parliament. It received Royal Assent on February 15, 1881.

[49] The 1880 Contract, including the draft charter attached to it, was appended as a schedule to the *1881 CPR Act*.

[50] The *1881 CPR Act* provided for the construction and permanent working of the Railway. Its recitals state, in part:

> Whereas by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government of the Dominion has assumed the obligation of causing a Railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada;
>
> And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactments therein contained have not been effectual for that purpose;
>
> And whereas certain sections of the said Railway have been constructed by the Government, and others are in course of construction, but the greater portion of the Historic Main Line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and

> for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said Railway;
>
> And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the Historic Main Line of the said Railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same;

[51] The *1881 CPR Act* provided as follows:

a) Section 1 approved and ratified the 1880 Contract, and authorized the Federal Government to perform and carry out the conditions of same;

b) Section 2:

   i. permitted the Governor-in-Council to issue to the Stephen Syndicate, in conformity with the 1880 Contract, under the corporate name of the Canadian Pacific Railway Company, "a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended"; and

   ii. provided that such charter, upon being published in the *Canada Gazette*, "shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of [the 1880 Contract]";

c) Section 3 permitted the Federal Government to grant money and lands to the Company for purposes of constructing the Railway, and stated in part:

> Upon the organization of the said Company… and in consideration of the completion and perpetual and efficient operation of the railway by the said Company, as stipulated in the said [1880

> Contract], the Government may grant to the Company a subsidy of twenty-five million dollars in money, and twenty-five million acres of land, to be paid and conveyed to the Company in the manner and proportions, and upon the terms and conditions agreed upon in the said contract, and may also grant to the Company the land for right of way, stations and other purposes, and such other privileges as are provided for in the said contract.

d) Section 4 permitted the Federal Government to grant duty-free admission of materials required to construct the Railway, including:

> … all steel rails, fish plates, and other fastenings, spikes, bolts and nuts, wire timber and all material for bridges to be used in the original construction of the said Canadian Pacific Railway…

e) Section 5 authorized the transfer of the already constructed portions of railway line to the Company, as well as portions that the Federal Government was still completing.

(e) Issuance of the CPRC Charter and Incorporation in 1881

[52] Pursuant to s 2 of the *1881 CPR Act*, the CPRC Charter incorporating the Plaintiff as the Canadian Pacific Railway Company was issued by the Governor-in-Council on February 16, 1881 (reproduced in Annex G to these Reasons).

[53] The CPRC Charter was in the form set out in Schedule A to the 1880 Contract. Among other things, the CPRC Charter:

a) Recites the fact of execution of the 1880 Contract and sets out the terms of the 1880 Contract;

b) States that the draft charter attached as Schedule A to the 1880 Contract was set out in the *1881 CPR Act*;

c) Reproduces the recitals to the *1881 CPR Act*, and states that the 1880 Contract and attached draft charter were approved and ratified by the *1881 CPR Act*;

d) Recites the authority of the Federal Government as set out in ss 1 and 2 of the *1881 CPR Act*; and

e) Grants Letters Patent of incorporation to the Stephen Syndicate on the same terms and conditions as the draft charter set out in the *1881 CPR Act*.

[54] Section 4 of the CPRC Charter provides that the Company may avail itself of all the rights conferred to the Company under the 1880 Contract, and states:

> All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said [1880 Contract], are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

[55] The CPRC Charter was published in the *Canada Gazette* on February 19, 1881.

(f) CPRC Constructs and Operates the Railway

[56] CPRC completed construction of the Main Line in 1885. Since then, the Company has operated the Main Line and additional branch lines within Canada.

(g) Subsequent Corporate History

[57] The Company changed its name to “Canadian Pacific Limited” on July 3, 1971.

[58] Canadian Pacific Limited was granted a Certificate of Continuance under s 181 of the *CBCA* on May 2, 1984. That certificate provided for this continuance on the terms set out in the attached Articles of Continuance. (The Articles and Certificate of Continuance are reproduced in Annex H to these Reasons.)

[59] The Company reversed its name back to “Canadian Pacific Railway Company” on July 4, 1996.

[60] In 2004, CPRC transferred portions of the Main Line to a wholly owned subsidiary corporation, Mount Stephen Properties Inc. CPRC continues to maintain and operate the train service on these portions of the Main Line.

(h) Federal Taxation in Canada at the time of the 1880 Contract

[61] As of 1880, the Federal Government did not directly tax the income of individuals or corporations. There existed indirect federal taxation, including but not limited to customs duty (imposed on coal, oils, petroleum products, and wood) and excise tax (imposed on alcohol and tobacco).

[62] As of 1880, there was no direct taxation by any municipal or school authority within the Northwest Territories.

(i) Extension of Manitoba boundaries in 1881

[63] The province of Manitoba was established in 1870 over territory referred to as the "Postage Stamp". In July 1881, the Federal Government expanded Manitoba beyond its original boundaries, by incorporating into that province lands which had formerly comprised part of the Northwest Territories.

[64] This expansion of Manitoba was provided for in *An Act to provide for the extension of the boundaries of the Province of Manitoba,* SC 1881, 44 Vict, c 14 [*Boundaries Act*]. Section 2(b) of the *Boundaries Act* stated in part:

> The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

(j) Saskatchewan and Alberta Join Confederation in 1905

[65] On July 20, 1905, the provinces of Alberta and Saskatchewan were formed and became provinces of Canada under the *Alberta Act,* SC 1905, 4-5 Edw VII, c 3 [*Alberta Act*] and the *Saskatchewan Act,* SC 1905, 4-5 Edw VII, c 42 [*Saskatchewan Act*].

[66] The *Saskatchewan Act* and the *Alberta Act* each contain the same s 24, which states:

> The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the [1880 Contract] set forth in the schedule to chapter 1 of the statutes of 1881, being *an Act respecting the Canadian Pacific Railway Company* [the *1881 CPR Act*].

(k) CPRC Pays Certain Taxes or Makes Payments in Lieu of Taxes

[67] Since CPRC was established, new taxes have been introduced by different levels of government. These new taxes include federal and provincial income taxes, federal and provincial capital taxes, provincial business taxes, provincial sales taxes, federal and provincial fuel taxes, federal goods and services/harmonized taxes, and payroll taxes. CPRC has paid, or borne the economic burden of, these taxes. In some instances, CPRC has made payments in lieu of taxes without prejudice to its rights under Clause 16.

(l) Federal taxes

(i) *World War 1*

[68] In 1916, the Federal Government enacted *The Business Profits War Tax Act, 1916*, SC 1916, c 11 [*BPWTA*] for the purpose of raising revenues for the military effort of Canadian forces in the First World War.

[69] The *BPWTA* imposed a tax on the profits of corporations, including transportation businesses. That tax was imposed until the end of 1920.

[70] Prior to the passing of the *BPWTA*, CPRC submitted a petition to the Federal Government asserting that the proposed legislation did not apply to it because of Clause 16. At the same time, CPRC said that it would be willing to pay the tax without prejudicing its rights under Clause 16.

[71] The Federal Government took the position that the proposed legislation did not breach Clause 16 and that CPRC was liable to tax under the proposed legislation.

[72] CPRC and the Federal Government ultimately agreed to an arrangement that was reflected in an Order in Council approved on May 31, 1916.

[73] The May 31, 1916 Order in Council confirmed that payments by CPRC under the *BPWTA* would be accepted by the Federal Government without prejudice to CPRC's position that Clause 16 applied.

[74] In 1917, the Federal Government enacted the *Income War Tax Act, 1917*, SC 1917, 7-8 Geo V, c 28 [*Income War Tax Act, 1917*]. This statute is the forerunner of today's *ITA*.

[75] Under the authority of the separate *War Measures Act, 1914*, SC 1914, 5 Geo V, c 2 [*WMA*], by Order in Council dated March 14, 1918, the Federal Government required CPRC to pay special taxes in respect of earnings and ordered that such payment would relieve CPRC of liability under the *BPWTA*, any other statute of like nature, and the *Income War Tax Act, 1917* from and after January 1, 1918.

[76] The Federal Government's position was that these special taxes did not conflict with Clause 16. CPRC denied that the *WMA* authorized the imposition of such special taxes and asserted that their imposition contravened Clause 16. At the same time, CPRC expressed a willingness to pay the special taxes without prejudice to its rights under Clause 16. The Parties' positions are outlined in an Order in Council dated October 29, 1918 (and approved October 30, 1918).

[77] By Order in Council dated December 20, 1919, the Federal Government repealed orders and regulations made under the *WMA* as of January 1, 1920. This included the above-noted Orders in Council dated March 14, 1918, and October 29, 1918.

(ii) *Federal Income Taxes between 1920-1947*

[78] CPRC paid or accrued federal income taxes under the *Income War Tax Act, 1917* for the 1920 to 1947 taxation years.

[79] There is no available information to indicate that CPRC disputed its tax liability (to the extent there was any) under the *Income War Tax Act, 1917* for 1920 to 1947, based on Clause 16.

(iii) *Taxes under the ITA Since 1948*

a. Part I *ITA* Incomes Taxes

[80] *Income War Tax Act, 1917* remained in force until 1948, when it was replaced by the *Income Tax Act*, SC 1948, c 52.

[81] Since that time, CPRC has paid federal income taxes, or amounts in respect of federal income taxes, under Part I of the *ITA* for years where it had net taxable income.

[82] There is no available information to indicate that CPRC filed federal income tax returns since 1948 in which it claimed the Exemption on its income or earnings attributable to the Main Line.

[83] In the six years prior to the commencement of this action in 2007 and up until and including the 2014 taxation year, CPRC was not assessed Part I Income Tax liability.

[84] After this action was commenced, CPRC was assessed and paid Income Tax for the 2015, 2016, 2017, 2018, and 2019 taxation years.

b. Part I.3 *ITA* Large Corporations Tax

[85] In 1990, Part I.3 was added to the *ITA*. This established an LCT, computed by reference to long-term liabilities, the capital stock, and retained earnings of large corporations.

[86] CPRC paid LCT to the Federal Government between 1990 until 2005. As described below, CPRC sought refunds for portions of those payments based on the Clause 16 Exemption beginning in 2004.

[87] LCT was repealed as of January 1, 2006.

(iv) *Other Federal Non-Income Taxes*

a. Sales Taxes

[88] The *Special War Revenue Act, 1915*, SC 1915, 5 Geo V, c 8 [*SWRA*], was enacted in 1915 and was the forerunner to the *ETA*. In 1920, an excise tax on sales was enacted and in 1923 the tax was amended to become a "consumption or sales tax" payable by the "producer or manufacturer" of the goods.

[89] The *SWRA* was renamed as the *ETA* in 1947. The imposition of a federal sales tax under the *SWRA* was continued in Part VI of the *ETA*.

[90] In 1972, CPRC internally discussed claiming a Clause 16 federal sales tax exemption on materials manufactured by it for its own use. There is no available information to indicate that CPRC filed such a claim.

b. Excise Tax on Diesel Fuel

[91] Part III of the *ETA* was amended in 1986 to impose an excise tax on the manufacturers of diesel fuel effective September 3, 1985.

[92] Between 1986 and 1990, both federal sales tax (under Part VI of the *ETA*) and excise tax (under Part III of the *ETA*) were imposed in respect of diesel fuel.

[93] In 1991, the federal sales tax on diesel fuel was replaced with the Goods and Services Tax under Part IX of the *ETA*. Part III *ETA* excise tax on diesel fuel – the Fuel Tax – continues to apply.

[94] Fuel Tax is payable (i) by a manufacturer of diesel fuel on its first domestic sale and (ii) by an importer of diesel fuel upon importation into Canada.

[95] On subsequent domestic sales of diesel fuel, a supplier recovers the applicable Fuel Tax it paid by including an amount in respect of the Fuel Tax on its invoice to the buyer of the fuel. That amount may be separately broken out as a line item or not.

[96] CPRC purchases diesel fuel for use in its operations from several suppliers. Invoices or receipts received by CPRC in connection with its purchases of diesel fuel include an amount in respect of the Fuel Tax levied under Part III of the *ETA* for that fuel.

[97] CPRC has paid amounts to its suppliers to purchase diesel fuel without reference to Clause 16.

[98] As set out further below, in 2004 CPRC filed tax refund claims and statutory appeals with the Federal Government with respect to diesel fuel used in its Main Line operations, based on Clause 16.

(m) Provincial Taxes

[99] With respect to provincial taxation, CPRC has asserted Clause 16, including on the following occasions.

(i) *1909 Agreement with Government of Saskatchewan for Payments in Lieu of Gross Earnings Taxes*

[100] Under *The Railway Taxation Act*, RSS 1909, c 40 [*Railway Taxation Act*] in 1908, the Saskatchewan government levied a tax on the gross earnings of railways operating within Saskatchewan.

[101] CPRC objected and took the position that the payment of the tax contravened Clause 16. Notwithstanding that, in 1909 an agreement was reached between CPRC and the Saskatchewan government for CPRC to make payments in lieu of the tax without CPRC waiving its right to the Exemption.

[102] CPRC and the Saskatchewan government agreed upon the amounts to be paid in lieu of the tax each year until 1935, when the Saskatchewan government refused to enter into another agreement. CPRC made those payments, while relying on its right to the Exemption.

[103] CPRC paid or accrued amounts to the Saskatchewan government, for taxes on CPRC's gross earnings between 1934 and 1941.

[104] The *Railway Taxation Act* was suspended in 1941 pursuant to an agreement between the Saskatchewan government and Federal Government.

(ii) *Manitoba Retail Sales Taxes*

[105] In June 1971, CPRC applied for a refund of Manitoba retail sales tax on certain specified items for the years 1967 to 1970 based on the Exemption. In July 1972, Manitoba approved the application (with some minor adjustments) and granted the refund.

(iii) *Saskatchewan Sales Taxes*

[106] In the 1970s, CPRC disputed that Saskatchewan was entitled to levy sales taxes on CPRC under *The Education and Health Tax Act*, RSS 1965, c 66 based on Clause 16.

[107] In 1975, CPRC agreed to pay certain sales taxes going forward without prejudice to its position that it was exempt from the tax under Clause 16.

(n) Events of the 1960s

[108] In 1964, the governments of Alberta, Manitoba, and Saskatchewan lobbied the Federal Government to eliminate Clause 16, which prohibited municipalities in those provinces from taxing the Main Line and related property.

[109] By letter dated August 29, 1966, following an exchange of correspondence between the Parties, CPRC President Ian Sinclair wrote to Transport Minister Pickersgill:

You will recall conversations we have held over some months relative to whether as a contribution to the rationalization of Canadian transportation legislation, Canadian Pacific would be prepared voluntarily to forego the perpetual exemption from municipal taxation provided in Clause 16 of its contract of 21st October, 1880, which is the Schedule to the *Canadian Pacific Railway Act*, S.C. (1881) chap. 1.

This exemption from municipal taxation applies to the Historic Main Line of Canadian Pacific outside of the boundaries of the original "Postage Stamp" Province of Manitoba, across Saskatchewan and Alberta. This exemption has contractual, statutory and constitutional validity.

I have discussed this matter with the Directors of the Company and they have authorized me to say that, under the arrangement hereinafter mentioned, the Company is prepared to forego voluntarily perpetual exemption from taxation by the local authorities on our Historic Main Line in the Prairie Provinces in three equal stages: one-third for the year commencing January 1 after legislation is enacted modernizing and rationalizing existing legislation and taking into account, among other things, the effective changed conditions on freight rates otherwise fixed; a further one-third in the succeeding year; the balance in the third year from the commencement of the period as stated.

The Canadian Pacific proposes that the Government of Canada ascertain from the municipalities involved the municipal taxes that would have been payable, subject to statutory procedures as to assessment appeals, had the exemption not been in effect. When this amount has been determined, Canadian Pacific would make a grant of an equal amount to Her Majesty the Queen in the right of Canada for distribution for the municipalities involved in such manner as the Government of Canada might from time to time deem appropriate.

At any time after the expiry of the period indicated above, the Canadian Pacific would have no objection to action being taken to amend the constitution and the legislation to terminate the perpetual exemption from local taxation referred to.

You are free to make the position of Canadian Pacific public whenever it seems to you desirable to you to do so in the public interest.

[110] Transport Minister Pickersgill responded to CPRC by letter dated September 2, 1966.

[111] On September 8, 1966, Transport Minister Pickersgill addressed the House of Commons and read the August 29, 1966 letter.

[112] On February 9, 1967, following the passage of the *National Transportation Act*, SC 1966-67, c 69 [*National Transportation Act*] CPRC advised the Federal Government that it could inform Parliament that CPRC would carry out the proposals as outlined in the August 29, 1966 letter.

[113] On February 10, 1967, Transport Minister Pickersgill so advised the House of Commons.

[114] In the spring and summer of 1967, the Parties corresponded regarding CPRC making voluntary grants in lieu of municipal taxes, and how such grants would be treated for federal Income Tax purposes. CPRC sought, and ultimately received, assurances from the Federal Government that the payments would be considered deductible business expenses.

(o) CPRC Invokes Clause 16 against Federal Taxation in 2004

[115] Beginning in 2004, CPRC invoked Clause 16 against federal taxation in notices of objections to:

a) recover LCT levied under Part I.3 of the *ITA*; and
b) recover amounts related to excise tax imposed on diesel fuel levied under Part III of the *ETA*.

(i) *CPRC's Claim for Repayment of Capital Taxes Paid Under Part I.3 of the ITA*

[116] The Canada Revenue Agency ("CRA") assessed CPRC with LCT under Part I.3 of the *ITA* for CPRC's 2000, 2001, 2002, 2003, 2004, and 2005 taxation years.

[117] CPRC paid amounts for LCT for each of these six taxation years.

[118] CPRC filed notices of objection to recover a portion of the LCT it paid in respect of its "capital stock" for each of the 2003, 2004, and 2005 taxation years.

[119] The basis for CPRC's claims was that Clause 16 applied to exclude the amount of CPRC capital stock from the "taxable capital" component of the formula used to calculate its LCT liability under Part I.3 of the *ITA*.

[120] In response to CPRC's claims, the CRA refunded CPRC approximately $9.1 million of Part I.3 *ITA* tax for the 2001, 2002, 2003, and 2004 taxation years, plus interest.

[121] The CRA refunded CPRC the following amounts:

Year	**Principal**	**Interest**	**Total**
2001	$2,333,377.00	$555,190.39	$2,888,567.39
2002	$2,333,377.00	$633.533.48	$2,966,910.48
2003	$2,333,377.00	$241,989.43	$2,575,366.43
2004	$2,074,113.00	$108,844.70	$2,182,957.70
Total:	$9,074,244.00	$1,539,558.00	$10,613,802.00

(ii) *2000 Taxation Year*

[122] For the 2000 taxation year, CPRC's LCT liability was assessed in the amount of $8,769,426.00 on July 26, 2001.

[123] CPRC paid this amount. The CRA has not refunded any amount to CPRC for LCT in respect of the 2000 taxation year, which LCT is at issue in this action.

(iii) *2005 Taxation Year*

[124] In filing its Part I.3 return for the 2005 taxation year, CPRC excluded $1,814,849 from its calculations of LCT owing, on the basis of Clause 16.

[125] Subsequently, by notice of reassessment dated June 8, 2010, CPRC was reassessed an additional $1,822,157.00 in LCT plus arrears interest of $610,718.00.

[126] CPRC paid these additional amounts.

[127] On September 2, 2010, CPRC filed a notice of objection to the June 8, 2010 reassessment in which it sought recovery of these amounts.

[128] CPRC's objection for the 2005 taxation year remains outstanding. The CRA has not refunded any amount to CPRC for LCT in respect of the 2005 taxation year.

(iv) *CPRC's Claim for Repayment of Fuel Tax*

[129] Between May 31, 2005, and March 14, 2007, CPRC filed Fuel Tax statutory refund claims to the CRA based on Clause 16. These claims covered the period from June 2003 to March 2007.

[130] The CRA denied these claims and CPRC filed statutory objections to the decisions to deny the claims.

[131] In Notices of Decision dated March 15, 2007, the CRA denied CPRC's objections.

[132] Further to the statutory appeal procedures, CPRC subsequently filed six Statements of Claim with the Federal Court in June 2007.

[133] On September 19, 2007, after the commencement of this action, CPRC discontinued those Statements of Claim.

IV. The Witnesses and Evidence

[134] Part of the challenge with the historical nature of this litigation is the shortage of available, primary source evidence. Indeed, the 140th anniversary of the *1881 CPR Act* occurred during the course of this trial. No witnesses from that critical period are available for this litigation. Even many of the more recent points in contention arose over half a century ago, such as the 1960s negotiations. There were no fact witnesses who testified to those historical events

either. Therefore, much of the evidence in this action comes from the opinions of seven expert witnesses and testimony from one fact witness. The seven expert witnesses are listed below in order of appearance (the first four called by the Plaintiff, the last three by the Defendant), with a note on their area of expertise:

i. Dr. David Hanna – Canadian railway history and geography; opinion and reply to Dr. Regehr;
ii. Dr. Sean M. Kammer – US railway legal history, responding to Dr. Ely;
iii. Dr. Kurt Klein – Canadian railway subsidies/regulation, responding to Mr. Urban;
iv. Dr. Matthew Aharonian – Economic and financial analysis, responding to Mr. Urban;
v. Dr. Theodore D. Regehr – Canadian railway history and geography, responding to Dr. Hanna;
vi. Dr. James W. Ely, Jr. – US railway legal history; opinion and reply to Dr. Kammer; and
vii. Mr. Frank Urban – Canadian railway subsidies and regulation.

[135] Four of these experts were met with challenges in the preparatory stages of this trial through motions brought by the Plaintiff, and later the Defendant, respectively. Neither motion succeeded (see *Canadian Pacific Railway Co v Canada*, 2019 FC 1531 and *Canadian Pacific Railway v Canada*, 2020 FC 690). However, I also note that neither party opposed the experts' qualifications prior to or at trial.

[136] Indeed, I find that each expert witness holds impressive credentials as a prominent academic and/or as a respected industry professional, or both. All provided detailed and insightful reports, and annexed significant reference material and bibliographies. Both under

examination and cross-examination, each expert provided articulate and compelling testimony at trial and each provided oral evidence consistent with their reports. They also acknowledged and corrected the occasional administrative error made in those reports.

[137] Mr. Urban is a retired, long-serving Federal Government employee who spent his career specializing in the domain of railway regulation and costing. Dr. Aharonian currently works for a leading consulting firm and has taught university courses in economics and finance. The other five experts are widely published professors (current or emeritus) from leading universities, who have also consulted for industry and/or previously appeared as expert witnesses.

[138] The same comment regarding the overall reliability of testimony applies to the one fact witness that appeared. Called by the Plaintiff, Victor Wong testified about CPRC tax practices and filings during his tenure with the Company, which began in 1991. Mr. Wong currently serves as Assistant Vice President, Tax, as the most senior person responsible for tax matters at CPRC.

[139] Finally, I note that the Parties also tendered a large volume of historical evidence, including letters, articles, book extracts, texts, photographs, maps, corporate documents such as financial statements, annual reports and tax returns, as well as government records including orders in council, Hansards of Parliamentary debates, and legislation.

V. Issues

[140] CPRC seeks to recover amounts paid under three types of Taxes. As I referenced at paragraph 9 above, the three Taxes for which CPRC seeks recovery are (i) Income Tax, (ii) LCT, and (iii) Fuel Tax. CPRC argues that the Taxes imposed on the Main Line are contrary to Clause 16 of the 1880 Contract. Specifically, as summarized in paragraph 11 of the Plaintiff's Trial Memorandum of Fact and Law ("Plaintiff's Memorandum") and set out in paragraph 1 of the Further Further Further Amended Statement of Claim of December 5, 2019, CPRC seeks recovery of (i) Income Tax paid from 2015 onward, (ii) LCT paid for taxation years 2000 to 2005, and (iii) Fuel Tax paid from 2001 onward. As also noted above, CPRC additionally seeks a number of forward-looking declarations relating to these Taxes and Clause 16.

[141] Prior to trial, the Parties submitted a Joint Statement of Issues, wherein they suggested that this Court must resolve four main issues:

1. Is Clause 16 of the 1880 Contract legally binding between the Parties, and if so, to what extent?
2. Does Clause 16 of the 1880 Contract apply to the following:
    a. LCT under Part I.3 of the *ITA*;
    b. Income Tax under Part I of the *ITA*; and
    c. Fuel Tax under the *ETA*?
3. Is CPRC barred from relying on Clause 16 by virtue of its conduct?
4. Is CPRC entitled to the relief sought in the Further Further Further Amended Statement of Claim of December 5, 2019 (hereinafter, the "Claim")?

[142] During legal submissions, the Parties each suggested methodologies to address these issues. I have taken elements from each Party's suggestions in adopting the following structure for these Reasons, as set out in the following seven questions, and answers:

Q1. Does Clause 16 have constitutional, statutory, or contractual force?

A. Clause 16 does not have constitutional force but does have statutory and contractual force.

Q2. Does the *Kingstreet* remedy apply?

A. The *Kingstreet* remedy does not apply in these circumstances.

Q3. What interpretive principles apply to Clause 16?

A. Clause 16 must be interpreted using both contractual and statutory interpretation principles.

Q4. Does Clause 16 apply to the Taxes?

A. Clause 16 applies to LCT, but not to Income or Fuel Tax.

Q5. Does Clause 16 still stand today vis-à-vis federal taxation?

A. It does, with respect to federal taxation. Clause 16 was neither repealed nor rescinded in the 1960s or after CPRC's 1984 continuance.

Q6. Is CPRC entitled to the declaratory relief requested?

A. No declaratory relief is warranted.

Q7. Do equitable defences apply and prevent CPRC from invoking its rights under Clause 16?

A. With no available remedy, equitable defences raised need not be addressed.

[143] I now move onto the analysis for each of these seven issues.

1. *Clause 16 does not have constitutional force but does have statutory and contractual force*

(a) Clause 16 does not have constitutional force

[144] The nature of Clause 16 has important implications for a number of issues in this action. For example, whether it has constitutional or statutory force affects whether the *Kingstreet* remedy is available, and whether equitable defences may apply to prevent recovery.

(i) *The Parties' arguments*

a. The Plaintiff Company

[145] CPRC submits that Clause 16 has constitutional force. It argues that the BC Undertaking was a broad constitutional obligation and that the 1880 Contract provided the specific means by which Canada chose to deliver on that obligation. CPRC argues that the 1880 Contract – and Clause 16 – attained constitutional status because they played a direct, central role in fulfilling the constitutional BC Undertaking.

[146] CPRC relies on *British Columbia (Attorney General) v Canada (Attorney General), An Act respecting the Vancouver Island Railway (Re)* [1994] 2 SCR 41, [1944] SCJ No 35 (QL) [*Dunsmuir #2*] for the proposition that subsequent agreements related to the fulfillment of constitutional obligations may themselves gain constitutional character.

[147] In a parallel argument regarding Clause 16's constitutional status, CPRC argues that Clause 16 gained constitutional status through its inclusion into the legislation under which the Prairie Provinces joined Confederation. These statutes – the *Alberta Act* and the *Saskatchewan Act*, both incorporate Clause 16. Furthermore, the Company notes that both *Acts* are included in the schedule to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 and part of the Constitution pursuant to s 52(2)(b).

[148] CPRC also contends the same of Manitoba, whose 1881 *Boundaries Act* expressly incorporated Clause 16 through s 2(b). The Plaintiff notes that the SCC has twice confirmed that Manitoba's expanded territory (outside the Postage Stamp) is subject to Clause 16, citing *The Rural Municipality of Cornwallis v The Canadian Pacific Railway Co* (1891), 19 SCR 702 at para 8, 1891 CanLII 66 and *North Cypress v Can Pac Ry Co* (1905), 35 SCR 550 at paras 9-11, 30-31, 1905 CanLII 49.

b. The Respondent Attorney General of Canada

[149] Canada, on the other hand, emphasizes that although the *1881 CPR Act*, CPRC Charter, and the 1880 Contract were necessary to give meaning and effect to the BC Undertaking, neither the 1880 Contract nor its Clause 16 thereby gained constitutional status. In addition, Canada submits that a valid constitutional amendment in the late 19th century required the participation of the British Parliament, and could not occur through Canada's unilateral action. Canada provides a different reading of *Dunsmuir #2* than CPRC to support its argument.

[150] Overall, Canada contends that Clause 16 only ever had contractual force under the 1880 Contract, which was extinguished either due to its relinquishment in the 1960s or through the Company's *CBCA* continuance in 1984.

c. The Intervener Attorney General of Saskatchewan

[151] Saskatchewan mirrors Canada's position that Clause 16 holds no constitutional status. It too emphasizes that Canadian Parliament lacked the authority – in concert with CPRC – to unilaterally amend Canada's Constitution without the participation of the UK Parliament. Without British involvement, constitutional status could neither be conferred on the 1880 Contract, nor its constraining Instruments.

(ii) *The historical context of the 1880 Contract and Clause 16*

[152] To determine the legal status of Clause 16, I must consider the historical context in which the 1880 Contract was signed, including its connection to the BC Undertaking. Both Parties tendered expert witness evidence regarding the historical context of Clause 16. Dr. Hanna provided this evidence for the Plaintiff and Dr. Regehr provided it for the Respondent. Both experts largely agreed about the events that led to the signing of the 1880 Contract.

a. British colonial vulnerability to American territorial interests in the 19th century

[153] Drs. Hanna and Regehr agreed that Canada emerged as a new nation at a time of aggressive and expansionist foreign policy from the United States ("US"), and that the Main

Line was a crucial part of Britain's – and later, Canada's – strategy to address American threats to Canadian territorial integrity.

[154] Dr. Hanna testified that America's population and economy has historically been approximately ten times larger than Canada's. The US possessed more resources and had a more developed railway network in the American West by the late 19th century, and could move troops to the Pacific coast in a matter of days. For the British Crown, however, the same endeavour required four to six months, as its naval fleet had to sail great distances to reach the same territory. In the 19th century, Britain had also overstretched its military resources, sending troops to a number of conflicts in Asia, Oceania, Africa, and the Middle East, resulting in vulnerabilities to British interests in North America.

[155] Compounding the matter was the US' aggressive and expansionist foreign policy throughout the 19th century, which also threatened British interests in the region. For example, in the first part of the 19th century, territorial treaties between these two nations failed to stop the US from seizing territory south of modern-day BC, which Britain had claimed. Mid-century, the prospect of finding gold drew thousands of Americans into the BC interior, with many of them showing little support for British claims to the territory.

[156] Dr. Hanna went on to explain in his report that the US again surprised Great Britain with the sudden and unexpected acquisition of Alaska from Russia in 1867. The purchase further increased Britain's sense of vulnerability in the region, as Britain too had held an interest in acquiring the territory. The acquisition meant that the US now controlled territory both north and

south of modern-day British Columbia, which threatened Britain's access to the Pacific coast, and therefore access to its colonies in Asia and Oceania. Additionally, in southeastern Canada, Irish Republican loyalists led what became known as the "Fenian raids" from the northeastern US, primarily into Nova Scotia and Upper Canada (today's Ontario), which added to the geopolitical pressure.

[157] These combined threats incentivized Britain's strategy to build a transcontinental railway of its own to protect its interests in North America.

b. Trans-Canada railway as a check on territorial threats from the United States

[158] Construction of the Canadian transcontinental railway provided a viable solution to allay American threats, while also providing a means to stimulate settlement in the sparsely populated West, thereby helping to spur economic development and increasing the Dominion's economic resources. These twin goals were viewed as existentially important to both the governments of Britain and the Dominion of Canada.

c. The BC Undertaking obligates Canada to construct the railway to BC within ten years

[159] In 1871, when BC agreed to Confederation, the promise of a trans-Canada railway was explicitly written into the *BC Terms of Union*, and became a central condition of BC's entry into Canada, as discussed in paragraphs 27-28 of these Reasons. Term 11 of the *BC Terms of Union* provides as follows:

> The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific toward the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, toward the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.…

[160] The BC Undertaking shares similarities with the undertakings given to Nova Scotia and New Brunswick when they joined Confederation four years earlier, in their respective constitutional agreements under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] (originally enacted as the *British North America Act, 1867* and renamed in 1982). Canada had already agreed to build another railway line reaching the East Coast (the "Intercolonial Railway"), connecting the four original provinces that joined the Confederation in 1867 (the Province of Canada, namely Ontario and Quebec, to New Brunswick and Nova Scotia). Section 145 of the *Constitution Act, 1867* states:

> Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada; Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

[161] Construction of the Intercolonial Railway ran from 1870 to 1876, without delay. By contrast, the endeavour to build a trans-Canada railway line to the BC coast, that was to become the Main Line, did not proceed as smoothly.

d. Obstacles to constructing the Main Line

[162] Drs. Hanna and Regehr largely agreed about the obstacles that prevented the trans-Canada line from being built on time (that is, by 1881). First and most fundamentally, the Canadian Pacific Railway project was unprecedented in its complexity, with extremely difficult terrain north of Lake Superior and in the Rocky Mountains of BC and Alberta. It was difficult for railway companies to secure financing for the risky endeavour. Meanwhile, government resources were thinly spread, particularly with the construction of the Intercolonial Railway already underway.

[163] Political instability within the federal government in the first half of the 1870s – as discussed in paragraphs 32-33 above – added political complications to the geographic and resource challenges of a transcontinental line to BC. The challenges of building it were so great that former Prime Minister Alexander Mackenzie said in 1876 that "[a]ll the power of men and all the money of Europe could not likely complete the Pacific railway in ten years" (Expert Witness Statement of Dr. David Hanna, dated September 12, 2019 (the "Hanna Report") at 12).

[164] Finally, the 1870s also marked a period of prolonged economic downturn known as the "Long Depression". The period severely limited the Canadian government's ability to secure the

credit needed to finance the railway in domestic and international financial markets. The downturn only relented at the end of the decade.

[165] In this challenging context, the construction of the transcontinental railway line by 1881 became a matter of existential importance for Canada. Dissent had grown in BC. With no line yet laid in within BC's borders by the late 1870s, Dr. Hanna described the province as in "open revolt" over the Canada's slow progress in meeting its constitutional obligations (Hanna Report at 15).

e. Canada and CPRC sign the 1880 Contract with less than a year remaining to fulfill the BC Undertaking

[166] The Stephen Syndicate negotiated with the federal government to undertake the construction project. Some of the details of this agreement between Canada and the Stephen Syndicate (which later became the CPRC) are included at paragraphs 37-47 of these Reasons. The Parties ultimately signed a contract (the 1880 Contract) providing the terms under which the trans-Canada railway was to be built, including its key promises under clauses 1, 7, 9, 10, and 14-16, summarized above, and reproduced in full in the Schedule to Annex E of these Reasons.

[167] In short, after many false starts and failed attempts, Canada had finally found a solution to break the impasse in building its transcontinental railway: Canada and CPRC signed the 1880 Contract with less than a year remaining to fulfill the BC Undertaking. Parliament approved and ratified the 1880 Contract through the *1881 CPR Act*, which facilitated the momentous completion of the Main Line in late 1885.

[168] Having reviewed the historical context and challenges confronting Canada in meeting its BC Undertaking, and thus the 1880 Contract, I turn to the whether its Clause 16 has constitutional status.

f. The SCC's decision in Dunsmuir #2

[169] I mentioned above that the Plaintiff and Respondent both rely on *Dunsmuir #2* in their respective arguments about Clause 16's legal status. The Plaintiff argues that Clause 16 gained constitutional status by being one of the means through which Canada fulfilled the BC Undertaking. It argues that *Dunsmuir #2* stands for the proposition that subsequent agreements related to the fulfillment of constitutional obligations may themselves gain constitutional character. The Respondent disagrees, as do I.

[170] *Dunsmuir #2* is an SCC decision with circumstances somewhat similar to those surrounding the 1880 Contract. It involved the construction of a railway on Vancouver Island, BC. In *Dunsmuir #2*, the federal government and BC signed an agreement in 1883 (the "1883 Settlement Agreement") under which Canada would contribute funds to build the railroad, and BC would grant lands for the railway's construction on Vancouver Island. In addition to Canada and BC, a third party – the Dunsmuir railway syndicate (the "Dunsmuir Syndicate") – was intimately involved in the negotiations that culminated in the 1883 Settlement Agreement.

[171] On the same day that Canada ratified the 1883 Settlement Agreement, it also executed a contract with the Dunsmuir Syndicate (the "Dunsmuir Agreement"), under which the Dunsmuir Syndicate agreed, at clause 3, to "lay out, make, build, construct, complete, equip, maintain and

work continuously a line of railway" on Vancouver Island. At clause 9, the Dunsmuir Syndicate also agreed to "continuously and in good faith operate" that railway. As will become clear below, there are many similarities between the Dunsmuir Agreement and the 1880 Contract that help to interpret the latter's legal status.

[172] A century after the signing of the Dunsmuir Agreement, two decisions by the Canadian Transport Commission declared that the passenger rail services on the Vancouver Island line were "uneconomic". The decisions led to two Orders-in-Council, the latter of which terminated passenger railway service between Nanaimo and Courtenay.

[173] BC challenged the termination order as *ultra vires* on the basis that Term 11 imposed on Canada a perpetual, constitutional obligation to maintain railway service on Vancouver Island. In other words, the province argued that the federal government not only had a constitutional obligation to construct the railway, but also to ensure its operation in perpetuity. BC argued that since Term 11 was a "skeletal" provision – along with the 1883 Settlement Agreement and the Dunsmuir Agreement both adding the necessary details to achieve Term 11 – that Term 11 thus imbued the Dunsmuir Agreement with constitutional force.

[174] The Dunsmuir Agreement was similar to the 1880 Contract, in that both agreements with the government had language that committed the private companies to forever ("continuously", in the case of the Dunsmuir Agreement, and "perpetually" in the case of the 1880 Contract) operate the line. The agreements were also similar in that they were both ratified by and scheduled to federal legislation. In the case of the Dunsmuir Agreement, this legislation was *An*

Act Respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and Certain Railway Lands of the Province of British Columbia, Granted to the Dominion, SC 1884, c 6 [*Dominion Act, 1884*]. In the case of the CPRC, this legislation was the *1881 CPR Act*.

g. Term 11 includes an obligation to construct the railway, but not to operate it

[175] Justice Iacobucci disagreed with BC, finding that Term 11 was skeletal only "in so far as neither the route nor the terminus of the proposed railway could be known in 1871", and "because the railway belt had to be marked out on the ground" (*Dunsmuir #2* at 83, 87). However, he concluded that Term 11 was not "skeletal" in the sense that the parties could simply add to it terms absent from its wording.

[176] Key to Justice Iacobucci's decision was the principle that, while constitutional terms must be capable of growth, "constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question" (*Dunsmuir #2* at 88). Justice Iacobucci emphasized that, "in the express language of Term 11, there is no reference to railway operations, continuing, perpetual, or otherwise" (*Dunsmuir #2* at 82, emphasis in original). He found that while the 1883 Settlement Agreement gave Term 11 "precise meaning", it could not extend the scope of Term 11 beyond its actual wording (*Dunsmuir #2* at 87-88).

[177] In determining the scope of obligations under Term 11, Justice Iacobucci also compared Term 11 with the terms governing railway undertakings in the *Prince Edward Island Terms of Union*, reprinted in RSC 1985, Appendix II, No 12, pursuant to which the province of Prince

Edward Island ("PEI") joined Confederation in 1873. Notably, PEI's terms expressly provided for railway "service". Justice Iacobucci held that it "cannot be contended that either Canada or British Columbia was unaware, in 1871, of the distinction between constructing a railway, and operating [or, in other words, providing service on] a railway" (*Dunsmuir #2* at 87, emphasis in original).

[178] In so finding, Justice Iacobucci cited an earlier decision he wrote in *Prince Edward Island (Minister of Transportation and Public Works) v Canadian National Railway Co* (1990), [1991] 1 FC 129, 1990 CanLII 7976 (CA) [*PEI v CNR Co*], for the proposition that when the language under consideration is clear, there is no need to rely on the rules of statutory construction, extrinsic evidence, or legislative history (*Dunsmuir #2* at 89-90; *PEI v CNR Co* at para 12). He also explained in *Dunsmuir #2* (at 88) that:

> In *The Queen in Right of Canada v. The Queen in Right of Prince Edward Island*, *supra*, the Federal Court of Appeal effectively assumed that this clear language imposed upon Canada an operational obligation to ensure a service, and the court determined only how "continuous" that service must be. The contrast between this term, and British Columbia's Term 11, is striking: where, in Term 11, is the operational reference to railway service?
>
> [Emphasis in original.]

[179] Justice Iacobucci concluded that, for the 1883 Settlement Agreement to have had constitutional force, Term 11 would have needed to be clearer regarding "service". Term 11 was indeed clear on its face; however, he concluded that it imposed only an obligation of construction on Canada, not an obligation of operation (*Dunsmuir #2* at 90).

[180] The SCC has also endorsed a text-first approach to constitutional interpretation in a number of more recent cases, holding that while the interpretation of constitutional terms should provide room for growth, the text of the instrument in question occupies a central place in the interpretive exercise. A number of these cases cite *Dunsmuir #2* in support of their reasoning.

[181] For example, in *Caron v Alberta*, 2015 SCC 56 [*Caron*], a language rights matter, the Court ruled that, "we must assess the appellants' arguments by looking at the ordinary meaning of the language used in each document, the historical context, and the philosophy or objectives lying behind the words and guarantees" (at para 38). The Court also highlighted the primacy of the written text of the Constitution, with reference to Justice Iacobucci's observations in *Dunsmuir #2* (*Caron* at paras 36-37).

[182] *R v Blais*, 2003 SCC 44 [*Blais*] is an aboriginal law case that also relied on *Dunsmuir #2*, while interpreting the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter of Rights and Freedoms*]. In *Blais*, the Court opined that while the "living tree" principle was a fundamental tenet of constitutional interpretation, courts were nevertheless "not free to invent new obligations foreign to the original purpose of the provision at issue", noting that "[t]he analysis must be anchored in the historical context of the provision" (at para 40).

[183] Most recently, in *Quebec (Attorney General) v 9147-0732 Quebec inc*, 2020 SCC 32 [*Quebec inc*], the SCC reiterated that it "has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision" (at para 8), again

citing *Dunsmuir #2* (emphasis in original). This is so because constitutional interpretation, being the interpretation of the text of the Constitution, must first and foremost have reference to and be constrained by that text (*Quebec inc* at para 9).

[184] With this jurisprudential context in mind, I will now examine the legal status of the 1880 Contract and Clause 16.

h. Implications of *Dunsmuir #2* for the determination of Clause 16's legal character

[185] First, I note that the importance of the prospective Main Line for Canada's formation as a new, unified federation in 1867 is not in dispute. It is clear that CPRC played a crucial role in Canada's history by constructing the transcontinental railway, and without the 1880 Contract, the history of Canada could have taken a dramatically different turn.

[186] However, it is the legal status of Clause 16 and not the historical significance of the 1880 Contract that is in issue. In other words, historical significance does not guarantee constitutional character. As the SCC held in *Dunsmuir #2* (at 92), regarding Term 11:

> [T]o admit that nation building was at issue is to admit an historical, not a constitutional, fact. All constitutional amendments, perforce, can be considered acts of nation building. But not all acts of nation building, perforce, attain constitutional status.

[187] There is no doubt that the *BC Terms of Union*, including Term 11, have constitutional status. Prior to 1949, the British Parliament was the only legislative body with the power to amend Canada's Constitution, except where it expressly provided that autonomy to the

Dominion government. Section 146 of the *Constitution Act, 1867* enabled the British Cabinet to admit British Columbia into Confederation in 1871 by means of an Order-in-Council. The Order-in-Council was passed, and was deemed under the *Constitution Act, 1867* to have the same force and effect as if it had been enacted by the British Parliament, thereby making BC's admission a valid constitutional amendment.

[188] Second, as the SCC stated in *Dunsmuir #2* (at 82), to the extent that the status of Term 11 was unclear prior to the repatriation of Canada's Constitution in 1982, the inclusion of the *BC Terms of Union* into the schedule of the *Constitution Act, 1982* placed the constitutional status of Term 11 beyond doubt.

[189] Here, the Parties do not dispute the constitutional status of Term 11. However, as was noted in *Dunsmuir #2* (at 92-93), the constitutional character of Term 11 does not automatically extend to a private contract that provides the means by which the federal government would deliver on the BC Undertaking. The key question is whether Clause 16 and its 1880 Contract can be said to have been "specifically contemplated" by the language of Term 11.

[190] CPRC proposes a three-step test, based on its reading of *Dunsmuir #2*, to determine whether Clause 16 has acquired a "constitutional dimension". The steps of the proposed test are as follows:

1. there is a recognized constitutional obligation;
2. subsequent arrangements are necessary to give meaning and effect to that obligation; and

3. those subsequent arrangements are "geared toward" and imperative to fulfilling the obligation.

[191] In applying this proposed test, CPRC starts with Term 11's constitutional status. It asserts that CPRC inherited the constitutional obligation through the 1880 Contract – specifically under Clause 16 – which the Crown enacted through the *1881 CPR Act* and incorporated through its Charter.

[192] In taking this approach, CPRC maps out an indirect line from Clause 16 to a constitutional obligation. I cannot accept this approach because it is precisely the type of approach that the SCC rejected in *Dunsmuir #2* (at 89):

> The interpretive process proposed by British Columbia denies the straightforward proposition that regard must first be had for the language of the provision to be interpreted. British Columbia asserts that because some aspects of Term 11 are skeletal, the whole of the railway obligation must be considered ambiguous. I have already noted that Term 11 is 'skeletal' only in a very limited sense. Even if a much broader view were acceptable, however, what British Columbia invites this Court to do is to move beyond the language of Term 11 to the Settlement Agreement of 1883, from thence to the *Dominion Act*, and from thence to the Dunsmuir Agreement where, finally, an obligation in respect of operations will be located.

[193] Equally, I am not persuaded by CPRC's argument that the 1880 Contract and its terms, including Clause 16, gained constitutional status because they provided the means by which Canada discharged its Term 11 obligation. I find that neither Term 11 specifically, nor the *BC Terms of Union* as a whole, specified how the railway was to be built, or noted any tax

exemptions for the party that built it – or for that matter, the other incentives provided by the 1880 Contract, including certain land grants, duty-free imports, and a monopoly clause.

[194] I cannot agree with the Plaintiff that the magnitude of their railway undertaking, which was unprecedented in scope at the time, is a justified basis for an expanded reading of Term 11. Certainly, the extraordinary effort to build the Main Line remains part and parcel of the bargain the Parties made, and shaped their negotiations, but the Stephen Syndicate received consideration for its efforts through the various incentives contained in the 1880 Contract.

[195] The ambit of Term 11 is much more narrow: it simply contemplates that Canada must build a railway. The details through which Canada committed to fulfilling this commitment are contained in the 1880 Contract and its related Instruments, the CPRC Charter and *1881 CPR Act*, not the *BC Terms of Union*.

[196] *Dunsmuir #2* is unequivocal: a textual reading of Term 11 does not extend beyond the building of a railway to the contract. Just as the Dunsmuir Agreement could not alter the meaning of the *BC Terms of Union*, neither can the 1880 Contract. Only the Dominion and BC are privy to the constitutional obligations set out in Term 11, *i.e.*, the BC Undertaking.

[197] In short, the Plaintiff contends that an agreement that is pivotal and directly related to a constitutional obligation becomes constitutional itself. However, that argument epitomizes precisely what Justice Iacobucci said should not happen. The 1880 Contract cannot create subordinate constitutional obligations that derogate from the words of the principal constitutional

obligation. The Parties at the time knew the difference between "operating" and "constructing" a railway.

i. Comments by Transport Minister Pickersgill

[198] CPRC also points to excerpts from the Hansard (*House of Commons Debates*, 27th Parl, 1st Sess, No 8 (6 Sept 1966) at 8211). In one passage, federal Minister of Transportation J. W. Pickersgill, who led negotiations on legislative reform in the 1960s, stated in the House of Commons:

> [I]t appears from the best legal advice the government is able to attain that this perpetual exemption from taxation enjoyed by the Canadian Pacific on its Historic Main Line is part of the constitution of Canada and also part of the constitutions of Manitoba, Saskatchewan and Alberta. It is not competent for this parliament by a simple act of parliament, under the constitution as it now stands, to make this change. An amendment would be required also to the constitutions of those provinces. For that reason it is not possible for this parliament to make the Canadian Pacific main line subject to taxation, nor is it possible for the provincial legislatures to do so.

[199] CPRC also points out that Minister Pickersgill made a similar statement in his 1993 memoir (JW Pickersgill, *Seeing Canada Whole: A Memoir* (Markham: Fitzhenry & Whiteside, 1994), at 711-712):

> The perpetual exemption from local taxation on its Historic Main Line was included in the contract of 1881 between the company and the Crown. The best legal advice of the government was that the 1880 Contract was a part of the Constitution of Canada and of the constitutions of Manitoba, Saskatchewan and Alberta and could be changed only by the British Parliament.

[200] Such after-the-fact opinion statements cannot change the impact of Term 11's wording, which as I have already found, does not include obligations beyond the construction of the railway.

[201] While Minister Pickersgill would certainly have had his views in the 1960s, he was not a part of the Parliament responsible for the 1880 Contract. In any event, single parliamentarians – even senior Ministers – do not necessarily speak for the government or for Parliament (I further discuss this point at paras 513-515 below). As Justice Iacobucci observed in *Dunsmuir #2*, Term 11 imposed an obligation of construction on Canada, not an obligation of operation. In the face of clear language, as Justice Iacobucci had stated in his earlier *PEI v CNR Co* decision (at para 12), "there is no need to rely on the rules of statutory construction, extrinsic evidence, or legislative history when the language under consideration is clear".

[202] Given the jurisprudence, and the plain wording of Term 11, this Court is limited to giving effect to constitutional obligations contained in Term 11, and cannot "create" them (*Dunsmuir #2* at 90; *Caron* at para 203).

j. Parliament could not unilaterally amend the Constitution

[203] In considering the scope of Term 11 obligations in *Dunsmuir #2*, Justice Iacobucci noted (at 92) that, in the late 19th century, BC and Canada could neither amend the Constitution by themselves, nor otherwise make an agreement which had a "constitutional nature" not specifically contemplated by legislation, given that Imperial Parliamentary consent was required.

[204] In support of his conclusion that the 1883 Settlement Agreement did not have constitutional force, Justice Iacobucci noted that BC was able to renounce land grants due to changes in the route of the railway without the involvement of the British Parliament (*Dunsmuir #2* at 83). Justice Iacobucci also noted (*Dunsmuir #2* at 91-92) that Canada had certain autonomy to introduce constitutional amendments, both before and after 1949:

> The manner in which Canada's Constitution could have been amended in 1883 is, or should be, trite law. Today, of course, the federal government and any affected provincial government can agree upon constitutional amendments which affect no other province pursuant to s. 43 of the *Constitution Act, 1982*. Similarly, after 1949, amendment of the *Constitution Act, 1867* could occur without Imperial Parliament consent if the amendment involved modification of a purely federal power: *British North America (No. 2) Act, 1949* (U.K.), 13 Geo. 6, c. 81 (reprinted in R.S.C., 1985, App. II, No. 33), repealed by *Constitution Act, 1982*, s. 53(1) and Schedule, Item 22; see *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54. Clearly, however, prior to 1949, constitutional amendments did require the participation of the Imperial Parliament, since the *Constitution Act, 1867* (then the *British North America Act, 1867*) was an Act of that Parliament.
>
> [Emphasis in original.]

[205] In addition, the *Constitution Act, 1871* (UK), 34-35 Vict, c 28, reprinted RSC 1985, Appendix II, No 11 [*Constitution Act, 1871*] enabled Parliament to autonomously enact provisions having constitutional force, that is, without the participation of the British Parliament. Section 2 of the *Constitution Act, 1871* states that Parliament "may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof" and "may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province…" (emphasis added).

[206] Equally, s 3 of the *Constitution Act, 1871* provides that Parliament "may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature", and "may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby".

[207] It was under this authority that the *Saskatchewan* and the *Alberta Acts* were passed. Both of these Acts, in accordance with the *Constitution Act, 1871*, were enacted by Parliament without the participation of the British Parliament. They are both scheduled to the *Constitution Act, 1982* and form part of Canada's Constitution. Thus, Parliament was delegated exceptional authority to amend the Constitution without the participation of the British Parliament in this instance. For further comment on this issue, see paragraphs 223-227 and 649-650 of these Reasons.

[208] However, with respect to the case at bar, the federal government was not acting under any such delegated authority in concluding the 1880 Contract, granting to the Company the CPRC Charter and enacting the *1881 CPR Act*.

[209] I do, however, agree with Canada that the Dominion government could not have amended the *BC Terms of Union* unilaterally, and could not add any terms to it that were not already there. In 1880, to amend the *BC Terms of Union*, Parliament would have required the involvement of the British Parliament.

[210] In this context, I also note Canada and Saskatchewan's submissions that Parliament amended the 1880 Contract following its ratification in the *1881 CPR Act*, without sanction from the British Parliament, noting that it could not have done so if that legislation indeed had a constitutional character. Two examples in particular are worthy of note.

[211] First, in 1884, Parliament passed *An Act to amend the Act intituled "An Act respecting the Canadian Pacific Railway," and for other purposes*, SC 1884, 47 Vict, c 1 [*1884 CPR Act*]. As outlined in the preamble to the *1884 CPR Act*, the Plaintiff applied for "certain modifications of the [1880 Contract]". The *1884 CPR Act* authorized the Federal Government to provide CPRC an additional loan up to $22.5 million. Section 12 also repealed sections of the 1880 Contract that were inconsistent with the *1884 CPR Act*.

[212] Second, in 1888, Parliament passed *An Act respecting a certain agreement between the Government of Canada and the Canadian Pacific Railway Company*, SC 1888, 51 Vict, c 32 [*1888 CPR Act*], which again changed the terms of the 1880 Contract by terminating clause 15 (the monopoly clause; see para 45 in these Reasons). Canada agreed to provide CPRC with financial assistance in the form of $15 million in bond support as a *quid pro quo* (Report prepared by T.D. Regehr, dated September 3, 2019 (the "Regehr Report") at para 63).

[213] In the words of Justice Iacobucci in *Dunsmuir #2* (at 91-92), addressing Canada's inability at the time to amend constitutional guarantees unilaterally:

> I do not discount the proposition… that the 1883 arrangements were the culmination of a nation-building effort. I must plainly state, however, that such arrangements could not create obligations of a constitutional kind unless those obligations were already

> specifically envisioned by the terms of Term 11. To assert otherwise is to suggest that British Columbia and Canada – acting alone in 1883 – could agree upon, and give effect to, a constitutional amendment…
>
> I am thus somewhat confounded by the argument which suggests that Canada and British Columbia, acting alone, could have made an agreement which had a "constitutional nature" in 1883 which was not specifically contemplated by Term 11.

[214] Having established the caveat that Canada was not acting under the authority to amend the Constitution within the powers delegated to it under the *Constitution Act, 1871*, the same logic as in the above statement precludes a conclusion that Canada and the Stephen Syndicate triggered a constitutional amendment through the 1880 Contract.

[215] *Dunsmuir #2* held that subsequent agreements, which added necessary details to constitutional provisions, could take on a constitutional dimension in certain circumstances, for example, if they were integral to how that constitutional provision was put into practice. However, as Justice Iacobucci stated, while constitutional terms must be capable of growth, "constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question" (*Dunsmuir #2* at 88).

[216] I have already found above that Term 11 did not include operating the railway, and it said nothing about a tax exemption. The Parties, acting alone, could not have enacted a constitutional amendment in this context.

k. The scheduling of the *Alberta Act* and the *Saskatchewan Act* to the *Constitution Act, 1982* does not imbue Clause 16 with constitutional authority

[217] Finally, the Plaintiff argues that the constitutional status of Clause 16 is further supported by the fact of its inclusion into the *Alberta Act* and the *Saskatchewan Act* which, again, form part of the Constitution of Canada through their inclusion into the schedule to the *Constitution Act, 1982*. To recall, when Alberta and Saskatchewan joined Confederation in 1905, s 24 of each of the *Alberta Act* and the *Saskatchewan Act* provided that the "powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the [1880 Contract]".

[218] Similarly, the *Boundaries Act* of 1881 expanded the size of Manitoba beyond its original "Postage Stamp" size. Its s 2(b) provides that Manitoba's expanded territory "shall be subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway and the lands to be granted in aid thereof". Litigation later determined that Clause 16 is a "provision" within the meaning of s 2(b), and therefore a limit on the legislative powers of the expanded territory of Manitoba (see *The Attorney General for Manitoba v Canadian Pacific Railway et al*, [1958] SCR 744, 15 DLR (2d) 449 [*Manitoba Reference*] at 754-755 and 771-772).

[219] However, neither s 24 of the *Alberta Act* and the *Saskatchewan Act*, nor s 2(b) of the *Boundaries Act*, have anything to say about the federal taxing power. Section 24 of the Alberta and Saskatchewan legislation explicitly limits the "provincial power" to Clause 16. Equally, s 2(b) of the *Boundaries Act* states that the powers of the expanded territory of Manitoba "shall

be subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway…". Simply put, each of these provisions relates to the provincial taxation power only. I note that CPRC does not challenge provincial taxes in this action.

[220] Because none of these provisions impose any constitutional constraint on the federal taxation power, I am unpersuaded by the Company's argument that these provisions support the constitutional status of Clause 16 with respect to federal taxation.

[221] As Dr. Klein explained, the limits on provincial legislative authority imposed by s 24 and s 2(b) proved unpopular in Alberta, Saskatchewan, and Manitoba since they inhibited the provinces' and municipalities' ability to levy local taxes. After all, the *Constitution Act, 1867* had given the provinces the exclusive authority over matters concerning "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" (at s 92(2)). Because Clause 16 restricted the provinces' constitutionally granted powers, they argued that the above-mentioned provisions were *ultra vires* Parliament, and therefore of no force and effect.

[222] Saskatchewan and Manitoba ultimately litigated their positions. However, their arguments failed before the highest Courts. Both the SCC and Britain's Judicial Committee of the Privy Council ("JCPC") upheld the impugned provisions as valid and *intra vires* Parliament's authority (*CPR v AG for Saskatchewan* (1950), [1951] SCR 190, [1951] 1 DLR 721 [*Saskatchewan Reference SCC*], aff'd, *Reference re Taxation of Canadian Pacific Railway*, [1953] 3 DLR 785 (JCPC) [*Saskatchewan Reference JCPC*]; and *Manitoba Reference*).

[223] The courts in these decisions found that the *Constitution Act, 1871* had delegated authority to Canada to create new provinces, to expand the boundaries of existing provinces, and to enact laws for their administration: under such delegated powers, the courts found that Canada had the authority to impose the limits that it did on the provinces' taxation powers. Thus, the limit that Clause 16 imposed on the provinces' taxation power was found to be a valid one, despite s 92(2) of the *Constitution Act, 1867*, which stipulates that under the division of powers, direct taxation within the provinces in order to raise revenue, falls exclusively to the provinces.

[224] In dismissing the provinces' arguments, the SCC and JCPC largely grounded their decisions in the *Constitution Act, 1871*, which gave Parliament the authority to create new provinces and to expand the boundaries of existing ones.

[225] Turning back for a moment to Saskatchewan's challenge to the constitutionality of Clause 16 on its taxation powers, the SCC upheld Canada's authority to enact s 24 of the *Saskatchewan Act*, as it found that Canada had delegated authority to enact such amendments under the *Constitution Act, 1871*. The JCPC, Canada's highest Court of the time, in turn upheld the *Saskatchewan Reference SCC*, confirming that s 24 was a valid limit on Saskatchewan's taxation power, based on the same logic.

[226] The JCPC concluded that if the *Constitution Act, 1871* had not granted Parliament the authority to limit the right of a new province to impose taxes, and had instead intended to give all provinces the same powers, then the words in s 2 – which enabled "the passing of laws for the peace, order and good government" – would be superfluous (*Saskatchewan Reference JCPC* at

791-792). Thus, the limitation on Saskatchewan's taxation power contained in s 24 of the *Saskatchewan Act* created by the inclusion of Clause 16 was found valid, as it related to provincial taxation.

[227] Similarly, in the *Manitoba Reference*, Manitoba challenged Parliament's ability to bind the province to the Clause 16 Exemption in its expanded territory. The SCC once again found, like in the *Saskatchewan Reference*, that the incorporation of the Clause 16 Exemption in the *Boundaries Act* was *intra vires* Parliament. Justice Rand, relying on the JCPC's decision in the *Saskatchewan Reference JCPC*, upheld Clause 16 as a valid limit on Manitoba's taxing power within its expanded territory. Justice Rand also found (at 754) that s 2(b) of the *Boundaries Act* preserved the constitutional obligations of Term 11:

> It is argued that it was beyond the competence of Parliament to withhold the taxing power furnished the province by s. 92(2) of the 1867 Act. It has already been held by the Judicial Committee in *Attorney General of Saskatchewan v Canadian Pacific Railway Company*, approving *Reference re Constitutional Validity of section 17 of the Alberta Act*, that in the constitution of Saskatchewan, which in this respect is identical with that of Alberta, a reservation to that effect was valid; both are provinces set up under the powers conferred upon Parliament by s. 2 of the *British North America Act, 1871*. That section provides for vesting in new provinces power to pass laws for their "peace, order and good government"; s. 3 enables the alteration of provincial limits on "such terms and conditions as may be agreed to". <u>That these conditions embrace the preservation of one of the terms of fulfilling such a vital constitutional obligation as that being carried out in 1881 seems to me to be too clear for debate.</u>
>
> [Emphasis added.]

(iii) *Conclusion*

[228] Given the observations above, I do not find that Clause 16 gained constitutional status through the *BC Terms of Union*. Canada's Parliament did not have the authority to unilaterally grant constitutional status to the 1880 Contract, given the absence of any explicitly delegated authority to do so (as with, for example, ss 2 and 3 of the *Constitution Act, 1871*). The constitutional obligation that Term 11 imposed on Canada was an obligation to construct a railway to connect the Canadian railway system to the BC seaboard. Term 11 did not create an obligation on Canada to construct that railway in any particular way, nor did it impose on it an obligation to grant a tax exemption to the selected company. Agreements put in place to give effect to constitutional obligations do not themselves acquire a constitutional character unless the constitutional instruments clearly provide for that. Here, they did not.

(b) Clause 16 has statutory force

[229] The starting point for determining whether Clause 16 has statutory force is to ascertain whether Clause 16 ever benefitted from same, or whether it was simply implemented as a term of a contract.

(i) *The Parties' arguments*

[230] CPRC submits that s 2 of the *1881 CPR Act*, the CPRC Charter, and common law jurisprudence establish the statutory nature of the 1880 Contract, and by extension, Clause 16. Section 2 of the *1881 CPR Act* authorized Canada to issue to the Company the CPRC Charter by

Letters Patent. Upon publication in the *Canada Gazette*, the CPRC Charter acquired statutory force and effect as if it were an Act of Parliament. Since the CPRC Charter has statutory force, and conferred on the Company the "franchises, privileges and powers" embodied in the 1880 Contract, CPRC submits that the CPRC Charter's statutory force must simultaneously extend to the 1880 Contract and thus, to Clause 16.

[231] CPRC relies heavily on the *Manitoba Reference* to support these arguments. In the *Manitoba Reference*, the SCC found that Clause 16 proved a valid statutory limitation on Manitoba's taxing power. CPRC argues that Justice Rand's *Manitoba Reference* reasons represent the SCC's last word on the issue, clarifying that as an Act of Parliament, the CPRC Charter gave Clause 16 legislative effect.

[232] The Defendant, on the other hand, submits that Clause 16 constitutes nothing more than a contractual term and grounds its arguments in *Dunsmuir #2*. Canada's ratification of the 1880 Contract as a schedule to the *1881 CPR Act*, without more, signals that Parliament never intended for the agreement to gain statutory force. The fact that none of the relevant clauses of the 1880 Contract required legislative action to take effect further supports the contractual nature of the agreement, according to Canada.

[233] Saskatchewan, the intervener, argued in its written materials that the *1881 CPR Act* did not confer statutory force to the 1880 Contract. Instead, Parliament's purpose for enactment was twofold. First, it served to give Parliament's statutory consent to the private 1880 Contract. Second, the legislation gave legal effect to the 1880 Contract's provisions outside the scope of

private law that needed legislative action, namely land and cash grants, clause 15 (the monopoly clause) and Clause 16.

[234] However, in oral argument, Saskatchewan clarified that the legislative action giving legal effect to clauses 15 and 16 stopped short of conferring statutory force on the clauses themselves, stating rather that to the extent that Parliament had not otherwise explicitly expressed its intent to confer statutory force, the clauses remained terms of the contract between CPRC and the federal government.

[235] Indeed, I note that there was no dispute amongst the Parties and intervener that Clause 16 has contractual force, should it continue to stand (and not have been rescinded, as Canada argues). Rather, the disagreement arises as to whether that force was elevated to attain a statutory or constitutional status, as well as whether it remains valid today. Since the constitutional status of Clause 16 has been ruled out above, I turn to whether it has the status of a federal statute. I conclude that it does.

(ii) *Analysis*

a. Did Parliament intend to give statutory force and effect to the 1880 Contract?

[236] The question of whether Parliament intended to give Clause 16 the force of a statute is a question of statutory interpretation, which requires that we examine the words of the *1881 CPR Act* and those of the CPRC Charter in the grammatical and ordinary sense, in light of their texts

as a whole, and harmoniously with their schemes and their objects (*Dunsmuir #2* at 68; *Rizzo & Rizzo Shoes Ltd, (Re),* [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [*Rizzo*]).

[237] Ultimately, to find that Clause 16 acquired statutory as opposed to simply contractual force, something about the *1881 CPR Act* or the CPRC Charter must compel the conclusion that statutory force was actually conferred upon the 1880 Contract (*Carcross/Tagish First Nation v R,* 2001 FCA 231 at para 20; *Dunsmuir #2* at 111). As I will discuss below, that conclusion indeed arises from the interaction of the three CPRC Instruments of the 1880s, along with the SCC's decision in the *Manitoba Reference*. To explain the basis for this conclusion, I return to the context and the statutory scheme created by two of the CPRC Instruments: the *1881 CPR Act* and the CPRC Charter.

[238] Although Term 11 of the *BC Terms of Union* imposed a constitutional obligation on the Dominion government to construct a railway connecting the BC seaboard to the Canadian railway system by 1881 (the BC Undertaking), it neither stipulated the process nor the means by which the federal government was to meet its obligation.

[239] The three CPRC Instruments in question – the 1880 Contract, the *1881 CPR Act*, and the CPRC Charter – provided such means. In *Canada (Attorney General) v Canadian Pacific Ltd*, 2000 BCSC 933, aff'd, 2002 BCCA 478 [*Squamish*], Justice Saunders of the BC Supreme Court spoke (at para 33) of the importance of the *1881 CPR Act*, quoting a 1905 SCC decision:

> [33] In Canadian Pacific Railway v. James Bay Railway (1905), 36 S.C.R. 42 (S.C.C.), Girouard J. reviewed the exceptional history of CPR and observed at p. 72:

> The Canadian Pacific Railway does not owe its existence to the ambition of individual adventurers, but to the national policy of Canada, as expressed in several Acts of its Parliament. The very preamble of the Act we are now requested to consider, 44 Vict. Ch. 1, [the CPR Act] declares that by the terms and conditions of the admission of British Columbia into the Dominion of Canada
>
> ["]the Government of Canada has assumed the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada.["]

In summarizing the history, Girouard J. reviewed the failed 1872 and 1874 schemes, outlined the 1880 plan, and said at p. 74:

> As it may easily be understood from the past experience most extensive and, in fact, unprecedented powers were demanded and obtained. To do so the whole policy of the country, as expressed in the Railway Act of 1879, had to be set aside and a new and exceptional one adopted.

And at p. 76 he observed:

> ...Parliament and the country, it seems to me - for its action was sanctioned by the people the following year - were prepared to grant almost anything to meet its obligation to British Columbia.

[34] In the same decision, Nesbitt J. observed at p. 93:

> ...I refer to this latter only to show that the undertaking was thought to be so hazardous that exceptional privileges were deemed necessary to induce the 1880 Contractors to enter upon the undertaking....

[240] The critical significance of the *1881 CPR Act* to the construction of the transcontinental railway can also be gleaned from its preamble (which is reproduced above at para 50 of these Reasons):

> WHEREAS by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government of the Dominion has assumed the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the railway system of Canada;
>
> And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactment therein contained have not been effectual for that purpose;
>
> And whereas certain sections of the said railway have been constructed by the Government, and others are in course of construction, but the greater portion of the Historic Main Line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said railway;
>
> And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the Historic Main Line of railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed laid before Parliament for its approval and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same: …

b. The Legislative Scheme

[241] Pursuant to s 2 of the *1881 CPR Act*, the Federal Government issued the CPRC Charter by Letters Patent dated February 16, 1881:

> For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific

> Railway Company, a charter conferring upon them the franchises, privileges, and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the Canada Gazette, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.
>
> [Emphasis added.]

[242] Upon its publication in the *Canada Gazette* on February 19, 1881, the CPRC Charter gained, in the words of s 2 above, "force and effect as if it were an Act of Parliament", and could confer upon the Company the "franchises, privileges and powers" embodied in the schedule to the 1880 Contract.

[243] By its own terms, the CPRC Charter confers on the Company the rights embodied in the 1880 Contract:

Clause 3:

> As soon as five million dollars of the stock of the Company have been subscribed, and thirty per centum thereof paid up, and upon the deposit with the Minister of Finance of the Dominion of one million dollars in money, or in securities approved by the Governor in Council, for the purpose and upon the conditions in the foregoing contract provided, the said contract shall become and be transferred to the Company, without the execution of any deed or instrument in that behalf; and the Company shall, thereupon, become and be vested with all the rights of the 1880 Contractors named in the said contract, and shall be subject to, and liable for, all their duties and obligations to the same extent and in the same manner as if the [1880 Contract] had been executed by the said Company instead of by the said contractors….
>
> [Emphasis added.]

Clause 4:

> All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said Contract, are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.
>
> [Emphasis added.]

[244] At the very least, then, the CPRC Charter grants the Company a statutory right to avail itself of the advantages agreed to in the 1880 Contract. It is less clear whether this confers statutory status to Clause 16. However, CPRC argues that the SCC has already answered the question in the affirmative in the *Manitoba Reference*.

c. The *Manitoba Reference*

[245] In the *Manitoba Reference*, the SCC held that Clause 16 gained statutory status through the enactment of the CPRC Charter. To recall, in expanding Manitoba beyond its previous "Postage Stamp", s 2(b) of the *Boundaries Act* provided that the new lands would be "subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway and the lands to be granted in aid thereof". To get around this provision, Manitoba claimed that Clause 16 was a contractual term, not a "provision" within the meaning of s 2(b).

[246] Justice Rand rejected the argument. He found that by virtue of clauses 3 and 4 of the CPRC Charter, the Company inherited "all the rights of the contractors" as well as the ability to rely on the rights and other advantages incorporated into the 1880 Contract (*Manitoba Reference* at 751). Among those rights, Clause 16 conferred an exemption from taxation by any legislature on the Company's Main Line and on the subsidy lands not contained in an existing province.

[247] Justice Rand explained that by virtue of the CPRC Charter's statutory force, and by its conferral of the rights and privileges enshrined in the 1880 Contract on the Company – including those of the 1880 contractors themselves – Clause 16 acquired statutory character (*Manitoba Reference* at 751-752):

> It was argued by Mr Hoskin [lead counsel for Manitoba] that by these sections [ss. 2-3 of the *1881 CPR Act*] the exemption is limited to "all such *provisions* as may have been or shall hereafter be *enacted*" respecting the railway or its lands and that what the company has is only a term of a contract which is not a "provision enacted". By cl. 3 of the charter there was vested in the company "all the rights of the contractors", and by cl. 4[:]
>
> > … all the franchises and powers necessary or useful to enable the Company to enforce, use, and avail themselves of, every condition, stipulation … right, remedy, privilege and advantage agreed upon, contained or described in the said contract.
>
> What was the "right" under cl. 16? Apart from Dominion taxation within existing provinces, it was exemption from taxation by any legislative organ, Dominion or provincial, of the main line of railway and the subsidy lands of the company which as of February 15, 1881, were not then contained within the territory of a province. <u>The effect of the charter as an Act was to declare that exemption legislatively; in the statutory structure for such a national work, unless the language does not permit any other interpretation, it is not to be taken that that character of declaration was omitted.</u> The express vesting of the right was more than effecting a contractual novation; that had sufficiently been done by substituting the company for the individual contractors. In the face

> of that statutory provision neither Parliament nor legislative delegate in the Territories could then have validly imposed taxation without repealing or conflicting with the exemption as law existing within the Territories. As a contractual right the enforcement of the exemption could strictly be by way of injunction only.
>
> [Italics in original; underlining added.]

[248] Justice Rand added that the 1880 Contract acquired legislative force because it enabled the Dominion to carry out its legislative intent (*Manitoba Reference* at 752):

> By an exemption, as it might be called, "in rem", the taxing power is itself modified; and when a contractual right of that nature becomes the subject-matter of a statutory investment in a company, in order to carry out the legislative intent, there is necessarily to be attributed to it the character of enactment.

[249] CPRC submits that the SCC answered, in unequivocal terms, the same question that now arises before this Court: Parliament intended to confer statutory force upon Clause 16.

[250] Canada takes issue with the *Manitoba Reference*, suggesting that the SCC strayed on a number of grounds. Canada principally argues that the SCC's later decision in *Dunsmuir #2*, rendered some 36 years after the *Manitoba Reference*, now serves as the barometer for determining whether an agreement between the Federal Government and a private entity has statutory force.

[251] In short, Canada maintains that CPRC has failed to demonstrate that Clause 16 acquired statutory force and argues that the *Manitoba Reference* has been overtaken by Justice Iacobucci's

decision in *Dunsmuir #2*. I disagree, and find for the following reasons that both cases can, and do, co-exist as good law.

d. *Dunsmuir #2*'s consideration of statutory force

[252] *Dunsmuir #2* considered whether the federal government could terminate passenger rail services on Vancouver Island unilaterally – that is without violating its constitutional obligations under Term 11 of the *BC Terms of Union*. While I have already summarized *Dunsmuir #2* with a focus on its constitutional implications, the discussion below concerns the parts of that decision relating to statutory analysis.

[253] In *British Columbia (Attorney General) v Canada (Attorney General)* (1991), 59 BCLR (2d) 280, 84 DLR (4th) 385 (CA) [*Dunsmuir #2 BCCA*], the BC Court of Appeal agreed with the earlier decision of the BC Supreme Court that there existed a constitutional obligation to construct and operate the railway. As such, the Court of Appeal agreed that the order-in-council ordering the termination of the railway service was *ultra vires* the Governor in Council.

[254] The Court of Appeal also found, in the alternative, that if Parliament could constitutionally order rail service termination, it would need to do so via special legislation because the *Dominion Act, 1884* – and by extension, the Dunsmuir Agreement – qualified as "special acts".

[255] The Court of Appeal viewed the Dunsmuir Agreement as an integral part of the 1883 Settlement Agreement, such that it "must have been intended to have statutory force",

particularly in light of the constitutional importance of the undertaking and of the "plainly potentially unprofitable character" of the railway (*Dunsmuir #2 BCCA* at para 164). The Court of Appeal also relied on a 1905 Act (*An Act Respecting the Esquimalt and Nanaimo Railway Company*, SC 1905, 4-5 Edw, c 90), which declared the railway line to be a work "for the general advantage of Canada", and which expressly preserved the pre-existing rights and liabilities of the Company and the province. Thus, in the BC Court of Appeal's view, it seemed "wholly reasonable that Parliament would have intended that the obligations to maintain and operate the line be incorporated into the federal statute" (*Dunsmuir #2 BCCA* at para 163).

[256] The SCC disagreed on the issue of statutory force. Justice Iacobucci specified that the relevant question was not whether it would have been reasonable for Parliament to confer statutory force on the 1880 Contract, but "whether, in fact, there is anything about the [*Dominion Act, 1884*] which compels the conclusion that such force was actually conferred" (*Dunsmuir #2* at 111). He examined the *Dominion Act, 1884*, by which the Dunsmuir Agreement was "approved and ratified, and [whereby] the Governor in Council [was] authorized to carry out the provisions thereof according to their purport" (at s 2). In his view, this language was in itself insufficient to confer statutory force (*Dunsmuir #2* at 111).

[257] Justice Iacobucci also relied on the SCC's decision in *Ottawa Electric Railway Co v The City of Ottawa* (1944), [1945] SCR 105, 57 CRTC 273, in which the Court held that an agreement had not obtained statutory force by virtue of statutory ratification and confirmation, noting that "statutory ratification and confirmation of a scheduled agreement, standing alone, is

generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself" (at 109-110).

[258] Finally, Justice Iacobucci cited the Manitoba Court of Appeal's decision *Winnipeg (City) v Winnipeg Electric Railway* (1921), 31 Man R 131, 59 DLR 251 (CA), in which the Court held that "in order to make an agreement scheduled to an Act a part of the Act itself it is not sufficient to find words in the statute merely confirming and validating the agreement; you must find words from which the intention can be inferred" (at 277).

[259] While Justice Iacobucci cautioned that it was not necessary for a statute to expressly state an intention to incorporate a schedule into its legislative ambit, for such incorporation to occur, that intention would nevertheless need to be ascertained through statutory interpretation: mere "ratification" or "confirmation" of a scheduled agreement, without more, would be insufficient and "equivocal in terms of the required legislative intention" (*Dunsmuir #2* at 110).

[260] Turning to the *Dominion Act, 1884*, Justice Iacobucci in *Dunsmuir #2* found nothing beyond s 2 of the *Dominion Act, 1884* that demonstrated the required intention. This finding was dispositive, as s 2 revealed a number of possible intentions, none of which conferred statutory force on the Dunsmuir Agreement (at 111):

> It is not difficult, in my view, to envision the rationale to account for the existence of this provision. Had the need arisen, for example, s. 2 might have prevented arguments to the effect that the Dunsmuir Agreement was ultra vires the executive. Given what is said immediately above, however, I do not believe that s. 2, by itself, bestows statutory force upon that Agreement.

[261] He found further support in the fact that many of the Dunsmuir Agreement provisions had been reproduced in the *Dominion Act, 1884*, and thus the ratifying statute could not demonstrate the legislature's intent to incorporate the Dunsmuir Agreement into that law, nor to give it statutory effect, as explained in *Dunsmuir #2* (at 111):

> … The Dominion Act simply confirms and ratifies the Dunsmuir Agreement, authorizes the Governor in Council to carry out the 1880 Contract, and proceeds, in several of its provisions, to recount specifically clauses from that contract (ss. 4, 5, 6, 8 and 9). If the Dunsmuir Agreement was intended to have statutory force, I would find this repetition of contractual provisions in the text of the Dominion Act to be inexplicable.

e. The *Manitoba Reference* and *Dunsmuir #2* can coexist

[262] The Parties take opposing views of the relationship between the *Manitoba Reference* and *Dunsmuir #2*.

[263] In Canada's view, *Dunsmuir #2* places on CPRC the difficult burden of demonstrating that Parliament intended to confer legislative status on the 1880 Contract. To do so, CPRC must point to "something more" than the mere fact of ratification and confirmation. Canada argues that CPRC has failed to demonstrate this burden because it has neither directed this Court to anything in the words of the *1881 CPR Act* and the CPRC Charter, nor in the circumstances surrounding ratification, that would constitute the "something more" required to reveal the requisite legislative intent.

[264] CPRC responds that "something more" is found in two places. First, it is expressed in s 2 of the *1881 CPR Act*, which permitted the Dominion to confer upon the Company, via the CPRC

Charter, the advantages under the 1880 Contract. Second, clause 4 of the CPRC Charter enabled the Company to avail itself of all the 1880 Contract's advantages. From the moment the CPRC Charter gained statutory force, CPRC says, the Dominion inherited a statutory obligation to provide the Clause 16 Exemption by virtue of the 1880 Contract and the *1881 CPR Act*.

[265] I see no conflict in the rationales or outcomes of *Dunsmuir #2* and the *Manitoba Reference*. Furthermore, *Dunsmuir* #2 – the later decision – does not mention, much less, overturn, the *Manitoba Reference*. Both decisions expound a common proposition: that an agreement ratified by statute will only have legislative force if there is something about that statute, beyond the fact of ratification, which demonstrates Parliament's clear intention to confer upon the agreement legislative force.

[266] Though both cases adopt similar reasoning, they are distinguishable on their facts. As explained above, *Dunsmuir #2* held that the language in s 2 of the *Dominion Act, 1884*, which "approved and ratified" the Dunsmuir Agreement, did not sufficiently reveal the requisite parliamentary intent. In addition, several provisions from the agreement made their way into the statute, suggesting Parliament had expressly indicated which of its provisions formed part of the statutory ambit.

[267] Conversely, in the *Manitoba Reference*, the SCC held that the language in clauses 3 and 4 of the CPRC Charter revealed an intention to confer legislative status because they vested in the Company all the rights and benefits embodied in the 1880 Contract. The express vesting of rights through the CPRC Charter was more than a mere "contractual novation", because "that had

sufficiently been done by substituting the company for the individual contractors" (*Manitoba Reference* at 752). In other words, vesting the advantages on the Company in addition to transferring the 1880 Contract revealed an intent for those rights to acquire legislative force. This was the "something more" missing in *Dunsmuir #2*.

[268] Canada submits that clauses 7, 9, and 10 of the 1880 Contract are duplicated or otherwise incorporated into the *1881 CPR Act* (at ss 3, 4, and 5). Canada contends that this duplication shows Parliament's intention to omit Clause 16 – which is not itself reproduced in the *1881 CPR Act* – from that statute's legislative force.

[269] To support this argument, Canada points to *Squamish*, referenced above, in which the BC Supreme Court stated that the 1880 Contract had no statutory force (*Squamish* at paras 50-52). In that case, the Court briefly remarked that the question of whether the 1880 Contract had statutory force was answered by *Dunsmuir #2*, specifically on the grounds that many of the provisions of the agreement had been replicated in the *1881 CPR Act*.

[270] I do not agree that *Squamish* assists the Defendant, because it overlooks a key point in the *Manitoba Reference*. There, Justice Rand found the requisite legislative intent in the words of the CPRC Charter, not the *1881 CPR Act*. I also note that the Court's comments at paragraphs 50-52 of *Squamish* were *obiter*, because they were not dispositive of the issues before the Court.

[271] Canada also submits that the *Manitoba Reference* raises redundancy issues with respect to the CPRC Charter because clause 4 confers on CPRC not the rights in the 1880 Contract, but

rather the “franchises and privileges” needed to perform and enforce the provisions of the 1880 Contract. In Canada’s view, it is redundant to read “franchises” in clause 4 to include tax exemptions, because the purpose of the franchise is to permit CPRC to enforce its contractual rights, which includes Clause 16.

[272] Canada also submits that Justice Rand’s inclusion of tax exemptions within the definition of “franchises” strayed from other relevant authorities, which had expressly excluded such exemptions.

[273] I do not agree. Justice Rand found that the vesting of “all the rights of the 1880 Contractors” through clause 3 of the CPRC Charter was the primary source of Clause 16’s legislative force, because Clause 16 was embodied among those “rights” (*Manitoba Reference* at 751). For good measure, he illustrated that the same result was achieved by looking at the word “franchises” in clause 4 of the Charter, which he considered would include the legislative immunity from taxation (*Manitoba Reference* at 752). Whether or not a tax exemption could properly qualify as a franchise is of no consequence, in any event, because there was sufficient legislative intent evidenced in the words of clause 3, according to Justice Rand.

[274] Canada raises another point of contention with the *Manitoba Reference*, arguing that s 2 of the *1881 CPR Act* only authorized the Dominion, via the CPRC Charter, to confer on the Company the advantages embodied in the schedule to the 1880 Contract. The CPRC Charter could thus not confer statutory force on Clause 16, as it is a provision of, and not a schedule to, the 1880 Contract.

[275] However, this argument also ignores the true sources of legislative force with respect to Clause 16 under the *Manitoba Reference* – as clauses 3 and 4 of the CPRC Charter – and not s 2 of the *1881 CPR Act*. Those legislative provisions clearly vest on the Company the rights and privileges embodied in the 1880 Contract, which include the Clause 16 Exemption.

f. The *Manitoba Reference* remains good law

[276] Canada also cites the *Saskatchewan Reference SCC*, in which the Court held (at 202) that the 1881 CPR Act conferred "nothing more" upon the 1880 Contract than legal effect.

[277] In the *Saskatchewan Reference SCC*, the Court was asked to determine whether a reference to Clause 16 in s 24 of the *Saskatchewan Act* precluded taxation of the railway via municipal statutes passed in the 1940s. Describing the relationship between the *1881 CPR Act* and the 1880 Contract, Chief Justice Rinfret wrote that the *1881 CPR Act* did no more than ratify the 1880 Contract (at 198-199):

> … It is apparent, therefore, that the Statute [the *1881 CPR Act*], in effect, was passed with the object of approving and ratifying the contract without adding anything to it and that it is to the contract, and not to the Statute, that we must look for the purpose of answering the questions submitted to the Court.
>
> The difference is important for a term of a contract is quite another thing from an exemption section in a taxing Act.
>
> [Emphasis added; citation omitted.]

Speaking to the role of Clause 16 as a part of the Dominion's consideration, Chief Justice Rinfret continued (at 199):

> … The exemptions claimed by the Appellant are the result of a *quid pro quo*, the company receiving these exemptions as a consideration for the fact that they undertook the construction and the working of the railway throughout Canada. In that respect, the Statute added nothing to the consideration given by the Government; the provisions relating thereto are entirely contained in the contract.
>
> [Emphasis added.]

On the role of the CPRC Charter in the conferral of rights under the 1880 Contract, the Chief Justice stated (at 202-203):

> By force of Section 4 of Schedule "A", annexed to the contract [the CPRC Charter], and referred to in Section 21 [of the *1881 CPR Act*], all the advantages agreed upon, contained or described in the contract of 1880 were "conferred upon the company", but, of course, this cannot be read as having extended the tax exemption. What the company thereby acquired was the exemption described in Section 16 of the contract and nothing more.
>
> This is further emphasized by the wording of the *"Act Respecting the Canadian Pacific Railway"* [the *1881 CPR Act*]. By that Statute, the contract was approved and ratified and it was therein provided that for the purpose of incorporating the persons mentioned in the contract and those who shall be associated with them in the undertaking, the Governor may grant to them *in conformity with the contract*, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them *the franchises, privileges and powers embodied in the schedule*.
>
> This made clear the intention of Parliament that the tax exemption contained in Clause 16 was conferred upon the company exactly as described in the said clause. The object was only to specify that the exemption was to apply to the corporate entity or person, but only in respect of the property described in Clause 16.
>
> [Emphasis in original; citations omitted.]

[278] This pronouncement certainly seems categorical, and at first blush appears to run counter to the *Manitoba Reference*, above. However, the issues at bar in the two cases were very different. In the *Saskatchewan Reference SCC*, the Court had to decide whether, in creating a new province, the federal government had the ability to limit the taxing power of its own creation, and whether specific municipal "business" taxes fell within the scope of Clause 16 and applied to property on branch lines.

[279] The key issue before the Court in the *Saskatchewan Reference SCC* was therefore to determine Clause 16's proper scope. Chief Justice Rinfret's statement, that the *1881 CPR Act* "added nothing" to the 1880 Contract (at 199), merely reflected his view that the scope of the agreement – and of Clause 16 – ought to be ascertained by reference to its text, because the agreement best reflected what the Parties had intended would benefit from the Exemption. In that sense, the scope of Clause 16 gained nothing from the *1881 CPR Act* other than legal effect.

[280] That is a question markedly different from the one before the Court in the *Manitoba Reference*, which explicitly required that the SCC identify the nature of the 1880 Contract and Clause 16, and whether Clause 16 was merely a term of contract or a statutory provision enacted by Parliament.

[281] This distinction explains Justice Rand's reliance on the vesting of rights in the CPRC Charter to infer Parliament's intent to confer legislative force upon Clause 16. Had the Court in the *Manitoba Reference* been required to determine the scope of Clause 16, as it had in the

Saskatchewan Reference SCC, Justice Rand would presumably have referred to the words of the 1880 Contract.

[282] It is also worth noting Chief Justice Rinfret's statement in the *Saskatchewan Reference SCC* (at 194-195), describing how the 1880 Contract had been incorporated into the CPRC Charter:

> The [1880] contract which the Court is called upon to construe was executed between the Crown, in the right of the Dominion of Canada, and [the Stephen Syndicate] and was dated October 21, 1880. It was appended as a Schedule to the [*1881 CPR Act*], and it was ratified by that Statute; the wording of the contract being incorporated in the Letters Patent.
>
> [Emphasis added.]

[283] Thus, to the extent that Chief Justice Rinfret ruled on the nature of Clause 16 in the *Saskatchewan Reference SCC*, such statements were not dispositive of the issues before him, and therefore constitute *obiter*. Such statements cannot, as the Defendant contends, be taken to undermine the determinative findings in the *Manitoba Reference*, which was decided nearly a decade later.

[284] Finally, Canada relies on *Canadian Pacific Railway Company v The Town of Estevan*, [1957] SCR 365, 7 DLR (2d) 657 [*Estevan SCC*], in which the SCC applied (at 373) contractual interpretation principles to determine whether certain properties fell within the scope of Clause 16.

[285] As I will discuss below, deciphering the Parties' intent with respect to the scope of the 1880 Contract indeed calls for an exercise in contractual interpretation. This finding aligns with the decisions in both the *Saskatchewan Reference SCC* and *JCPC* [together, the *Saskatchewan References*]. Nevertheless, the fact that the scope of the rights is determined through contractual interpretation does not derogate from the statutory character Parliament intended those rights to have. Indeed, as in the *Saskatchewan References,* in *Estevan SCC* the issue of whether the 1880 Contract had a statutory character was not central, much less dispositive. In each case, the courts ruled not on the status but rather on the scope of Clause 16, which is now once again a central issue, as to whether the three Taxes that CPRC contests indeed benefit from Clause 16's Exemption.

(c) Conclusion on the legal status of Clause 16

[286] The Parties have asked this Court to answer a question already tangled in prolonged judicial debate. Despite the Defendant's invitation to rule otherwise based on an interpretation of *Dunsmuir #2*, I find that the SCC has already found that the 1880 Contract had statutory force, addressing the issue squarely in the *Manitoba Reference*. That 1958 decision has not been overturned. Neither Party has identified an authority or submission that would compel this Court to depart from the *Manitoba Reference*'s outcome.

[287] This is not to say *Dunsmuir #2* has no application in this case: indeed, I have already relied on it to find that the 1880 Contract lacks constitutional force. However, *Dunsmuir #2* ruled on a different contract, distinct legislation, and a distinguishable set of facts.

[288] In light of both the *Manitoba Reference* and *Dunsmuir #2* decisions, I find that Clause 16 gained statutory force by virtue of clauses 3 and 4 of the CPRC Charter. Those clauses demonstrate that Parliament intended to confer legislative force upon the rights and privileges of the 1880 Contract and its contractors, which the CPRC Charter vested in the Company. The language Parliament employed in the CPRC Charter to confer those rights extends beyond mere ratification and confirmation expressed in the *1881 CPR Act*.

2. *The Kingstreet remedy does not apply in these circumstances*

[289] Having determined that Clause 16 has statutory but not constitutional force, I now turn to determining whether *Kingstreet*'s restitutionary remedy applies. The key question this Court must answer is whether the *Kingstreet* remedy may apply in cases that do not involve unconstitutional taxation by a public authority.

[290] In *Kingstreet*, the SCC equipped Canadian common law with a new cause of action and remedy distinct from the established categories of restitution. The "*Kingstreet* remedy", as it is often called, is the proper restitutionary basis for the repayment of "*ultra vires* taxes", and is "grounded, as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law" (*Kingstreet* at paras 31, 40).

[291] While the *Kingstreet* remedy changed the law of restitution vis-à-vis public authorities, it is important to recognize that the SCC established it with a very specific purpose in mind. The decision addresses the issue of constitutional supremacy, seeking to uphold the principle that

government cannot tax contrary to the Constitution, and cannot retain taxes unconstitutionally collected (*Kingstreet* at paras 15-16, 20, 27). Thus, the SCC in *Kingstreet* created a remedy to address taxes that have been collected unconstitutionally.

[292] In this action, CPRC claims the restitution of the Taxes it remitted to the government for certain of the 2000-2006 taxation years only on the basis of the *Kingstreet* remedy. CPRC has not claimed a remedy based on any other cause of action, such as unjust enrichment or breach of contract. Therefore, if *Kingstreet* does not apply to these circumstances, then no recovery is available in these proceedings.

(a) Parties' positions

[293] The Plaintiff argues that *Kingstreet* recognizes the constitutional right to recover taxes imposed without statutory authority. This right, according to the Plaintiff's Memorandum, applies in cases where taxes were levied in violation of the Constitution and where taxes were levied without authority in the "administrative law sense", that is, beyond the authority of a constitutionally valid statute. The Plaintiff therefore argues that the *Kingstreet* remedy is available whether Clause 16 has constitutional or statutory force.

[294] Regardless of whether Clause 16 has constitutional or statutory force, the Plaintiff contends that Clause 16 eliminated the federal government's ability to tax the Main Line and the listed properties in perpetuity, rendering any taxes imposed on them to be *ultra vires*, and thus subject to recovery under *Kingstreet*.

[295] For clarity, the Plaintiff is not arguing that the *Kingstreet* remedy applies when a claim is based on a misapplication of a taxing statute, where power to impose the tax is not in issue. As submitted in the Plaintiff's Reply Memorandum ("Plaintiff's Reply") and in their oral submissions, Clause 16 modified the federal government's "ability to impose taxation pursuant to the Tax Acts contrary to Clause 16 at first instance" (Plaintiff's Reply at para 106).

[296] The Plaintiff advances this broad view on the ground that the SCC underpinned *Kingstreet* on the foundational constitutional principle prohibiting taxation without representation. It follows, the Company argues, that *Kingstreet* prohibits the Crown from retaining any taxes levied without legal authority, subject to limitation periods.

[297] CPRC cites two cases, which it argues followed a similar line of reasoning, namely (i) *Barbour v University of British Columbia*, 2009 BCSC 425 [*Barbour*], rev'd on other grounds, 2010 BCCA 63, and (ii) *TimberWest Forest Corp v Campbell River (City)*, 2009 BCSC 1862 [*TimberWest*]. CPRC also recognizes another line of cases that narrowed the application of *Kingstreet* to the restitution of taxes – as opposed to any monies collected unlawfully – but which it contends did not contradict *Kingstreet*'s broad applicability to unlawful taxes under a valid statute. Those cases are *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*] and *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission*, 2018 ABQB 476 [*Steam Whistle QB*], rev'd on other grounds, 2019 ABCA 468 [*Steam Whistle CA*]. These cases will be reviewed in detail below.

[298] In the alternative to its constitutional argument, the Plaintiff relies on the implied exception rule of statutory interpretation to establish that the Taxes were levied without statutory authority, that is, unlawfully in the administrative law sense. Under the rule, CPRC contends that Clause 16 is a specific statute that must prevail over the general taxing statutes at issue, namely the *ITA* and *ETA*. Therefore, whatever authority the federal government may otherwise have to tax the listed properties must be read down to the extent it is inconsistent with Clause 16. In that sense, the Taxes were levied "without legal authority" and give rise to the *Kingstreet* cause of action.

[299] Canada, on the other hand, puts forward a much narrower view, submitting that the *Kingstreet* remedy only applies in cases of an unconstitutionally *ultra vires* taxing statute. Canada contends that the SCC intended the *Kingstreet* remedy to apply only in cases where a tax was levied in an unconstitutional manner, which it contends was confirmed in *Elder Associates*.

[300] Canada also argues that *Kingstreet* is subject to statutory restrictions on rights of recovery, including restrictions on the Minister to pay refunds and jurisdictional limits set out in the relevant statutes. Canada argues that the SCC has held that legislatures cannot pass laws which attempt to bar all causes of action arising out of an *ultra vires* statute (*Amax Potash Ltd v Saskatchewan*, [1977] 2 SCR 576, 71 DLR (3d) 1). In parallel, it argues that the SCC has also recognized the particular importance of procedure and limitations set out in tax statutes (*Canada v Addison & Leyen Ltd*, 2007 SCC 33 [*Addison*] at 11).

[301] Canada finds further support for its argument in decisions from the Ontario Courts and the Federal Court of Appeal. It argues that in *British Columbia Ferry Corp v Canada (Minister of National Revenue)*, 2001 FCA 146 and in *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 [*Merchant*], the Federal Court of Appeal ruled that the *ETA* statutory regime was sufficiently comprehensive to preclude common law remedies such as *Kingstreet*.

[302] Canada also relies heavily on *Sorbara v Canada (Attorney General)* (2008), 93 OR (3d) 241, [2008] OJ No 4739 (Sup Ct J) [*Sorbara ONSC*], aff'd, 2009 ONCA 506 [*Sorbara ONCA*], leave to appeal to the SCC ref'd, [2009] SCCA No 299, where the Ontario Superior Court held that the *Kingstreet* remedy would only arise if there existed a possibility that the Minister would fail to comply with the outcome of a statutory appeal.

[303] Finally, Canada submits that if this Court were to accept CPRC's broad argument that *Kingstreet* allows for the recovery of any taxes collected without authority, then such an interpretation would effectively oust the statutory provisions that enable recovery. Canada argues that the statutory mechanisms enacted within the tax statutes (*ITA* and *ETA*) are intended to capture all mistakes made by the tax authority in administering the taxation scheme, whether rooted in constitutional, statutory, or factual circumstances. In this vein, Canada stresses that *Sorbara ONCA* and *Merchant* both interpreted *Kingstreet* narrowly – and correctly – such that the *Kingstreet* remedy does not arise where taxes are collected under a valid statute.

[304] Canada concludes that the Plaintiff's view of *Kingstreet* would displace all statutory appeal mechanisms provided by Parliament in the taxing legislation, effectively allowing

taxpayers to circumvent the legislature's intent, and that the same would apply for any statutory limits on recovery set out in the various taxing statutes.

(b) Analysis

(i) *Restrictive and expansive views on Kingstreet*

[305] The question of *Kingstreet*'s applicability to this action is a challenging one, as manifested by the Parties' diametrically opposed interpretation of its reach. These views stem from opposing characterizations of *Kingstreet* that merit further explanation.

[306] I note at the outset that the Constitution of Canada empowers the federal government to levy taxes. To employ this power, the government must have consent from the federal legislature in the form of constitutionally enacted legislation (see *Constitution Act, 1867* at s 53; *Eurig Estate, Re*, [1998] 2 SCR 565 at 581, 165 DLR (4th) 1 at paras 32-36). Both Parties submit that the recognition of *Kingstreet*'s restitutionary measure is grounded in this constitutional principle guarding against taxation without representation, which is contemplated in s 53 of the *Constitution Act, 1867*. Neither contests that the SCC recognized the *Kingstreet* remedy as a means to recover taxes collected unlawfully. The root of their disagreement lies in the proper characterization of what it means for a public body to collect taxes "unlawfully", as interpreted by the SCC in *Kingstreet*.

[307] Two views on the matter predominate. The first, narrower view holds that an unlawful levy of taxes in the *Kingstreet* sense signifies that a public body collected taxes contrary to its

delegated powers under the Constitution of Canada. In other words, the statutory authority upon which the government relies to levy the taxes is unconstitutional because it purports to enable that government to exercise a legislative power, which the Constitution does not expressly provide. This kind of levy is *ultra vires* or unlawful in the "constitutional law sense".

[308] The second view of *Kingstreet* expands on the first by defining "unlawful" as any levy of taxes for which there exists no proper legal basis. This second view holds that a public body that misapplies a constitutionally valid tax statute, and therefore acts beyond the scope of that statute, has unlawfully collected taxes. In other words, finding that a levy is unlawful and subject to *Kingstreet* does not necessarily hinge on whether the public body acted beyond its constitutionally delegated powers, although that determination would be sufficient. Instead, it only requires that the public body acted beyond the scope of *intra vires* or constitutional legislation. This kind of levy would be *ultra vires* the public body in the "administrative law sense". Thus, the second view holds that *Kingstreet* applies to unlawful or *ultra vires* taxes in both the constitutional and administrative law senses.

[309] Former Professor (now Justice) Patrick J. Monahan provides a useful description of these two meanings of "*ultra vires*", albeit explained in the context of judicial review (*Constitutional Law*, 5th ed, (Toronto: Irwin Law, 2017) at 151):

> Where public bodies exceed the powers conferred on them, the decisions are said to be invalid or ultra vires and will be declared invalid by the courts….
>
> [T]wo distinct kinds of arguments might be raised by a person seeking to challenge government action. First, it may be argued that the statute purporting to authorize the public body's actions is inconsistent with a provision of the Constitution of Canada [*i.e.*,

> the constitutional law sense]. Second, assuming the relevant statute is constitutionally valid, it may be argued that the public body exceeded the powers conferred on it by statute [*i.e.*, the administrative law sense].

[310] Canada argues in favour of the first, narrow approach to *Kingstreet*, which is generally expounded by judicial and academic commentary. The Plaintiff relies on the second, broad approach.

[311] I agree with Canada that *Kingstreet* only applies in the context of an unconstitutional statute, for the reasons explained below.

(ii) *The Kingstreet cause of action arose from an unconstitutional statute*

[312] In *Kingstreet*, the owners of nightclubs in Fredericton and Moncton, New Brunswick, purchased liquor for their establishments from the New Brunswick Liquor Corporation, which charged them a "user charge" in addition to the retail price, totalling from five to eleven per cent, prescribed by a provincial regulation.

[313] The plaintiffs challenged the constitutionality of the user charge, seeking reimbursement of all amounts paid over the years, with interest. The plaintiffs initially argued that the charges amounted to an unconstitutional, indirect tax, levied contrary to the province's constitutional taxing power, because s 92(2) of the *Constitution Act, 1867* grants the province authority only for direct taxation – not for indirect taxation.

[314] However, the plaintiffs changed tack on the eve of trial, arguing instead that the charges were a direct tax that had been illegally imposed by regulation, rather than originating in the legislature. Under ss 53 and 90 of the *Constitution Act, 1867*, taxes may only be levied with the authority of Parliament or the legislature.

[315] The plaintiffs additionally argued that the user charge, if held to constitute a tax, was *ultra vires* in the administrative sense, because the legislation only permitted the imposition of charges. This argument, as concluded by the Court of Appeal (*Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2005 NBCA 56 at para 16 [*Kingstreet NBCA*]), sought to frame the imposition of the charge as a misapplication of an otherwise valid statute – that is, *ultra vires* in the administrative law sense – with the goal of skirting the general rule against the recovery of *ultra vires* taxes (the "Crown immunity rule" proposed by Justice La Forest in *Air Canada v British Columbia*, [1989] 1 SCR 1161, 59 DLR (4th) 161 [*Air Canada*]). Justice La Forest's immunity rule held that monies errantly paid to public officials under an *ultra vires* or unconstitutional statute were nevertheless non-recoverable under the remedy of unjust enrichment and restitutionary law as a matter of public policy. This stemmed from a longstanding bar against restitution from public authorities due to a misapplication, or "mistake of law", further explained below.

[316] At trial, the Court of Queen's Bench determined that the user charges indeed constituted an indirect tax, and it declared the impugned regulation *ultra vires* the provincial legislature in the constitutional law sense (*Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2004 NBQB 84 at para 55). The Province did not appeal this finding, and both parties

agreed before the Court of Appeal that the charges constituted an unlawful tax (*Kingstreet NBCA* at para 1). Thus, the only issue before the SCC was whether money paid to a public authority pursuant to unconstitutional legislation was recoverable, and if so, on what basis (*Kingstreet* at paras 5, 12-13). In other words, the *Kingstreet* decision was premised on *ultra vires* taxes in the constitutional law sense.

[317] *Kingstreet*'s nightclub owners, as appellants before the SCC, framed their case on unjust enrichment. While the Province put forward Justice La Forest's immunity rule as a bar to recovery of the user charges, the owners argued that it had not formed part of the majority decision in *Air Canada*. Instead, the appellants relied on Justice Wilson's dissenting opinion in that case, as well as the SCC's unanimous decision in *Air Canada v Ontario (Liquor Control Board)*, [1997] 2 SCR 581, 148 DLR (4th) 193, emphasizing that the burden of ensuring the applicability and the constitutionality of a law should rest with the taxing authority, and not individual taxpayers (*Kingstreet* at para 6).

[318] The Province also relied on Justice La Forest's *Air Canada* reasons to argue that, since the nightclub owners had passed the burden of the *ultra vires* charges onto their patrons, reimbursing the owners would conflict with the underlying motives of law of restitution by resulting in a windfall – the "passing-on defence" (*Kingstreet* at para 5).

[319] In his reasons, Justice Bastarache emphasized that the case addressed the "consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes" (*Kingstreet* at para 13; emphasis added). The Court's central concern was to guarantee respect

for constitutional principles, and to ensure the constitutionality of fiscal legislation (at paras 12, 14). He wrote (at para 15):

> When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle. As a result, a citizen who has made a payment pursuant to *ultra vires* legislation has a right to restitution.
>
> [Emphasis added; citation omitted.]

[320] Indeed, Justice Bastarache dealt with a provincial taxing statute that had been found unconstitutional. The facts of *Kingstreet* do not concern taxes levied "without authority" under an *intra vires* statute, *i.e.*, in an "administrative law sense". Rather, Justice Bastarache noted that the "principal issue is whether money paid to a public authority pursuant to *ultra vires* legislation is recoverable" (at para 5; emphasis added).

[321] Therefore, insofar as Justice Bastarache refers to taxes levied "without legal authority" and "*ultra vires* taxes or legislation", the decision flows from a finding that the underlying taxing statute is unconstitutional. It is notable that Justice Bastarache explicitly recognized that the facts of *Kingstreet* did not deal with the administrative law sense of *ultra vires* (at paras 3-4):

> The appellants also attempted to argue that the user charge, if held to constitute a tax, was *ultra vires* in the administrative law sense….
>
> The trial judge held that the user charge constituted an indirect tax… Robertson J.A. rejected the appellants' attempts to recharacterize the user charge as either a direct tax which could not be imposed by way of regulation, or as *ultra vires* in the

> administrative law sense. I agree: the trial judge's decision that the user charge constitutes an unconstitutional indirect tax must stand.
>
> [Emphasis Added.]

[322] After rejecting the Crown immunity rule proposed in *Air Canada*, Justice Bastarache elaborated that the law of unjust enrichment is ill suited to address claims for recovery of monies paid under an unconstitutional statute. Referring to the unjust enrichment framework set out in *Garland v Consumers' Gas Co*, 2004 SCC 25 [*Garland*], he found that the public policy concerns of protecting the public purse and ensuring the efficient workings of taxation schemes – which underpinned Justice La Forest's support for the immunity rule in *Air Canada* – did not fall within the scope of acceptable policy considerations permitted under the *Garland* test, including those relating to broad principles of fairness (*Kingstreet* at paras 36-38).

[323] As a result, Justice Bastarache held that the ordinary principles of unjust enrichment did not apply in the context of an unconstitutional taxing statute, noting that the distinction between mistakes of law, and mistakes of fact, was no longer relevant in this context. Instead, taxes levied under an unconstitutional statute called for a new, distinct category of restitution grounded in constitutional principles which circumscribe government power within the rule of law (*Kingstreet* at para 40). That new category was the *Kingstreet* remedy.

[324] Justice Bastarache recognized that the fundamental, constitutional hue of this new restitutionary measure was shielded from certain doctrines impeding traditional unjust enrichment claims. First, he held that the "passing-on" defence was entirely unamenable to the context of *ultra vires* legislation (*Kingstreet* at para 51).

[325] Justice Bastarache also considered the applicability of the protest and compulsion doctrine. In doing so, he expanded his discussion to include situations where taxes are *ultra vires* in the constitutional law sense and in the administrative law sense, notably in a "mistake of law" situation. However, it is crucial to recognize that this expanded discussion does not apply to *Kingstreet* as a whole, but rather is limited solely to the applicability of this doctrine as an exception to passing-on defence. Justice Bastarache had explicitly rejected (at paras 42-54) both the passing-on defence and the protest and compulsion exception to it in the context of *ultra vires* legislation – that being the context of *Kingstreet*.

[326] To the extent that there remains any doubt as to the applicability of the comments vis-à-vis the protest and compulsion doctrine on the scope of *Kingstreet*, I point to words prefacing the discussion (at para 52):

> … Because I have rejected the passing-on defence as generally inapplicable in the context of *ultra vires* taxes, it is not necessary to deal with the doctrine of protest and compulsion. I think some general comments will, however, be useful.

[327] Still discussing the doctrine of protest and compulsion, Justice Bastarache explains why the doctrine is not amenable to the circumstances of the case (*Kingstreet* at para 53):

> In my view, the doctrine of protest and compulsion is simply not applicable to cases such as the present. This flows from the constitutional basis for the right of restitution in this case: that the Crown should not be able to retain taxes that lack legal authority. It therefore matters little whether the taxpayer paid under protest and compulsion.… The right of the party to obtain restitution for taxes paid under *ultra vires* legislation does not depend on the behaviour of each party but on the objective consideration of whether the tax was exacted without proper legal authority.
>
> [Emphasis added.]

[328] He then explains why the doctrine is also problematic in the context of *intra vires* legislation (*Kingstreet* at paras 54-55):

> I also have concerns about the applicability of the doctrine of protest and compulsion to cases where the tax, although collected pursuant to valid legislation, was misapplied in relation to the taxpayer….
>
> … in my opinion, the absence of duress on the part of the taxpayer should not be an important factor. It is not up to the taxpayer but rather to the party that makes and administers the law to bear the responsibility of ensuring the validity and applicability of the law… I agree with Wilson J. in *Air Canada* that
>
> > payments made under unconstitutional legislation are not "voluntary" in a sense which should prejudice the taxpayer. [...] Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so….
>
> Although made in the context of *ultra vires* legislation, Wilson J.'s comments are equally applicable to the situation where a taxpayer is required to pay a levy because of an incorrect application of the law. In either case, the protest requirement is inappropriate.
>
> [Emphasis added.]

[329] Justice Bastarache noted (at para 57) that the doctrine of protest and compulsion is inapplicable both in the context of unconstitutional legislation and in the misapplication of a valid statute. CPRC relies on paragraph 57 as an explicit endorsement by the Court that any unlawfully collected taxes are subject to the *Kingstreet* remedy, without having to protest. Specifically, it relies on the following underlined statement from Justice Bastarache:

> … Once the immunity rule is rejected, there is no need to distinguish between cases involving unconstitutional legislation and cases where delegated legislation is merely *ultra vires* in the administrative law sense. In all such cases, the payment of the

> charge should not be viewed as voluntary in a sense that would prejudice the taxpayer. Rather, the plaintiff is entitled to rely on the presumption of validity of the legislation, and on the representation as to its applicability by the public authority in charge of administering it.
>
> [Emphasis added.]

[330] CPRC, however, has taken this statement out of context. Read in context, Justice Bastarache was merely explaining that the protest and compulsion doctrine is unamenable to the context of unlawfully collected taxes. The underlying principle holds that a taxpayer should not bear the cost of the government's mistake in administering a tax – whether committed by enacting unconstitutional legislation, or by misapplying valid legislation – simply because the taxpayer failed to protest the legality of the government's actions. Rather, the taxpayer ought to be able to rely on the presumption of the statute's validity, or representations on its applicability by the public authority, as the case may be (*Kingstreet* at para 57).

[331] CPRC also relies on a number of statements in *Kingstreet* referring to taxes collected "without legal authority" (specifically, at paras 33, 40, and 53), positing that these expand the scope of the decision to taxes levied without legislative authority. I note, again, that *Kingstreet* arose from a tax that had been found to violate the constitutional delegation of powers, and which was thus unconstitutional and *ultra vires* the provincial legislature.

[332] Overall, Justice Bastarache reasoned that to allow public authorities to retain taxes collected under *ultra vires* legislation would condone a breach of the fundamental constitutional principle of the rule of law (*Kingstreet* at para 15). Yet, Justice Bastarache did not develop a new

constitutional cause of action aimed at disgorging the public purse of any and all funds collected without authority; he merely recognized that traditional categories of restitution gave insufficient regard to the fact that the underlying taxes were unconstitutional, and thus recognized a new branch within the realm of restitution that properly accounted for that fact (see *Merchant* at para 20, discussed below).

[333] It is therefore evident that while the *Kingstreet* cause of action exists as of constitutional right, it is nevertheless triggered only when the government levies taxes pursuant to an unconstitutional statute (see also Peter D Maddaugh & John D McCamus, *The Law of Restitution* (Toronto: Thomson Reuters, 2003) (loose-leaf 2021 revision) ch 22:10 [McCamus]).

(iii) *Subsequent jurisprudence supports a restricted approach to Kingstreet*

[334] The Parties' contradictory views on the proper interpretation of *Kingstreet* – Canada's that restricts the cause of action to unlawful taxes in the constitutional law sense, and CPRC's that expands Canada's by including unlawful taxes in the administrative law sense – have both garnered judicial comment since its release nearly 15 years ago. However, the vast majority of the jurisprudence over this period has supported the narrow interpretation of *Kingstreet*, as advanced by Canada.

a. The restrictive view of *Kingstreet*

i. *Elder Advocates*

[335] One significant argument in favour of a restrictive approach to *Kingstreet* comes from the SCC itself in *Elder Advocates*, in which the SCC held that *Kingstreet* did not preclude claims against public authorities for monies wrongly paid, but which did not constitute taxes levied under an unconstitutional statute.

[336] In *Elder Advocates*, residents at Alberta long-term care facilities launched a class action against Alberta, arguing that it had artificially inflated long-term care costs to subsidize costs for medical expenses. By statute, Alberta bore the burden of patient medical care costs; however, the statute permitted the facilities to charge its residents "accommodation charges" to contribute to the cost of housing and meals. The plaintiffs sued based on *Charter of Rights and Freedoms* violations, a breach of fiduciary duty, negligence, bad faith, and unjust enrichment.

[337] Alberta brought a motion to strike the claims and to decertify the class. Before the SCC, the only issue was whether the causes of action pleaded were supportable at law (*Elder Advocates* at para 4). After striking out the other claims, Chief Justice McLachlin addressed the claim for unjust enrichment.

[338] The argument was straightforward: by overcharging residents for accommodation and food, the government used money unlawfully to offset some of its obligations under the statutory scheme. Alberta argued that unjust enrichment did not apply to public authorities in cases such as

this, positing that the government should not be required to "endlessly defend levies made under valid statutes and regulations" (*Elder Advocates* at para 83).

[339] Chief Justice McLachlin explained that under the traditional common law doctrines, payments made under *intra vires* legislation had been potentially recoverable, whereas those made pursuant to *ultra vires* legislation had not necessarily received the same benefit (*Elder Advocates* at para 84). Observing that the traditional doctrines provoked inconsistent and inequitable results, she reviewed a number of authorities that narrowed their ambit, including *Kingstreet*.

[340] In her discussion of *Kingstreet*, Chief Justice McLachlin unequivocally framed its ratio as relating to taxes collected under unconstitutional or *ultra vires* legislation (*Elder Advocates* at para 89):

> Most recently, this Court in [*Kingstreet*], held that taxes collected by public authorities on the basis of an ultra vires statute are recoverable where the law is found to be unconstitutional. Restitution is generally "available for the recovery of monies collected under legislation that is subsequently declared to be *ultra vires*": para. 12. Bastarache J. suggested that where the claim is for unconstitutional taxes, the claim should be brought under public law principles, and not the private law rules of unjust enrichment. However, he added that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances": para. 34.
>
> [Emphasis added; citation omitted.]

[341] Chief Justice McLachlin rejected Alberta's argument that *Kingstreet* precluded all unjust enrichment claims against a public body, explaining that Justice Bastarache had recognized the

remedy specifically to address unlawful taxation in the constitutional sense (*Elder Advocates* at paras 90-91):

> Alberta argues that *Kingstreet* stands for the proposition that an action for unjust enrichment cannot be brought against the government. The only recourse, it argues, is under public law principles, such as a claim for misfeasance in public office. The plaintiff class, in response, argues that Alberta interprets *Kingstreet* too narrowly. It fastens on Bastarache J.'s statement that "[c]laims of unjust enrichment against the government may still be appropriate in certain circumstances".
>
> In my view, *Kingstreet* stands for the proposition that public law remedies, rather than unjust enrichment, are the proper route for claims relating restitution of taxes levied under an *ultra vires* statute, on the ground that the framework of unjust enrichment is ill-suited to dealing with issues raised by a claim that a measure is *ultra vires*.…
>
> [Emphasis added.]

[342] She also explained that *Kingstreet* did not preclude a claim of unjust enrichment against a public authority before her because the unlawful monies Alberta collected did not amount to unconstitutional taxes, at paragraph 91 of *Elder Advocates*:

> … However, *Kingstreet* leaves open the possibility of suing for unjust enrichment in other circumstances. The claim pleaded in this case is not for taxes paid under an *ultra vires* statute. It is not therefore precluded by this Court's decisions in *Kingstreet*. The pleading should be allowed to go to trial, at which point the propriety of the claim for unjust enrichment may be explored more fully in the context of the evidence adduced.
>
> [Emphasis added.]

[343] Thus, while *Kingstreet* was not determinative in *Elder Advocates*, Chief Justice McLachlin confirmed its narrow reach. She distinguished *Kingstreet* on the basis that it involved an unconstitutional taxing statute.

[344] In this action, I note that both CPRC and Canada cited academic commentary from Professors McInnes and McCamus on *Elder Advocates* and *Kingstreet* (Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, (Toronto: LexisNexis, 2014) ch 24, Part II, F [McInnes]; and McCamus, ch 22, 22:300.50). Both sources cited generally agree that the restrictive approach to *Kingstreet* is most supported by the case law, and that *Elder Advocates* confirms *Kingstreet*'s restricted scope.

[345] CPRC argues that both Professors McInnes and McCamus misinterpreted *Elder Advocates* by finding that it restricted *Kingstreet* to the constitutional sense of *ultra vires*. As CPRC sees it, both authors imported the word "unconstitutional" to Chief Justice McLachlin's findings that *Kingstreet* applies to "*ultra vires* legislation" in her comments at paragraph 91 of *Elder Advocates*. Instead, CPRC argues, the proper interpretation is much broader, and also includes a taxing provision that is *ultra vires* in the administrative law sense.

[346] I agree with Professors McInnes and McCamus that in *Elder Advocates*, the SCC intended the requirement for an unconstitutional statute to trigger the new remedy provided in *Kingstreet*. There is ample contextual commentary in *Elder Advocates* and *Kingstreet* to infer that the SCC references to "*ultra vires* legislation" was intended to apply exclusively in the constitutional law sense.

[347] Of fundamental importance is that neither *Kingstreet* nor *Elder Advocates* equivocates as to the proper scope for the remedy – namely that funds collected under an *ultra vires,* unconstitutional statute are a prerequisite without which the *Kingstreet* cause of action and remedy both fail.

ii. *Appellate support for the restrictive view of Kingstreet*

[348] As the Defendant points out, a number of appellate cases have similarly interpreted *Kingstreet* in a narrow fashion. First, in *Steam Whistle CA*, the Alberta Court of Appeal held (at para 152) that the *Kingstreet* cause of action was inapplicable to unconstitutional proprietary markups imposed on industrial brewers by the Alberta Gaming and Liquor commission pursuant to a provincial statute. At trial, the Court had ruled that the plaintiffs were entitled to rely on the *Kingstreet* remedy, holding that it applied to any monies collected in an unconstitutional manner (*Steam Whistle QB* at para 126).

[349] The Court of Appeal rejected this interpretation, finding that *Kingstreet* only applied in the context of taxes levied pursuant to an *ultra vires* statute. Recognizing that certain statements in *Kingstreet* support both a broad and a restrictive interpretation, the Court of Appeal nonetheless held that "the balance of the remarks support a narrow reading according to which the money must be paid under an invalid tax" (*Steam Whistle CA* at para 144). The Court of Appeal found further support for this view at paragraphs 145 and 146, noting that *Elder Advocates* framed the ratio of *Kingstreet* in relation to an *ultra vires* statute.

[350] The Court of Appeal in *Steam Whistle CA* (at paras 147-149) also referred to judicial and academic commentary on *Kingstreet*:

> Various appellate courts have endorsed a narrow reading of *Kingstreet* as limited to the recovery of invalid taxes: *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2017 ONCA 555 at paras 26-30; *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506 at para 4; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2012 BCSC 1030 at para 97. In these cases, it was clear that *Kingstreet* is limited to the recovery of *ultra vires* taxes.
>
> At least one trial-level decision holds the *Kingstreet* cause of action is wider and applies whenever government collects money without statutory authority, never mind whether it did so by levying an invalid tax: *Barbour v. University of British Columbia*, 2009 BCSC 425 at para 69.
>
> However, the weight of academic commentary favours the narrow interpretation according to which *Kingstreet* only applies when money is paid under ultra vires *taxes*. Professor McCamus criticizes the conclusion that *Kingstreet* restitution is available whenever the government exacts money unconstitutionally as "clearly incorrect" in light of *Elder Advocates*: Peter D Maddaugh & John D McCamus, *The Law of Restitution*, vol 2 (Toronto: Thomson Reuters, 2017) (loose-leaf, updated 2017, release 19), ch 22 at 32-33 [Maddaugh & McCamus]. Professor McInnes, surveying the case law on this topic, concludes that the "dominant view" of the cases is against a broad interpretation of *Kingstreet* according to which restitution is available for all unauthorized payments extracted by government: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada, 2014) at 1031, 1035 [McInnes].
>
> [Emphasis added.]

[351] Notably, the following paragraph, on which CPRC relies, appears to muddy the waters (*Steam Whistle CA* at para 150):

> Authority aside, the restriction of *Kingstreet* to the recovery of *ultra vires* taxes is supported by principle. The action for the recovery of unconstitutional taxes is based on the constitutional

> principle, reflected in ss 53 and 90 of the *Constitution Act, 1867*, of "no taxation without representation". This principle ensures that taxation must originate with the legislative branch and is undermined if the government collects taxes relying on *ultra vires* legislation or by exceeding the scope of *intra vires* legislation. The principle is not engaged where, as here, government collects money as a proprietary charge, which need not have any statutory basis at all.
>
> [Emphasis added.]

[352] I do not interpret this comment as an endorsement of the broader view of *Kingstreet*. Rather, the Court of Appeal was simply emphasizing the constitutional principle requiring that government only levy taxes under proper constitutional or legislative authority. What the Alberta Court of Appeal does not, in my view, suggest is that the *Kingstreet* right of recovery can flow from an unlawful tax in the "administrative law sense". In any event, such a suggestion would run directly counter to the words of *Kingstreet* itself, as well as to *Elder Advocates*.

[353] CPRC argues that both *Elder Advocates* and *Steam Whistle CA* only restrict the scope of *Kingstreet* to the recovery of unlawful taxes, as opposed to all unlawfully collected monies. As CPRC seeks repayment of what they call unlawful taxes, it contends that this action falls within the four corners of the *Kingstreet* remedy.

[354] For the reasons I have already stated, however, I cannot agree. The important contextual element missing from CPRC's argument stems from the distinction I noted at the beginning of this section: the meaning of the term "unlawful" in the *Kingstreet* sense. CPRC's argument relies on the expansive view that captures government taxation, which strays beyond the scope of otherwise valid legislation.

iii. *Sorbara ONSC and Sorbara ONCA*

[355] Next, there is *Sorbara ONSC*, affirmed by the Ontario Court of Appeal in *Sorbara ONCA*. Before the Superior Court, two plaintiffs proposed a class action to recover Goods and Services Tax ("GST") collected on top of financial portfolio management fees under the *ETA*. The plaintiffs claimed that the financial management services qualified as an exempted service under the *ETA*, such that the GST had been collected without legal authority. Relying on *Kingstreet*, they claimed that the Superior Court had jurisdiction to hear the constitutional claim, as opposed to the Tax Court, which had statutory jurisdiction over matters arising under the *ETA* pursuant to that Act together with the *Tax Court of Canada Act*, RSC 1985, c T-2.

[356] The defendant moved for summary judgment, arguing that Parliament had explicitly vested jurisdiction for such matters in the Tax Court. The Court agreed (*Sorbara ONSC* at para 13), referring to *Kingstreet*:

> As noted in *Kingstreet Investments Ltd.*, the case relied upon by the Sorbaras, there is a distinction between (a) a government wrongfully collecting taxes under unconstitutional legislation and (b) a government wrongfully collecting taxes as a result of misapplying otherwise constitutionally valid law. The case at bar falls into the second type of case because there is no suggestion in the amended statement of claim that the Federal Crown cannot pass valid legislation to impose GST on the services of portfolio managers. Rather, the substance of the Sorbaras' case is that the Federal Crown has not done so. That is a matter in the first instance for the Tax Court to decide.
>
> [Emphasis Added.]

[357] The Ontario Court of Appeal upheld the decision, explicitly rejected the plaintiff's broad reading, and affirmed that *Kingstreet* only applied in the context of *ultra vires* legislation (*Sorbara ONCA*, at paras 4-5):

> … Like the motion judge, we think the appellants read *Kingstreet* too broadly. *Kingstreet* addressed the right of the taxpayer to recover tax monies improperly paid to the provincial government under an *ultra vires* taxing provision. The court held that constitutional principles and not private law unjust enrichment concepts must control the taxpayer's right to recover tax monies paid under an unconstitutional taxing provision. The case was not concerned with the proper forum in which to advance a claim. The jurisdiction of the provincial Superior Court was never in issue in *Kingstreet*.
>
> We do not read *Kingstreet* as creating a constitutional cause of action available to a taxpayer whenever he or she claims a right to recover tax assessed under a misapplication or misinterpretation of a taxing statute. Like the motion judge, we do not characterize the appellants' claim as constitutional in nature. It follows that the appellants cannot rest their assertion of jurisdiction in the provincial Superior Court on the undoubted and unchallenged authority of the provincial Superior Court to adjudicate constitutional claims.
>
> [Emphasis added.]

iv. *Merchant*

[358] Finally, in *Merchant* the Federal Court of Appeal's decision upheld a trial decision striking the appellants' statement of claim for similar reasons to *Sorbara ONSC*. The underlying facts involved a proposed class action by two law firms and their clients alleging that the CRA should not have required the collection and remittance of GST on exempt disbursements charged to clients. The trial judge struck the claim on three grounds, only one of which is relevant to this discussion: the plaintiff's claim for restitution – which relied heavily on *Kingstreet* – or

"wrongful receipt" was not available in the circumstances because the *ETA* provided a statutory mechanism for compensation, ousting common law causes of action (*Merchant* at para 5).

[359] The appellants in *Merchant* argued that *Kingstreet* created an independent cause of action in restitution founded on the principle that the government is constitutionally obligated to return taxes wrongfully paid. They argued that the cause of action existed independently from the *ETA* compensation mechanisms.

[360] The Federal Court of Appeal disagreed, and dismissed the appeal, explaining that the Court in *Kingstreet* spoke only of restitution for *ultra vires* taxes (*Merchant* at para 20). Moreover, the Federal Court of Appeal held that the right of recovery recognized in *Kingstreet* was constitutional because the provision imposing the tax had been declared unconstitutional, but that "the constitutional aspect in that case did not change the nature of the cause of action, which remained restitution" for *ultra vires* taxes (*Merchant* at para 20). The Court warned against broad interpretations of *Kingstreet* which aim beyond its limited scope (*Merchant* at para 21):

> … in *Kingstreet*, the Supreme Court did not create a new, sweeping constitutional remedy to recover tax assessed under a misapplication or misinterpretation of a taxing statute. It certainly did not create a new, sweeping constitutional remedy that would allow aggrieved taxpayers to bypass all of the legislative schemes in force across the country that govern the recovery of tax assessed under a misapplication or misinterpretation of a taxation statute. Rather, the Supreme Court based the taxpayer's recovery on the common law cause of action for restitution, changing the analysis somewhat to reflect the fact that an *ultra vires* taxing provision was involved.
>
> [Emphasis Added.]

[361] *Merchant* emphasized the key contextual element of Justice Bastarache's reasons: an unconstitutional statute serves as the linchpin without which the *Kingstreet* cause of action fails, and claims for taxes wrongly paid in the administrative law sense must be made in accordance with the applicable statutory mechanisms (*Merchant* at para 22).

[362] Thus, between *Steam Whistle CA*, *Sorbara ONCA*, and *Merchant*, there is ample appellate authority supporting a restrictive approach to the *Kingstreet* remedy.

b. The expansive view of *Kingstreet*

[363] As I noted above, CPRC relies on two cases, which interpreted *Kingstreet* in a broader manner: *Barbour* and *TimberWest*.

[364] In *Barbour*, the plaintiff sued the University of British Columbia ("UBC") on the grounds that the fines and fees imposed for parking violations exceeded the institution's delegated legislative authority. He claimed restitution for the fines allegedly collected contrary to the *BC University Act*, RSBC 1996, c 468 [*University Act*].

[365] The plaintiff argued that *Kingstreet* affords recovery for any monies paid in response to *ultra vires* demands as of right (*Barbour* at para 59). UBC, recognizing its lack of legislative authority to impose the fines, responded that *Kingstreet* was limited to the context of unconstitutional taxes (*Barbour* at paras 26, 63).

[366] The BC Supreme Court agreed with the plaintiff. Relying on statements from Justice Bastarache's reasons that the government ought not be able to retain taxes it collected unlawfully, the Court found no reason that would preclude applying *Kingstreet* to the context of a public university which collects money without legal authority. The Court reasoned, "UBC purported to collect the Parking Regulation Fines pursuant to its powers under the [*University Act*]. It now concedes that it has no such power. Having collected the Parking Regulation Fines without any legal authority, those monies, like the taxes in *Kingstreet*, should be returned" (*Barbour* at para 69).

[367] After the release of *Barbour*, the BC legislature amended the *University Act*, effectively granting UBC retroactive authority to collect the fines at issue. UBC then appealed the decision. The BC Court of Appeal found the amended legislation valid, and overturned the trial decision on that basis (*Barbour v University of British Columbia*, 2010 BCCA 63 at para 3). The Court of Appeal did not address any potential errors in the trial court's interpretation of *Kingstreet*.

[368] The second case CPRC cites in support of a broad interpretation of *Kingstreet*, is *TimberWest*. The petitioners sought orders and declarations pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c 241 to quash or set aside a tax rate by-law imposed by the City of Campbell River. Those new rates increased the annual tax payable on the company's lands by nearly $1,000,000. Among the grounds of the petition were alleged inconsistencies between the tax by-law, *Private Managed Forest Land Act*, SBC 2003, c 80, and other provincial laws. The petitioners in *TimberWest*, however, did not challenge the constitutional validity of the tax by-law.

[369] The petitioners agreed to pay a majority of the tax increase to the city on the promise that it would be returned if the petition were to succeed. However, there remained roughly $200,000 that the petitioners did not pay to the city, and which the city was required by statute to transfer to other public bodies. The petitioners applied for interim relief permitting them to pay the amount into court, pending the outcome of their petition, instead of paying the money to the city, arguing that there existed a bar to recovery of monies wrongly paid to public bodies. In support of their request for interim relief, the petitioners argued that *Kingstreet* ought to be applied beyond the context of an *ultra vires* statute to permit recovery of taxes paid under municipal bylaws that are found to be *ultra vires* in the administrative law sense.

[370] The BC Supreme Court reviewed *Barbour* and *Sorbara ONSC*, and commented (*TimberWest* at para 18):

> I think it likely that, as in *Barbour* and *Sorbara*, *Kingstreet* would be applied in the present circumstances. However, the issue of recovery is not before me to decide, and absent an authority directly on point there is some risk that TimberWest would, if it paid the portion of the tax in question, be unable to recover if it succeeds in its petition.

[371] It is thus apparent that this statement from *TimberWest* on *Kingstreet* was *obiter*, and is not particularly persuasive for the issue in dispute today. Moreover, given the fact that the legislature addressed the issues pointed out by the trial court, such that the BC Court of Appeal did not pronounce on the *Kingstreet* issue, I find *Barbour* to be far less persuasive on *Kingstreet* than *Merchant*, *Sorbara ONCA*, *Steam Whistle CA*, and *Elder Advocates*. Indeed, these four appellate decisions all post-date *Barbour*.

c. Conclusion on case law

[372] Although I find *Sorbara ONCA*, *Merchant*, and *Steam Whistle CA* persuasive on the scope of *Kingstreet*, the words of the SCC speak for themselves: the Court was clearly addressing restitution for taxes levied under an unconstitutional statute in *Kingstreet*. This interpretation was confirmed in *Elder Advocates*. Thus, absent further commentary from the SCC on this particular subject, and in light of the three highly persuasive appellate authorities, I find that the *Kingstreet* remedy only applies in the context of an unconstitutional statute; as none arises here, *Kingstreet* does not apply.

(iv) *Implied exception and displacement of statutory schemes*

[373] CPRC argues in the alternative that Clause 16 modified the federal government's taxing powers by virtue of the implied exception rule of statutory interpretation. Clause 16, it is argued, is a much more specific statute which ought to prevail over the more general statutes at issue, those being the *ITA* and the *ETA*. Thus, to the extent those acts are inconsistent with, and applied to CPRC in spite of Clause 16, they were levied "without legal authority" and give rise to the *Kingstreet* remedy.

[374] In my view, it is unnecessary to address this argument as I have already found an unconstitutional statute or provision is necessary to trigger the *Kingstreet* remedy. As CPRC has neither challenged the constitutionality of the *ITA* nor of the *ETA*, the *Kingstreet* cause of action and remedy fails. As far as the *Kingstreet* remedy is concerned, it is therefore of no consequence whether the federal government had authority to levy the Taxes, because no other cause of action

aside from *Kingstreet* has been pleaded under which this Court might grant restitution for the Taxes that CPRC claims it wrongly paid to Canada.

(v) *Jurisdictional argument on declarations*

[375] Moreover, as I endorsed the restrictive approach to *Kingstreet*, I find it unnecessary to address Canada's argument that the *Kingstreet* remedy cannot displace mechanisms and limits on recovery for which the legislature has provided.

d. Section 18.5 of the *Federal Courts Act*

[376] I note that both Parties agreed that this Court has jurisdiction to grant the declaratory relief sought by the Company, although Canada raised an objection as to whether this Court has jurisdiction with respect to the *Kingstreet* remedy in light of s 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. Without opining on that particular objection, and to the extent there is any uncertainty on the matter, I emphasize that s 18.5 of the *Federal Courts Act* does not preclude declaratory relief in this case due to the following rationale.

[377] Section 18.5 holds that:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le

from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[378] This provision limits the Federal Court's exclusive jurisdiction under ss 18 and 18.1 to grant relief sought against "any federal board, commission or other tribunal", to the extent that an Act of Parliament provides for an appeal of the matter to, *inter alia*, the Tax Court.

[379] Parliament's purpose in enacting the provision was to avoid parallel proceedings in the Federal Court where a federal statute expressly provides for another forum (*Walker v R*, 2005 FCA 393 at para 11 [*Walker*]). The Federal Court of Appeal has held that s 18.5 of the *Federal Courts Act* should be "interpreted, as far as possible, to preclude parallel proceedings in the Federal Court and the Tax Court of Canada in respect of substantially the same underlying issue" (*Walker* at para 13). In other words, it limits the Federal Court's jurisdiction to judicially review decisions, orders and actions of federal administrative decision makers to the extent they are appealable under the relevant taxing statute (see, for example, *Addison* at paras 7-8; *Walker* at para 13).

[380] The case at bar is not an application for judicial review. Rather, it is an action against the Crown in relation to the 1880 Contract. This action is thus captured by s 17(2)(b) of the *Federal Courts Act* – and not ss 18 or 18.1 – which vests this Court with concurrent original jurisdiction in all cases where "the claim arises from a contract entered into or on behalf of the Crown", except where an Act of Parliament provides otherwise. Therefore, s 18.5 of the *Federal Courts Act* does not apply to this action.

[381] Moreover, even if s 18.5 could extend to s 17(2)(b), I would still think the provision inapplicable to the facts of this case in respect of the claims for declaratory judgement, because I remain unconvinced that they are properly matters arising under the *ITA* and the *ETA* which would be subject to a statutory appeal or reference.

[382] In *JP Morgan Asset Management (Canada) Inc v Minister of National Revenue*, 2013 FCA 250 at paras 49-50, the Federal Court of Appeal cautioned that courts must carefully ascertain the true nature of a claim to avoid frustrating Parliament's intention of having the Tax Court exclusively deal with Tax Court matters. It explained that courts "must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form" (at para 50; see also *Domtar Inc v Canada*, 2009 FCA 218 at para 28).

[383] In my view, the true character of CPRC's claims for declaratory relief do not relate to current or past income tax assessments, a decision of the Minister of Revenue, or for that matter, any existing tax liability, which would otherwise be subject to a statutory appeal. They instead

relate to the general applicability and the enforceability of the 1880 Contract vis-à-vis the *ITA* and the *ETA*, as well as the interpretation of the Exemption insofar as it relates to capital stock.

[384] These claims thus seek to settle a live dispute between the Parties as to whether the CPRC can accrue tax liability under the relevant portions of the *ITA* and the *ETA*, or in relation to its capital stock. Until such a liability has been determined or assessed, the Tax Court does not have jurisdiction over the matter, and accordingly, the Company filed its claim in the appropriate forum capable of dealing with it at the time (see *Canada (Attorney General) v British Columbia Investment Management Corp*, 2019 SCC 63 [*BCIMC*] at para 42). Accordingly, I find that the declarations sought by CPRC fall within the jurisdiction of this Court – subject of course to the discretion to grant them.

(vi) *The claim is not statute-barred*

[385] Canada further submits that the first enactment of each kind of tax that Clause 16 exempts the Plaintiff from paying was sufficient to trigger the start of the limitation period. Canada argues that the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*Crown Liability Act*] provides that limitations apply to require claims to be brought "… within six years after the cause of action arose" (s. 32). The Crown states that the enactment of taxing statutes were discrete acts that started the limitations clock once and for all, and that the Company's repeated payments under those statutes did not constitute fresh breaches of Clause 16.

[386] Canada also argues, citing *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 134-135 [*Wewaykum*], that the SCC held that it would defeat the purpose of a limitations statute if a

single act of breach (in that case of a fiduciary duty) gave rise to a cause of action years later based on the consequences of the breach. Exceptionally, where the tax itself is unconstitutional, then each time tax is taken, a new cause of action may arise, citing *Ravndahl v Saskatchewan*, 2009 SCC 7 at paras 21-22. However, Canada asserts that this exception does not apply to the present circumstances precisely because the taxing statutes are not *ultra vires*.

[387] The Company, on the other hand, submits that Canada's limitation defence has no merit, because *Kingstreet* offers the "complete answer" to Canada's arguments (Plaintiff's Memorandum at para 354). It submits that, in *Kingstreet* at paragraphs 59-61, the SCC confirmed that the limitation period for a claim to recover taxes begins to run each time the government receives a payment.

[388] I have already found that Clause 16 does not have constitutional force vis-à-vis federal taxation. However, I have concluded that Clause 16 has statutory force. The Parties do not dispute that the *1881 CPR Act*, which ratified the 1880 Contract (including Clause 16) has never been directly repealed by Parliament. I have also found as a result that *Kingstreet* does not apply. In the absence of the availability of a *Kingstreet* remedy, any limitations issue therefore need not be further assessed in the context of this restitution.

[389] As for the second remedy being sought – the declarations – since no substantive (or consequential) remedies are attached to the request for declaratory relief, and all that remains is a request for this Court to pronounce on the state of the law, and in so doing to define the Parties' rights, I need not consider the application of limitation periods to the declarations sought (see

Kyle v Atwill, 2020 ONCA 476 at paras 47-53; *Fehr v Sun Life Assurance Company of Canada*, 2018 ONCA 718 at paras 105-106, 207).

(c) Conclusion on the *Kingstreet* remedy

[390] Where taxes are levied under legislation deemed unconstitutional, *Kingstreet* provides a restitutionary cause of action and remedy to recover those taxes, existing as of constitutional right. However, *Kingstreet* does not recognize such a right in the absence of a constitutionally invalid statute or provision, such as when an otherwise valid statute is misapplied. Here the impugned Taxes originate from constitutional statutes, which are *intra vires* Parliament. The same is true of the *1881 CPR Act* and its Exemption. Consequently, we have no *ultra vires* taxing provision. This action therefore falls outside the realm of *Kingstreet*. Thus, the sole cause of action pleaded consequently fails, with respect to restitution. However, as CPRC also seeks declaratory relief, I must still determine Clause 16's applicability to the Taxes. To do so, I will first identify the interpretive principles applicable to Clause 16 and then analyze the reach of the Exemption under each of the three Taxes.

3. *Clause 16 must be interpreted using both contractual and statutory interpretation principles*

[391] Having concluded that Clause 16 has statutory and contractual, but not constitutional force, the next task is to determine its scope.

(a) Identifying the interpretive framework to determine the scope of Clause 16

[392] Determining the scope of Clause 16 requires interpreting both the clause and its 1880 Contract to decipher whether they reveal an intention to apply the Exemption to the Taxes, in what capacity, and to what extent. Yet, as this Court examines a contract that benefits from statutory force, it is imperative first to identify the appropriate framework that will guide the interpretative exercise. I conclude below that the 1880 Contract and Clause 16 should be interpreted according to the principles of contractual interpretation.

(i) *The Parties' arguments*

a. The Plaintiff

[393] CPRC submits that Clause 16 must be interpreted using the principles of statutory interpretation. It argues that this Court must determine the plain and ordinary meaning of the words in the provision in their objective historical context, and in the context of the document as a whole. To do so, the Court must have regard for the intention of Parliament and the extraordinary circumstances surrounding the 1880 Contract.

[394] As the 1880 Contract envisions forward-looking obligations of construction and operation of the transcontinental railway, CPRC posits that the terms of the 1880 Contract ought to be interpreted in a dynamic manner – that is, evolving – as opposed to fixing its words in time. CPRC argues that a dynamic approach accords with s 10 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*], which provides that the law "be considered as always speaking". In this

way, CPRC contends that Clause 16 applies to the Taxes, which were not in existence when the 1880 Contract was signed. CPRC further submits that a dynamic approach best represents the ongoing nature of the obligations crystallized in the agreement, such that Clause 16 may apply to specific property and forms of taxation not in existence at the time.

[395] In the alternative, CPRC argues that even if using contractual principles of interpretation, the significant historical background of the BC Undertaking necessarily informs the interpretation of the 1880 Contract. To the extent that this Court relies on contractual interpretation, CPRC submits that the applicable principles are those enunciated in the leading decision of *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*]. The *Sattva* principles include a place for objective evidence of the circumstances surrounding contract formation in the interpretative exercise, without regard to subsequent party conduct or subjective party intentions (*Sattva* at paras 58-59).

b. The Respondent

[396] Canada submits that only the principles of contractual interpretation apply to interpret Clause 16, since it argues that the 1880 Contract only has contractual – and not constitutional or statutory – force. Thus, Canada submits that statutory interpretation principles do not apply.

[397] As a result, Canada asks this Court to ascertain the objective intent of the Parties to give effect to their rights and obligations enshrined in the 1880 Contract. It submits that the words of the agreement must be read per their ordinary and grammatical meaning, in light of the entire

document, consistent with the objective and mutual surrounding circumstances known to the Parties at formation.

[398] Canada further submits that even if Clause 16 has statutory force, a contractual approach is the only appropriate framework to interpret its scope. Unlike the *1881 CPR Act*, the 1880 Contract was neither drafted nor passed as legislation by Parliament, but was instead negotiated between the Stephen Syndicate and the federal government before the legislature was involved. In support of this argument, the Defendant notes that the SCC applied contractual interpretation principles to the 1880 Contract in both the *Saskatchewan Reference SCC* and *Estevan SCC*.

[399] Accordingly, while Canada agrees that the Exemption is forward-looking, it is nevertheless limited to the specific items of property listed in the clause. Canada submits that there exists no justified basis on which to expand the meaning of those listed items to include property that CPRC wishes to include. Thus, Canada argues that Clause 16 should be read more restrictively so as not to derogate from the original intent of the Parties.

(ii) *Analysis*

[400] Canada identifies a number of authorities supporting a contractual approach to interpret a bargain endowed with statutory force. First, Canada raises *Bogoch Seed Co v Canadian Pacific Railway*, [1963] SCR 247, 38 DLR (2d) 159 [*Bogoch*], a case in which the SCC held that the federal *Interpretation Act* did not apply to a contract, the 1897 Crow's Nest Pass Agreement ("CNPA"). The CNPA was a contract between CPRC and the federal government, ratified by the *Crow's Nest Pass Act*, SC 1897, 60-61 Vict, c 5.

[401] Canada also notes that the Court in *Bogoch* found that the contract did not warrant a construction "most beneficial to the widest possible amplitude of its powers", as would a "constituent or organic" statute, because the contract served a purely private purpose (*Bogoch* at 255). While the CNPA benefitted from legislative force by virtue of statutory ratification, the SCC found that it nevertheless represented an agreement between two parties for a reduction in rates for the transport of certain commodities, in exchange for grants.

[402] In its reasons, the SCC held that the appropriate approach called for interpreting the words "as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute" (*Bogoch* at 256). While the Court still referred to the interpretation of a statute, it is noteworthy that it gave primacy to the bipartite nature of the instrument in question – namely a contract with statutory force – to justify a departure from an otherwise broad rule of construction.

[403] Canada also points out that the SCC interpreted the 1880 Contract according to contract law in other cases. In the *Saskatchewan Reference SCC,* for instance, the SCC held (at 198-199) that it was "to the contract, and not to the [*1881 CPR Act*], that we must look" to interpret the scope of the Exemption.

[404] A few years later, in *Estevan SCC,* Justice Locke applied the "common and universal principle for the interpretation of an agreement" to the 1880 Contract to ensure that it received the construction of the contract's language, "which [would] best effectuate the intention of the parties" (at 373).

[405] Canada notes that other courts have adopted a similar approach with respect to other contracts benefiting from statutory force, including *Canadian Pacific Railway Co v Burnett* (1889), 5 Man R 395, 1889WL9145 (CA); *Balgonie Protestant Public School District v Canadian Pacific Railway* (1901), 5 Terr LR 123, 2 CRC 214 (NWTSC); and *Canadian Northern Pacific Railway Company v New Westminister (City)*, [1917] AC 602, 36 DLR 505 (JCPC) [*Northern Pacific*].

[406] Ultimately, while each Party prefers a different method of interpretation, I find that contractual interpretation should be used to ascertain the meaning of Clause 16 as has been done by the SCC in previous cases determining scope, including the CPRC Instruments in *Saskatchewan Reference SCC* and *Estevan SCC*, and the CNPA in *Bogoch*. As other courts have also applied contractual principles to agreements endowed with statutory force, it is prudent not to derogate from this approach. Certainly, courts must rely on statutory interpretation when determining whether a contract scheduled to a statute is intended to have legislative force. However, if the task requires determining the scope of that same contract, and thus the objective intentions of the contracting parties, then analysis calls for the application of contractual interpretation principles.

a. The contractual interpretation framework

[407] As both Parties suggested, there exist many similarities between the principles of contractual interpretation and those of statutory interpretation. Principally, the task focuses on the ordinary meaning of the words in context, attempting to ascertain the intent which underlies

them. As Justice L'Heureux-Dubé suggested in *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at para 41, [1996] SCJ No 101 (QL), dissenting in part:

> [T]he "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation.

[408] That "modern contextual approach", commonly labelled "Driedger's modern principle", calls for an interpretation which reads the words of an Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo* at para 21; see also *Michel v Graydon*, 2020 SCC 24 at para 21).

[409] The main difference between a statute and a contract for the purposes of interpretation lies in where courts must look to determine intent. An exercise in statutory interpretation centres on the intention of Parliament alone. Contractual interpretation, by contrast, calls for the Court to give meaning to the intent of all contracting parties. Said differently, a contract originates from more than one perspective and may culminate in a bargain founded by parties with competing interests. Such a bargain is precisely what I will next construe in determining the scope of the Exemption vis-à-vis the three Taxes.

[410] Before engaging in the contractual interpretation exercise, I find it helpful to recite some of its key principles. First and foremost, the interpretation of a contractual provision must always be grounded in the words of the contract as chosen by the parties and read in light of the

document as a whole (*Sattva* at para 57). Parties are presumed to have intended what the text of the contract actually says, as well as the legal consequences that flow therefrom (*Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36 at para 73 [*Mosten Investments*]; *Goodlife Fitness Centres Inc v Rock Developments Inc*, 2019 ONCA 58 at para 15 [*Goodlife Fitness*], *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at para 56, 161 DLR (4th) 1 [*Eli Lilly*]).

[411] Moreover, courts must give meaning to all of the terms of a contract, avoiding interpretations that would render one or more of its provisions ineffective (*Goodlife Fitness* at para 15, citing *Salah v Timothy's Coffees of the World Inc*, 2010 ONCA 673 at para 16 [*Timothy's Coffees*]). The overriding concern is to determine the intent of the parties and the scope of their understanding; the contract must be read as a whole, its words given their ordinary and grammatical meaning, and considered in the context of the surrounding circumstances known to the parties at the time of formation of the contract (*Sattva* at para 47).

[412] To do so, courts must have regard for the objective evidence of the "factual matrix" or context underlying the negotiation of the contract (*Goodlife Fitness* at para 15; *Timothy's Coffees* at para 16). These surrounding circumstances assist the Court in understanding the mutual and objective intentions of the parties expressed by the words of the agreement.

[413] Consideration of surrounding circumstances "almost always matters because words rarely have meaning apart from their context" (*Thunder Bay (City) v Canadian National Railway Company*, 2018 ONCA 517 at para 30, leave to appeal to SCC ref'd, 2019 CarswellOnt 4696

(WL Can) [*Thunder Bay*]). The surrounding circumstances cannot, however, overwhelm the words chosen by the parties, nor be used to create a new agreement or rights not bargained for (*Sattva* at para 57).

[414] The nature and type of evidence admissible to establish the surrounding circumstances varies from case to case, but is limited to objective evidence of the background facts at the time of the execution of the contract, that is, "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (*Sattva* at para 57).

[415] Evidence relating to the parties' specific negotiations, including subjective evidence of intentions, is generally inadmissible (*Goodlife Fitness* at para 17, citing *Weyerhaeuser Company Limited v Ontario (Attorney General)*, 2017 ONCA 1007 at para 112 [*Weyerhaeuser*]; *Timothy's Coffees* at para 16).

[416] Lastly, evidence of conduct subsequent to contract formation should only be admitted if the contract remains ambiguous after considering its text and its factual matrix (*Mosten Investments* at para 180; *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912 at para 46).

b. The dynamic versus the static approach

[417] As noted above, both Parties made submissions on whether Clause 16 should receive a "dynamic" or a "static" interpretation. Many of the cases cited focus on the interpretation of statutes (for example, *Ontario v 974649 Ontario Inc*, 2001 SCC 81; *R v Stucky*, 2009 ONCA

151, and *Kimberly-Clark Nova Scotia v Nova Scotia Woodlot Owners & Operators Assn*, [1998] 175 NSR (2d) 34, 18 Admin LR (3d) 67 (SC), aff'd, 2000 NSCA 2).

[418] Similarly, references to secondary sources focus on statutory interpretation principles. For example, the Plaintiff cites Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Lexis Nexis Canada), 2014 [Sullivan] on dynamic interpretation. Professor Sullivan states (at 6.27), "legislation that is aimed at a particular set of circumstances or is tied to a specific time or place invites a static interpretation. By contrast, legislation that is enacted to regulate an ongoing activity over an indefinite period of time invites a dynamic approach". The Plaintiff asserts that updated interpretations of statutory wording must prevail such that new inventions, institutional change, and new ideas may all be taken into account, provided that this dynamic approach does not require adjusting the original sense of the word being interpreted (Sullivan at 6.29).

[419] As discussed above, in *Bogoch*, the SCC applied a static approach to its interpretation of the word "grain" in the CNPA, thereby excluding items that were not considered grain at the time of the agreement from the scope of the word "grain". Canada relies on this restrictive interpretation to support a similarly restrictive interpretation of Clause 16 to exclude properties that did not clearly fall within the categories of listed properties in the Exemption.

[420] The static approach is problematic because it runs counter to the language adopted in the 1880 Contract. As CPRC points out, the Court in *Bogoch* restricted the meaning of "grain" because the agreement provided for a reduction of "present rates and tolls on grain and flour"

(emphasis added) in exchange for grants. The language of the CNPA evidenced a clear aim to address a particular set of circumstances at a particular point in time. The Court noted (*Bogoch* at 255), that after specifying present rates and tolls, the CNPA went on:

> … after providing how and when such reductions should be effected, to provide: "and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned." In other words, the reduction in rates was not temporary in nature, but would continue. The agreement was dealing with a reduction in the existing rates on grain and flour and it seems to me that the parties contemplated, and only contemplated, the effecting of a reduction in rates then applicable on what both parties, at that time, regarded as being grain.

[421] Everything about the 1897 CNPA, in other words, revolved around that point in time, which is distinct from the forward-looking framework of "forever" stipulated in Clause 16 of the 1880 Contract.

[422] In contrast to *Bogoch*, there is a recent example of a forward-looking, dynamic approach taken in a recent railway case. In *Thunder Bay*, the Ontario Court of Appeal overturned a lower court decision that had interpreted the words "vehicle traffic" in a 1906 agreement restrictively to include only types of vehicles in existence at the time of the agreement's formation. The agreement between the city of Thunder Bay and the railway company required that company to build and maintain in perpetuity a combined railway and roadway bridge across the Kaministiquia River.

[423] In one clause the agreement provided to the city of Thunder Bay the "perpetual right to cross the said bridge for street railway, vehicle and foot traffic" and in another, it obligated CN Rail to "maintain the bridge in perpetuity" (*Thunder Bay* at para 4).

[424] In assessing the railway's obligations to maintain the bridge, the issue was whether the word "vehicle" should include vehicles not in existence at the time of the agreement, namely just after the turn of the century. This category would include motor vehicles.

[425] The application judge found that the parties intended to maintain the bridge only for streetcar, horse, and cart traffic – that is, traffic which existed in 1906 (see *Thunder Bay (City) v CN Rail*, 2017 ONSC 3560 at para 26).

[426] The Ontario Court of Appeal ruled that the application judge's finding restricting the scope of "vehicles" warranted appellate review on three grounds (*Thunder Bay* at para 29). First, it found that the application judge failed to take due account of the full context surrounding the formation of the agreement, and that his finding contravened the parties' reasonable expectations, ignoring the express words used in their agreement. Second, the application judge failed to give effect to the words "perpetual" and "in perpetuity" contained in the 1906 agreement. Third, the judge wrongly considered subsequent party conduct in the face of an unambiguous agreement.

[427] Textually, the Court found that the word "vehicle" was neither restricted nor defined, but rather open-ended. Similarly, the right to cross the bridge was not limited, but "perpetual" in

nature (*Thunder Bay* at paras 31-32). Furthermore, the purpose of the agreement had been "intended to promote long term growth and prosperity and expand industrial activity" in the region (*Thunder Bay* at para 36). Such a purpose did not accord with the restrictive meaning attributed to the types of traffic envisioned by the parties.

[428] A restrictive meaning would also conflict with the expectations of the parties that the bridge would prove a significant source of revenue for years to come, as well as the anticipated growth in population, industrial activity, and use of the bridge (*Thunder Bay* at paras 35-40). The Court also found that the coming of the automobile era would have been known or reasonably capable of being known in 1906.

[429] Based on these findings, the Court of Appeal determined that the term "vehicles" must have been intended to include types of vehicles not yet in existence, such as cars and trucks (*Thunder Bay* at para 69).

(b) Conclusion on interpretive principles applicable to Clause 16

[430] Ultimately, while cases such as *Thunder Bay* and *Bogoch* apply different approaches to determining the meaning of their underlying agreements, what ultimately determines the outcome in interpretation are the words of the contract in question and the context in which they were formed, which may well assist in elucidating the parties' intent at the time. Objective intent reveals whether the meaning of the relevant words employed in a contract were meant to evolve over time, or whether they were meant to remain stagnant.

[431] While I agree that taxes are not static creations in that they can be introduced and then removed (LCT being just one example), before determining whether any given tax falls within the purview of Clause 16, the scope of that clause must be established to determine whether the activity being taxed was contemplated by the words of the Exemption. That scoping exercise is necessarily informed by *Sattva* considerations, including the intention of the contracting parties.

4. *Clause 16 applies to LCT, but not to Income or Fuel Tax*

[432] Having established that Clause 16, despite its statutory force, must nevertheless be interpreted using principles of contractual interpretation, I now move to determining its scope. To begin, and for ease of reference, the key portion of Clause 16, for the purposes of this action, reads:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

(a) The Parties' arguments

[433] The Parties agree on a number of points. Neither takes issue with the perpetual nature of the Exemption embodied in the term "forever". Both also acknowledge that Clause 16 was intended to apply to taxes not yet in existence in 1880. In addition, the Parties agree that "taxation" is broad, but does not include regulatory charges, and that income constitutes personal

property for tax purposes. Finally, they agree that Clause 16 exempts the Company from LCT by the inclusion of "capital stock" in the wording of the Exemption, subject to Canada's position that Clause 16 has been repealed and the equitable defences raised. From there, the Parties diverge, including on the quantum of capital stock exempted from LCT.

(i) *The Plaintiff's arguments*

[434] CPRC contends that when "forever" and "taxation" are given their plain meaning, Clause 16 is a universal exemption from all forms of taxation, regardless of when they were created or imposed. Clause 16 is an omnibus exemption that is not restricted by any other words either in the clause itself, in the 1880 Contract, or in the *1881 CPR Act*.

[435] CPRC argues that Clause 16 exempts three different categories of objects from taxation. The first is the "Canadian Pacific Railway". The second are the listed properties, "all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof". The third is the "capital stock of the Company".

[436] CPRC argues that the listed properties following "Canadian Pacific Railway" in the Exemption are conjunctive and include property separate from the physical railway line. Clause 1 of the 1880 Contract defines the term "Canadian Pacific Railway" by referencing its definition in the *1874 CPR Act*, that is, meaning the "entire railway".

[437] The *1874 CPR Act*'s more detailed definition of "Canadian Pacific Railway" (*i.e.*, the Main Line) includes: the route, rolling stock, real property, buildings, and works, as well as other personal property used in construction of the Canadian Pacific Railway. The Plaintiff argues that inclusion of listed properties in Clause 16 required for the "construction and working thereof" must refer to something more, namely facilities not included in the term "Canadian Pacific Railway" but located on branch lines and used for the construction and operation of the Main Line.

[438] Accordingly, CPRC argues that the Exemption applies to Income Tax because Clause 16 extends to cover taxes in respect of the use and operation of the Main Line. As income is derived from the operation of the railway, imposing Income Tax would enable the Crown to do indirectly what it cannot do directly – that is, in effect, tax the railway.

[439] Moreover, CPRC argues that "fuel" is captured under the terms "Canadian Pacific Railway", "other property", and "appurtenances" such that Clause 16 prohibits the Fuel Tax. At the very least, CPRC argues that, as fuel is required to operate the rolling stock of the Company, and with Clause 16 clearly exempting rolling stock, Fuel Tax amounts to an impermissible tax on the use of the rolling stock. (For clarity, rolling stock refers to items used in the railway industry that have wheels, such as locomotives, freight, passenger, and other kinds of transport cars, which can either be powered or unpowered.)

[440] As for the exemption on “capital stock”, CPRC argues that applies to all current paid-up capital of the Company, not just the initial capital investment of $25 million, and LCT should thus never have been levied.

(ii) *The Respondent’s arguments*

[441] Canada cautions that the extraordinary nature of the 1880 Contract cannot change the meaning of the words in Clause 16. Canada argues that while the Exemption is perpetual, its scope is limited. Clause 16 does not exempt the Company from “all taxation by the Dominion” in an omnibus fashion. Rather, it lists specific types of property to which the Exemption applies, which is consistent with other provisions of the 1880 Contract. The Defendant argues that the Parties would have been aware of the established historical principle that, to be valid, exemptions from tax law should be clearly expressed (*Nowegijick v The Queen*, [1983] 1 SCR 29 at 39-40, 46, 144 DLR (3d) 193 [*Nowegijick*]). The Crown asserts that this principle of strict construction dates back to at least the early 20th Century, citing *R v Madawaska School District* (1917), 46 NBR 506 (NBSC), at para 5.

[442] As a result, Canada asserts that for Clause 16 to apply to a particular tax, the tax must relate to the listed properties in a way that accords with the intent of the Parties. In Canada’s view, neither Income Tax nor Fuel Tax meet that requirement. Further, while the words “capital stock” capture LCT, the Exemption only applies to the initial $25 million investment.

[443] Canada also submits that the term “Canadian Pacific Railway” refers only to the physical railway, and nothing more. It argues that the term excludes other forms of property not listed in

Clause 16, because finding otherwise would render the listed properties in Clause 16 redundant. Moreover, Canada disagrees with CPRC that Clause 16 was intended to capture both direct and indirect taxation, arguing only direct taxation falls within the scope of the Exemption.

[444] Canada disagrees with the Plaintiff that Clause 16 is an omnibus exemption. In support, Canada compares the Exemption to other exemptions granted in the 1870s and 1880s, which feature much broader language. Canada first contrasts the wording of Clause 16 with the wording of the tax exemption clause granted to the Company by a Winnipeg by-law in 1881, which provided a broad tax exemption to CPRC from all types of taxes and assessments on all of the Company's property. The relevant part of the Winnipeg by-law reads (*Canadian Pacific Railway Co v Winnipeg (City)* (1951), [1952] 1 SCR 424, [1952] 2 DLR 1 [*Winnipeg (City)*] at 436):

> Upon the fulfillment by the said Company of the conditions and stipulations herein-mentioned, by the said Canadian Pacific Railway Company all property now owned, or that hereafter may be owned by them within the limits of the City of Winnipeg, for Railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.
>
> [Emphasis added.]

[445] This tax exemption was granted to the Company in return for its agreement to build "within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said province, and for ever continue the same within the

said City of Winnipeg". The broad scope of the by-law's tax exemption was confirmed by the SCC in *Winnipeg (City)* (at 438-439).

[446] In contrast, Canada argues that the Exemption in this case is nowhere near as broad as the Winnipeg exemption, noting that here, Clause 16 contains a very specific list of property.

[447] Canada also compares Clause 16 to a tax exemption granted to the Canadian Northern Pacific Railway Company ("CNPRC Exemption") in 1910. That clause reads (*Northern Pacific* at 507):

> The Pacific Company and its capital stock, franchises, income, tolls, and all properties and assets which form part of or are used in connection with the operation of its railway shall, until the first day of July 1924, be exempt from all taxation whatsoever, or however imposed, by, with, or under the authority of the Legislature of the Province of British Columbia, or by any municipal or school organisation of the province.
>
> [Emphasis added.]

[448] Notwithstanding the broad wording of this provision, the Crown notes that the JCPC found in *Northern Pacific* that the exemption did exempt all the company's property, on the basis that holding otherwise would render nearly all of the text of the provision as "surplusage" (*Northern Pacific* at 508). The JCPC explained that interpreting the CNPRC Exemption so broadly would "be to add to it words which are not to be found in it", and that "there is nothing in the context or in the object of enactment, or in the incorporated enactments, which make it necessary or justifiable to read in the necessary words" (*Northern Pacific* at 508).

[449] A more detailed examination follows, containing the Parties' specific interpretation of the Exemption's scope, along with my analysis of their differing interpretations. However, before examining the text of Clause 16 in relation to each of the Taxes at issue, it is important to bear in mind the surrounding circumstances that underpinned the 1880 Contract, in light of *Sattva*.

(b) Surrounding circumstances: The historical context of the 1880 Contract

[450] *Sattva* holds that surrounding circumstances cannot create new obligations or otherwise usurp the meaning intended by the parties (*Sattva* at para 57). Still, surrounding circumstances help to ascertain the meaning behind the words chosen by the parties as "context… almost always matters because words rarely have meaning apart from their context" (*Thunder Bay* at para 30).

[451] Those circumstances cannot include subjective evidence of parties' intentions. They can, however, include knowledge that was known or that reasonably ought to have been known by the parties prior to contract formation (*Sattva* at para 60). Such knowledge in this case will necessarily include aspects of the extraordinary nature of the endeavour, such as the federal government's commitment to uniting the Canadian territories. Only by placing the bargain in its proper context can this Court ascertain the Parties' true intentions.

(i) *Context: The nation-building of the railway*

[452] Both Parties recognize in their PASF reproduced in Part III above, as do Drs. Hanna and Regehr, that the federal government confronted a constitutional obligation of unmatched

complexity in the BC Undertaking. All agree that this constitutional undertaking faced nearly a decade of economic, financial, and political challenges in getting the work underway. The Stephen Syndicate then provided an opportunity for Canada to fulfill its promise. The preamble to the *1881 CPR Act* reiterates the federal government's commitment to completing the railway.

[453] One important piece of the factual matrix was the forward-looking importance of the undertaking. Dr. Hanna underscored the importance of the railway to the development of the country, national unity, and security. He testified that Prime Minister John A. MacDonald viewed the "perpetual and efficient operation" clause (captured in clause 7) as "key" to the agreement.

[454] Dr. Hanna also wrote in his report that two prominent negotiators representing the federal government, Sir Charles Tupper and John Henry Pope, along with Prime Minister Macdonald, as well as legal Counsel to CPRC, John J.C. Abbott, all strongly believed in railways "as powerful economic development agents" as well as "agents of national unity and ambitions" (Hanna Report at 16). Members of the Stephen Syndicate, all experienced railway magnates, likely shared similar views.

[455] Dr. Regehr, in his testimony, echoed these nation-building aspects that the federal government sought to create through the transcontinental railway, as "integrated national Canadian economic transportation system which would channel traffic to and from western Canada through the major Canadian commercial and industrial centres" in the east to avoid diverting western Canadian traffic to the United States (Regehr Report at para 12). He also spoke

to the need for a reliable, national rail system by which the federal government could safely transport military personnel and supplies, as well as mail, government supplies, and those linked to communications.

[456] The parties to the 1880 Contract were thus no doubt well aware that the agreement would serve to foster continuing national development and unity on a number of fronts. That is, they sought to complete the transcontinental railway in a way that would ensure the continued operation of the railway, promoting the nation's economic, geographic, and social development.

(ii) *Context: The 1880 Contract considered as a whole*

[457] Continuous operation of the railway, which underlies the 1880 Contract, is also evidenced by the terms of the agreement. As pointed out in the PASF, clause 7 provided that upon completion of construction, CPRC would "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway". Clause 8 provided that when the federal government transferred pre-completed portions of the railway to CPRC, the company would "equip the same in conformity with [the Contract]" and would "thereafter maintain and efficiently operate the same". Clause 14 empowered CPRC to "lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line", that is, to branch off the main line as the company saw fit.

[458] Clearly, the Parties intended to provide for the construction and the efficient operation of the railway over time. They negotiated a framework that would best preserve the objectives of the railway in the future, without temporal limitation (with few exceptions, such as the 20-year

monopoly provision in clause 15, and the 20-year limitation taxation for land grants under the second part of Clause 16). Indeed, as the Parties agree, the Clause 16 Exemption applies "forever"; there is no temporal limitation.

[459] That said, the Parties chose to restrict the applicability of the Exemption to certain listed items in Clause 16. The language clearly states that it is the "Canadian Pacific Railway", the "stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances", and the "capital stock of the Company" that "shall be forever free from taxation". Moreover, those listed properties, with the exception of capital stock, only benefit from the Exemption to the extent that they are used for the construction and working of the railway (see *Saskatchewan Reference SCC* at 246).

[460] What is also clear on a plain reading is that for Clause 16 to apply to the Taxes in question, they must relate to one or more of the listed items. Also notable is that Clause 16 neither defines nor otherwise limits what taxes may qualify as "taxation". However, as Dr. Regehr testified, Clause 16 served as a "precautionary measure" against future taxation, as railways generally paid no federal or provincial taxes in 1880 (Regehr Report at para 64).

[461] Given this reality and the need to interpret the scope of the Exemption, I turn to address whether Clause 16 applies to each of the three Taxes in issue – (i) income, (ii) fuel, and (iii) LCT.

(c) Income Tax

[462] As mentioned above, the Parties agree on the extraordinary significance of the 1880 Contract and the principle that income, including taxable income, constitutes personal property for tax purposes. However, they disagree on whether Clause 16 captures income tax.

(i) *The Parties' arguments on Income Tax*

[463] CPRC argues that Clause 16 extends to taxes in respect of the use and operation of the Main Line. Income is derived from the use of the Main Line property. Therefore, a tax on that income, which the Plaintiff states is a necessary component to railway operation, constitutes a tax on the use of the exempted property, thereby contravening Clause 16. CPRC, as will become evident below, applies similar reasoning to Fuel Tax.

[464] The Plaintiff submits that Income Tax is impermissible because it would allow the federal government to do indirectly what it cannot do directly – that is, to tax the Main Line. CPRC relies on the *Saskatchewan Reference SCC*, where the SCC held that a purported "business tax" actually constituted a veiled, impermissible tax on the use of Main Line property.

[465] CPRC contends that the *Saskatchewan Reference SCC* supports the Exemption against Income Tax, in that even if "Canadian Pacific Railway" is restricted to mean the physical railway only, as Canada contends, Income (and Fuel) Tax still fall within the ambit of Clause 16 because those taxes are levied on the use of the physical railway.

[466] CPRC also refers to a number of passages from Hansard in which Members of Parliament ("MPs") debated Clause 16. Statements from MPs Edward Blake, John Charlton, and George William Ross allude to the breadth of Clause 16 and its possible applicability to income, earnings, and profits.

[467] CPRC also points to Dr. Ely's expert evidence for the proposition that "other property" means something beyond the physical property listed in Clause 16. He testified that the word "property" was interpreted in the US context to include physical and non-physical items such as a railway's franchise to operate and intangible property.

[468] The Plaintiff notes that the listed property is both generic as well as varied, including real property (station grounds), personal property (rolling stock), and appurtenances, and therefore cannot describe one specific class of property. For instance, "other property" could not be limited to physical property. Rather, CPRC contends that "other property" must be of the same character as the other items stated generically to be "required and used for the construction and working" of the Main Line, which includes income.

[469] Canada opposes CPRC's interpretation of the *Saskatchewan Reference SCC*. Canada agrees that the SCC held the true nature of the "business tax" to be a tax on the property used for carrying on business. However, Canada notes that the JCPC specifically rejected the argument that the impugned tax was a business – or income – tax in that that it was "imposed on persons and companies carrying on a business and not upon their property or upon their ownership or user of property" (*Saskatchewan Reference JCPC* at 793).

[470] Canada further submits that Clause 16 mentions neither "income" nor "earnings", suggesting that the Parties intended to exclude it from the Exemption. Canada argues that "income" and "earnings" were commonly understood terms in 1880, referring to revenues received for services rendered. Canada notes that while the federal government did not levy income taxes at the time, British Columbia and Quebec had experimented in the area. Further, Canada notes that American railways were subject to taxes on gross earnings in states such as Minnesota.

[471] Specifically, Canada points to a tax arrangement (the "Minnesota Arrangement") granted in 1872 by the US State of Minnesota to the St. Paul, Stillwater & Taylor Falls Railroad as evidence of tax exemptions on income and earnings in the 1870s. This railroad was the predecessor to the St. Paul and Pacific Railroad, which certain members of the Stephen Syndicate (notably George Stephen, Richard Angus, and James Hill) acquired and reorganized in 1878 into the St. Paul, Minneapolis, and Manitoba Railroad.

[472] Under the Minnesota Arrangement, the Company paid taxes on gross earnings, but not on a specific list of properties required for the railway. The Minnesota Arrangement was incorporated into that state's 1878 tax law (*Minnesota Statutes, 1878*, Chapter 11, sections 128, as published in George B Young, *The General Statutes of Minnesota*, (Saint Paul: West Publishing Company, 1883) at 247):

> In consideration of an annual payment of a percentum, as provided in this section, by the St. Paul, Stillwater and Taylor's Falls Railroad Company, the railroad, its appurtenances and appendages, and all other property, estate and effects of said corporation, held or used for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, including the lands

> granted to said company to aid in the construction of said railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to and the privileges conferred upon the said company, and the exemption contained in this section, the said company shall, during the [first three years] pay into the treasury of this state one per cent on the gross earnings of said railroad…, and shall [for the next seven years] pay into the treasury of the state, … two per cent on the gross earnings of said railroad [and after 10 years therefrom] shall pay into the treasury of this state three per cent of the gross earnings of said railroad…

[473] Canada submits that the Minnesota Arrangement resembles Clause 16 in two ways, it: (i) specifies listed properties which are exempt from taxation, and (ii) distinguishes the railroad from the Company.

[474] Canada argues that if the Minnesota Arrangement's listing of property and "the railroad" included income, then the statute would contradict itself by both exempting income, while also taxing it at various rates. Canada argues, given the federal government's and the Stephen Syndicate's knowledge, that the parties to the 1880 Contract would have been aware that the taxation of earnings was a distinct event from the taxation of other forms of property.

[475] Canada also contrasts the language of Clause 16 with that used in a tax exemption granted during the earlier efforts to construct the transcontinental railway. Section 6 of the *1872 CPR Act* specifically provided that the "earnings of the Company" would be exempt from taxation:

> The buildings, right of way, permanent way, rolling stock and earnings of the Company and all property thereof, except the lands granted or to be granted by any government in aid of the said railway, shall be exempt from taxation in any Province hereafter to

> be constituted from the territory of the Dominion for fifty years after the completion of the said railway, under any law, ordinance or by-law of any Provincial, local or municipal authority, to any other or greater extent than if the same were the property of the Dominion,—the said railway being in fact a public work constructed mainly at expense of the Dominion for the benefit of all the Provinces thereof.
>
> [Emphasis added.]

[476] CPRC counters that a comparison with the *1872 CPR Act* reinforces the "omnibus" nature of Clause 16, which it submits is much broader in scope than the 1872 exemption, along with the fact that it was drafted in a different political climate.

[477] The Plaintiff further distinguishes the *1872 CPR Act* from the Exemption, noting that the earlier statute does not apply to federal taxation, is temporally limited to 50 years rather than the 1880 Contract's perpetual nature, and does not reference an exemption for the "Canadian Pacific Railway". In CPRC's view, the reference to the "Canadian Pacific Railway" obviates the need for an express reference to "income" or "earnings".

[478] Finally, recalling the CNPRC Exemption (at paras 447-448 above), Canada emphasizes that even broadly worded tax exemptions may be found to have a limited scope. Canada points to the JCPC's decision in *Northern Pacific*, that held the CNPRC Exemption only applied to the listed properties, which included "income". Rejecting the plaintiff's argument, the JCPC remarked that interpreting the exemption so broadly would "be to add to it words which are not to be found in it", and that "there is nothing in the context or in the object of enactment, or in the

incorporated enactments, which make it necessary or justifiable to read in the necessary words" (*Northern Pacific* at 509).

(ii) *Analysis*

[479] As mentioned above, both Parties acknowledge that income, including taxable income, constitutes personal property for tax purposes. Yet, despite forming part of the title of the tax in question, the term "income" is not defined in the *ITA*. Rather, the *ITA* refers to sources or amounts that are to be included or excluded from "income" for tax purposes. Subsection 9(1) outlines that "a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year", without defining "profit". As noted by Justice Iacobucci in his decision for the majority in *Symes v Canada*, [1993] 4 SCR 695, 110 DLR (4th) 470 [*Symes*], the test to determine profit under s 9(1) is to be calculated in accordance with "well accepted principles of business (or accounting) practice" or "well accepted principles of commercial trading" (at 723).

[480] Canada provides a number of sources indicating that both the plain and ordinary meaning of "profit", as well as legal definitions, generally define the term as the excess of revenue over expenses (see *The Canadian Oxford Dictionary*, 2nd ed, *sub verbo* "profit"; *Black's Law Dictionary*, 11th ed, *sub verbo* "profit").

[481] Justice Iacobucci expanded on his comments above as set out in *Symes* on the calculation of income and profit in *Canderel Ltd v Canada*, [1998] 1 SCR 147, 155 DLR (4th) 257. There, Justice Iacobucci wrote for the Court that: "In the simplest cases, it will not even be necessary to

resort formally to the various well-accepted business principles, as the simple formula by which revenues are set against the expenditures incurred in earning them is always the basic determinant" (at para 50). Simply stated, Part 1 of the *ITA* imposes Income Tax on the excess of a corporation's income over expenses, or in other words, its profit. Thus, in order to conclude that the Clause 16 Exemption applies to Income Tax, there must first be something in the text of the Exemption, taken in context, revealing that the Parties intended to exempt from taxation profits flowing from the operation of the Main Line.

[482] It is also important to recall that Clause 16 qualifies that the listed properties, excluding capital stock, are exempted only to the extent that they are "required and used for the construction and working" of the "Canadian Pacific Railway", *i.e.*, the Main Line (see *Estevan SCC* at 369-370).

[483] For Clause 16 to apply to Income Tax, given the scheme of the *ITA*, the proper question is therefore whether Clause 16's text, in context, reveals an intention to exempt profit "required and used" for the operation of the Main Line. Necessarily, one must also question whether "profit", being the "income" on which a corporation is taxed under the relevant *ITA* provision, can properly be "required and used" for the operation of the Main Line. (Note that "income" and "profit" are used interchangeably within a tax context for the purposes of this analysis.)

[484] I disagree with CPRC that having included the words "Canada Pacific Railway" where they are located in Clause 16 serves to include in the scope of the Exemption additional types of properties that were not expressly listed in Clause 16.

[485] First and foremost, the Court in *Estevan SCC* held that certain properties situated on branch lines did not qualify for the Exemption because they were not required and used for the construction and working of the railway. In that case, CPRC brought three actions against municipalities, claiming an exemption from assessment and taxation over a five-year period, in respect of certain railway properties situated within the boundaries of the respondent municipal corporations. CPRC also sought injunctions against future taxation or attempts to tax those same properties. The properties in question included roadways, stations, station grounds, work shops, buildings, yards, water-supply sites, and pump houses, all located on branch lines around Estevan, Saskatchewan. CPRC argued that these properties, as well as the branch lines themselves, all qualified for the Clause 16 Exemption, as they were necessary for the operation of the Main Line. Reviewing the 1880 Contract, Justice Nolan pointed to the definition of the term "Canadian Pacific Railway" (*Estevan SCC* at 382):

> Clause 1 of the contract, annexed as a schedule to the Act… concludes as follows: "And that the words 'the Canadian Pacific Railway', are intended to mean the entire railway, as described in the [*1874 CPR Act*]." Clause 1 of the contract is also declared to be "for the better interpretation of this contract" and it seems clear that wherever the words "Canadian Pacific Railway" occur in the contract they must be construed to mean the main line, consisting of the four sections referred to above, together with the two branch lines described in [the *1874 CPR Act*], unless the language used in any clause plainly indicates some other construction.
>
> [Emphasis added.]

[486] Thus concluding that the Exemption did not apply to branch lines aside from the two branch lines provided for in the *1874 CPR Act*, Justice Nolan went on to consider whether the meaning of Clause 16's phrase "required and used for the working of the railway" could extend

to the real or personal property located on Saskatchewan's branch lines. Answering in the negative, he wrote (*Estevan SCC* at 385-386):

> I am unable to agree with the contention that the Portal and Estevan subdivisions are "required and used" for the working of the main line because lignite coal is carried over those branch lines to provide fuel for stationary boiler-plants on the main line. To agree would be to extend the argument for exemption to other branch lines transporting material and supplies to main line points. Neither do I agree with the contention that the roadway in the Portal and Estevan subdivisions, together with the stations, station grounds, houses and other buildings located in the respondent Town of Estevan, can be said to be exempt. Clearly they are used for the convenience of passengers, for the maintenance of the roadway of the two subdivisions and for the servicing of rolling stock, but, in my view, it cannot be said that they are also required and used for the working of the main line.
>
> What I have said regarding the roadway of the Portal subdivision applies equally to the roadway in the respondent Rural Municipality of Caledonia, which roadway is part of the Portal subdivision. Milestone water-supply site and pumphouse, situate in this respondent municipality, although the last watering point before Moose Jaw, are, in my view, not entitled to exemption as being required and used for the working of the main line.
>
> [Emphasis added.]

[487] Justice Locke, who arrived at the same conclusion, also focused on the definition of the Main Line, holding that the listed properties were exempted from taxation regardless of where they were situated, to the extent they were required for the operation of the "Canadian Pacific Railway" (*Estevan SCC* at 369-370):

> In my opinion, the "stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working" of "the Canadian Pacific Railway" include property of the nature referred to, whether situate upon the main line or elsewhere, including branch lines. I am unable… to agree that this enumeration applies only to properties of this nature situate upon

> the branch lines. While undoubtedly capable of that interpretation, my conclusion is that the enumeration was included for the purpose of making it clear that it was not merely the right-of-way of the main line but all of the properties and facilities needed for working it as an entity that were to be exempted from taxation.
>
> [Emphasis added.]

[488] Both Justices Nolan and Locke interpreted the "Canadian Pacific Railway" as written in Clause 16 to refer to the physical railway consisting of the Main Line. While the listed properties need not be located on the Main Line to qualify for the Exemption, they must be necessary to operate the Main Line, or as it was referred to in *Estevan SCC*, the "Canadian Pacific Railway". Justice Rand, in separate concurring reasons, emphasized this point (at 367):

> Both the main line and the branch lines are expressly dealt with in the charter and are specifically distinguished from one another. With a full appreciation of this distinction the tax exemption was limited to the main line. The items mentioned in clause 16 are merely a detailed enumeration of what, besides the right-of-way, roadbed and trackage of the main line, are its ordinary and necessary facilities. That they are required to be contained within the normal right-of-way is not suggested.
>
> [Emphasis added.]

[489] Thus, as the SCC examined Clause 16, it interpreted the "Canadian Pacific Railway" as a qualifier for the remaining listed properties. That is, the subsequent listed properties all relate to the physical railway. In addition, Justice Nolan expressly rejected the argument that property required to operate branch lines, which CPRC argued were required to operate the Main Line, qualified for the Exemption.

[490] Based on the entirety of the 1880 Contract, I view the term "Canadian Pacific Railway" in the same way as the Court viewed it in *Estevan SCC* – that is, as a reference to the physical Main Line. Clause 1 clearly distinguishes the "Canadian Pacific Railway", being the physical railway, from the Company:

> For the better interpretation of this contract, it is hereby declared that the portion of railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said railway, now partially in course of construction, extending from Selkirk to central Kamloops, is hereinafter called the Central section; and portion of said railway now in course of Construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire railway, as described in the [the 1874 CPR Act]. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.
>
> [Emphasis added.]

[491] The *1874 CPR Act* refers to the "Canadian Pacific Railway" as a physical railway (s 1):

> A railway to be called the "Canadian Pacific Railway" shall be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both the said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.
>
> [Emphasis added.]

[492] Clause 16 itself distinguishes between the physical railway line and the Company by providing that both the listed properties required to construct and operate the railway and "the capital stock of the Company" are exempted from taxation. The 1880 Contract consistently treats the Canadian Pacific Railway, *i.e.*, the physical railway, as distinct from the Company. For example, clause 2 of the 1880 Contract provides for security deposits to be made by the Company. Clause 7 provides that upon completion – and meeting certain conditions – portions of the Canadian Pacific Railway become the property of the Company. Clause 9 provides for the $50 million in land and money grants to the Company in exchange for the completion of the Canadian Pacific Railway.

[493] While the 1880 Contract alternates between the terms "Canadian Pacific Railway" and "railway", it is nevertheless evident on a plain reading of the entire document that the Parties intended the term to mean no more than the physical railway constituting the Main Line. This interpretation is also reinforced by the fact that under both the 1880 Contract and *1881 CPR Act* the term "Canadian Pacific Railway" is referred to as property to be constructed and then possessed by the Company. Interpreting "Canadian Pacific Railway" to capture the Company, including its activities and operations, would conflict with the plain wording that the drafters adopted, which incorporates the 1874 definition of physical Main Line.

[494] Moreover, s 7 of the *1874 CPR Act* provides that the Canadian Pacific Railway "shall be constructed under the general superintendence of the Department of Public Works". Clause 7 of the 1880 Contract states that it "shall become and be thereafter the absolute property of the Company". Further, s 5 of the *1881 CPR Act* states, "the Canadian Pacific Railway defined as

aforesaid shall become and be thereafter the absolute property of the Company". These excerpts add no support to the argument that the inclusion of the words "Canadian Pacific Railway" in Clause 16 was intended to subsume additional property to that term as defined under the *1874 CPR Act*.

a. The *Saskatchewan References*

[495] As noted, CPRC relies on the *Saskatchewan Reference SCC* to support the exemption against Income Tax as an impermissible tax on the use of the physical railway. Canada responds that the *Saskatchewan Reference JCPC* explicitly rejected the argument that the impugned tax in that case was a tax on business or income.

[496] The *Saskatchewan Reference SCC* concerned what the province had labelled a "business tax" and assessed on "either the area of the land or the floor space of buildings used, the rental value of the land and buildings used or their assessed value", which the government claimed was not "a charge upon such land or buildings" (*Saskatchewan Reference SCC* at 243-244). Justice Locke explained that because Clause 16 exempted the listed properties only to the extent that they were used for the construction and working of the railway, it would contravene Clause 16 to permit taxation upon the owner of those properties in respect of their use to operate the railway (*Saskatchewan Reference SCC* at 246-247). He reasoned (at 247):

> To construe the clause otherwise is to say that the properties mentioned are exempt from all taxation *when* used for the defined purpose, but *if* they are so used that the owner may be taxed in respect of that use. I am unable to so construe the clause.
>
> [Emphasis in original.]

[497] Justice Kellock made similar comments in his reasons (*Saskatchewan Reference SCC* at 218):

> Under the provisions of paragraph 16 of the [1880 Contract], the stations, station grounds, workshops and buildings required for the working of the railway were to be "forever free from taxation." It would be an extraordinary result if the proper interpretation of this exemption were to be said to be that while taxes imposed upon the owner in respect of his ownership of these things fall within the exemption, nevertheless taxes imposed upon the owner in respect of his use of the same items do not. I do not think the intention of the contracting parties to be derived from the language which they have employed involves any such result…

[498] Accordingly, the SCC found that a tax on the use of exempted property required for the operation of the railway amounted to a tax on the property itself, in contravention of Clause 16.

[499] The JCPC upheld this ruling, finding that Clause 16 exempted CPRC's Main Line from the impugned tax. Thus, both Courts struck down the Provincial "business tax", not because it was levied on something required to operate the railway, but rather because its true nature was a "property tax".

[500] Upon reviewing the *Saskatchewan Reference SCC* and the *Saskatchewan Reference JCPC*, I do not find that CPRC's argument can succeed in the case at bar. CPRC argues that the quote from Justice Kellock, above, prohibits a tax on income, which CPRC derives from the use of the Canadian Pacific Railway (*i.e.*, the Main Line), because the levy constitutes an impermissible tax on the physical railway.

[501] Yet, nothing in the *Saskatchewan References* supports equating taxes on income – an item not listed in Clause 16 – to taxes imposed on the use of the properties that Clause 16 lists. CPRC's guiding premise assumes that a tax on income must constitute a tax on the listed property because income is not otherwise listed in Clause 16. That is indeed one way of stretching the ordinary meaning of the words of the Exemption, but given the context, I do not agree with that expanded reading of Clause 16.

[502] In other words, the SCC and JCPC both held that Clause 16 captured the Saskatchewan business tax in question because it in essence only taxed the existence of the property itself, despite nominally targeting the use of the property. In the JCPC's phrasing, "where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is "forever free from taxation" the tax measured cannot be regarded as something lying outside the exemption" (*Saskatchewan Reference JCPC* at 794). Thus, the "use" of the property being taxed was exactly the same as the property itself, consequently making it, in essence, a property tax, rather than a business tax as it had been described by the province.

[503] Here, on the other hand, Income Tax derives from something beyond the property itself. It is not imposed on the physical existence of, for instance, rolling stock, whether in movement or stationary, or in another example, on the broader railway infrastructure required for the construction and working of the Main Line. Rather, Income Tax is levied only when CPRC activities and use of its equipment result in a profit. Looked at formulaically, whereas tax derived purely from use of property equals a tax on property, tax on income derived from the use of that

property does not equate to a tax on property. Taxing income is a step removed from taxing the property itself.

[504] Further, CPRC's argument ignores the remaining words of Clause 16 itself, which restrict the Exemption to properties "required and used" to operate the Canadian Pacific Railway. Thus, the argument either assumes that profit is "required and used" to operate the railway, or it extends the scope of the Exemption by creating a distinct category of tangible property that does not need to be "required and used" to work the Canadian Pacific Railway. In my view, neither option properly reflects the intent of the Parties evidenced by the words they chose to draft the Clause.

[505] CPRC has not provided this Court with evidence or authority indicating that profit is required to operate the Canadian Pacific Railway. As mentioned, in simple terms taxable income represents the amount by which revenues exceed expenses. While one might certainly argue that some form and quantity of revenue is required to operate the railway successfully – leaving aside the question of the Exemption – nothing before this Court suggests that in order for the railway to operate, the Company must generate a profit, giving rise to a tax liability.

[506] Said differently, I see nothing on the record to suggest that the contracting parties viewed profit as "required and used" for the working of the railway – as desirable as it would likely be for all practical purposes. Similarly, no intention to insulate profit from taxation can be ascertained from a plain reading of Clause 16, or any of the surrounding circumstances. Unlike the *1881 CPR Act*, the concept of "earnings" took a prominent place in the precursor *1872 CPR*

Act. Again, that 1872 legislation included earnings amongst other types of property listed in the *1881 CPR Act*, namely "buildings, right of way, permanent way, rolling stock and earnings of the Company and all property thereof" (see full extract above at para 475).

b. The other railway exemptions

[507] Moreover, I agree with Canada that, to the extent that some members of the Stephen Syndicate were involved in the Minnesota Arrangement, they would have been aware that the taxation of income was a distinct notion from the taxation of other physical property. That much is clear from the fact that the Minnesota Arrangement expressly exempted the railway, while also imposing taxes on annual income.

[508] Indeed, Dr. Regehr testified that the inclusion of Clause 16 in the 1880 Contract should be seen in the context of members of the Stephen Syndicate's involvement in the Minnesota Arrangement. Both Canada's and the Company's expert witnesses – Drs. Regehr and Hanna – agreed that Syndicate members George Stephen, Richard Angus, and James Hill had previously purchased the St. Paul, Stillwater &Taylor Falls Railroad in Minnesota in 1876 and reorganized it in 1878 as the St. Paul, Minneapolis and Manitoba Railroad.

[509] As mentioned, Dr. Regehr explained that a number of the members of the Stephen Syndicate would have been very familiar with Minnesota railway tax exemptions. He also explained that both CPRC and government spokespersons, when speaking in support of Clause 16, frequently referred to them.

[510] However, Dr. Regehr emphasized that in statements made in parliamentary debates about railways in Minnesota being exempt from property and capital stock taxes, there was no mention that these railways were subject to a gross earnings tax, paid in lieu of all other state and local taxes and assessments.

[511] In addition, Dr. Hanna stated that the Minnesota railway had proven to be very profitable, and the tax on gross revenue had become rather painful for the company; consequently, the tax exemption had been a wise precautionary measure. However, while the Minnesota Arrangement was explicitly linked to the imposition of a tax on gross earnings, Clause 16 made no reference to possible taxes on gross earnings.

[512] This interpretation is also consistent with *Northern Pacific*, in which the JCPC found that interpreting a tax exemption beyond its words would risk overshadowing the actual words chosen by the parties (at 508). Indeed, I see nothing in the circumstances or in the CPRC Instruments "which make it necessary or justifiable to read in the necessary words" to incorporate Income Tax into Clause 16 (*Northern Pacific* at 509).

c. Hansard evidence regarding the scope of Clause 16

[513] The Parties have encouraged me to place stock in certain statements of MPs. However, I give little, if any, weight to the passages from Hansard cited by the Parties in relation to whether Clause 16 exempts "income" or "earnings" from taxation. Case law cautions against the reliance on Hansard excerpts to determine the legislative intent behind statutes. As Justice Rothstein

wrote for the SCC in *Canadian National Railway v Canada (Attorney General)*, 2014 SCC 40 (at para 47):

> This Court has observed that, while Hansard evidence is admitted as relevant to the background and purpose of the legislation, courts must remain mindful of the limited reliability and weight of such evidence. Hansard references may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose. Here, Hansard is advanced as evidence of legislative intent. However, such references will not be helpful in interpreting the words of a legislative provision where the references are themselves ambiguous.
>
> [Citations omitted.]

[514] Here, statements made in Parliament concerning the 1880 Contract and the *1881 CPR Act* are ambiguous at best vis-à-vis the impugned Taxes: those statements do not shed light on whether Clause 16 applies to every possible type of taxation that could subsequently be imposed on the Main Line. Thus, MP statements offer limited help in interpreting the scope of Clause 16.

[515] Furthermore, the SCC has recently emphasized the distinction between the intent of particular MPs and the intent of Parliament as a whole (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 46, citing *R v Heywood*, [1994] 3 SCR 761 at 788, 120 DLR (4th) 348). I am all the more reluctant to place any weight on such statements to interpret the intention of contracting parties. Notably, in this case, the 1880 Contract had already been executed by the time many of these debates had taken place, and they therefore reveal very little, if anything, on why the contracting parties chose the words they did.

d. Extraordinary nature and circumstances of the agreement

[516] While acknowledging the significance of the BC Undertaking and the 1880 Contract, the Parties and their experts disagree on the relative importance of Clause 16 in incentivizing CPRC to construct the Main Line.

[517] The Plaintiff and Dr. Hanna describe the Exemption as the lynchpin of the 1880 Contract. CPRC submits that Clause 16 was the crucial incentive to attract investors because of the risks inherent in the creation of an extended railway line at the time, along with the requirement of its perpetual maintenance.

[518] The Company argues that the $50 million in combined land and money grants provided by the federal government were, alone, insufficient to attract the Stephen Syndicate, and were in fact less than what had been offered to the other syndicates in 1872. An income tax exemption was therefore the crucial element needed to attract investors and sufficiently outweigh the financial risks posed by the venture in the Plaintiff's submission. Indeed, they point to Dr. Hanna's testimony that Clause 16 was needed to lift the project off the ground.

[519] The Defendant and its expert, Dr. Regehr, on the other hand, view the financial grants and related concessions, such as the monopoly clause, as the key incentives that drove the Stephen Syndicate to build the railway. Canada categorizes Clause 16 as an afterthought; because federal Income Tax did not exist in 1880 – but rather emerged only during the First

World War – Clause 16 would have had only speculative and forward-looking value in that respect.

[520] Canada points to a number of communications between Stephen Syndicate member, Duncan McIntyre, and Prime Minister MacDonald during the negotiations for the 1880 Contract. In these exchanges, Mr. McIntyre expressed regret that the federal government would not extend the proposed exemption to branch lines beyond the Main Line. The Defendant also notes Dr. Regehr's remarks on the dearth of historical references to Clause 16 by railway historians in comparison with other clauses, such as the clause 15 monopoly provision, suggesting its secondary importance at the time. Dr. Regehr testified that this demonstrates the lesser importance of the Exemption, as a late-stage addition to the agreement. Overall, Dr. Regehr characterized the inclusion of Clause 16 as a precautionary measure against future taxation.

[521] These surrounding circumstances clearly influenced the "perpetual" obligations for both Parties in the 1880 Contract. Each obligation – whether the government's in terms of a perpetual tax exemption of Clause 16, or CRPC's obligation to operate the railway in perpetuity – was unusual and indicative of the extraordinary nature of the times and the 1880 Contract that they yielded.

[522] However, extraordinary as the history and content of Clause 16 was, a general appeal to the exceptional nature of the enterprise cannot translate to an unconstrained interpretation of the contractual provision. Context certainly forms an important part of the interpretation exercise, but it cannot overwhelm the words of the agreement chosen by the parties, nor their intent or the

scope of their understanding (*Sattva* at paras 47, 57). The parties to an agreement are presumed to have intended what the text of the contract actually says, as well as the legal consequences that flow therefrom (*Mosten Investments* at para 73; *Goodlife Fitness* at para 15; *Eli Lilly* at para 56).

[523] Contractual interpretation must consequently always be grounded in the precise words of the contract chosen by the parties, which are to be given their ordinary and grammatical meaning and read in light of the document as a whole, consistent with the surrounding circumstances (*Sattva* at paras 47, 57). As *Sattva* warns (at para 47), ascertaining contractual intention can be difficult when looking at words on their own "because words alone do not have an immutable or absolute meaning". Thus, context gives meaning to the words of the parties, but it must not be permitted to betray their contractual intent.

[524] With these principles in mind, I do not find that the extraordinary circumstances surrounding the formation of the 1880 Contract and Clause 16 support the argument that Clause 16 exempts the Main Line from Income Tax. While that type of tax was not imposed by the federal government in 1880, both the concepts of income, and its taxation, existed at the time. Neither income nor profits as concepts fell outside the common realm of knowledge, certainly not for the two sophisticated Parties involved.

[525] Furthermore, this case differs from those where the Courts were asked to consider the applicability of a term to a completely new item that emerged on the market after contract formation, such as whether "rapeseed" counted as "grain" (as in *Bogoch*), or whether a "vehicle" can refer to "cars and trucks" (as in *Thunder Bay*). Here, instead, CPRC asks this Court to

incorporate into the Exemption an item expressly omitted from the text of the agreement, but which existed and was commonly known, but not taxed, at the time of contract formation.

(iii) *Conclusion on Income Tax*

[526] Clause 16 does precisely what it says – it perpetually exempts from taxation those listed properties required and used for the construction and working of the Canadian Pacific Railway. As the Parties agree, the SCC has ruled that income constitutes personal property for tax purposes. None of "income", "profit", "earnings", or "personal property" are listed in the Exemption, nor have they been shown necessary to work the railway. In addition, these concepts were well known at the time the 1880 Contract was signed. In fact, earnings were expressly included in the *1872 CPR Act*. A careful consideration of the historical context of Clause 16, together with an analysis of the text of the provision, in comparison to other provisions of the same contract, leads to the conclusion that the contracting parties purposely chose to exclude income from the Exemption, and thus Clause 16 does not apply to Income Tax. A general appeal to the exceptional nature of the enterprise cannot unduly broaden its scope.

(d) Fuel Tax

[527] The second tax which CPRC submits falls into the scope of Clause 16's Exemption is Fuel Tax, which is an excise tax that has been imposed on diesel fuel since 1991. At the time of the 1880 Contract, no excise tax on diesel fuel existed. In that era, government relied predominantly on customs and excise duties as sources of revenue. Excise tax on diesel fuel came into existence approximately 40 years after the contract was executed. Subsection 2(1) of

the *ETA* defines diesel fuel to include any fuel oil suitable for use in compression-ignition type, internal combustion engines. Depending on its use, fuel may be excluded from the definition of taxable diesel fuel – for instance, when it is used as heating oil.

[528] Fuel Tax is payable (i) by a manufacturer of diesel fuel on its first domestic sale, and (ii) by an importer of diesel fuel upon importation into Canada. Fuel produced in Canada and subsequently sold domestically is taxed at four per cent per litre, which tax is paid by the manufacturer or producer of the fuel (*ETA* ss 23(1)-(2); *ETA* Schedule I, s 9.1).

[529] Broadly speaking, if the vendor can apply for the refund, the cost would not be passed onto the buyer. If not, then the purchaser pays for the added cost of the Fuel Tax, and then is refunded by CRA if used for an exempt purpose.

[530] CPRC purchases diesel fuel for its operations from several suppliers. The invoices and receipts provided by these suppliers indicate an amount paid in respect of the Fuel Tax for the fuel purchased. At the time of purchase, CPRC does not know the precise purpose to which the fuel will be used, and therefore does not know if the fuel may later be excluded from the definition of taxable diesel fuel.

(i) *The Parties' arguments*

[531] CPRC argues that Fuel Tax is covered by Clause 16, as it is "anchored" in the phrase "Canadian Pacific Railway" and the terms "appurtenances", "other property", and "rolling stock". The Company contends that fuel is "other property" and/or an "appurtenance" which is

"required and used for the construction and working of the Main Line". Specifically, CPRC submits that "property", listed in Clause 16, is a broad term perfectly capable of encapsulating "fuel". It notes that the Defendant's American railway law expert, Dr. Ely, accepted that fuel is required to operate railways.

[532] In addition, CPRC posits that Fuel Tax is purely and simply a tax on the use of exempted "rolling stock". In particular, the Company contends that without fuel, it is inhibited from using its rolling stock, and locomotives and therefore from operating the railway as a whole. The Plaintiff's arguments regarding Fuel Tax are similar to those it made with respect to Income Tax, which include reliance on the *Saskatchewan References* regarding the use of the property that Clause 16 enumerates (see previous section of these Reasons).

[533] Canada, on the other hand, argues that a plain reading of Clause 16 reveals the Exemption does not apply to Fuel Tax. The Defendant contends it is not "property" *per se*. While Canada acknowledges that Clause 16 declares "other property" forever free from taxation, it nonetheless contends that the adjective "other" calls for the application of the class closing rule – or *ejusdem generis* – to restrict the term "property" to the same class of property as those items previously listed. These preceding items are "stations and station grounds, workshops, buildings [and] yards". Applying the class closing principle, Canada submits that Fuel Tax does not qualify as "other property", and is not exempt from taxation by Clause 16.

[534] Furthermore, Canada contends that Fuel Tax is not imposed upon CPRC, but rather on the vendor of diesel fuel selling it to the Plaintiff. Thus, the Fuel Tax, at most, represents an

economic cost that forms part of the consideration – or purchase price – that CPRC pays to procure diesel fuel.

[535] Finally, both Parties also provide significant comment on whether, in their estimation, fuel is captured as an "appurtenance" by Clause 16. CPRC argues that it is, because the term is broad. Canada argues the opposite. As these submissions invoke specific case law interpreting "appurtenance", the Parties' positions with respect to the term will be set out in greater detail next, in the analysis section.

(ii) *Analysis*

[536] For ease of reference, the critical portion of Clause 16 in respect of Fuel Tax reads:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation…

a. "Other property" in Clause 16 does not include fuel

[537] I agree with Canada that it is appropriate in these circumstances to restrict the meaning of the term "other property" using the class closing rule. According to Professor McCamus, where a provision lists a series of particular items sharing a common characteristic, and the list is then completed by a more general phrase, the class closing (*ejusdem generis*) principle limits the scope of the general phrase to the extent of the common characteristics or the class of the

particularised items (John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 827 [McCamus (Contracts)]).

[538] Professor McCamus cautions that the principle is not a rule, but an interpretive aide which requires a contextual assessment of the particular clause in question (McCamus (Contracts) at 828). He remarks that, "the common sense underlying the canon is that the particular items in a list are suggestive of the object of the provision and it is generally appropriate, of course, to interpret a clause in the light of its object".

[539] Though the principle is more commonly applied in the context of statutory interpretation (for example, see *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at paras 42-43; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at paras 106, 109), it is equally applicable in the contractual context (see for instance *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029 at 1039-1042, 74 DLR (4th) 197). The SCC's decision in *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co* (1975), [1976] 1 SCR 580, 56 DLR (3d) 409 [*Atlantic Paper*] provides another example of applying the class closing principle to a commercial contract.

[540] *Atlantic Paper* concerned a 10-year commercial agreement providing for the purchase and sale of a minimum annual quantity of waste paper for the manufacture of corrugating cardboard. The agreement provided that the minimum purchase requirement could be waived in any year in which "as a result of an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the

nonavailability of markets for pulp or corrugating medium" (*Atlantic Paper* at 582, emphasis added).

[541] After 14 months, the purchaser notified the vendor that it would no longer accept waste paper. Based on the lack of demand for its product, the purchaser invoked the phrase "nonavailability of markets for pulp or corrugating medium" to excuse its breach of the agreement. That lack of demand was largely due to the purchaser's poor planning, marketing, and high operating costs.

[542] Writing for the Court, Justice Dickson found that the clause was properly characterized as an "act of god or *force majeure*" clause, meaning that its invocation required an event or occurrence which was unexpected and beyond the control of either party, or "beyond reasonable human foresight and skill" (*Atlantic Paper* at 583). This was because the phrase "nonavailability of markets" was found in a clause which otherwise listed events and occurrences that were entirely out of either party's control – hence the characterization as a *force majeure* clause. He wrote (*Atlantic Paper* at 583):

> Reading the clause *ejusdem generis*, it seems to me that "nonavailability of markets" as a discharging condition must be limited to an event over which the respondent exercises no control.

[543] As the purchaser had control over the events preceding the breach, Justice Dickson concluded that the purchaser could not invoke the clause to excuse their breach. Thus, the more general phrase "nonavailability of markets" was restricted by the common characteristics shared by the other items, namely, a lack of control.

[544] In my view, in the present case, it is similarly appropriate to rely on the class closing principle as an interpretative tool to determining the meaning of Clause 16. The relevant phrase in question states, “The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances…”. First, there is a reference to real property, which serve as a common thread among all items preceding “other property” – recalling that “Canadian Pacific Railway” refers to the physical railway.

[545] Moreover, “other property” is followed by specific types of property, namely in “rolling stock” and “appurtenances”, making it illogical to construe “other property” as a catchall term for real or personal property. To that point, the terms in question are included in the phrase “yards and other property”, suggesting a commonality among the enumeration that ends at “other property”.

[546] As Canada submits, the Court in *Estevan SCC* interpreted Clause 16 in a similar manner. While examining its scope, Justice Locke wrote (at 373):

> The common and universal principle for the interpretation of an agreement is that it should receive that construction which its language will admit which will best effectuate the intention of the parties and, applying this rule to the construction of the contract in question, it is my opinion that the intention of the parties to this contract was that the exemption should extend only to stations, workshops and other properties of the nature referred to, the primary purpose of the acquisition or construction or maintenance of which was to be of use in the construction or operation of the main line as an entity.
>
> [Citations omitted, emphasis added.]

[547] CPRC argues that the class closing principle cannot restrict the meaning of "other property" to one specific class of property, such as real property, because Clause 16's list of property is generic and the items listed comprise several types of property, including real property (stations, work shops, buildings, yards), personal property ("rolling stock"), appurtenances, and intangible property ("capital stock"). In other words, there is no one "class" to close according to the Plaintiff. CPRC also claims that Dr. Ely contradicted the argument that items not expressly listed in Clause 16 are excluded, because the term "property" has been interpreted in the American context to include tangible and intangible property.

[548] Instead, the better interpretation, according to the Plaintiff, is that "other property" is of the same character as the other items stated to be "required and used for the construction and working" of the Main Line. This includes property falling within that generic definition from time to time, such as fuel and income. Otherwise, CPRC argues that restricting "other property" would render the word "appurtenance" meaningless.

[549] On the first point, I recognize that Clause 16 enumerates three different categories of property: real, tangible, and intangible. Setting aside "other property", (i) "Canadian Pacific Railway, all stations and station grounds, work shops, buildings [and] yards" generally constitute real property; (ii) "rolling stock" constitutes tangible personal property; and (iii) "capital stock" is intangible personal property. This question therefore arises: does the class closing principle restrict the meaning of "other property" to "real property", notwithstanding that there are other types of property listed in the Exemption?

[550] Canada has persuaded me that the answer to this question is “yes”. The location of the words “other property” within Clause 16 (emphasized below) supports the position that it closes the class of real property that precedes it. Again, Clause 16 states that the following items are forever free from taxation:

> (i) The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, (ii) rolling stock and appurtenances required and used for the construction and working thereof, and (iii) the capital stock of the Company…
>
> [Numeration (i)-(iii) added for the three types of property.]

[551] The location of the words “and other property”, in my view, closes the real property class of the railway, having specified the types of real property, namely stations and station grounds, workshops, buildings, and yards. In my view, had the drafters intended to capture other types of non-real property, they would have placed the term “and other property” at the very end of the list, *i.e.*, after item (iii) above.

[552] I also note, from a structural point of view, “other property” does not sit in isolation, but rather comes mid-sentence in the phrase “yards and other property”. That phrase is then followed first by a comma, and then by two further types of property, namely (i) rolling stock and (ii) appurtenances “required and used for the construction and working” of the railway.

[553] The phrase “other property”, if interpreted broadly, would include all property required for the railway and not already listed in the clause. That would render the two following types of property – “rolling stock” and “appurtenances” – redundant, because those are clearly types of

"other property". Similarly, it would render the inclusion of "capital stock" redundant, although there is no limitation on capital stock being "required and used" to work the railway.

[554] Imagining the possibility of Clause 16 having been constructed in another manner, and applying the principles of contractual interpretation to that hypothetical, is helpful in this instance. Consider the placement of "other property" at the end of the enumerated terms, where the Exemption could have read thus:

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards ~~and other property~~, rolling stock and appurtenances required and used for the construction and working thereof, the capital stock **and other property** of the Company, shall be forever free from taxation…

[555] The hypothetical placement of "other property" after "capital stock", would have led to a broader interpretation such that the term included all types of property that had not been listed beforehand. If that had been the case, "other property" would not be properly read down under the *ejusdem generis* (class closing) rule.

[556] Indeed, one analogous occurrence of a similar, generic phrase that would have been broadly interpreted was the exemption in the *1872 CPR Act*, which states:

> [t]he buildings, right of way, permanent way, rolling stock and earnings of the Company and all property thereof, except the lands granted or to be granted by any government in aid of the said railway, shall be exempt from taxation.
>
> [Emphasis added.]

[557] While the distinction in the wording "other property" in the *1881 CPR Act*, as opposed to "all property" in the *1872 CPR Act*, might warrant some debate, the placement of these terms within the two tax exemption provisions in analogous legislation is notable: the *1872 CPR Act* places the phrase at the very end of the enumeration, subject to the exceptions for land grants in aid of the railway.

[558] The terms negotiated several years later by the Parties read very differently: the drafters of Clause 16 and the 1880 Contract specifically chose to insert the phrase "other property" after a list of items of real property, and before a list of personal property. While certainly not suggesting the same individuals drafted both the 1872 legislation and the Clause 16 Exemptions – other than the fact that Canada enacted both the 1872 and 1881 legislation – I nevertheless find the difference in phrasing between the two to be significant.

[559] In addition to a purely textual reading of Clause 16 and where the term "other property" falls within its enumeration, the term must be read in the broader context of the day, including the fact that fuel was a well known commodity at the time, and as the Plaintiff observes, was required to run the locomotives and the railway at large. Yet Clause 16 makes no mention of fuel whatsoever (as I expand upon below).

[560] Furthermore, I have not been presented with – nor come across – any authority that prohibits using the *ejusdum generis* principle to close a list of common words within a larger enumeration. That is, nothing prevents the class closing principle from being applied to some, but not all, words in a list, provided those words share a common trait.

[561] As discussed, the class closing principle states that a list of specific words with a shared characteristic can restrict the meaning of a more general word that follows the list. While a general word may "complete" a specific list, it does not need to be physically situated at the end of a sentence, or even at the end of the list. All that matters is that the specific words and the general word(s) must share a common trait. Thus, applying the class closing principle to "other property" is not precluded by the fact that Clause 16 subsequently lists "rolling stock", "appurtenances", and "capital stock" after the general word "other property".

[562] On its face, it appears clear that the drafters of Clause 16 intended to limit "other property" to the type of property preceding it, that is, real property. For example, this could potentially include the "dock ground and water frontage at the termini on navigable waters" referenced in clause 10:

> In further consideration of the premises the Government shall also grant to the Company the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, and other appurtenances required for the convenient and effectual construction and working of the railway.
>
> [Emphasis added.]

[563] Further, this interpretation resolves the ambiguity raised by CPRC in relation to the phrases "other property" and "appurtenances". By restricting "other property" to mean "other real property", one can infer from the text of the agreement that the drafters intended to exempt other types of properties, other than real property, which are appurtenant to the Main Line, and the listed properties that are used and required to operate the railway. Appurtenances could thus include, for example, personal property that is accessory to the Main Line (*e.g.*, tools in a station

workshop). As explained later in these Reasons, I do not view "appurtenance" as it appears in Clause 16 to have been intended to include fuel.

[564] Note that I conclude on the narrower meaning of "other property" not by applying *ejusdem generis* alone – the class closing principle is by no means determinative of the issue by itself. Rather, it is but one factor assisting to determine the objective intentions of the contracting parties in light of the text of the 1880 Contract and Clause 16, along with the objective surrounding circumstances (see, for instance, *Bankruptcy of 5813906 Manitoba Ltd*, 2016 MBQB 133 at para 32(d); see also *Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71 at para 48). In the context of the scope of Clause 16, fuel – similar to income – was a known property.

[565] Another notable factor is that Clause 16 provides no express text to exempt fuel or consumables required to operate the railway. During his direct examination, Dr. Hanna took the Court through a series of eight photographs (reproduced in Annex I to these Reasons). These eight photographs were selected from an informative historical collection contained in his Reply report (Reply Expert Witness Statement of Dr. David Hanna, dated November 8, 2019, Tab A – Illustrated Catalogue of CPR Main Line Facilities). Dr. Hanna referred to a map of Regina to demonstrate the size requirements for railway grounds at the time, remarking on the need for numerous facilities, which included "passenger and freight facilities, sidings, water tower, coal fuel [and] wood fuel" (Hanna testimony, Vol 2 at 238: 12-13; see Regina map at Annex I-2 to these Reasons). Dr. Hanna further testified that (at 240: 21-28, referring to the image at Annex I-4 to these Reasons):

> [I]n the foreground, we see the coal sheds because we are in a transitional period in the early 1880s where locomotives are moving from wood fuel to coal fuel. And then the wood structure would be kept -- you see photographs where all these structures remain in place through the 1900s as coaling facilities. So these huge sheds, on the right, contain the fuel, the carbon, I guess, that goes into the steam locomotive operation.

[566] Dr. Hanna later explained the elements of these coal sheds, as well as the process by which coal was delivered to them. Dr. Hanna's testimony demonstrates that railways in the 1880s generally required some form of fuel, though not diesel, to operate at the time.

[567] The 1880 Contract could have provided an exemption on fuel. The Parties would certainly have been aware of the necessity of consumable fuels for the operation of the railway. If they were intent on exempting such fuel from taxation, they would, in my view, have provided for such an exemption in unequivocal terms. However, Clause 16 makes no such mention of fuel.

[568] Similar to my comments on Income Tax above, this Court has not been asked to include or read diesel – which did not exist at the time of drafting, but which later came into existence and would be included in a modern, dynamic interpretation – into a listed category of "fuel" or "combustible" (again, the examples of *Thunder Bay* and *Bogoch* were referenced in the relevant section above vis-à-vis Income Tax). Instead, here CPRC asks that this Court read diesel fuel into the listed terms that the drafters did not include.

[569] I am not satisfied that the term “other property”, or any other term of Clause 16, was intended to capture an item as vital as “fuel”. In light of that finding, it is not this Court’s role to change the meaning of Clause 16 beyond the intention of the drafting parties.

b. Fuel is not an “appurtenance”

[570] In the same vein as CPRC’s first argument, I am equally unpersuaded by its argument that the term “appurtenance” incorporates fuel, given its indispensable nature to railway operations in 1880. Despite the authorities that the Plaintiff has relied on to support its submission that the word “appurtenance” can hold a very broad meaning, I remain unconvinced that its breadth can be cast wide enough, in these circumstances, to capture fuel.

[571] CPRC notes that in *Hudson, Re* (1908), 16 OLR 165, 11 OWR 912, the Ontario Weekly Court held that the term “appurtenances”:

> is a word of large and flexible meaning, and, apart from its legal conveyancing sense, it has a popular meaning, and may be applied to personalty. One of is meanings in the Oxford Dictionary is, “things which naturally and fitly form a subordinate part of and belong to a whole system — contributory adjuncts.”

[572] CPRC also points to the trial level decision in *Canadian Pacific Railway v Estevan (Town)* (1955), 15 WWR 673 (Sask QB) [*Estevan QB*], rev’d in part (1956), 2 DLR (2d) 166 (Sask CA) [*Estevan CA*], aff’d *Estevan SCC*, which relied on this statement in noting that “appurtenance” was a “very comprehensive word”, and in finding that the water-supply facilities and systems along branch lines were appurtenances.

[573] *Estevan QB* was varied on cross appeal in *Estevan CA*. However, CPRC submits that this finding remained untouched, noting that the facilities would have been exempt had they been required and used to operate the Main Line.

[574] Canada responds that "appurtenance" does not generally include consumable goods, instead referring to items that are accessory to another item, whether that be real or personal property. Canada submits at paragraph 388 of its Memorandum:

> An appurtenance is something that is accessory to another item of real or personal property. In the case of the railway, items like, fences, switches or railway crossing arms may be viewed as appurtenant to the plaintiff's real property. In the case of personal property, a snow blowing attachment or cattle catcher may be appurtenant to a railway locomotive. Consumable items are not appurtenant to anything.

[575] A number of cases have held "fuel" not to be an appurtenance. For instance, Canada notes that Prothonotary Hargrave held in *Fraser Shipyard & Industrial Centre Ltd v Expedient Maritime Co* (1999), 170 FTR 1, [1999] FCJ No 947 (TD) [*Fraser*], rev'd in part, 170 FTR 57, [1999] FCJ No 1212 (TD), that fuel aboard a ship which was subject to a mortgage claim did not constitute an appurtenance in respect of the claim, and was not subject to a priority claim against the fuel supplier.

[576] *Fraser* relied on the United Kingdom case in *Den Norske Bank et al v Owners of the Ships Eurosun and Eurostar*, [1993] 1 Lloyd's Rep 106 (QB Adm), in which Justice Sheen held that a mortgage on a ship and its appurtenances did not include the ship's fuel. Canada refers to a particular quote from Justice Sheen, describing why "fuel" was not an appurtenance (at 111):

> The word ‘ship’ does not include fuel. It is common practice for the fuel to be the property of the charterers. The only word which arguably covers fuel is ‘appurtenances.’ The ordinary meaning of ‘appurtenances’ is a mechanical accessory or some apparatus or gear which appertains or belongs to the ship. Fuel oil cannot be an appurtenance in this sense.

[577] Canada also relies on *Penner International Inc v Canada*, 2002 FCA 453 [*Penner*], a Fuel Tax case in which the Federal Court of Appeal drew a distinction between a truck and the fuel housed in its fuel tank. The Court held that, for tax purposes, the truck was not considered an “export” because it left and returned to Canada, whereas the fuel consumed by the truck outside Canada would never return, meaning it had been “exported” (at para 11).

[578] In the *Penner* line of reasoning, Canada challenges CRPC’s reliance on *Estevan QB,* noting that while the Court did mention that the water-supply facilities and holding tanks would have been considered appurtenances, it did not speak to the water inside those facilities and tanks. Canada submits fuel is not an “appurtenance” because it is never appurtenant to anything, even when contained in something that is.

[579] In the alternative, Canada contends that fuel, even if considered an appurtenance, is not taxed as such under the *ETA*, but rather as a commodity. To be taxed as an appurtenance, by definition, it must be taxed for being appurtenant – or an accessory – to something else. Yet, s 23 of the *ETA* imposes tax on the purchase and sale of diesel fuel as a good. Canada contends, as a result, that Fuel Tax is not a tax on an appurtenance in the sense of Clause 16.

[580] I agree with the proposition that an appurtenance, in respect of Clause 16, must be something that is accessory or appended to a principal item of tangible property. Being "accessory" does not mean that an appurtenance must be permanently or physically attached to other railway property, although it certainly can be.

[581] While the term "appurtenance" has rarely been litigated, as evident from the sparse jurisprudence, ultimately the term has most often been used in the real property sense to determine whether something is "appurtenant" to land, but which does not include real estate itself. For example, the Ontario Court of Appeal in *Reid v Mimico* (1926), [1927] 1 DLR 235, 59 OLR 579 (CA) cited this early common law precedent from the United Kingdom (at 237):

> In *Buck v. Nurton* (1797), 1 Bos. & P. 53, 126 E.E. 774, the headnote is as follows: — "Lands usually occupied with a house, will not pass under a devise of 'a messuage, with the appurtenances,' unless it clearly appears that the testator meant to extend the word 'appurtenances' beyond its technical sense."

[582] The SCC has occasionally (and not for many years) interpreted the term "appurtenance". It stated in *Canada (Attorney General) v Higbie*, [1945] SCR 385 at 412, [1945] 3 DLR 1 [*Higbie*]:

> Standing alone the word "appurtenances" does not include land. Land cannot be appurtenant to land.
>
> [Citations omitted.]

[583] *Higbie* in turn cited (at 412) an earlier SCC decision in *Vaughan v Eastern Townships Bank* (1909), 41 SCR 286 at 299, 10 WLR 165, which had interpreted the word "appurtenance", relying on two definitions of appurtenance. The first, from Bouvier's Dictionary (vol 1, at 158),

reads: “[t]hings belonging to another thing as principal, and which pass as incident to the principal thing”. The second, from *Burton on Real Property* (8th ed, at 353) states “[i]n general everything which is appendant or appurtenant to land will pass by any conveyance of the land itself, without being specified, and even without the use of the ordinary form “with the appurtenances” at the end of the description”.

[584] Turning back to the concept of appurtenance as “accessory”, its broader sense requires a necessary or complementary, direct link between the appurtenance and its associated property. This will most often require physical proximity between the principal property and the appurtenance.

[585] Examples of these accessories are water and fuel holding tanks or pumps. These items can be permanently affixed to the land, and would then be considered fixtures or buildings. However, they are not necessarily considered buildings or fixtures, but may rather be defined as appurtenances, to the extent that they serve a direct and complementary purpose in relation to another item of railway property – such as the railway itself, a yard, a building, rolling stock, etc. – in that they are required and used to work the railway. However, I note that those appurtenances are separate from their contents.

[586] This interpretation accords with the broader text of the 1880 Contract. For instance, the federal government granted certain lands to the Company required for appurtenances under clause 10 which reads:

> In further consideration of the premises, the Government shall also grant to the Company the lands required for the road bed of the

> railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenience and effectual construction and working of the railway, in so far as such land shall be vested in the Government…
>
> [Emphasis added.]

[587] Similarly, clause 14 provides for grants of land required for property, including appurtenances, in respect of branch lines:

> … And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the government.
>
> [Emphasis added.]

[588] In my view, to include "appurtenances" among those clause 14 properties requiring land further suggests that the term was meant to capture property accessory to or annexed to the physical railway, and required and used in its operation.

[589] This discussion regarding appurtenances, and whether the term captures fuel, brings us back once again to the disagreement between CPRC and Canada on the relative importance of Clause 16 as an incentive, with the Plaintiff contending it was indispensable to attract investors, and the Defendant, arguing it held secondary importance. Counsel put the question to railway history experts Drs. Hanna and Regehr, who similarly disagreed on the Clause's relative importance.

[590] There is little to be gained by dwelling on this point as I see minimal value in attributing subjective intentions to the drafters in the 1880s based on this modern testimony. More to the point, evidence of subjective intentions should not form part of the interpretative exercise (*Goodlife Fitness* at para 17; *Weyerhaeuser* at para 112; *Timothy's Coffees* at para 16).

[591] I have already observed that the drafters omitted the word "fuel". Neither does one find other words such as "coal" or "combustibles" in the listed properties subject to the Exemption. The evidence on record shows that those same drafters would objectively have been aware that fuel was required to work railways, though not diesel fuel specifically.

[592] As Dr. Regehr pointed out, and as both Parties acknowledge, Clause 16 served a precautionary purpose against future tax. For this forward-looking reason alone, had the drafters intended fuel to be exempt, they would have specified it, whether in the lists at Clause 16, or for that matter in clause 10. Yet, they did not. In light of this fact, to find that "fuel" was captured within the meaning of "appurtenance" would strain the term beyond its reasonable limits. Respectfully, I decline the invitation to include it, and thus conclude that the term "appurtenances" does not prohibit Fuel Tax on diesel fuel levied under Part III of the *ETA*.

c. The meaning of the French translation (*dépendances*) does not change the analysis

[593] Towards the end of the legal submissions phase of this trial, I asked a question regarding any impact that might result from applying the principles of bilingual interpretation (vis-à-vis the French version of the 1880 Contract). I pointed the Parties to the term "dépendances", the French

translation of “appurtenance”, which, on its face, appeared more restrictive in meaning than that of its English counterpart. The Parties provided post-hearing written submissions in response.

[594] Both Parties caution the Court that the 1880 Contract was translated after the agreement had been signed, such that there is no evidence that the signatories spoke French or specifically chose the word “dépendances”. Thus, both Parties assert the focus should be on the English text in determining the intent of the drafters.

[595] CPRC submits that the Court could apply the shared meaning rule of statutory interpretation in the event that the English “appurtenance” is ambiguous, acknowledging that “dépendance” appears more restrictive in meaning. Canada cautions that the word “appurtenance” was not always restricted to real property in the tax context, pointing to the GST provisions in the *ETA*, as it sometimes included personal property.

[596] I agree it wise to restrict the analysis of the term “appurtenance” to the English text, as there is no evidence demonstrating that the contracting parties, including Messrs Stephen, McIntyre, Kennedy, Angus, and Hill of the Stephen Syndicate negotiated the 1880 Contract in French, or even understood the language. This approach is most consistent with the contractual interpretation applied to the 1880 Contract, the ultimate purpose of which is to ascertain the intent of both contracting sides. It would be ill-advised to stray beyond the four corners of the agreement and of its factual matrix.

d. Tax on the use of the Main Line

[597] CPRC's argument that a tax on fuel is a tax on the use of the Main Line mirrors one of its arguments in respect of Income Tax. I have already determined above, in paragraphs 484-494 of these Reasons, that the term "Canadian Pacific Railway" at Clause 16 refers only to the physical railway line, and does not therefore include income. For the same reasons, I also do not find that the exemption from taxation on the "Canadian Pacific Railway" applies to or incorporates fuel.

e. Tax on the use of rolling stock

[598] CPRC submits that "rolling stock", which Clause 16 renders exempt from taxation, requires fuel to operate. The Company argues that, as a result, a tax on fuel required for the rolling stock is the equivalent of a tax imposed on the use of that rolling stock. In support of this argument, CPRC relies primarily on the *Saskatchewan References*. As discussed above, those decisions held that Clause 16 prohibited an impugned "business tax" that, in reality, was levied on the exempted property in relation to its use, and was thus a property tax by another name: both the SCC and JCPC found that permitting the tax would irreconcilably mean the Exemption prohibited taxation directly on the ownership of the properties, but allowed taxation on their use.

[599] In my view, the debate over the interpretation of Clause 16 in this case is distinguishable from the facts that presented themselves in the *Saskatchewan References*. The tax at issue in those cases was computed, according to the statute, "a rate per square foot of the floor space… used for business purposes". Both the SCC and JCPC found that the tax contravened Clause 16 because it directly taxed the use of the exempted property. The pivotal factor in the facts

presented in the *Saskatchewan References* was that the tax directly targeted properties listed in the Exemption.

[600] In oral arguments before the SCC and the JCPC, Saskatchewan had argued that Clause 16 applied only to the physical items of property – that is, it exempted taxes imposed directly on those properties, but not in respect of those properties. Part of their reasoning was that the taxes imposed no liens or charges on the property itself. Justice Locke of the SCC summarized Saskatchewan's argument as follows (*Saskatchewan Reference SCC* at 244):

> The position adopted on behalf of the Province of Saskatchewan put bluntly is this: That while neither the physical property defined by cl. 1 nor the Canadian Pacific Railway Company in respect of its ownership of that property is liable to taxation, so-called business taxes may be levied upon the Company in respect of its business of operating it. <u>While the language of cl. 16 is that the property shall be "forever free from taxation" by any Province thereafter to be established, it is said that to tax the Company in respect to the use of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited.</u>
>
> [Emphasis added.]

[601] Before the JCPC, counsel argued that the tax was not imposed on property *per se*, but was imposed upon persons carrying on business, and the computation of the tax liability with reference to square footage was merely a yardstick. The JCPC remarked that even though the Exemption was conferred upon the listed physical property, "all taxes are exacted from and paid by persons, and the question comes to be whether the respondent company, as the owner and user of the properties mentioned, is free from taxation in respect of them" (*Saskatchewan Reference JCPC* at 793). The Court continued (at 793-794):

> There are no doubt many instances in which it is important to distinguish between the nature of the tax imposed and the measure of the amount of tax to be paid… But where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is "forever free from taxation" the tax measured cannot be regarded as something lying outside the exemption.
>
> Their Lordships agree with the view of the majority of the Supreme Court that in the present instance the tax in question is imposed upon the owner of things which he is using in his business.
>
> [Emphasis added.]

[602] The JCPC, like the SCC, thus concluded that Clause 16 prohibited a tax on the use of listed property. Consequently, the *Saskatchewan References* allow two ways to view a tax on fuel in relation to Clause 16. First, viewed narrowly, the two courts held that where a clause exempts certain property required for a particular purpose forever from taxation, and the government imposes a tax on the owner of that property computed by direct reference the property for this purpose, the tax would contravene the Exemption.

[603] Second, viewed broadly, the *Saskatchewan References* held that a clause which exempts certain physical property from taxation (in that case stations and station grounds, buildings, and other property) required for a particular purpose (the construction and working of the Main Line) also exempts those properties from taxes imposed on the use of those specific properties.

[604] I remain unpersuaded, however, that either a broad or narrow reading of the *Saskatchewan References* assists the Plaintiff here. As already explained, Clause 16 does not list "fuel" as an item of property.

[605] CPRC asks this Court to incorporate "fuel" into the term "rolling stock". Looking back to "rolling stock", the words chosen by the drafters of the 1880 Contract, I note that Fuel Tax is imposed on diesel fuel – not on rolling stock. The tax is not computed by reference to the use of locomotives, for instance, by measures such as their distance travelled, by the number of train cars used, or by the net weight of the locomotives. Nor is it computed by the weight or quantity of cargo. Similarly, Fuel Tax liability does not arise on the purchase and sale of rolling stock.

[606] Rather, Fuel Tax only flows from the purchase of diesel fuel, proportional to the quantity purchased. Diesel fuel is unquestionably necessary to run the rolling stock, and thus instrumental to its use. Indeed, a refund can be obtained for fuel used for exempted purposes, including as heating fuel.

[607] While I agree that for all practical purposes, rolling stock cannot be operated without fuel, Clause 16 of the 1880 Contract lists the items that benefit from the tax exemption, just as clause 10 itemizes a list of duty-free items. Yet, fuel is absent from Clause 16, and I do not find that it can be read in, given the drafters' express wording, which is specific and deliberate, not only in Clause 16 but also in all other provisions of the 1880 Contract.

[608] In sum, the argument that Fuel Tax is a tax on the use of rolling stock ultimately assumes that "rolling stock" and fuel are one and the same. However, the drafters treated the two differently by including one in the Exemption (*i.e.*, rolling stock) and excluding the other (*i.e.*, fuel). I am therefore unpersuaded that Fuel Tax is a tax on the rolling stock of the Company.

f. Indirect taxation

[609] Aside from its plain reading interpretation of Clause 16, Canada posits that another reason Fuel Tax does not fall within the Exemption is that it is an indirect tax paid by the fuel manufacturer, not CPRC as the ultimate consumer. Canada maintains that because the fuel manufacturer or producer passes on the tax to the fuel consumers, it is in fact an "economic burden", which forms part of the purchase price. In Canada's view, a tax exemption does not protect a person or entity from the economic burden of a tax imposed on another.

[610] Canada relies on *Saugeen Indian Band v Canada* (1989), [1990] 1 FC 403, 31 FTR 160 (CA) [*Saugeen*] for this argument. In that case, the Appeal Division of the Federal Court held that an exemption on tax for First Nations Peoples under s 87 of the *Indian Act*, RSC 1970, c I-6, as amended by SC 1980-81-82-83 [*Indian Act*] did not apply to federal sales tax ("FST"), which was at that time imposed on diesel fuel under the *ETA*.

[611] Applying for a refund of FST paid on the purchase of diesel fuel, the First Nations Band argued that FST constituted an indirect tax contravening the tax exemption under the *Indian Act* (which, for reference, exempts certain listed properties, as well as First Nations individuals and bands in respect of those properties, from "taxation"). The Court proceeded to examine various historical and judicial statements on the distinctions between direct and indirect taxes, accepting that an indirect tax was paid by one person, on the expectation and intention that person would indemnify themselves for the tax from the next person (*Saugeen* at 5).

[612] The Court noted that the terms “direct” and “indirect” tax were tailored not for legal purposes, but instead to trace the incidence of taxation from an economic perspective. For legal purposes, Justice MacGuigan observed that when a tax was “passed on” to a subsequent party as part of a purchase price, it was not the tax itself that was passed on, but merely the equivalent economic burden of that tax (*Saugeen* at 10). The Court held that purchasers had not paid the tax, but rather a commodity price that included the tax.

[613] The Court ultimately found that that the purchaser could not be considered a “taxpayer” eligible for a refund. As the tax had been paid by another party earlier in the commercial chain, the Court reasoned that the band could not rely on s 87 of the *Indian Act* because there was no tax imposed on the “personal property of an Indian or a band situated on a reserve” (*Saugeen* at para 30). Neither could the band rely on the words “otherwise subject to taxation in respect of such property” in s 87 because, again, the band never paid the tax. Justice MacGuigan noted in *Saugeen* (at 10) that:

> [T]he appellant cannot be said to be taxed by the Excise Tax Act, even though the burden of the tax is undoubtedly passed on to it, as several of the invoices made explicit. What the appellant paid was not the tax as such, but commodity prices which included the tax. This is sufficient, for constitutional purposes, to make the tax indirect. But it is not enough, for tax purposes, to establish the appellant as the real taxpayer.

[614] Aside from *Saugeen*, the Defendant relies on several cases for the proposition that a tax passed on as part of a purchase price is not necessarily a tax on the purchaser. For instance, in *R v M Geller Inc*, [1963] SCR 629 at 631, 41 DLR (2d) 367, the reimbursement of FST was a matter strictly between the parties not affecting the rights of the Crown.

[615] More recently, in *Telus Communications (Edmonton) Inc v R*, 2009 FCA 49, leave to appeal to SCC ref'd, [2009] GSTC 120, the Federal Court of Appeal held that the applicant purchaser of a company had not paid GST on the purchase, but had rather paid the consideration for the supplies that formed part of the purchase price.

[616] Similarly, in *Roberge Transport Inc v R*, 2010 TCC 155, GST paid by a trucking company and recouped from drivers was found to constitute consideration drivers paid for supplies, and not tax. Finally, in *British Columbia Transit v R*, 2006 TCC 437, an amount equivalent to property tax paid by a lessee under a lease obligation to a landlord – who paid the tax directly – constituted part of the lessee's consideration, and not a tax.

[617] The Defendant, in light of these cases, asserts there is ample support demonstrating that CPRC does not pay a tax *per se* on the fuel it receives, but instead pays an added cost as part of the purchase price for the fuel. The actual tax is dealt with earlier in the supply chain, in Canada's view.

[618] CPRC acknowledges that it does not pay Fuel Tax directly. It notes, however, that the tax is imposed on diesel fuel only where that fuel is used to operate the rolling stock. Otherwise, CPRC has a special arrangement whereby it can apply to the CRA for an end-user refund. The Plaintiff argues that as a result, taxing fuel constitutes a tax on the use of CPRC's rolling stock, which goes against the spirit and the text of Clause 16.

[619] When examining the legal definition of taxation, one must remain wary of characterizations that serve an economic or other purpose. The Ontario Court of Appeal addressed the issue in *Out-Of-Home Marketing Association of Canada v Toronto (City)*, 2012 ONCA 212, leave to appeal to SCC ref'd, [2012] SCCA No 249 [*Out-Of-Home Marketing*]. An advertising company argued that because it could not survive in the advertising business there, if it could not pass on a tax burden to another party by increasing its advertising rates or by paying less rent to a landowner, the tax at issue was an indirect tax. The Court of Appeal rejected the argument (*Out-Of-Home Marketing* at paras 11-14):

> [C]ourts have consistently adopted John Stuart Mill's classic distinction between a direct and an indirect tax in his 1848 treatise, *Principles of Political Economy*, Book V, c. III at p. 371:
>
> > A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.
>
> …
>
> It is well-established in the case law, however, that the legal definition of an indirect tax is not to be determined on the basis of pure economics or on the basis of the particular financial circumstances of the parties affected by the tax. The reason is obvious: if the argument of Pattison and OMAC were accepted, virtually every tax would be an indirect tax. Every business that bears a tax will treat the tax as a cost that must be factored into the price charged for its products. This natural tendency of every taxpayer cannot, and does not, automatically make the tax an indirect tax.
>
> One of the most frequently cited and helpful definitions of an indirect tax is that articulated by Rand J. in *Canadian Pacific Railway v. Saskatchewan (Attorney General)*, [1952] 2 S.C.R. 231 (S.C.C.), at pp. 251-52:

> If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.
>
> [Emphasis added.]

[620] Thus, assessing the nature of an alleged tax, for tax purposes, requires a particular focus on the relation between the alleged tax and the commodity in respect of which it is imposed.

[621] Ultimately, however, the distinction between a tax and its economic burden passed on to a consumer in the price of a commodity overlooks the underlying issue. Recall that CPRC puts forward three main arguments with respect to fuel: (i) fuel is "other property" or an "appurtenance", (ii) a tax on fuel is a tax on the "Canadian Pacific Railway" or on its use, and (iii) a tax on fuel is a tax on use of the "rolling stock".

[622] I find it objectively reasonable that the drafters had an awareness of consumable fuels at the time of negotiations and drafting, it being such a pivotal commodity to operate the railway. That knowledge no doubt would have been relevant to discussions of an anticipatory, perpetual tax exemption in light of the continuing obligation to work the Canadian Pacific Railway, and the underlying objectives of promoting Canadian growth in many senses of the word.

[623] Therefore, based on the factual matrix of the 1880 Contract, its text, and the words of Clause 16, even in light of the extraordinary context of the railway construction, I am of the view that omission of "fuel" from Clause 16 means it falls outside the scope of the Exemption.

g. Fuel absent from clause 10 and duty free list

[624] One additional observation about the 1880 Contract further suggests that fuel does not fall within the scope of the Exemption. Clause 10 exempts the following materials required for the construction of the railway and an associated telegraph line from import duties:

> And the Government shall also permit the admission free of duty, of all steel rails, fish plates and other fastenings, spikes, bolts and nuts, wire, timber and all other material for bridges, to be used in the original construction of the railway, and of a telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line.

[625] I acknowledge that this clause is more limited in scope than Clause 16: it applies only to import duties and not "taxation" generally, and exempts only the materials required to construct the railway and not to operate it. However, the drafters regarded the exemption from duties on the building materials with enough significance to warrant explicit text to that effect. Moreover, while the drafters included "timber" (for bridges) in these enumerated products, they omitted any mention of coal or wood for fuel.

[626] As noted earlier in these Reasons, direct evidence from the drafting parties is no longer available on why distinctions occur in the drafting of the various clauses. The expert witnesses agree that, as with other incentives in the 1880 Contract, clause 10 was included as an inducement to address the difficulties stemming from prior attempts to build the Canadian Pacific Railway, incentivise the Syndicate to complete it, and in doing so, remove unnecessary barriers to its completion.

[627] Aside from its construction, one of the prime motivations was also to ensure that the national railway network would endure over time, fostering national growth and unity. Hence, the drafters included a perpetual obligation to work the railway and perpetually exempted Clause 16's listed properties from taxation. The Exemption was either viewed as a necessary enticement to ensure the future operation of the railway – when the drafters would have suspected that taxation regimes might differ – or it merely constituted a concession of secondary importance. In either case, it does not appear as though the Parties intended fuel to fall within its ambit.

(iii) *Conclusion on Fuel Tax*

[628] CPRC's submissions on fuel require this Court not to interpret the actual words of Clause 16, but to read between them and imply into them CPRC's view of the drafters' intent. This approach does not accord with the *Sattva* principles. Rather, the meaning of Clause 16 flows clearly from its text, taken in context with the entire document and its factual matrix. Indeed, if the drafters of Clause 16 had intended to exempt fuel from taxation, they would have stated so in clear terms. I see no need to stray from the words chosen by the Parties. Based on the evidence and the discussion above, and similar to the scope of Clause 16 in relation to Income Tax, I conclude that Clause 16 does not apply to Fuel Tax.

(e) LCT

[629] The Parties agree that LCT, imposed between 1990 and 2006, is captured by Clause 16 through the inclusion of "capital stock" in the Exemption. They disagree, however, whether "capital stock" limits the Exemption to the initial capital stock of the Company – that is, the

initial $25 million investment – or whether it captures capital stock accrued subsequent to the initial investment.

[630] Ultimately, given the conclusion that the *Kingstreet* remedy does not apply in this case, particularly when taken in tandem with the fact that LCT was ended in 2006, the issue of this particular tax is clearly of questionable relevance. However, it remains relevant with respect to the revised declaration sought by CPRC, which asks that the Court declare that any attempt to tax its capital stock to be of no force and effect. I will therefore undertake the analysis to provide an opinion on the disagreement about whether the Exemption is limited to the $25 million in capital stock originally issued, or rather to all accrued capital stock since that time.

[631] Canada argues that while Clause 16 does not define "capital stock", s 2 of the CPRC Charter set the Company's initial capital stock at $25 million, divided into an equivalent number of $100 shares. In its view, Parliament never approved nor extended the Exemption beyond that initial capital stock investment.

[632] Canada cites *University Health Network v Ontario (Minister of Finance)* (2001), 208 DLR (4th) 459, 151 OAC 286 (CA), leave to appeal to SCC ref'd, [2002] SCCA No 23 [*University Health*]. In that case, the Ontario Court of Appeal was required to determine whether an exemption on retail sales tax found in the enabling statutes of three individual hospitals, transferred over to the new, single amalgamated hospital, the University Health Network ("UHN"). The two new UHN amalgamation statutes did not include any specific tax exemption. However, they each contained a "continuation of rights" clause, providing that all rights of the

three amalgamating corporations became the rights of UHN, the amalgamated corporation (*University Health* at para 2).

[633] The Court found that the UHN did not inherit the exemptions of its three predecessor hospitals. As the obligation to pay taxes was a creature of statute, the Court held that any exemption from that obligation would need to be expressed by statute explicitly (*University Health* at para 37).

[634] Relying on *University Health*, Canada argues that, absent parliamentary approval, Clause 16 could not extend beyond the initial capital stock investment. Canada also contends that Parliament would have stipulated a different, broader meaning of capital stock than the one provided at s 2 of the CPRC Charter if it had intended to do so. Canada suggests, as an example, that Parliament stipulated a specific definition of "capital stock" used to compute tolls in the *Consolidated Railway Act, 1879*, SC 1879, 42 Vict, c 9, at s 17(11) (as amended in SC 1881, c 24, s 1), to include the equity of railway companies and the debt and equity of the CPRC.

[635] CPRC disagrees, and argues that Canada's reliance on *University Health* is misplaced. The Plaintiff submits that *University Health* is distinguishable because the original tax exemptions were repealed upon the amalgamation of the new hospital, and that the new statute contained no explicit exemption. In this case, however, CPRC stresses that Parliament repealed neither the *1881 CPR Act* nor the 1880 Contract. Thus, the Exemption remains.

[636] Furthermore, CPRC submits that Canada misinterprets Clause 16 by inserting a qualifier such as “original” or “initial” before the term “capital stock” – a qualifier that is not there. In that same light, the Plaintiff contends that the Defendant’s argument would require this Court to incorporate into the 1880 Contract an obligation on the Company to obtain Parliamentary approval before it could make any changes to its capital stock.

[637] I agree with CPRC that Canada’s narrow interpretation strays from the ordinary meaning of the words and the underlying purpose of the agreement. First, neither Clause 16, nor the 1880 Contract as a whole, nor the CPRC Charter define “capital stock” for the purposes of the Exemption.

[638] Absent any definition of capital stock, we move to the words of the CPRC Instruments themselves. The 1880 Contract and CPRC Charter provide a clear distinction between the initial and future stock of the company. Clause 16 refers to “capital stock”. The CPRC Charter, on the other hand, uses limiting language, referring to the “initial capital stock” of the Company. Had the signatories’ intention been to limit the Exemption to the $25 million in initial capital stock, I would expect the language in the 1880 Contract to have been the same as that used in the CPRC Charter.

[639] Second, reading in the word “initial” or “original” would be inconsistent with the *Sattva* principles and the approach adopted to interpret the applicability to Income and Fuel Tax, namely that contractual provisions must be given an ordinary reading, in light of the contract as a

whole and the underlying context. Here, the contextual analysis supports a plain reading of the words “capital stock”.

[640] The extraordinary context of the transcontinental railway construction, and failures already encountered by 1880, have already been amply reviewed above. The drafters were well aware of the incomplete attempts to overcome the harsh terrain and market difficulties that had plagued earlier attempts to attract investors to the venture during the 1870s. Dr. Hanna’s testimony described the hostility of financial markets at the time in great detail. The exemption from taxation on capital stock was thus one of the key 1880 Contract incentives for the Stephen Syndicate to proceed with the project.

[641] The expectation would certainly have been for CPRC’s capital stock to grow after completion of construction, and likely increase, as the Company’s operation took on a greater role in transportation and communications in Canada. Reading in a limitation to Clause 16 would subvert these expectations, and thus the intentions, of the contracting parties.

[642] As discussed above, *Sattva* highlights the importance of ascribing an ordinary and grammatical meaning to the words of a contract in line with the document as a whole and, consistent with its context, in order to determine the true intentions and understanding of the parties (at paras 47, 57). In light of what the contracting parties reasonably knew at the time of contract formation, it would betray their objective intentions to restrict the meaning of “capital stock” without clear text to that effect.

[643] Finally, returning to the case law referenced, I agree with CPRC that *University Health* is distinguishable on the ground that the relevant tax exemption in that case was no longer found in the statutes that amalgamated the three hospitals, in contrast to the *1881 CPR Act*. That legislation has neither been repealed by Parliament, nor by the actions of the Parties (as will be explained next in Part V.5 of these Reasons).

[644] Rather, I find *Thunder Bay* to be a more appropriate analogy and compelling precedent as an interpretative aide, wherein the Court found the drafters of a 1906 bridge operation contract intended "vehicle traffic" to capture future types of vehicles not yet in mass use, such as cars and trucks. Its broad interpretation came from the lack of limiting language in the agreement, the perpetual obligation to operate and maintain the bridge, and the underlying expectation that the use of the bridge would increase as vehicle traffic increased, cars became more commonplace, the population grew, and industry in the region expanded.

[645] I also note that the question here is not whether something other than capital stock now qualifies as capital stock, but rather whether the amount of "capital stock" in Clause 16 is restricted. The interpretive question is therefore narrower than the one explored by the Ontario Court of Appeal in *Thunder Bay*.

[646] Given that "capital stock" in Clause 16 is without restriction, I conclude that the drafters intended that exemption to apply to that stock over time, beyond the initial $25 million investment.

(f) Conclusion on the scope of the Clause 16 Exemption

[647] Examining the 1880 Contract must be done through the lens of contractual interpretation, regardless of its statutory force. Applying those principles, I find that while Clause 16 neither applies to Income Tax nor to Fuel Tax, it does apply to LCT, and that exemption is not limited to the initial capital investment.

5. *Clause 16 was neither repealed nor rescinded in the 1960s nor after CPRC's 1984 continuance, with respect to federal taxation*

[648] Having found that Clause 16 has statutory and contractual force, and having made findings as to the scope of the Exemption to the three Taxes at issue, all that remains before turning to consider the relief sought, is to address Canada's arguments that the Clause 16 Exemption has been extinguished by one of two events – (i) the 1960s negotiations, or (ii) the impact of the *CBCA* on the Company's continuance.

[649] It is trite law that the principle of parliamentary sovereignty permits the legislature not only to make law, but to repeal any of its earlier laws (Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters 2007, loose-leaf 2021 revision) at ch 12:9 [Hogg and Wright]). The Supreme Court has acknowledged that this power can extend to legislatively avoiding a contract, and further, provided there is clear and explicit statutory language, extinguishing the rights of an aggrieved party to the remedies that would otherwise be available to them because of the breach (*Wells v Newfoundland*, [1999] 3 SCR 199 at para 41, 177 DLR (4th) 73).

[650] Interestingly, and as an aside, Hogg and Wright cite an exception to the statement that the principle of parliamentary sovereignty empowers Parliament to repeal any of its earlier laws, namely, the constitutions of Manitoba, Alberta, and Saskatchewan. While they were enacted by federal Parliament pursuant to s 2 of the *Constitution Act, 1871*, these three Acts cannot simply be repealed or amended by Parliament, since s 45 of the *Constitution Act, 1982* confers on provincial legislatures the power to amend their own constitutions (Hogg and Wright at ch 12:9). The present action is a rare example of when we are reminded that by virtue of the peculiarities of our constitutional framework, those Acts may be the only three creations of Parliament that remain even beyond its own reach to alter.

[651] Although Canada accepts that the *1881 CPR Act* has never been directly repealed, it asserts that Clause 16 was rescinded, either (i) by agreement of the Parties in 1966, or, in the alternative, (ii) subsequent to a 1984 corporate reorganization and the issuance of the CPRC's Articles and Certificate of Continuance under the *CBCA*. Both events (i) and (ii), in Canada's submission, foreclose any CPRC claim under the Exemption.

[652] In this section, I will first consider whether events that took place between the Parties in the 1960s resulted in the termination of Clause 16. Then, I will consider the effect of the 1984 continuance, and the impact of the *CBCA* on whether Clause 16 continues to bind the Parties.

[653] For the reasons that follow, I conclude that neither set of events (the 1960s negotiations or the *CBCA* continuance) terminated Clause 16, and that it remains binding between the Parties.

(a) Effect of discussions and negotiations between the Parties in the 1960s

[654] First, regarding the 1960s negotiations and agreement, Canada asserts that CPRC agreed to voluntarily give up the Clause 16 Exemption in respect of federal taxation in 1966, in exchange for legislative amendments to the fixed freight framework that had been enacted under the CNPA.

[655] A statutory rate for shipping grain (the "Crow Rate") was established in the late 19th century as a strategy of ensuring that farmers in the Prairie Provinces could benefit from the construction of railway lines in the region. As Dr. Klein explained, early settlers on the prairies had often complained that the rates the railways established were prohibitively high. Thus, to stimulate agricultural and economic development in the Prairie Provinces, the Crown established the Crow Rate in exchange for the construction and funding benefits received by CPRC through the CNPA (Expert Witness Statement of Dr. Kurt Klein dated February 11, 2020 (the "Klein Report"), at para 21).

[656] However, the Crow Rate came to have unexpected consequences and proved extremely unpopular with railway companies, increasingly so toward the middle of the 20th century. Consequently, in the 1960s, in exchange for mutual concessions, Canada agreed to certain legislative amendments to the Crow Rate, namely those that culminated in the 1967 *National Transportation Act*.

[657] Some of the key communications between the Parties in 1966-1967 have been referenced within the PASF section above (at paras 108-114). However, to provide the full context to their negotiations, and Canada's argument that CPRC agreed to repeal Clause 16 in the 1960s, I will now review the background to the events of the 1960s in more detail.

(i) *Historical context of the 1960s negotiations between Canada and CPRC*

[658] After completing construction of the Main Line in 1885, CPRC built other branch lines, as permitted under clause 14 of the 1880 Contract. (As discussed previously, the contract stipulates that the Clause 16 Exemption does not apply to branch lines, except to the extent that they are necessary for the operation of the Main Line.)

a. The Crow's Nest Pass Agreement (CNPA)

[659] Shortly after the completion of the Main Line, valuable deposits of coal and other minerals were discovered to the south of the railway in the Kootenay region of BC (Klein Report at para 13). To exploit these resources and to enjoy the tangential benefits of new railway lines, such as agricultural and economic development, the federal government undertook to construct a branch line to the Kootenays from Lethbridge, Alberta, via the Crow's Nest Pass.

[660] CPRC was interested in contracting with Canada to construct this new branch line. However, as with other parts of the Main Line, CPRC anticipated that there would not be enough traffic on it – at least not initially – to cover the cost of investment. To overcome this problem, the federal government negotiated the CNPA with CPRC to incentivize construction of the new

route. The CNPA would have important implications for CPRC and the national transportation industry as a whole for most of the following century.

[661] As noted above, farmers were vulnerable to the railways due to expensive freight costs, as no transportation alternatives existed to move their product. Unavoidably high freight rates impeded farmers' ability to make a living.

[662] To protect farmers' interests and to realize the economic and social benefits of railways, Canada included a term in the CNPA, placing a ceiling on the freight rates that railways could charge for transporting grain. It is this fixed limit on grain transportation rates that became known as the Crow Rate. The primary purpose for regulating freight rates in Canada, according to Dr. Klein, was to offset the monopoly power of companies like CPRC and to help farmers get their products to market, thereby stimulating economic development.

[663] Dr. Klein testified that farmers and farm groups in western Canada interpreted the CNPA framework as limiting the cost of freight in the Prairies in perpetuity. Farmers saw the Crow Rate as part of the "Confederation package" that would continue to apply regardless of the economic circumstances (Klein Report at para 20). A Deputy Minister of Transport described prairie farmers' understanding of the Crow Rate price and agreement as follows (Klein Report at para 21):

> The agreement, which was older than the provinces of Saskatchewan and Alberta, included the word 'forever', and western grain producers were in no doubt that it was to be taken at face value. There was long standing belief, in the West and elsewhere in the country, that the Crow was sacred and that

> whoever laid his hands upon the Ark of the Covenant of 1897
> would be struck dead politically.

[664] Being politically sensitive, the Crow Rate remained unchanged, except for minor adjustments, for nearly a century. The statutory, fixed Crow Rate provided significant benefits to crop farmers. Even as crop prices increased over time, freight rates remained unchanged and farmers were thereby able to increase economic returns.

[665] At the same time, by preventing railways from adjusting the freight rate according to changing circumstances, the Crow Rate created challenges for the railways. For example, when inflation rose dramatically during the First and Second World Wars, the railways were unable to increase their rates to cover these higher costs. Other challenges included labour unions' advances in negotiating higher wages for their workers in the mid-20th century, and increased competition from growing road infrastructure, including the development of the Trans-Canada Highway. While such pressures would naturally have driven freight rates up, the Crow Rate nonetheless prevented CPRC from increasing its pricing.

[666] It was not until the federal government enacted the *Western Grain Transportation Act*, SC 1980, c 168, that the Crow Rate regime ended. A number of developments and compromises between Canada and the railways led to new legislation, including the recommendations of a Royal Commission on the issue.

b. MacPherson Commission (1959-1961)

[667] In response to pressure from railway companies to modify the CNPA framework, Canada established a Royal Commission on Transportation (the "MacPherson Commission") to investigate whether the railroads were in fact suffering financial losses as a result of the Crow Rate. CPRC made substantial submissions to the MacPherson Commission in 1959, including the identification of a number of potential administrative methods that the Federal Government could use to provide compensation for its Crow Rate losses

[668] The MacPherson Commission Report of 1961 recommended that the federal government compensate the railways for their shortfalls. That way, governments could continue to secure the benefits of railway transportation of grain across the Prairies. The MacPherson Commission also recommended that shortfalls be calculated annually and that the railways be compensated through an annual subsidy, equal to variable costs not covered by freight rates.

c. Provincial lobbying against the Clause 16 Exemption

[669] While the railways lobbied the MacPherson Commission, the Prairie Provinces lobbied Canada to end the Clause 16 Exemption. In March 1964, the Prairie Provinces wrote to the federal government to request a repeal of Clause 16, which they said operated "to free the main line of the Canadian Pacific Railway from provincial and municipal taxation of every kind" (March 18, 1964, Prairie Provinces' Memorandum at para 6).

[670] Specifically, the Prairie Provinces argued that there was no justification for the continued operation of the Exemption, but rather "excellent reasons for its discontinuance", and that allowing the Exemption to continue would perpetuate discrimination and inferior treatment of municipalities within those provinces with respect to their taxing powers, resulting in an inability for local communities to collect revenues from CPRC (March 18, 1964, Prairie Provinces' Memorandum at para 7).

d. The 1960s Negotiations

[671] Transport Minister Pickersgill sought and received authorization from Cabinet to enter into discussions with CPRC with a view to settle the tax exemption in light of new legislation proposed by the Government, which would include reforming railway rates. The responsible Cabinet Committee emphasized that under the existing federal legislation, CPRC received an exemption from municipal taxes in certain areas of the Prairie Provinces, and that reforming the law offered an excellent opportunity to terminate CPRC's tax benefits.

[672] Minister Pickersgill subsequently reported to Cabinet that there "seemed to be a good case for terminating the exemptions from municipal taxes enjoyed by [CPRC] on the prairies and that, in view of the fact that railway legislation now before parliament contemplated payment to [CPRC] in compensation for the Crows Nest rates, the railway might be asked to reciprocate by giving up its tax exemptions". Cabinet approved that the Minister enter into discussions with CPRC "with a view to reaching an agreement for the lifting of the exemption from municipal taxes in certain areas of the Prairie Provinces, granted to the Railway by legislation in 1881" (Cabinet Minutes of September 24, 1964 at 6-7; emphasis added).

[673] Minister Pickersgill wrote to CPRC's President on November 6, 1964, pointing to the two major new imperatives raised by the MacPherson Commission for viability of the industry, namely (i) the payment of subsidies, and (ii) more freedom for railways to set rates. He referred to the legislation that was ready for introduction, which would compensate the railways for obligations assumed under the CNPA. The Minister stated that, for reasons of equity, these two new privileges should "be accompanied by the withdrawal of those privileges which give the railways a preferred status compared to ordinary commercial enterprises". The Minister highlighted the issue that Clause 16 raised for municipalities:

> It must also be kept in mind that the impact of the tax exemption falls most heavily on the urban areas. This is a matter of some importance, particularly at this time when increasing demands for municipal services are threatening to run ahead of the existing sources of municipal revenue.

[674] The Defendant also points to two letters sent to the Department of Transport's Deputy Minister on April 14, 1965. The first, from the Deputy Attorney General, stated that while the federal government had the authority to revoke Clause 16 by legislation with respect to federal taxation, its revocation with respect to provincial taxation would require constitutional amendment through the British Parliament. The second, sent by Crown counsel, stated that there would be no purpose in revoking Clause 16 for federal taxation only, since the Prairie Provinces' submission only raised provincial taxation.

[675] Minister Pickersgill stated that it would be difficult for the Government simply to cancel the 1880 Contract unilaterally, "though presumably the sovereign power of Parliament could be used for this purpose". The Minister presented various options for Cabinet as a *quid pro quo*

from CPRC for the proposed new legislation, which he felt would ease the historic inequity caused to the Company by the CNPA (May 31, 1965 Memorandum for Cabinet at 1-2).

[676] On June 16, 1965, Minister Pickersgill wrote to Mr. Crump, the then-Chairman and CEO of CPRC, explaining the request of the Prairie Provinces to withdraw the local tax exemption. He described in his letter their concerns "that this represented discrimination within Canada since other provinces were not similarly restricted in their powers to tax railways lying within their borders; and that by depriving municipalities of the taxes involved, this led to unfair distribution of local tax burdens" (June 16, 1965 Letter from Minister Pickersgill to Mr. Crump; emphasis added).

[677] CEO Crump and Minister Pickersgill exchanged subsequent letters in June and July 1965 with the Company agreeing to the "voluntary arrangement". In 1966, the Crown prepared internal memoranda positing that the proposal for CPRC would relate only to grants in lieu of municipal taxes given, since municipal tax was the only tax that CPRC was not already paying.

[678] In a July 20, 1966 letter, Minister Pickersgill wrote to new CEO Ian Sinclair, stating:

> [i]n our proposed legislation we will be undertaking, on behalf of the Treasury, to assume the liability of the C.P.R. under the Crows Nest Pass agreement which was presumed to have the same perpetual character as the tax immunity. In other words, the C.P.R. would be giving up an immunity at the same time as it was being relieved of a perpetual obligation.

[679] In this letter, Minister Pickersgill added that "whatever course is taken, it should be conditional on the passage of the railway legislation and effective only when the railway legislation comes into operation".

[680] CPRC's Board of Directors met on August 8, 1966, and the Minutes recorded that:

> In a review of this situation, it was the consensus that the hazards associated with an adamant stand by the Company on the provisions of the 1881 contract with the Crown in this matter were sufficient to justify serious consideration of means to resolve the problem which, over the years, has been a source of much irritation between the Company and the various levels of government in the Provinces concerned. After a full discussion on various aspects of the matter, political and otherwise, there was unanimous agreement that the President be authorized to initiate negotiations with the appropriate Federal Authorities for voluntary withdrawal of the mainline tax exemptions, negotiations to be on the basis that such withdrawal would be phased in over a number of years and would not become effective until passage of legislation or implementation of recommendations of the MacPherson Royal Commission has been achieved.

[681] Cabinet then met later that month. Its August 23, 1966 Minutes indicate that Minister Pickersgill reported on the approval by CPRC's Board of Directors, noting that he:

> …had recently discussed with the President of the Canadian Pacific Railway Company the desirability of the Company voluntarily giving up its exemption from taxation in relation to the Company's mainline. Mr. Sinclair had now convinced the Board of Governors of the Company that it would be desirable to give up the exemption, phased over a period of three years. The action would be taken in relation to the costing of grain transportation… The Cabinet noted with approval the intention of the Minister of Transport to announce at an appropriate time in the resumed session of the House of Commons the intention of the Canadian Pacific Railway to phase out over a period of three years the Company's present exemption from land taxes along the Canadian Pacific Railway's mainline.

[682] On August 29, 1966, Mr. Sinclair wrote to Minister Pickersgill, stating that the Company "would be prepared voluntarily to forego the perpetual exemption from municipal taxation provided in [C]lause 16 of [the 1880 Contract]" (emphasis added). Mr. Sinclair, setting out the phase-in period for the payment of municipal taxes, also stated:

> I have discussed this matter with the Directors of the Company and they have authorized me to say that, under the arrangement hereinafter mentioned, the Company is prepared to forgo voluntarily perpetual exemption from taxation by the local authorities on our main line in the Prairie Provinces in three equal stages…
>
> [Emphasis added.]

[683] Finally, Mr. Sinclair indicated:

> [a]t any time after the expiry of the period indicated above, the Canadian Pacific would have no objection to action being taken to amend the constitution and the legislation to terminate the perpetual exemption from local taxation referred to.
>
> [Emphasis added. See more complete extract of this letter at para 109 above.]

[684] By letter dated September 2, 1966, Minister Pickersgill responded to Mr. Sinclair, thanking him for "the willingness of the Canadian Pacific to forego voluntarily the perpetual exemption from municipal taxation provided in Clause 16 of its contract" (emphasis added). The Minister confirmed that he would indicate to Parliament the terms that "Canadian Pacific is prepared to forego voluntarily perpetual exemption from taxation by the local authorities on its main line in the Prairie Provinces". The Minister noted in addition – referring to his pending statement to Parliament – that he would "also indicate that at any time after the expiry of the period above the Canadian Pacific would have no objection to action being taken to amend the

constitution and the legislation to terminate the perpetual exemption from local taxation referred to" (emphasis added).

[685] On December 20, 1966, Minister Pickersgill followed through, advising Parliament during debates on what was to become the *National Transportation Act*, that CPRC had "voluntarily undertaken to pay grants… that this offer was made in anticipation of the freedom which would be granted under this new legislation. This freedom would enable the railway to compete for revenue in a way in which they are not able to compete at present…" (House of Commons Debates, 27-1, vol XI (December 20, 1966) at 11374).

[686] The Minister again reported to Parliament the following month that CPRC had "taken the initiative… of voluntarily giving up an immunity from taxation, or of agreeing to do so if we do certain things in return", an undertaking he described as "certainly morally irrevocable, to go on paying grants in lieu of taxes until such time as we put our Constitution and the constitutions of the three Prairie Provinces in such a state that the taxes can be levied on them like they are levied on the CNR and other railways" (House of Commons Debates, 27-1, vol XI, January 10, 1967 at 11599).

[687] Shortly after these parliamentary debates, the *National Transportation Act* received royal assent on February 9, 1967. Mr. Sinclair sent Minister Pickersgill a telegraph later that same day:

> On learning of royal assent to the National Transportation bill I am sending this message so that you may inform parliament that Canadian Pacific will carry out its proposals as set out to you in my letter to you of August 29, 1966 regarding municipal taxation

> as though the National Transport bill had become law before the end of 1966.
>
> [Emphasis added.]

[688] Minister Pickersgill indeed communicated the contents of the telegram to Parliament. Mr. Sinclair then wrote a letter to Minister Pickersgill dated May 3, 1967, regarding the tax treatment of its grant payments:

> As it was intended that the Company should be able to include as an expense for income tax purposes, the full amount of the grants, it was agreed that the payment should be made to Her Majesty in Right of Canada for distribution to the municipalities.
>
> [Emphasis added.]

[689] According to internal government communications, Canada indeed agreed that CPRC's municipal grants would be treated as deductible business expenses for Income Tax purposes. Deputy Minister of Transport Baldwin advised CPRC of this in a July 19, 1967 letter and Mr. Sinclair responded on behalf of CPRC by letter dated August 7, 1967, agreeing that CPRC would pay the grants directly to the municipalities.

[690] Finally, an internal government memorandum of January 29, 1970, entitled "Legislative Removal of CPR Tax Exemption in Prairie Provinces" states:

> In reviewing the file on this, it seems evident that the arrangements agreed upon by both CN and CP since 1966 for providing compensatory payments in lieu of taxes on otherwise tax-exempt properties have made available, in effect, a tax-equivalent source for the Prairie provinces and municipalities. These agreements, of course, were reached subsequent to the 1965 investigation of' how CP prairie properties could be made "normally" tax-liable, and substantially achieved what was at issue at that time. While CP's

> payment to the various jurisdictions since 1967 may be regarded as "gratuitous" in a literal sense, Mr. Sinclair's August 1966 correspondence to Mr. Pickersgill indicates that CP regards this understanding as a commitment which will continue to be met…

(ii) *Parties' positions*

[691] Based on the Plaintiff's historical conduct and representations detailed above, Canada argues that Clause 16 was rescinded by agreement of the Parties in 1966, contending that CPRC presented itself – and indeed saw itself – as a federal taxpayer when it negotiated the 1966 agreement.

[692] The Crown further argues that because the Company was already paying all federal and provincial taxes at the time, there was no need to formally repeal Clause 16 after the 1966 agreement between the Parties was concluded. The Crown contends that after Canada delivered on its promise to introduce legislation that addressed the Plaintiff's concerns over the Crow Rate, the Plaintiff agreed that Clause 16 could be repealed. Canada argues that it did not formally repeal Clause 16 because to do so engaged constitutional considerations at the provincial level. Canada states that because the Company was already paying all federal and provincial taxes, there was no pressing need to address those constitutional matters.

[693] CPRC disagrees, noting that the only part of the Exemption from which it agreed to resile in the 1960s – and the only part of the Exemption from which it has ever agreed to resile – was restricted to the municipal tax exemption, and nothing else. All other exemptions set out in

Clause 16 survived the 1960s, based on its permanent nature resulting from the use of the word "forever".

[694] CPRC further asserts that Clause 16 continues to have statutory force as a valid limit on federal taxation. Neither the *1881 CPR Act* nor the CPRC Charter have ever been repealed, and these CPRC Instruments ratified the 1880 Contract that, subject to a recognized change, continues in perpetuity. The Plaintiff emphasizes, as above, that Clause 16, unlike clause 15 for instance, has never been repealed by any legislation.

(iii) *Analysis*

[695] The numerous letters, memos, Hansard excerpts, and other evidence provide a clear window into the discussions and negotiations that took place during the months and years leading up to the 1967 adoption of the *National Transportation Act*.

[696] Having considered the evidence documenting the 1960s negotiations, Canada has not persuaded me that Clause 16 was repealed, such that CPRC surrendered the Exemption in its entirety, including vis-à-vis federal taxation, in the lead-up to Canada's enactment of the *National Transportation Act*. Rather, the evidence clearly shows the Plaintiff rescinded its exemption vis-à-vis municipal (or "local") taxation; it does not show that the Parties agreed to repeal the Exemption with respect to federal taxation.

[697] I agree with the Crown's observation that there were some documents and exchanges over the months that preceded the agreement – both formal and informal – which used broader

and non-limiting language relating to taxation in general, rather than only municipal taxation. Certainly, if separated from the full complement of exchanges, these pieces of correspondence can be read more broadly. I further agree that various government officials may have wished for CPRC to relinquish the full breadth of the tax exemptions contained in Clause 16.

[698] However, when read in the full historical context, I am not persuaded that the Plaintiff agreed to anything more than what is contained in the key correspondence – namely the letter of July 1966 from Minister Pickersgill to Mr. Sinclair, the latter's response of August 1966, and Minister Pickersgill's follow-up of September 1966 (see paras 678-684 above).

[699] I read these three letters particularly in light of what preceded them in Cabinet Committee, and then in Cabinet. The Minister and his senior officials provided a recommendation only after they had considered various options, and put those options to both the Committee and Cabinet as a whole. The Cabinet Committee, and then Cabinet, both endorsed the recommendation that would eliminate the "local" or "municipal" tax exemption, in exchange for reforms addressing the grain transportation issues caused by the Crow Rate, through the passage of prospective legislation (*i.e.*, the *National Transportation Act*).

[700] Minister Pickersgill, on behalf of Canada, made the offer to CPRC to forego Clause 16's municipal tax exemption. CPRC agreed to do this, as well as to provide grants directly to the municipalities, rather than an equivalent payment in lieu to the federal government for it to distribute to the municipalities, as had first been proposed. CPRC clearly indicated it was prepared to do so in exchange for legislative reforms to the problematic grain transportation

rates, but noted that would be on the condition that the grants be deductible as a business expense to CPRC. Canada accepted these terms, and passed the new legislation shortly after these negotiations.

[701] The historical frame leading to the 1966 deal between Canada and CPRC was also described by the testimony of the Plaintiff's experts, Drs. Hanna and Klein. Both testified to the difficulties created by the low Crow Rate, which increased as the years went on.

[702] In sum, I agree with CPRC that it agreed to forego the municipal tax exemption in exchange for legislative reform to the grain transportation rates, along with treatment of the payments as business expense deductions for income tax purposes. In other words, the *quid pro quo* for Canada took the form of the *National Transportation Act*, that followed on the heels of the agreement between CPRC and Canada to end Clause 16's Exemption for municipal – but not federal – taxes.

[703] With respect to Canada's argument that the Company was already paying "all federal and provincial taxes" at the time, I am unpersuaded that CPRC had therefore waived their right to claim an exemption under Clause 16. Rather, in my view, and particularly in light of my findings above that the Exemption neither covers Income nor Fuel Tax, the fact that the Company was paying federal and provincial taxes that are not exempted by Clause 16, is immaterial. The Company's willingness to pay tax outside a tax exemption that applies in perpetuity, does not mean that it is prepared to forever surrender or waive the benefit of that exemption for all future taxes. There is no rational connection between a past willingness to pay a tax for which a

taxpayer is not exempt, and a future willingness to pay an as-yet unlevied tax for which the taxpayer may be exempt.

[704] In short, if Canada intended that Clause 16 was to be repealed in its entirety – whether at the conclusion of the 1966 negotiations, or for that matter at any point prior to or after that point in time – the Parties needed to make that clear in their exchanges and final agreement.

[705] Failing such an agreement to consensually amend their contract, Parliament had – and has to this day – both the unilateral ability and sovereignty to amend the legislation. Indeed, it did so following the ratification of the *1881 CPR Act*, with the *1884 CPR Act* and the *1888 CPR Act* (see paras 211-213 of these Reasons). Parliament could also have repealed the *1881 CPR Act* at any time, but has never exercised this power to terminate the Clause 16 Exemption vis-à-vis federal taxation.

(b) *CBCA* continuance did not terminate Clause 16

[706] Having dispensed with the primary basis upon which Canada argues that the Parties terminated Clause 16 in the 1960s, I now consider the alternative basis upon which the Crown argues that Clause 16 has been repealed – namely due to the legal effect of the 1984 Company continuance and the impact that that legislation had on this corporate change.

[707] On May 2, 1984, the Plaintiff was granted a Certificate of Continuance under s 181 of the *CBCA* (see paras 57-58 of these Reasons). That certificate provided for this continuance on the

terms set out in the Company's Articles of Continuance. The Parties disagree on its impact, and specifically whether Clause 16 continues to be binding as a result.

(i) *The Parties' arguments*

[708] Canada asserts that changes to the Company's corporate structure, combined with the impact of new legislation, caused Clause 16 to lose its statutory force. First, Canada argues that when CPRC was granted a continuance under the *CBCA*'s s 181 as it appeared on May 2, 1984 (now s 187), Clause 16 lost its statutory force because the CPRC Charter ceased to have effect.

[709] In Canada's view, the effect of continuance was to remove the Company from the ambit of the CPRC Charter and import it into the *CBCA* regulatory regime. It argues that the Articles of Continuance filed under the *CBCA* replaced the CPRC Charter as the Company's incorporating documents, and the Charter is deemed to have been repealed pursuant to s 2 of the *Interpretation Act*, SC 1967, c 7, (see the Articles and Certificate of Continuance at Annex H to these Reasons).

[710] Canada also refers to two legislative enactments that amended the *CBCA*. The first is the *Canada Transportation Act*, SC 1996, c 10 [*CTA*], which Parliament enacted to replace the repealed *Railway Act*. Sections 212 and 213 of the *CTA* amended the *CBCA* such that "Special Acts", including the CPRC Charter, no longer applied to continued corporations to the extent they were inconsistent with the *CBCA* (at ss 3(3) and 268(11)). The amendments, codified at *CTA* s 214, also validated continuances issued before the *CTA*'s enactment.

[711] The second subsequent legislative enactment the Crown raises is the *Canada Not-For-Profit Corporations Act*, SC 2009, c 23 [*NFP Act*] (s. 311(4) of the *NFP Act* coming into force on March 12, 2010 via Order-in-Council PC 2010-265), under which Parliament enacted s 268(8.1) of the *CBCA*. Subsection 268(8.1) declared that any Special Act under which a company was incorporated would cease to apply to that company upon continuance. In Canada's view, s 268(8.1) was enacted "for greater certainty", such that it applies equally to corporations continued under the *CBCA* before and after the enactment of the provision.

[712] CPRC responds with two arguments. First, CPRC asserts that the Articles of Continuance filed by the Company contain express provisions that suggest it continues to benefit from the statutory exemption under Clause 16. Second, CPRC argues that the *CBCA* provisions cited by the Defendant, including s 268(8.1), apply only prospectively and not retrospectively, such that they cannot alter CPRC's existing legal rights.

[713] On the first argument, CPRC points to Schedule "C" to the Articles of Continuance, which provides that:

> (i) the provisions of the CPRC Charter "including its Act of incorporation and all amendments thereto and its Letters Patent and all Letters Patent supplementary thereto" continue to apply to the Company, amended as required to conform to the *CBCA* (at clause 1), and
>
> (ii) the Company continues to "have, hold and enjoy all rights, licences, franchises, powers, privileges, authorities and immunities hereto granted to or conferred upon it by law or contract" (at clause 12).

[714] CPRC contends that the Company today remains the same entity in which the rights were initially vested by the CPRC Charter, and that the CPRC Charter remains in effect.

[715] In support of this argument, CPRC cites *Canadian Pacific Ltd, Re* (1996), 30 OR (3d) 110, [1996] OJ No 2412 (OCJ (Gen Div)) [*Re Canadian Pacific (1996)*], aff'd, [1998] OJ No 3699 (CA). In that case, CPRC sought court approval for its corporate reorganization by an arrangement under the *CBCA*. A group of shareholders holding Consolidated Debenture Stock ("CDS") opposed the approval. One of the grounds raised posited that the Court had no jurisdiction to amend the terms relating to the CDS because it was originally authorized by *The Canadian Pacific Railway Act, 1889*, 52 Vict, c 29, which set out the applicable terms and conditions. That Act was amended from time to time through 1937. Being a creature of statute, the shareholders pleaded, the CDS could only be amended by the terms of the statute.

[716] Justice Blair rejected the argument on the ground that upon continuance in 1984, the Company fell under the umbrella of the *CBCA* (*Re Canadian Pacific (1996)* at para 71). He examined the words of the Articles of Continuance, by which various incorporating statutes and Letters Patent continued to apply to the Company, subject to amendments necessary to conform to the *CBCA*.

[717] Justice Blair concluded that the Company was entitled to avail itself of the various re-organization mechanisms under the *CBCA*. Section 192 expressly permitted the changes the Company sought. Therefore, notwithstanding the statutory origin of the CDS and the statutory framework of their terms and conditions, the arrangement was possible under the *CBCA* (at para

72). Most importantly, Justice Blair recognized that the Articles of Continuance expressly provided that the acts of incorporation and the various Letters Patent continued to apply to the Company, but were amended as required to conform with the *CBCA* (at para 71).

[718] In my view, *Re Canadian Pacific (1996)* is distinguishable from the issue at hand. As noted, the key question in that case was whether the Court could approve the Company's plan for an arrangement under the *CBCA* notwithstanding that the CDS securities had been authorized and were governed by a different statute. Because the *CBCA* now incorporated the Company, Justice Blair held that it benefitted from the various reorganization methods provided for under that statute. At paragraph 71, he wrote that:

> Pursuant to its Articles of Continuance, the provisions of the various acts of incorporation and all amendments thereto, its Letters Patent and all supplementary Letters Patent continued to apply to the Company, but were amended as required to conform to the CBCA.
>
> [Emphasis added.]

This passage, in my view, supports the continued applicability of the *1881 CPR Act* and the CPRC Charter.

[719] In April 2021, I asked the Parties for input on several outstanding questions, four of which related to this issue of corporate continuance. First, the Parties were asked whether there was an incoherence between *CBCA* s 3(3)(c), which deems that provisions of special railway Acts inconsistent with the *CBCA* do not apply to continued corporations, and s 268(8.1) of the *CBCA*, which deems that special Acts no longer apply to continued corporations. Second, I asked

whether Clause 16 was a "special Act" under s 87 of the *CTA*, and third, whether clauses 1 and 12 of the Articles of Continuance conflicted with the *CBCA*, and/or whether those clauses could preserve the Clause 16 rights. Fourth, I asked the Parties whether s 43(c) of the *Interpretation Act* or the common law concept of vested rights could preserve the Exemption. An additional hearing took place on April 30, 2021, primarily to address these four residual questions.

[720] During the hearing, the Parties rejected the possible conflict between s 3(3)(c) and s 286(8.1) of the *CBCA*. CPRC argued that the conflict only existed if s 268(8.1) applied retrospectively to alter the rights of corporations continued before its enactment. Relying on Sullivan (at 11.2), the Company asserted the presumption that Parliament does not intend legislation to apply retrospectively unless the legislation is beneficial, or its purpose is to protect the public.

[721] CPRC further suggested that legislation itself could reveal an intent for retrospective effect. In CPRC's view, *CBCA* s 3(3)(c) applies to Special Act corporations continued under the *CBCA* between 1996 and 2009, while s 268(8.1) applies only to corporations continued after 2009. Neither provision is applicable to corporations continued under the *CBCA* prior to 1996. Thus, in this case, neither s 3(3)(c) nor s 268(8.1) could apply to the Company as it was continued prior to their enactments, and neither served a beneficial or public protection purpose.

[722] CPRC also argued that clauses 1 and 12 of its Articles of Continuance expressly provided for a preservation of Clause 16 rights, which in any event could not be altered by a repeal of the

CPRC Charter – which CPRC denied had occurred – because s 2 of the *1881 CPR Act* was the true source of Clause 16's legislative status.

[723] Canada, on the other hand, argued that CPRC's position created inconsistent treatment of corporations without good reason. Additionally, Canada argued that CPRC's position ignored s 187(5) of the *CBCA*, which confirms that upon continuance, corporations are subject to the *CBCA* as if they had originally been incorporated thereunder. CPRC's position assumed that prior to the enactment of s 268(8.1) in 2009, Special Acts continued to have legal effect on corporations continued under the *CBCA*, despite the fact that those corporations were then organized solely under the *CBCA*.

[724] Canada submitted that, as a result, s 268(8.1) either confirms the deeming provision in s 187(5), or applies on a go-forward basis without regard to the date on which a corporation was continued. While the Articles of Continuance could "copy and paste" Clause 16 rights, they could not preserve the operation of the CPRC Charter once the Company became subject to the *CBCA* regime. Thus, according to Canada, when the CPRC Charter ceased to have effect, the statutory nature of the Clause 16 rights disappeared with it.

(ii) *Analysis*

[725] The Parties provided helpful submissions in response to these four questions with on the *CBCA* and the 1984 continuance. The focus of the Parties' submissions, as described, was on the effect of continuance on the CPRC Charter. Yet, one key issue regarding whether the CPRC

Charter was repealed or otherwise ceased to apply to the Company, concerns the statutory character of Clause 16.

[726] The CPRC Charter represented the means by which Parliament conferred statutory force upon the rights enshrined in Clause 16 (and not through s 2 of the *1881 CPR Act*). Once endowed with that statutory force, the Clause 16 rights became their own statutory creature independent from the CPRC Charter. Thus, the possible demise of the CPRC Charter under the *CBCA* does not end the Company's rights under Clause 16, because the two CPRC Instruments exist independently from one another.

[727] Justice Rand alluded to the distinct character of Clause 16 effected by the conferral of statutory force in the *Manitoba Reference* (at 752). By conferring statutory force upon the Exemption, Justice Rand explained that the federal government had effectively modified the federal and provincial taxing powers. As a result, no legislature could validly tax the company in respect of the exempted property within the prescribed territory "without repealing or conflicting with the exemption as law existing within the Territories" (*Manitoba Reference* at 752; emphasis added). Thus, the CPRC Charter did not merely incorporate Clause 16; it went further by transforming the Exemption into its own statutory being that holds the force of a law.

[728] If Clause 16 did not exist as its own instrument, and the exemption rights claimed by CPRC issued solely from the CPRC Charter, then the effect of continuance on that Charter would prove most salient. In that case it would indeed have been necessary to address whether there exists a conflict between s 3(3)(c) and s 268(8.1) of the *CBCA*, whether the CPRC Charter

could continue to apply to the Company, and whether its rights could persist in a statutory sense beyond continuance. However, the Clause 16 statutory rights now exist independently from the CPRC Charter.

[729] The key question that remains is whether the continuance of the Company in 1984 affected the statutory force of Clause 16. Based on the record and the Parties' submissions, I see no evidence that it did. Professor Sullivan describes in her text on statutory interpretation that enacted legislation continues to form part of the law until it expires or is repealed (Ruth Sullivan, *Statutory Interpretation*, 3d ed (Toronto: Irwin Law, 2016) at 21). She explains that "[e]xpiry occurs when legislation provides for its own demise by designating a time at which it shall cease to be law", whereas a repeal "occurs when legislation is brought to an end through the operation of other legislation that declares it to be repealed" (emphasis added). Neither has occurred with respect to Clause 16.

[730] Moreover, the SCC has recognized that the legislature must use clear language to modify existing law. In *Rawluk v Rawluk*, [1990] 1 SCR 70, 65 DLR (4th) 161 [*Rawluk*], the Court's majority observed in connection with the availability of a constructive trust remedy under Ontario family law legislation that (at 90):

> It is trite but true to state that as a general rule a legislature is presumed not to depart from prevailing law "without expressing its intentions to do so with irresistible clearness".
>
> [Citations omitted.]

[731] While *Rawluk* considered whether a statutory provision had ousted an equitable remedy in common law, similar reasoning has been applied in cases where new legislation was argued to impact rights existing under older statutes. For example, in *R v Sivalingam*, 2019 ONCJ 239 [*Sivalingam*] an individual had been charged with an offence under the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], for driving with a blood alcohol concentration (BAC) exceeding 80 mL of alcohol/100 mL of blood (an "over 80" offence). The *Criminal Code* also included a presumption that an alcohol breath test confirmed the BAC of the subject at the time of the offence – the "presumption of identity".

[732] After the charge, Parliament amended the impaired driving offence, making it a crime to have a BAC in excess of 79mL alcohol/100mL blood up to two hours after ceasing to drive. Under this new law, the presumption of identity was built into the definition of the offence because there was no longer a need to prove BAC at the time of driving. However, the new legislation did not state whether the old presumption of identity applied to trials commenced before the amendments came into force.

[733] Given the ambiguity in the new legislation, the Court held that the old presumption of identity continued to apply to trials commenced before the new enactment came into force (*Sivalingam* at para 90). The Court found that it would unnecessarily complicate trials commenced under the old offence and, relying on *Rawluk*, held that Parliament had not expressed "with irresistible clearness" that the old presumption would not apply to outstanding "over 80" offences (at paras 91-95).

[734] Another example occurred in *Alberta Teachers' Association v Pembina Hills Regional Division No 7*, 2008 ABQB 87, a case in which the Alberta Court of Queen's Bench ruled that a bundle of procedural rights on termination afforded to teachers under the *School Act*, RSA 2000, c S-3, were not displaced when the School Board delegated its authority to terminate to the Superintendent (at paras 45-50). The Court, relying on *Rawluk*, ruled that simply allowing delegation of authority was not clear language sufficient to take away statutory procedural rights.

[735] The SCC has also recognized a presumption that legislation is not intended to abolish or interfere with existing rights. In *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 at 506-507 and 509, 3 DLR (4th) 1, the Court stressed that existing statutory rights would not be deemed abrogated in the absence of express language indicating a clear legislative intention to do so:

> Naturally, one would expect to find in any amending legislation an express reference to this right in the taxpayer if the Legislature had the intention of altering or revising this right in any way.
>
> …
>
> In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced…. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself it has all the resources available to correct that inadequacy of expression.

(See also *Li v Rao*, 2019 BCCA 265 at paras 83-84; *Royal Crown Gold Reserve Inc v Schneider*, 2012 SKCA 105 at para 17; and *Bhatnager v Canada (Minister of Employment & Immigration)*, [1990] 2 SCR 217 at 228, 71 DLR (4th) 84.)

[736] Even where an enactment purports to affect existing statutory rights, those rights can be modified or abrogated only with clear language (for example, see *Spooner Oils Ltd v Turner Valley Gas Conservation Board*, [1933] SCR 629 at 638, [1933] 4 DLR 545).

[737] Nothing in the *CBCA* or in the various Acts of Parliament enacted to amend the *CBCA* expresses a clear intent to repeal the statutory rights flowing from Clause 16. Neither has this Court come across nor been provided with any such authority. Thus, I find that Clause 16 continues to exist and its rights retain their statutory character.

(iii) *Conclusion on continuance*

[738] Accordingly, I find that the Company's continuance under the *CBCA* did not alter the statutory force of Clause 16.

6. *No declaratory relief is warranted*

[739] I now turn to the declaratory relief that CPRC has requested. Having found that the *Kingstreet* remedy is not available in this action, the remaining relief requested lies with the declarations CPRC seeks. As a reminder, CPRC sought four declarations under this category in its Claim, namely that:

> A. pursuant to the constitutional, statutory and contractual nature of the [Clause 16] Exemption any purported action that is inconsistent with the Exemption is *ultra vires* and, to the extent of the inconsistency, of no force or effect;
>
> B. the Defendant is not entitled to collect Fuel Taxes on Fuel purchased, consumed or used in the construction or working of the Canadian Pacific Railway (as defined in paragraph 9 of this Statement of Claim) since such taxes are *ultra vires*;
>
> C. The Defendant is not entitled to collect tax imposed under Part 1 of the *ITA* on income earned by CPRC in connection with the operation of the Canadian Pacific Railway (as defined in paragraph 9 of this Statement of Claim) since such taxes are *ultra vires*;
>
> D. The Defendant is not entitled to collect Carbon Taxes imposed under Part 1 of the *GGPPA*, in connection with the operation of the Canadian Pacific Railway (as defined in paragraph 9 of this Statement of Claim) since such taxes are *ultra vires*.

[740] The second and third declarations no longer apply, as I have determined that Clause 16 does not exempt Income or Fuel Tax. The fourth declaration is no longer relevant, as CPRC withdrew its claim in respect of the *GGPPA* following the SCC's decision in the *GGPPA References*. That leaves me to consider only the first declaration.

[741] Among the questions sent to the Parties prior to the additional hearing on April 30, 2021, I asked whether the Court could properly grant the first, seemingly open-ended and forward-looking declaration.

[742] Canada answered in the negative. Although Canada accepts this Court's jurisdiction to, in its discretion, grant declarations as to CPRC's rights under the taxing statutes, and does not dispute that the test for granting a discretionary declaration is satisfied (Canada's Memorandum

at para 575, citing *BCIMC* at paras 35-42), Canada argues that the declaration sought is exceedingly broad and theoretical, and that it would serve no practical utility. Canada argues declaratory relief should be "narrowly tailored to respect the procedural requirements of the relevant Statutes and the equitable defences" (Canada's Memorandum at para 575).

[743] CPRC, on the other hand, answered that this Court could grant the declaration, noting that it has ultimate discretion to tailor the precise wording of any declaration issued. The Company nonetheless provided an alternative, less expansive wording for the declaration:

> any purported action of the federal Crown to tax or collect taxes on diesel fuel purchased, consumed, or used in the construction or working of the historic Main Line, on income earned by CPRC in connection with the operation of the historic Main Line, and on the capital stock of CPRC ~~that~~ is inconsistent with Clause 16 of the 1880 Contract ~~is *ultra vires* and, to the extent of the inconsistency,~~ and therefore of no force or effect.

[744] In doing so, CPRC explained that the underlying objective was to settle the matter of Canada's future ability to levy the Income and Fuel Tax, and thereby to avoid relitigation in the event this Court found that those Taxes fell within the scope of Clause 16. I note that no suggestion was made that this declaration sought to address any existing tax on capital stock, similar to the now-repealed LCT.

[745] In light of these clarifications, and my finding that Income and Fuel Tax fall beyond the scope of Clause 16, I now turn specifically to the (amended) first declaration sought by CPRC.

[746] Even as amended, I find that this forward-looking declaratory relief risks encroaching on the hypothetical, which is something courts avoid (see *Operation Dismantle Inc v R*, [1985] 1 SCR 441 at para 33, 18 DLR (4th) 481; *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at paras 60-61; *Committee for Monetary and Economic Reform v R*, 2016 FC 147 at para 144, aff'd, 2016 FCA 312, leave to appeal to SCC ref'd, 2017 CarswellNat 1859 (WL Can); *McLean v Law Society of British Columbia*, 2016 BCCA 368 at paras 17-22, leave to appeal to SCC ref'd, [2016] SCCA No 490). I see no reason to do otherwise in this case, and accordingly decline to issue the revised declaration sought.

[747] To the extent that this first declaration sought contemplates a tax on capital stock on CPR, no such tax currently exists, and has not since the 2006 repeal of the LCT. Further, there is nothing in the record to suggest the likelihood of the imposition of another similar tax. It would be unjustified and inappropriate to make a forward-looking declaration contemplating a hypothetical, inexistent tax, for the reasons explained in the paragraph above.

[748] In any event, I have found that the Clause 16 Exemption vis-à-vis federal taxation was neither repealed nor rescinded in the events canvassed during the 1960s and 1984 continuance, and would appear, barring some other issue not raised by the Parties in these proceedings, to survive to this day.

7. *With no available remedy, equitable defences raised need not be addressed*

[749] As explained in the sections above, this Court cannot grant CPRC the remedies it seeks, neither for restitutionary nor declaratory relief.

[750] Canada submits that to the extent this Court finds Clause 16 still exists and applies to CPRC, a number of equitable defences preclude the Company from relying on them. Specifically, the Crown submits that CPRC's representations, conduct, or lack thereof during the last 140 years give rise to the defences of estoppel (promissory estoppel and estoppel by convention), waiver by election, abandonment, laches, and acquiescence.

[751] CPRC argues that equitable defences do not apply. CPRC contends that the defences apply only in respect of equitable, and not legal, claims. CPRC further argues that equitable defences cannot displace its statutory entitlements and rights under Clause 16. In the alternative, CPRC contends that Canada has not made out the required elements for the various defences.

[752] Equitable remedies are always subject to the discretion of the court (*Jiro Enterprises Ltd v Spencer*, 2008 ABCA 87 at para 9; *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at para 66). They not only operate "on the conscience" of the alleged wrongdoer, but require equitable conduct on the part of the claimant (*Wewaykum* at para 107). It is thus understood that whether an equitable remedy will be granted requires a highly fact-specific analysis, which turns on the particular circumstances of each case.

[753] I see no reason to exercise the discretion of this Court to analyse equitable defences because I have neither found a basis upon which the *Kingstreet* remedy applies, nor that the declarations sought should issue. The issues arising from Canada's equitable defences are, in my view, best left for another day.

[754] Finally, the Parties have requested a period of up to 60 days from the release of this decision to reach an agreement on costs, or failing such agreement, to make submissions on costs to this Court. I have accepted that request.

JUDGMENT in T-1359-07

THIS COURT'S JUDGMENT is that:

1. The relief sought in paragraphs 1(a)-(j) of the Claim for (i) the repayment of Income and Large Corporations Tax collected under the *ITA*, and Fuel Tax collected under the *ETA* by the Defendant, and (ii) declarations in respect of the prospective collection of these taxes, is denied.

2. In terms of (i), the restitution sought under *Kingstreet* will not be granted due to the lack of an unconstitutional tax.

3. In terms of (ii), the Court will neither exercise its discretion to grant the declarations sought for Income and Fuel tax because they do not fall within the scope of the Clause 16 Exemption, nor LCT, because of the repeal of that tax in 2006, and the resulting hypothetical, forward-looking declaration that would issue.

4. The Plaintiff's claim is dismissed.

5. The Parties have 60 days from the release of this Judgment to reach an agreement on costs, or failing such agreement, to make submissions on costs to this Court of up to ten (10) pages (exclusive of a Bill of Costs annex).

"Alan S. Diner"

Judge

Table of Contents – Annexes

Annex A: Map of Main Line

"CPR Network Map (2020)"
Source: CP Archives
Page 23 of the Plaintiff's Book of Maps of the Historical Main Line

Annex B: Term 11 of the *BC Terms of Union*

11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia (not to exceed however, twenty (20) miles on each side of said line,) as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West territories and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the Union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

Annex C: *1872 CPR Act*

FC01180

ACTS

OF THE

4 - 1872

PARLIAMENT OF THE UNITED KINGDOM

OF

GREAT BRITAIN & IRELAND,

PASSED IN THE SESSIONS HELD IN THE

2ND AND 33RD, 33RD AND 34TH, 34TH AND 35TH, AND 35TH AND 36TH YEARS OF THE REIGN OF HER MAJESTY

QUEEN VICTORIA,

BEING THE FIRST, SECOND, THIRD, AND FOURTH SESSIONS OF THE TWENTIETH PARLIAMENT OF THE UNITED KINGDOM.

OTTAWA
PRINTED BY BROWN CHAMBERLIN
LAW PRINTER (FOR CANADA) TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1872.

JB0111
CPFED0012

their charter, a notice stating that such proposition will be made to the shareholders at their annual meeting shall be inserted for at least two weeks in one or more newspapers published in the City of Montreal and the Town of Sherbrooke, prior to the time when such annual meeting will take place.

Company may erect and work an electric telegraph.

3. The St. Francis and Megantic International Railway Company may, whenever their Directors consider it necessary for their purposes to do so, erect, establish and operate an electric telegraph on the line of their road, and make arrangements to connect the same with other railway or telegraph companies, and such telegraph may be used by the public for general purposes under such rules and regulations as the Company may adopt.

CAP. LXXI.

An Act respecting the Canadian Pacific Railway.

[*Assented to 14th June*, 1872.]

Preamble.

WHEREAS by the terms and conditions of the admission of British Columbia into union with the Dominion of Canada, set forth and embodied in an address to Her Majesty, adopted by the Legislative Council of that Colony, in January, 1871, under the provisions of the one hundred and forty-sixth section of "*The British North America Act*, 1867," and laid before both the Houses of the Parliament of Canada by His Excellency the Governor General, during the now last session thereof, and recited and concurred in by the Senate and House of Commons of Canada during the said session, and embodied in addresses of the said Houses to Her Majesty under the said section of the British North America Act, and approved by Her Majesty and embodied in the Order in Council admitting British Columbia into the union under the said Act, as part of the Dominion of Canada, from the twentieth day of July 1871,—it is among other things provided, that the Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such Railway within ten years from the date of the union;—The Government of British Columbia agreeing to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to

Recital: Agreement with British Columbia as to Pacific Railway.

to exceed, however, twenty miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North West Territories and the Province of Manitoba, subject to certain conditions for making good to the Dominion Government from contiguous lands, any lands within the said limits which may be held under pre-emption right or Crown grant, and for restraining the sale or alienation by the Government of British Columbia, during the said two years, of lands within the said limits;—And whereas, the House of Commons of Canada resolved during the said now last session, that the said railway should be constructed and worked by private enterprise and not by the Dominion Government; and that the public aid to be given to secure that undertaking, should consist of such liberal grants of land, and such subsidy in money, or other aid, not increasing the present rate of taxation, as the Parliament of Canada should thereafter determine; and it is expedient to make provision for carrying out the said agreement and resolution: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Resolution of House of Commons.

Canadian Pacific Railway. Name, course and line.

1. A railway, to be called "The Canadian Pacific Railway," shall be made in conformity with the agreement referred to in the preamble to this Act, and such railway shall extend from some point on or near Lake Nipissing and on the south shore thereof, to some point on the shore of the Pacific Ocean, both the said points to be determined by the Governor in Council, and the course and line of the said railway between the said points to be subject to the approval of the Governor in Council.

How to be made and worked.

Capital of Company.

Time limited for construction.

2. The whole line of the said railway shall be made and worked by private enterprise, and not by the Dominion Government, and by one company having a subscribed capital of at least ten million dollars, and approved of and agreed with by the Governor in Council in the manner hereinafter mentioned, and shall be *bond fide* commenced within two years from the twentieth day of July, one thousand eight hundred and seventy-one, and completed within ten years from the said day; and subject to the said provision as to commencement and completion, the company shall further be bound to commence and complete at such time or times as the Government may prescribe, any portion or portions of the railway lying between points on the line thereof to be defined in the Order or Orders in Council to be made from time to time in that behalf: Provided always that ten per cent. of the capital of the company shall be paid up and deposited, in money or Government securities, in the hands of the Receiver General of Canada, before any agreement is concluded between the Government and the company, and shall remain in his hands until otherwise ordered by Parliament; but if after the payment into the hands of the Receiver General by any company of the said deposit, such contract should not be finally executed, the Governor in Council shall order the said deposit to be returned.

Proviso: deposit of ten per cent of capital.

3.

Land grant.

3. The land grant to be made to the company constructing and working the said railway, to secure the construction of the same, and in consideration thereof, shall not exceed in the whole fifty million acres; but subject to this limitation, it may, in the Provinces of Manitoba and British Columbia and the North West Territories, be equal to but shall not exceed what would be contained in blocks not exceeding twenty miles in depth, on each side of the said railway, alternating with other blocks of like depth on each side thereof to be reserved by and for the Dominion Government, for the purposes of this Act, and to be sold by it, and the proceeds thereof applied towards reimbursing the sums expended by the Dominion under this Act: and the lands to be granted to the company may be laid out and granted in such alternate blocks, in places remote from settlement and where the Governor in Council may be of opinion that such system is expedient, and to be designated in and by agreement between the Government and the company; but no such grant shall include any land then before granted to any other party, or on which any other party has any awful claim of pre-emption or otherwise, or any land reserved for lschool purposes; and the deficiency arising from the exception of any such lands shall be made good to the company by the grant of an equal extent from other wild and ungranted Dominion lands: Provided that, so far as may be practicable, none of such alternate blocks of land as aforesaid shall be less than six miles nor more than twelve miles in front on the railway, and the blocks shall be so laid out as that each block granted to the company on one side of the railway shall be opposite to another block of like width reserved for the Government on the other side of the railway: And provided further, that if the total quantity of land in the alternate blocks to be so granted to the company, should be less than fifty million acres, then the Government may, in its discretion, grant to the company such additional quantity of land elsewhere as will make up with such alternate blocks, a quantity not exceeding fifty million acres; and in the case of such additional grant, a quantity of land elsewhere equal to such additional grant shall be reserved and disposed of by the Government for the same purposes as the alternate blocks to be reserved as aforesaid by the Government on the line of the railway, and such additional lands granted to the company and reserved for the Government shall be laid out in alternate blocks on each side of a common front line or lines, in like manner as the blocks granted and reserved along the line of the railway: And the Governor in Council may, in his discretion, grant to the company the right of way through any Dominion lands.

Extent.

Lands granted to be in alternate blocks.

Proviso.

Proviso: as to frontage on railway.

Proviso; if alternate blocks granted do not amount to 50,000,000 acres.

Right of way.

Lands in Ontario.

In the Province of Ontario, the land grant to the company for the purposes aforesaid, shall be such as the Government of the Dominion may be enabled to make, under any arrangement with the Government of the Province of Ontario.

When and in what proportion lands may be granted.

The lands to be granted to the company under this section, may be so granted from time to time as any portion of the railway is proceeded

proceeded with in quantities proportionate to the length, difficulty of construction or expenditure upon such portion, to be determined in such manner as may be agreed upon by the Government and the company.

Subsidy in money to company.

Amount limited.

Loan authorized.

4. The subsidy or aid in money to be granted to the said company shall be such sum not exceeding thirty millions of dollars in the whole, as may be agreed upon between the Government and the company, such subsidy to be granted from time to time by instalments as any portion of the railway is proceeded with, in proportion to the length, difficulty of construction, and cost of such portion:—And the Governor in Council is hereby authorized to raise by loan in the manner by law provided such sum not exceeding thirty million dollars as may be required to pay the said subsidy.

Gauge of railway, grades, &c.

5. The gauge of the railway shall be four feet eight inches and a half, and the grades thereof, and the materials and manner of and in which the several works forming part thereof shall be constructed, and the mode of working the railway, including the description and capacity of the locomotive engines and other rolling stock for working it, shall be such as may be agreed on by the Government and the company.

Completion and working of sections of the railway.

6. The Government of Canada and the company may agree upon the periods within which any definite portion or portions of the railway shall be completed: and whenever any portion of the railway exceeding twenty miles is completed, the Governor in Council may require the company to work the same for the conveyance of passengers and goods at such times and in such manner as may have been agreed upon with the company or provided in their charter.

Transport of Her Majesty's officers, war material, &c.

7. Her Majesty's naval or military forces, and all artillery, ammunition, baggage, provisions or other stores for their use, and all officers and others travelling on Her Majesty's naval or military or other service and their baggage and stores, shall at all times, when the company shall be thereunto required by one of Her Majesty's Principal Secretaries of State, or by the Commander of Her Majesty's Forces in Canada, or by the Chief Naval Officer on the North American Station on the Atlantic, or the Valparaiso Station on the Pacific Ocean, be carried on the said railway on such terms and conditions, and under such regulations as the Governor in Council shall from time to time make, or as shall be agreed upon between the Government of Canada, and one of Her Majesty's Principal Secretaries of State.

Cost of survey made by Government to be part of subsidy.

8. The company shall allow as part of the subsidy aforesaid, the cost of the survey made in the years one thousand eight hundred and seventy-one and one thousand eight hundred and seventy-two, by the Government of Canada, for the purpose of ascertaining the best line for the said railway.

9.

Government may agree with a company incorporated for the construction of the railway.

9. If there be any company incorporated by the Parliament of Canada with power to construct and work a railway from Lake Nipissing to the Pacific Ocean, on a line approved by the Governor in Council under this Act,—then, if such company have the amount of subscribed capital hereinbefore mentioned, and be in the opinion of the Governor in Council able to construct and work such railway in the manner and within the time hereinbefore prescribed, and there be no provision in their Act of incorporation preventing an agreement being made with and carried out by such company under this Act and in conformity with all the provisions thereof,—the Governor in Council may make such agreement with the company, and such agreement shall be held to be part and parcel of its Act of incorporation, as if embodied therein, and any part of such Act inconsistent with such agreement shall be null and void.

If more than one are so incorporated.

10. If there be two or more companies incorporated by the Parliament of Canada, each having power to construct and work a railway over the whole or some part of the line between Lake Nipissing and the Pacific Ocean approved by the Government, but such companies having together power to construct and work railways over the whole of such line, and having together a subscribed capital of at least ten million dollars,—then the directors of the several companies may at any time within one month after the passing of this Act, agree together that such companies shall be united and form one company, on such terms and conditions as they may think proper, not inconsistent with this Act; and such agreement shall fix the rights and liabilities of the shareholders after such union, the number of directors of the company after the union, and who shall be directors until the then next election, the period at which such election shall take place, the number of votes to which the shareholders of each company shall be respectively entitled after the union, and the provisions of their respective Acts of incorporation and by-laws, which shall apply to the united company; and generally such agreement may contain all such stipulations and provisions as may be deemed necessary for determining the rights of the respective companies and the shareholders thereof after the union.

Companies may unite, and in what manner.

Agreement to unite to be submitted to shareholders of respective companies.

11. Whenever any agreement of amalgamation shall have been made under the next preceding section, the directors of each of the companies which it is to affect shall call a special meeting of the shareholders of the company they represent, in the manner provided for calling general meetings, stating specially that such meeting is called for the purpose of considering the said agreement and ratifying or disallowing the same; and if, at such meeting of each of the companies concerned, respectively, three-fourths or more of the votes of the shareholders attending the same, either in person or by proxy, be given for ratifying the said agreement, then it shall have full effect accordingly, as if all the terms and clauses thereof, not inconsistent with this Act, were contained in an

Proviso.

an Act of the Parliament of Canada: Provided that no such agreement shall have any effect unless it be ratified as aforesaid within three months after the passing of this Act, and be also ratified and approved by the Governor in Council before either or any of the companies have commenced work upon its railway.

United companies to form one company.

12. From and after the ratification of the agreement for their union, the companies united shall be one company, and the subscribers and stockholders of each shall be deemed subscribers and stockholders of the company formed by the union, according to the terms of the agreement, which shall have force and effect, in so far as it is not inconsistent with this Act, or with law, as if embodied in an Act of the Parliament of Canada; and the corporate name of the company shall be such as provided by the agreement, subject to the provision hereinafter made.

Agreement may be made with company so formed.

13. The Government of Canada may in its discretion agree with the company so formed by the union of two or more companies, for the construction and working of the railway in accordance with this Act, in like manner as with a company originally incorporated for the construction of the whole line of the railway:—Provided that with whatever company such agreement is made, the name of such company shall thereafter be "The Canadian Pacific Railway Company," and the chief place of business of the company shall be in the City of Ottawa.

Corporate name and chief seat of business.

Company may surrender its Act of incorporation and accept a charter.

14. The company with which such agreement as aforesaid is made may, with the consent of the Governor in Council, surrender its Act or Acts of incorporation, and accept instead thereof a charter to be granted by the Governor embodying the agreement, so much of this Act, and such of the provisions of its Act or Acts of incorporation and of the Railway Act, modified as mentioned in the next following section, as may be agreed upon by the Government and the company, and such charter, being published in the *Canada Gazette*, with any Order or Orders in Council relating to it, shall, in so far as it is not inconsistent with this Act, have force and effect as if it were an Act of the Parliament of Canada.

If there is no incorporated company, governor may grant a charter.

15. If there be no company, either incorporated originally for the construction of the whole line of railway or formed out of two or more companies as aforesaid for that purpose, or if the Government cannot or does not deem it advisable to agree with any such company for the construction and working of the whole line of railway under this Act, or is of opinion that it will be more advantageous for the Dominion and will better ensure the attainment of the purposes of this Act, that a company should be incorporated by charter as hereinafter provided,—then, if there be persons able and willing to form such company, and having a subscribed capital of at least ten million dollars, secured to the satisfaction of the Governor in Council, and ready to enter into such

Conditions on which to be granted.

such agreement,—the Governor may grant to such persons and those who shall be associated with them in the undertaking, a charter embodying the agreement made with such persons, (which shall be binding on the company) and so much of this Act and of the Railway Act (as the said Act is modified by any Act of the present session, with reference to any railway to be constructed under such Act, on any of the lines, or between any of the points mentioned in this Act) as may be agreed upon by the Government and the company; and such charter being published in the *Canada Gazette* with any Order or Orders in Council relating to it, shall, in so far as it is not inconsistent with this Act, have force and effect as if it were an Act of the Parliament of Canada: Provided that one of the conditions of the agreement and of the charter shall be, that at least ten per cent of the capital shall be paid into the hands of the Receiver General, in money or Government securities, within one month after the date of the charter, and shall remain in his hands until otherwise ordered by Parliament.

Publication of charter and its effect.

Proviso.

16. The Government of Canada may further agree with the company with whom they shall have agreed for the construction and working of the said railway, for the construction and working of a branch line of railway, from some point on the railway first hereinbefore mentioned, to some point on Lake Superior in British territory, and for the construction and working of another branch line of railway from some point on the railway first mentioned, in the Province of Manitoba, to some point on the line between that Province and the United States of America,—the said points to be determined by the Governor in Council: and such branch lines of railway shall, when so agreed for, be held to form part of the railway first hereinbefore mentioned, and portions of "The Canadian Pacific Railway:" and in consideration of the construction and working of such branches a land grant in aid thereof may be made to the company to such extent as shall be agreed upon by the Government and the company: Provided that such land grant shall not exceed twenty thousand acres per mile of the branch line in Manitoba,—nor twenty-five thousand acres per mile of the branch line to Lake Superior.

Agreement for construction of branches.

To form part of the railway.

Land grant in such case.

17. The Governor may from time to time appoint such officers or persons as he may see fit, to superintend the construction of the said railway, and the works connected with it, for the purpose of ensuring the faithful performance of the agreement between the Government and the company constructing them, and the observance of all the provisions of the charter of such company.

Officers to superintend construction of railway.

18. The company shall from time to time furnish such reports of the progress of the work, and with such details, as the Government may require.

Reports by the Company.

19. The expression "the Government," or "the Government of Canada" in this Act, means the Governor in Council, and anything

Interpretation.

thing authorized to be done under this Act by the Governor, may be done by him under an Order in Council; and any agreement made by the Government with any railway company, may be made with a majority of the directors *de facto* of such company, and being certified as so made, by the signature of the President *de facto* of the company, shall be held to be made by the company and have effect accordingly.

Agreements with the Government.

CAP. LXXII.

An Act to incorporate the Inter-oceanic Railway Company of Canada.

[*Assented to* 14*th June*, 1872.]

Preamble.

WHEREAS, by the terms and conditions of the union of British Columbia with Canada, the Government of Canada agreed to secure the commencement simultaneously within two years from the date of the union, of the construction of a railway from the Pacific Ocean towards the Rocky Mountains, and from such point as might be selected east of the Rocky Mountains towards the Pacific Ocean, to connect with the railway system of Canada; and further to secure the completion of the said railway within ten years from the date of the union;

And whereas the Parliament of Canada, passed a resolution declaring that the said railway should be constructed and worked by private enterprise, and not by the Government of Canada; and that public aid should be given to secure the completion of such railway, to consist of liberal grants of lands, and subsidies in money, or other aid, as the Parliament of Canada might determine;

And whereas it is highly expedient that a great national Inter-oceanic Railway, aided and subsidized by Parliament, should be managed, controlled and worked in the interest of the Dominion, and as far as possible, by persons who are residents of Canada and subjects of Her Majesty;

And whereas the persons hereinafter mentioned, residents of Canada, and subjects of Her Majesty, are desirous of associating themselves together as a company for the purpose of constructing the said railway; and, by their petition, have prayed to be incorporated and invested with such powers as may enable them effectually to carry out the undertaking; and it is expedient to grant their prayer:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1.

Annex D: *1874 CPR Act*

Interpretation clause. 'Conveyance.'

3. The term "conveyance" in this Act includes a "surrender" to the Crown, and any conveyance to the Crown or to the Minister of Public Works, or any officer of that Department, in trust for or to the use of the Crown, shall be held to be a surrender; and no surrender, conveyance, agreement or award under the said Act or this Act shall require registration or enrolment to preserve the rights of the Crown under it, but may be registered in the Registry Office of Deeds for the place where the lands lie, if the Minister of Public Works deems it advisable.

"Lands and property."

2. The expression "lands and property" includes real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown under the said Act.

Section 26 of 31 V., c. 12, amended.

4. So much of the twenty-sixth section of the said Act, as requires that the compensation in any case therein referred to, shall be paid within six months after it has been agreed on, appraised or awarded, shall not apply to any case where such compensation is paid into court under this Act, except that such payment into court shall be made within the said time; and all the foregoing provisions of this Act shall apply to any lands or property taken, or the compensation for which was agreed upon or awarded, before the passing of this Act, but in such last mentioned case the compensation if paid into court shall be so paid within six months after the passing of this Act.

Proviso.

CHAP. 14.

An Act to provide for the construction of the Canadian Pacific Railway.

[*Assented to 26th May*, 1874.]

Preamble.

Recital of part of order of H. M. in Council admitting British Columbia into the Dominion.

WHEREAS by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, set forth and embodied in an address to Her Majesty adopted by the Legislative Council of that Colony in January, One thousand eight hundred and seventy-one, under the provisions of the one hundred and forty-sixth section of "*The British North America Act*, 1867," and laid before both the Houses of the Parliament of Canada during the Session of One thousand eight hundred and seventy-one, and concurred in by the Senate and House of Commons of Canada, and embodied in addresses of the said Houses to Her Majesty under the said section of "*The British North America Act*, 1867," and approved by Her Majesty and embodied in the Order of Her Majesty in Council of the sixteenth day of May, One thousand eight hundred and seventy-one, admitting British Columbia into the Union under the said Act as part of the Dominion of Canada, from the twentieth day of July, One thousand eight hundred and seventy-one, it is among other things provided:

That

Agreement.

That the Government of the Dominion shall construct a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected for the purpose east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the Railway System of Canada: and further that the Government of the Dominion shall secure the commencement of such railway within two years and its completion within ten years from the date of the Union;—the Government of British Columbia agreeing to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, (not to exceed, however, twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba, subject to certain conditions for making good to the Dominion Government from contiguous lands the quantity of land which may be held under pre-emption right or by Crown grant within the said limits, and for restraining the sale or alienation by the Government of British Columbia during the said two years of lands within the said limits.

Resolutions of House of Commons and Act 35 V., c. 71.

And whereas the House of Commons of Canada resolved in the Session of the year One thousand eight hundred and seventy-one, that the said railway should be constructed and worked by private enterprise and not by the Dominion Government, and that the public aid to be given to secure its accomplishment should consist of such liberal grants of land and such subsidy in money or other aid, not increasing the then existing rate of taxation, as the Parliament of Canada should thereafter determine; And whereas the Statute thirty-fifth Victoria, chapter seventy-one, was enacted in order to carry out the said agreement and resolution; but the enactments therein contained have not been effectual for that purpose.

Tariff act of present session, c. 6.

And whereas by the legislation of this present Session, in order to provide means for meeting the obligations of the Dominion, the rate of taxation has been raised much beyond that existing at the date of the said resolution: And whereas it is proper to make provision for the construction of the said work as rapidly as the same can be accomplished without further raising the rate of taxation: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Railway to be made from near L. Nipissing to the Pacific.

1. A railway to be called the "Canadian Pacific Railway" shall be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both the said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.

Division into four sections.

2. The whole line of the said railway, for the purpose of its construction, shall be divided into four sections;—the first section

First section.

to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake Superior, to a point where it shall intersect the second section hereinafter

Second section.

mentioned; the second section to begin at some point on Lake Superior, to be determined by the Governor in Council, and connecting with the first section, and to extend to Red River, in the

Third section.

Province of Manitoba; the third section to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the

Fourth section.

Governor in Council; the fourth section to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean.

Branches.

3. Branches of the said railway shall also be constructed as follows, that is to say:—

From eastern terminus to Georgian Bay.

First.—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

From Fort Garry to Pembina.

Secondly.—A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

How this Act shall apply to branches.

4. The branch railways above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject to all the provisions hereinafter made with respect to the said Canadian Pacific Railway, except in so far as it may be otherwise provided for by this Act.

Lines of telegraph.

5. A line of electric telegraph shall be constructed in advance of the said railway and branches, along their whole extent respectively, as soon as practicable after the location of the line shall have been determined upon.

Gauge, materials and mode of construction.

6. The guage of the said railway shall be four feet eight inches and a half, and the grades thereof, and the materials and manner of and in which the several works forming part thereof shall be constructed, and the mode of working the railway, including the description and the capacity of the locomotive engines and other rolling stock, shall be such as may be determined by the Governor in Council.

To be under superintendence of Department of Public Works.

7. The said Canadian Pacific Railway and the branches or sections hereinbefore mentioned, and the stations, bridges and other works connected therewith, and all engines, freight and passenger cars and rolling stock shall be constructed under the general superintendence of the Department of Public Works.

8.

Sub-sections may be made and given out by contract.

8. The Governor in Council may divide the several sections of the said railway into sub-sections, and may contract with any person, co-partnership or company incorporated or to be hereafter incorporated (hereinafter referred to as the "Contractors," which expression shall be understood to include a single "Contractor" for any such work) for the construction of any section or sub-section of the said railway, including all works connected therewith, and all rolling stock required to work the same, and for the working of the same as hereinafter provided, on such terms and conditions as by the Governor in Council may be deemed just and reasonable, subject to the following provisions:—

What the contracts shall include.

Conditions to be observed.

Tenders.

1. That the works on any section or sub-section of the said railway shall not be given out to any contractor or contractors except after tenders shall have been obtained for the same;

Contractors must have capital and give security on it.

2. That the contract for any portion of the said works shall not be given to any contractors unless such contractors give satisfactory evidence that they possess a capital of at least four thousand dollars per mile of their contract, and of which twenty-five per cent. in money, government or other sufficient securities approved by the Governor in Council, shall have been deposited to the credit of the Receiver General, in one or more of the chartered banks of the Dominion, to be designated for that purpose by the Governor in Council as security for the completion of the contract; and the Governor in Council may make such further conditions as he may deem expedient for securing the performance of the contract, as well with respect to the construction as to the working of the railway after completion, and any such condition shall be valid and may be enforced as provided by the contract;

Further security may be required.

Total sum per mile, payable in money limited, and how to be paid.

3. That the total sum to be paid to the contractors shall be stipulated in the contract, and shall be ten thousand dollars for each mile of the section or sub-section contracted for, and that such sum shall be paid to the contractors as the work progresses by monthly payments in proportion to the value of the work then actually performed, (according to the estimates of the engineers designated for the purpose by the Minister of Public Works,) as compared with the value of the whole work contracted for, including rolling stock and all things to be done or furnished by the contractors; and except money arising from the sale of lands, as hereinafter provided, no further sum of money shall be payable to the contractors as principal, but interest at the rate of four per cent. per annum for twenty-five years from the completion of the work, on a sum (to be stated in the contract) for each mile of the section or sub-section contracted for shall be payable to the contractors, and guarantees for the payment thereof shall be given from time to time to the contractors in like manner and proportion, and on like conditions, as payments are to be made on the principal sum above mentioned; and the tenders for the work shall be required to state the lowest sum per mile on which such interest and guarantees will be required;

Guarantee may be given for interest only, on a further sum for 25 years: and on what conditions.

Tenders to state lowest sum for guarantee.

4.

Subsidy in land:

4. That a quantity of land, not exceeding twenty thousand acres for each mile of the section or sub-section contracted for, shall be appropriated in alternate sections of twenty square miles each along the line of the said railway or at a convenient distance therefrom, each section having a frontage of not less than three miles nor more than six miles on the line of the said railway, and that two-thirds of the quantity of land so appropriated shall be sold by the Government at such prices as may be from time to time agreed upon between the Governor in Council and the contractors, and the proceeds thereof accounted for and paid half-yearly to the contractors free from any charge of administration or management,—the remaining third to be conveyed to the contractors. The said lands to be of fair average quality, and not to include any land already granted or occupied under any patent, license of occupation or pre-emption right; and when a sufficient quantity cannot be found in the immediate vicinity of the railway, then the same quantity, or as much as may be required to complete such quantity, shall be appropriated at such other places as may be determined by the Governor in Council.

Location of land, and conditions of subsidy: sales of land, &c., by government.

Quality of lands.

Proviso as to location.

When to be appropriated.

5. That the said blocks of land to be appropriated as aforesaid, shall be designated by the Governor in Council as soon as the line of railway, or of any section or sub-section thereof, is finally located: Provided that all such payments of the proceeds of lands sold, and conveyances of lands to be granted shall be so made and granted from time to time as the work of construction is proceeded with, in like manner and proportion and on like conditions as the money and guarantees above mentioned, and subject to any conditions of the contract as respects the construction or the working of the railway after completion.

Proviso: as to conditions of land subsidy.

Right of way through public lands.

6. That the Governor in Council may further grant to the contractors the right of way through government lands, as also any such lands required for stations or work-shops, and generally all such lands as may be necessarily required for the purpose of constructing or working the said railway.

Cost of surveys.

7. That the cost of surveys and of locating the line of the several sections and sub-sections of the said railway shall be part of the subsidy or consideration allowed to the contractors or not, as may be determined by the Governor in Council and agreed upon in the contract entered into with the contractors.

Railway, &c., to be property of contractors and worked by them. Conditions.

8. Each section or sub-section of the said railway, as it is in whole or in part completed, shall be the property of the contractors for the same, and shall be worked by and for the advantage and benefit of such contractors under such regulations as may, from time to time, be made by the Governor in Council, as regards the rates chargeable for passengers and freight, the number and description of trains to be run, and the accommodation to be afforded for freight and passengers.

9,

Railway Act, 1868, to apply.

9. All and every the provisions of the "*Railway Act*, 1868," in so far as the provisions therein contained are applicable to the said Canadian Pacific Railway, or any section or sub-section thereof, and are not inconsistent with or repugnant to the provisions of this Act, shall be considered as forming part of this Act, and are hereby incorporated therewith.

How interpreted for that purpose.

10. In applying the said Railway Act to the Canadian Pacific Railway or any portion thereof, the expression "the Railway" shall be construed as meaning any section or sub-section of the said railway, the construction of which has been undertaken by any contractors,—and the expression "the Company" shall mean the contractors for the same; and such contractors shall have all the rights and powers vested in Companies by the said Act.

Section 8 modified as to "plans and surveys."

11. As respects the said railway, the eighth section of "*The Railway Act*, 1868," relating to *Plans and Surveys*, shall be subject to the following provisions:—

Deposit of map or plan, &c.

It shall be sufficient that the map or plan and book of reference for any portion of the line of the railway, not being within any district or county for which there is a Clerk of the Peace, be deposited in the office of the Minister of Public Works of Canada, and any omission, mis-statement or erroneous description of any lands therein may be corrected by the contractor with the consent of the Minister, and certified by him; and the railway may then be made in accordance with such certified correction.

Deviations.

The eleventh sub-section of the said eighth section of the Railway Act shall not apply to any portion of the railway passing over ungranted lands of the Crown, or lands not within any surveyed township in any Province; and in such places, deviations not exceeding five miles from the line shown on the map or plan, approved by the Minister of Public Works, shall be allowed, on the approval of the engineer employed by the said Minister, without any formal correction or certificate, and any further deviation that may be authorized by the Governor in Council, and the railway made in accordance with such authorized deviation.

Proof of map or plan, &c.

The map or plan and book of reference made and deposited in accordance with this section, after approval by the Government, shall avail as if made and deposited as required by the said "*The Railway Act*, 1868," for all the purposes of the said Act, and of this Act; and any copy of the same or extract therefrom, certified by the said Minister or his deputy, shall be received as evidence in any court of law in Canada.

When there is no registry office.

It shall be sufficient that a map or profile of any part of the completed railway, which shall not lie within any county or district having a registry office, be filed in the office of the Minister of Public Works.

12,

Sections, respecting incumbrances how to apply.

12. The provision made in sub-sections thirty, thirty-one and thirty-two, of section nine of "*The Railway Act*, 1868," as to incumbrances on lands acquired for the said railway shall apply to lands so acquired in the Provinces of Manitoba and British Columbia, and in the North-West Territories; and as respects lands in the North-West Territories, the Court of Queen's Bench for the Province of Manitoba shall be held to be the Court intended by the said sub-sections.

Exercise of certain judicial powers in British Columbia, Manitoba and N. W. Territories.

13. In the Provinces of British Columbia and Manitoba, any judge of a superior or county court shall have all the powers given by the said Act to a County Judge, and in the North-West Territories such powers shall be exercised by a Judge of the Court of Queen's Bench of the Province of Manitoba.

Power to take materials.

14. It shall be lawful for the contractors to take from any public lands adjacent to or near the line of the said railway, all stone, timber, gravel and other materials which may be necessary or useful for the construction of the railway; and also to lay out and appropriate to the use of the contractor a greater extent of lands, whether public or private, for stations, depots, workshops, buildings, side-tracks, wharves, harbors, and roadway, and for establishing screens against snow, than the breadth and quantity mentioned in "*The Railway Act*, 1868," such greater extent taken, in any case, being allowed by the government, and shown on the maps or plans deposited with the Minister of Public Works.

And to take extra land for stations, &c.

Notices in Gazette.

15. As respects places not within any Province, any notice required by "*The Railway Act*, 1868," to be given in the "Official Gazette" of a Province, may be given in the *Canada Gazette*.

Form of conveyances to contractors.

16. Deeds and conveyances of lands to the contractors (not being letters patent from the Crown) may, in so far as circumstances will admit, be in the form following, that is to say:—

"Know all men by these presents, that I, A.B., in consideration of paid to me by the contractors for section (*or as the case may be,*) of the Canadian Pacific Railway the receipt whereof is hereby acknowledged, grant, bargain, sell and convey unto the said contractors for section successors and assigns, all that tract or parcel of land (*describe the land*) to have and to hold the said land and premises unto the said contractors, their successors and assigns for ever.

"Witness my hand and seal, this day of One thousand eight hundred and

"Signed, sealed and delivered in presence of } A. B. [L.S.]

"C.D.
"E.F."

or in any other form to the like effect.

17.

Terms of conveyance of H. M. troops, stores, &c., by contractors.

17. Her Majesty's naval and military forces, whether Imperial or Canadian, regular or militia, and all artillery, ammunition, baggage, provisions, or other stores for their use, and all officers and others travelling on Her Majesty's naval or military or other service, and their baggage and stores shall, at all times, when the contractors shall be thereunto required by one of Her Majesty's principal Secretaries of State, or by the Commander of Her Majesty's forces in Canada, or by the Minister of Militia and Defence of Canada, or by the Chief Naval Officer on the North American Station on the Atlantic or on the Pacific Ocean, be carried on the said railway by the contractors on such terms and conditions, and under such regulations as the Government shall, from time to time, make.

As to exercise of powers of Justices of the Peace under Railway Act.

18. The Justices of the Peace for any county or district in British Columbia and Manitoba, assembled in general or quarter sessions, shall have the power vested by section forty-nine of "*The Railway Act*, 1868," in the justices so assembled in the Province of Ontario as to the appointment of railway constables, and in places where there are no such sessions, any two Justices of the Peace in any Province, or in any place not within a Province, shall have the powers given by the said section to any two Justices of the Peace in Ontario for the appointment and dismissal of any such constables; and where there is no Clerk of the Peace the record of the appointment of constable shall be dispensed with.

GENERAL PROVISIONS.

As to offences against penal clauses of Railway Act, 1868.

9. Any felony or misdemeanor in contravention of the "Penal Clauses" of "*The Railway Act*, 1868," committed in the Province of Manitoba or British Columbia, shall be tried, punished, and dealt with in such Province, by and before the court or tribunal having cognizance of felonies and misdemeanors respectively (as the case may be), and punished in the manner provided by the said Act; and, if committed in any place not within the Province, may be tried, punished and dealt with by any court having like jurisdiction, in British Columbia, Manitoba or Ontario, in any of which Provinces the offender may be arrested and dealt with as if the offence had been committed there; or he may be arrested in the territory where the offence is committed, and committed by any Justice of the Peace for such territory for trial at such court, and in such county, district or place in either of the said Provinces, as the justice may think most convenient, and to the common gaol whereof he may commit such offender, and authorize his being conveyed by any constable; and if the punishment to which he is sentenced be imprisonment in the penitentiary, and there be no penitentiary in the Province, such imprisonment shall be in the common gaol for the place where he is convicted; and any offence against the said "Penal Clauses," or any other section of the said Act thereby cognizable before a Justice or Justices of the Peace, shall be cognizable before a Justice or Justices of the Peace

Where triable, &c.

Imprisonment.

Pecuniary penalties.

Peace for the place where the offence is committed; and if any pecuniary penalty be imposed, and there be no party entitled to receive it under the said Act, it shall be paid to the Receiver General, to the credit of the Railway Inspection Fund. And this section shall apply as well to any part of the said railway, constructed by the Government of Canada as a public work, as to any portion thereof constructed by contractors.

To apply to any portion made by Govt.

Right of purchase of Railway from contractors by Govt. to be reserved.

10. In every contract for the construction of the said railway or of any section or sub-section thereof, the Government of Canada shall reserve the right to purchase under the authority of Parliament, the said railway or such section or sub-section thereof, on payment of a sum equal to the actual cost of the said railway, section or sub-section, and ten per cent. in addition thereto,—the subsidies in land and money granted or paid by the government for the construction of the said railway being first returned or deducted from the amount to be paid, the lands sold being valued at the full amount the contractors may have received from the sale of such lands as may have been sold.

As to contracts for any part of main line.

11. No contract for the construction of any portion of the main line of the said railway shall be binding until it shall have been laid before the House of Commons for one month without being disapproved, unless sooner approved by a resolution of the House.

Any portion may be made by Government as a public work if found more advantageous.

12. In case it shall be found by the Governor in Council more advantageous to construct the said railway or any portion thereof, as a public work of the Dominion of Canada, the construction thereof shall be let out by contracts offered to public competition, and the Governor in Council may establish from time to time the mode and regulations under which the contract shall be given,

Provision in such case.

and the railway or such portion thereof shall be constructed and worked after it shall have been completed, including the rates to be charged for freight and passengers; such regulations not being contrary to any of the provisions of the Acts regulating the Department of Public Works or to any other Act or law in force in the Dominion.

How branch line to Georgian Bay may be made by contractors.

13. The branch railways shall be constructed as follows, that is to say: That section of the first branch extending from the eastern terminus of the first section of the said railway to some point on the Georgian Bay to be fixed as aforesaid, shall be constructed by contractors as a private enterprise on the same terms and conditions as provided with respect to the main line of the

Or as a public work.

said railway, or any section thereof,—or as a public work of the Dominion under such contract or contracts as may be agreed upon and sanctioned by the Governor in Council.

Bonuses or subsidies in aid of Railways from eastern terminus to to existing or

14. The Governor in Council may also grant such bonus or bonuses, subsidy or subsidies to any company or companies already incorporated or to be hereafter incorporated, not exceeding twelve thousand dollars per mile, as will secure the construction

tion of the branch lines extending from the eastern terminus of the said Canadian Pacific Railway to connect with existing or proposed lines of railway; the granting of such bonuses or subsidies to be subject to such conditions for securing the running powers and other rights over and with respect to the whole or any portion of the said branch railway, to the owners or lessees of the main line of the said railway or of any section thereof, or to the owners or lessees of any other railway connecting with the said branch railway, as the Governor in Council may determine; but every Order in Council granting such subsidy shall be laid before the House of Commons for its ratification or rejection, and shall only be operative after its ratification by resolution of the House.

proposed Railways.

Conditions.

Ratification by House of Commons required.

15. The Governor in Council may, at any time after the construction of the said branch railway, make with the company or companies owning any portion of the said branch railway, such arrangement for leasing to such company or companies any portion of the said branch railway which may belong to the government, on such terms and conditions as may be agreed upon,—such lease not to exceed a term of ten years; and may also make such other arrangements as may be deemed advantageous for working the said railway in connection with that portion of the said branch railway belonging to such company or companies: Provided no such contract for leasing the said branch railway, and no such agreement for working the said railway in connection with any other railway shall be binding until it shall have been laid before the House of Commons for one month without being disapproved unless sooner approved by a resolution of the House.

Arrangements for leasing or working any portion made by Government.

Proviso: for approval of House of Commons.

16. The branch of the said railway, from Fort Garry to Pembina, in the Province of Manitoba, shall be built either as a private enterprise, on the terms and conditions on which the main line may be constructed, or as a public work of the Dominion, under such contract or contracts as may be agreed upon and sanctioned by the Governor in Council.

Branch from Fort Garry to Pembina, how to be made.

17. The Governor, by Order in Council, shall have the right to determine the time when the works on each section or sub-section of the said railway shall be commenced, proceeded with, and completed.

Commencement, &c., of works on any section.

18. The contractors shall furnish such information of the progress of the works as may be required by the Minister of Public Works, and such statistical details, accounts and information as may be required from them after completion.

Information to be furnished by contractors.

19. The Minister of Public Works shall, within one month of the opening of each session, lay before the two Houses of Parliament a report of the progress of the works, and of the sums expended, together with copies of all contracts entered into since the

Report by Minister of P. W. to Parliament at each session.

the last report made to Parliament, for the construction of the said railway or any portion thereof, or for the running or working of the same.

Governor in Council may suspend progress of works.

20. The Governor in Council shall have the power at any time to suspend the progress of the work until the then next session of Parliament.

Appropriation for Railway out of loan with Imperial guarantee. 37 V., c. 2.

21. Out of the sums of money to be raised under the Act of the present session, intituled *"An Act to authorize the raising of a loan for the construction of certain Public Works, with the benefit of the Imperial guarantee for a portion thereof,"* and subject to the provisions of the said Act, the Governor in Council may from time to time apply sums not exceeding in the whole two million five hundred thousand pounds sterling out of the sum so raised with the Imperial guarantee, and sums not exceeding in the whole fifteen million dollars out of the sum raised under the said Act without the Imperial guarantee, for the construction of the said railway, and the purposes of this Act.

Out of loan not so guaranteed.

Separate accounts of monies hereby appropriated.

22. Separate accounts of the money expended under this Act and of the sums proceeding from the sale of any of the lands appropriated by this or any other Act for the constructing or assisting in the construction of said railway and branches thereof, shall be kept by the Receiver-General, and all sums required for the carrying out of this Act shall be paid out of money, mentioned in this or the next preceding section, and not out of any other fund, except that the Governor in Council may (as provided by the Act last cited) authorize the advance, out of the Consolidated Revenue Fund, of such sums as it may be necessary to expend for the purposes aforesaid, before the said loans can be raised,—such sums to be repaid to the Consolidated Revenue Fund out of the loans.

What monies only shall be applied for carrying out this Act.

Act of 1872 c. 71, repealed.

23. The Act intituled *"An Act respecting the Canadian Pacific Railway,"* passed in the session of 1872, by the Parliament of Canada, is hereby repealed.

Short title.

24. This Act may be cited as *"The Canadian Pacific Railway Act, 1874."*

CHAP.

Annex E: *1881 CPR Act*, including text of 1880 Contract

TREATIES

H-1896

BETWEEN

HER MAJESTY, THE QUEEN,

AND

FOREIGN POWERS.

OTTAWA:
PRINTED BY BROWN CHAMBERLIN,
LAW PRINTER (FOR CANADA) TO THE QUEEN'S MOST EXCELLENT MAJESTY,
ANNO DOMINI, 1881.

44 VICTORIA.

CHAP. 1.

An Act respecting the Canadian Pacific Railway.

[*Assented to* 15*th February*, 1881.]

Preamble.

WHEREAS by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government of the Dominion has assumed the obligation of causing a Railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada;

Preference of Parliament for construction by a company.

And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactments therein contained have not been effectual for that purpose;

Greater part still unconstructed.

And whereas certain sections of the said Railway have been constructed by the Government, and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said Railway;

Contract entered into.

And whereas, in conformity with the expressed desire of Parliament, a contract has been entered into for the construction of the said portion of the main line of the said Railway, and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract, and to make provision for the carrying out of the same:

Therefore

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

Contract approved.

1. The said contract, a copy of which with schedule annexed, is appended hereto, is hereby approved and ratified, and the Government is hereby authorized to perform and carry out the conditions thereof, according to their purport.

Charter may be granted.

2. For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the *Canada Gazette*, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.

Publication and effect of charter.

Certain grants of money and land may be made to the company chartered.

3. Upon the organization of the said Company, and the deposit by them, with the Government, of one million dollars in cash or securities approved by the Government, for the purpose in the said contract provided, and in consideration of the completion and perpetual and efficient operation of the railway by the said Company, as stipulated in the said contract, the Government may grant to the Company a subsidy of twenty-five million dollars in money, and twenty-five million acres of land, to be paid and conveyed to the Company in the manner and proportions, and upon the terms and conditions agreed upon in the said contract, and may also grant to the Company the land for right of way, stations and other purposes, and such other privileges as are provided for in the said contract. And in lieu of the payment of the said money subsidy direct to the Company, the Government may convert the same, and any interest accruing thereon, into a fund for the payment to the extent of such fund, of interest on the bonds of the Company, and may pay such interest accordingly; the whole in manner and form as provided for in the said contract.

Conversion of money grant authorized.

Certain materials may be admitted free of duty.

4. The Government may also permit the admission free of duty, of all steel rails, fish plates and other fastenings, spikes, bolts and nuts, wire, timber and all material for bridges to be used in the original construction of the said Canadian Pacific Railway, as defined by the Act thirty-seventh Victoria,

Victoria, chapter fourteen, and of a telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line, the whole as provided by the tenth section of the said contract.

Company to have possession of completed portions of the railway.

5. Pending the completion of the eastern and central sections of the said railway as described in the said contract, the Government may also transfer to the said Company the possession and right to work and run the several portions of the Canadian Pacific Railway as described in the said Act thirty-seventh Victoria, chapter fourteen, which are already constructed, and as the same shall be hereafter completed; and upon the completion of the said eastern and central sections the Government may convey to the Company, with a suitable number of station buildings, and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed, or agreed by the said contract to be constructed by the Government, which shall then be completed; and upon completion of the remainder of the portion of the said railway to be constructed by the Government, that portion also may be conveyed by the Government to the Company, and the Canadian Pacific Railway defined as aforesaid shall become and be thereafter the absolute property of the Company; the whole, however, upon the terms and conditions, and subject to the restrictions and limitations contained in the said contract.

Conveyance thereof to company when the contract is performed.

Security may be taken for operation of the railway.

6. The Government shall also take security for the continuous operation of the said railway during the ten years next subsequent to the completion thereof in the manner provided by the said contract.

SCHEDULE.

THIS CONTRACT AND AGREEMENT MADE BETWEEN HER MAJESTY THE QUEEN, acting in respect of the Dominion of Canada, and herein represented and acting by the Honorable SIR CHARLES TUPPER, K.C.M.G., Minister of Railways and Canals, and George Stephen and Duncan McIntyre, of Montreal, in Canada, John S. Kennedy of New York, in the State of New York, Richard B. Angus and James J. Hill, of St. Paul, in the State of Minnesota, Morton, Rose & Co., of London, England, and Kohn, Reinach & Co., of Paris, France,

Witnesses:

That the parties hereto have contracted and agreed with each other as follows, namely :—

Interpretation clause.

Eastern section.

1. For the better interpretation of this contract, it is hereby declared that the portion of railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western

Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire railway, as described in the Act 37th Victoria, chap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

Lake Superior section.

Central section.

C. P. Railway.

Company.

Government.

Security to be given by the company.

Conditions thereof.

2. The contractors immediately after the organization of the said Company, shall deposit with the Government $1,000,000 in cash or approved securities, as a security for the construction of the railway hereby contracted for. The Government shall pay to the Company interest on the cash deposited at the rate of four per cent. per annum, half-yearly, and shall pay over to the Company the interest received upon securities deposited,—the whole until default in the performance of the conditions hereof, or until the repayment of the deposit; and shall return the deposit to the Company on the completion of the railway, according to the terms hereof, with any interest accrued thereon.

Eastern and central sections to be constructed by company described.

Standard of railway and provision in case of disagreement as to conformity to it.

3. The Company shall lay out, construct and equip the said Eastern section, and the said Central section, of a uniform gauge of 4 feet 8½ inches; and in order to establish an approximate standard whereby the quality and the character of the railway and of the materials used in the construction thereof, and of the equipment thereof may be regulated, the Union Pacific Railway of the United States as the same was when first constructed, is hereby selected and fixed as such standard. And if the Government and the Company should be unable to agree as to whether or not any work done or materials furnished under this contract are in fair conformity with such standard, or as to any other question of fact, excluding questions of law, the subject of disagreement shall be, from time to time, referred to the determination of three referees, one of whom shall be chosen by the Government, one by the Company, and one by the two referees so chosen, and such referees shall decide as to the party by whom the expense of such reference shall be defrayed. And if such two referees should be unable to agree upon a third referee, he shall be appointed

at the instance of either party hereto, after notice to the other, by the Chief Justice of the Supreme Court of Canada. And the decision of such referees, or of the majority of them, shall be final.

Commencement and regular progress of the work.

4. The work of construction shall be commenced at the eastern extremity of the Eastern section not later than the first day of July next, and the work upon the Central section shall be commenced by the Company at such point towards the eastern end thereof on the portion of the line now under construction as shall be found convenient and as shall be approved by the Government, at a date not later than the 1st May next. And the work upon the Eastern and Central sections, shall be vigorously and continuously carried on at such rate of annual progress on each section as shall enable the Company to complete and equip the same and each of them, in running order, on or before the first day of May, 1891, by which date the Company hereby agree to complete and equip the said sections in conformity with this contract, unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods, or other causes beyond the control of the Company. And in case of the interruption or obstruction of the work of construction from any of the said causes, the time fixed for the completion of the railway shall be extended for a corresponding period.

Period for completion.

As to portion of central section made by Government.

5. The Company shall pay to the Government the cost, according to the contract, of the portion of railway, 100 miles in length, extending from the city of Winnipeg westward, up to the time at which the work was taken out of the hands of the contractor and the expenses since incurred by the Government in the work of construction, but shall have the right to assume the said work at any time and complete the same, paying the cost of construction as aforesaid, so far as the same shall then have been incurred by the Government.

Government to construct portions now under contract within periods fixed by contract.

6. Unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods or other causes beyond the control of the Government, the Government shall cause to be completed the said Lake Superior section, by the dates fixed by the existing contracts for the construction thereof; and shall also cause to be completed the portion of the said Western section now under contract, namely, from Kamloops to Yale, within the period fixed by the contracts therefor, namely, by the thirtieth day of June, 1885; and shall also cause to be completed, on or before the first day of May, 1891, the remaining portion of the said Western section, lying between Yale and Port Moody, which shall be constructed of equally good quality in every respect with the standard hereby created for the portion hereby contracted for. And the said Lake Superior section, and the portions

portions of the said Western section now under contract, shall be completed as nearly as practicable according to the specifications and conditions of the contracts therefor, except in so far as the same have been modified by the Government prior to this contract.

Completed railway to be property of company.

7. The railway constructed under the terms hereof shall be the property of the Company: and pending the completion of the Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed.

Transfer of portions constructed by Government.

And upon the completion of the Eastern and Central sections, the Government shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company; and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

Company to operate the railway for ever.

Company to equip portions transferred to them.

8. Upon the reception from the Government of the possession of each of the respective portions of the Canadian Pacific Railway, the Company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, and shall thereafter maintain and efficiently operate the same.

Subsidy in money and land.

9. In consideration of the premises, the Government agree to grant to the Company a subsidy in money of $25,000,000, and in land of 25,000,000 acres, for which subsidies the construction of the Canadian Pacific Railway shall be completed and the same shall be equipped, maintained and operated, —the said subsidies respectively to be paid and granted as the work of construction shall proceed, in manner and upon the conditions following, that is to say:—

Apportionment of money.

a. The said subsidy in money is hereby divided and appropriated as follows, namely:—

CENTRAL SECTION.

Assumed at 1,350 miles—		
1st.—900 miles, at $10,000 per mile	$ 9,000,000	
2nd.—450 " " 13,333 " "	6,000,000	
		$15,000,000

EASTERN SECTION.

Assumed at 630 miles, subsidy equal to $15,384.61 per mile	10,000,000
	$25,000,000

And

And the said subsidy in land is hereby divided and appropriated as follows, subject to the reserve hereinafter provided for:— And of land.

CENTRAL SECTION.

1st.—900 miles, at 12,500 acres per mile	11,250,000	
2nd.—450 " " 16,666.66 " " "	7,500,000	
		18,750,000

EASTERN SECTION.

Assumed at 650 miles, subsidy equal to 9,615.35 acres per mile	6,250,000	
		25,000,000

b. Upon the construction of any portion of the railway hereby contracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon, together with such equipment thereof as shall be required for the traffic thereon, the Government shall pay and grant to the Company the money and land subsidies applicable thereto, according to the division and appropriation thereof made as hereinbefore provided; the Company having the option of receiving in lieu of cash, terminable bonds of the Government, bearing such rate of interest, for such period and nominal amount as may be arranged, and which may be equivalent according to actuarial calculation to the corresponding cash payment,—the Government allowing four per cent. interest on moneys deposited with them. When to be paid or granted. Option of company to take terminable bonds.

c. If at any time the Company shall cause to be delivered on or near the line of the said railway, at a place satisfactory to the Government, steel rails and fastenings to be used in the construction of the railway, but in advance of the requirements for such construction, the Government, on the requisition of the Company, shall, upon such terms and conditions as shall be determined by the Government, advance thereon three-fourths of the value thereof at the place of delivery. And a proportion of the amount so advanced shall be deducted, according to such terms and conditions, from the subsidy to be thereafter paid, upon the settlement for each section of 20 miles of railway,—which proportion shall correspond with the proportion of such rails and fastenings which have been used in the construction of such sections. Provision as to materials for construction delivered by company in advance.

d. Until the first day of January, 1882, the Company shall have the option, instead of issuing land grant bonds as hereinafter provided, of substituting the payment by the Government of the interest (or part of the interest) on bonds of the Company mortgaging the railway and the lands to be granted by the Government, running over such term of years as may be approved by the Governor in Council, in lieu of the cash subsidy Option of the company during a certain time to substitute payment of interest on certain bonds instead of issuing land grant bonds.

sidy hereby agreed to be granted to the Company or any part thereof—such payments of interest to be equivalent according to actuarial calculation to the corresponding cash payment, the Government allowing four per cent. interest on moneys deposited with them; and the coupons representing the interest on such bonds shall be guaranteed by the Government to the extent of such equivalent. And the proceeds of the sale of such bonds to the extent of not more than $25,000,000, shall be deposited with the Government, and the balance of such proceeds shall be placed elsewhere by the Company, to the satisfaction and under the exclusive control of the Government; failing which last condition the bonds in excess of those sold shall remain in the hands of the Government. And from time to time as the work proceeds, the Government shall pay over to the Company: firstly, out of the amount so to be placed by the Company,—and, after the expenditure of that amount, out of the amount deposited with the Government,—sums of money bearing the same proportion to the mileage cash subsidy hereby agreed upon, which the net proceeds of such sale (if the whole of such bonds are sold upon the issue thereof, or, if such bonds be not all then sold, the net proceeds of the issue, calculated at the rate at which the sale of part of them shall have been made,) shall bear to the sum of $25,000,000. But if only a portion of the bond issue be sold, the amount earned by the Company according to the proportion aforesaid, shall be paid to the Company, partly out of the bonds in the hands of the Government, and partly out of the cash deposited with the Government, in similar proportions to the amount of such bonds sold and remaining unsold respectively; and the Company shall receive the bonds so paid, as cash, at the rate at which the said partial sale thereof shall have been made. And the Government will receive and hold such sum of money towards the creation of a sinking fund for the redemption of such bonds, and upon such terms and conditions, as shall be agreed upon between the Government and the Company.

Deposit of proceeds of sale of such bonds.

Payments to company out of such deposits.

Payment by delivery of bonds.

Sinking fund.

e. If the Company avail themselves of the option granted by clause *d*, the sum of $2,000 per mile for the first eight hundred miles of the Central section shall be deducted *pro ratâ* from the amount payable to the Company in respect of the said eight hundred miles, and shall be appropriated to increase the mileage cash subsidy appropriated to the remainder of the said Central section.

Alteration in apportionment of money grant in such case.

10. In further consideration of the premises, the Government shall also grant to the Company the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such

Grant of land required for railway purposes.

land shall be vested in the Government. And the Government shall also permit the admission free of duty, of all steel rails, fish plates and other fastenings, spikes, bolts and nuts, wire, timber and all material for bridges, to be used in the original construction of the railway, and of a telegraph line in connection therewith, and all telegraphic apparatus required for the first equipment of such telegraph line; and will convey to the Company, at cost price, with interest, all rails and fastenings bought in or since the year 1879, and other materials for construction in the possession of or purchased by the Government, at a valuation,—such rails, fastenings and materials not being required by it for the construction of the said Lake Superior and Western sections.

Admission of certain materials free of duty.

Sale of certain materials to company by Government.

11. The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper House, in so far as such lands shall be vested in the Government,—the Company receiving the sections bearing uneven numbers. But should any of such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to receive them as part of such grant; and the deficiency thereby caused and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted (which lakes and water stretches shall not be computed in the acreage of such sections), shall be made up from other portions in the tract known as the fertile belt, that is to say, the land lying between parallels 49 and 57 degrees of north latitude, or elsewhere at the option of the Company, by the grant therein of similar alternate sections extending back 24 miles deep on each side of any branch line or lines of railway to be located by the Company, and to be shown on a map or plan thereof deposited with the Minister of Railways; or of any common front line or lines agreed upon between the Government and the Company,—the conditions hereinbefore stated as to lands not fairly fit for settlement to be applicable to such additional grants. And the Company may with the consent of the Government, select in the North-West Territories any tract or tracts of land not taken up as a means of supplying or partially supplying such deficiency. But such grants shall be made only from lands remaining vested in the Government.

Provision respecting land grant.

Case of deficiency of land on line of railway provided for.

Selection by Company in such case, with consent of Government.

12. The Government shall extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway.

As to Indian title.

13.

Location of railway between certain terminal points.

13. The Company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of the railway hereby contracted for, as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the Lake Superior section; and from Selkirk to the junction with the Western section at Kamloops by way of the Yellow Head Pass.

Power to construct branches.

14. The Company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

Lands necessary for the same.

Restriction as to competing lines for a limited period.

15. For twenty years from the date hereof, no line of railway shall be authorized by the Dominion Parliament to be constructed South of the Canadian Pacific Railway, from any point at or near the Canadian Pacific Railway, except such line as shall run South West or to the Westward of South West; nor to within fifteen miles of Latitude 49. And in the establishment of any new Province in the North-West Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period.

Exemption from taxation in N. W. territories.

16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

Land grant bonds.

Their nature, and condi-

17 The Company shall be authorized by their Act of incorporation to issue bonds, secured upon the land granted and to be granted to the Company, containing provisions for the use of such bonds in the acquisition of lands, and such other

other conditions as the Company shall see fit,—such issue to be for $25,000,000. And should the Company make such issue of land grant bonds, then they shall deposit them in the hands of the Government; and the Government shall retain and hold one-fifth of such bonds as security for the due performance of the present contract in respect of the maintenance and continuous working of the railway by the Company, as herein agreed, for ten years after the completion thereof, and the remaining $20,000,000 of such bonds shall be dealt with as hereinafter provided. And as to the said one-fifth of the said bonds, so long as no default shall occur in the maintenance and working of the said Canadian Pacific Railway, the Government shall not present or demand payment of the coupons of such bonds, nor require payment of any interest thereon. And if any of such bonds, so to be retained by the Government, shall be paid off in the manner to be provided for the extinction of the whole issue thereof, the Government shall hold the amount received in payment thereof as security for the same purposes as the bonds so paid off, paying interest thereon at four per cent. per annum so long as default is not made by the Company in the performance of the conditions hereof. And at the end of the said period of ten years from the completion of the said railway, if no default shall then have occurred in such maintenance and working thereof, the said bonds, or if any of them shall then have been paid off, the remainder of said bonds and the money received for those paid off, with accrued interest, shall be delivered back by the Government to the Company with all the coupons attached to such bonds. But if such default should occur, the Government may thereafter require payment of interest on the bonds so held, and shall not be obliged to continue to pay interest on the money representing bonds paid off; and while the Government shall retain the right to hold the said portion of the said land grant bonds, other securities satisfactory to the Government may be substituted for them by the Company, by agreement with the Government.

tions of issue by the company.

Deposit with Government; for what purposes and on what conditions.

If the company make no default in operating railway.

In case of such default.

18. If the Company shall find it necessary or expedient to sell the remaining $20,000,000 of the land grant bonds or a larger portion thereof than in the proportion of one dollar for each acre of land then earned by the Company, they shall be allowed to do so, but the proceeds thereof, over and above the amount to which the Company shall be entitled as herein provided, shall be deposited with the Government. And the Government shall pay interest upon such deposit half-yearly, at the rate of four per cent. per annum, and shall pay over the amount of such deposit to the Company from time to time, as the work proceeds,

Provision if such bonds are sold faster than lands are earned by the company, and deposit on interest with Government, and payments by Government to company.

ceeds, in the same proportions, and at the same times and upon the same conditions as the land grant—that is to say: the Company shall be entitled to receive from the Government out of the proceeds of the said land grant bonds, the same number of dollars as the number of acres of the land subsidy which shall then have been earned by them, less one fifth thereof, that is to say, if the bonds are sold at par, but if they are sold at less than par, then a deduction shall be made therefrom corresponding to the discount at which such bonds are sold. And such land grant shall be conveyed to them by the Government, subject to the charge created as security for the said land grant bonds, and shall remain subject to such charge till relieved thereof in such manner as shall be provided for at the time of the issue of such bonds.

Lands to be granted subject to such bonds.

Company to pay certain expenses.

19. The Company shall pay any expenses which shall be incurred by the Government in carrying out the provisions of the last two preceding clauses of this contract.

If land bonds are not issued, one-fifth of land to be retained as security.

How to be disposed of.

20. If the Company should not issue such land grant bonds, then the Government shall retain from out of each grant to be made from time to time, every fifth section of the lands hereby agreed to be granted, such lands to be so retained as security for the purposes, and for the length of time, mentioned in section eighteen hereof. And such lands may be sold in such manner and at such prices as shall be agreed upon between the Government and the Company; and in that case the price thereof shall be paid to, and held by the Government for the same period, and for the same purposes as the land itself, the Government paying four per cent. per annum interest thereon. And other securities satisfactory to the Government may be substituted for such lands or money by agreement with the Government.

Substitution of other securities.

Company to be incorporated as by schedule A.

21. The Company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the Company in the form hereto appended as Schedule A.

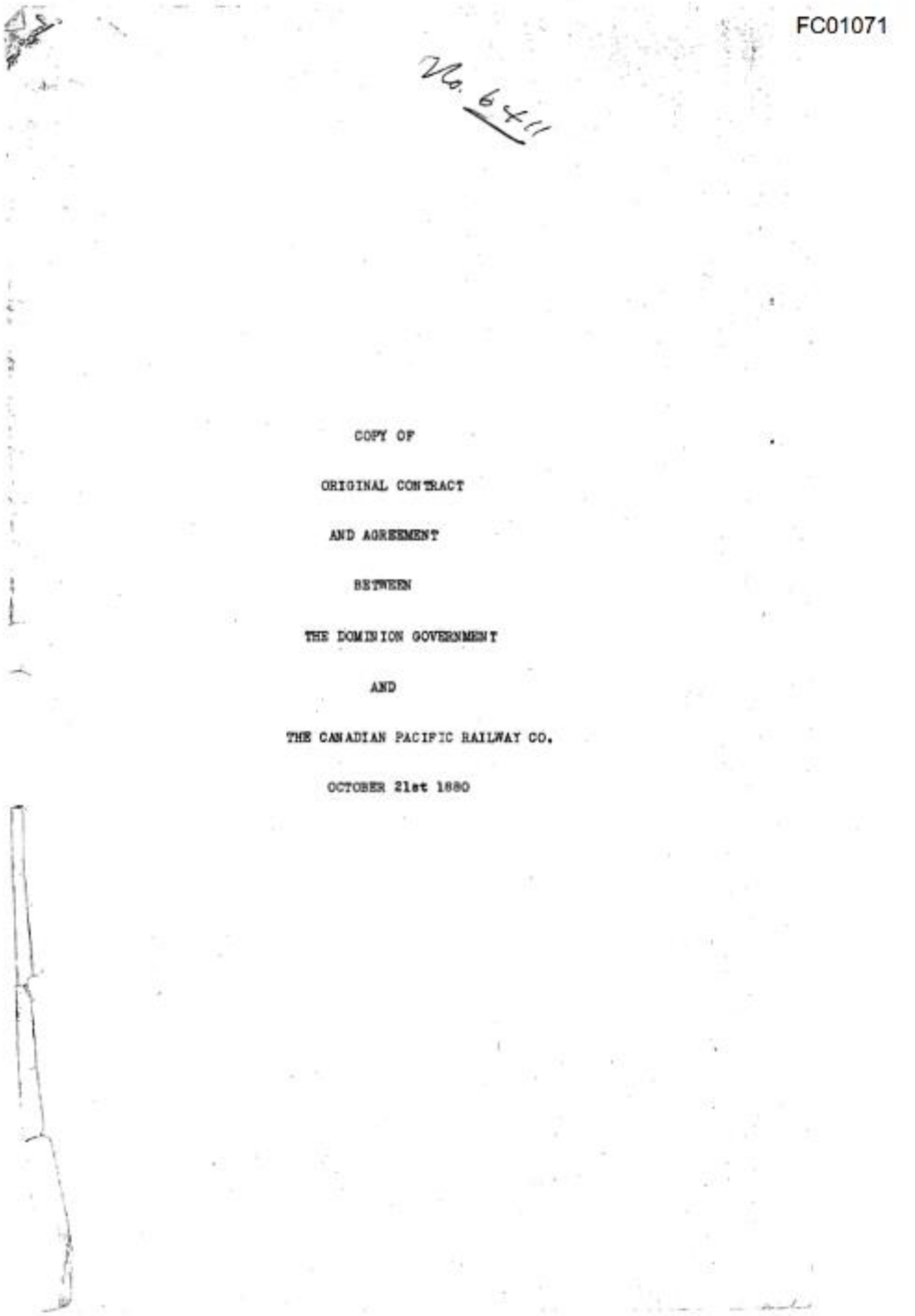
Railway Act to apply.

Exceptions.

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the Company, shall apply to the Canadian Pacific Railway.

In

Annex F: Copy of original, signed 1880 Contract



FC01071

No. 6411

COPY OF

ORIGINAL CONTRACT

AND AGREEMENT

BETWEEN

THE DOMINION GOVERNMENT

AND

THE CANADIAN PACIFIC RAILWAY CO.

OCTOBER 21st 1880

CP

No 6411

Confidential

THIS CONTRACT AND AGREEMENT MADE BETWEEN HER MAJESTY THE QUEEN, acting in respect of the Dominion of Canada, and herein represented and acting by the Honorable Sir Charles Tupper K.C.M.G. Minister of Railways and Canals and George Stephen and Duncan McIntyre, of Montreal, in Canada; John S. Kennedy of New York, in the State of New York; [redacted] Richard B. Angus and James J. Hill of St. Paul, in the State of Minnesota. Morton Rose & Company of London England and Cohen, Reinach & Company of Paris, France

Witnesseth: That the parties hereto have contracted and agreed with each other as follows, namely:—

1. For the better interpretation of this contract, it is hereby declared that the portion of Railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said Railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said Railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire Railway, as described in the Act 37th Victoria, cap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

2. The contractors immediately after the organization of the said Company, shall deposit with the Government $1,000,000 in cash or approved securities, as a security for the construction of the Railway hereby contracted for. The Government shall pay to the Company interest on the cash deposited at the rate of four per cent. per annum, half-yearly, and shall pay over to the Company the interest received upon securities deposited, the whole until default in the performance of the conditions hereof, or until the repayment of the deposit, and shall return the deposit to the Company on the completion of the railway, according to the terms hereof, with any interest accrued thereon.

3. The Company shall lay out, construct and equip the said Eastern section, and the said Central section, of a uniform gauge of 4 feet 8½ inches; and in order to establish an approximate standard whereby the quality and the character of the Railway and of the materials used in the construction thereof, and of the equipment thereof may be regulated, the Union Pacific Railway of the United States as the same was when first constructed, is hereby selected and fixed as such standard. And if the Government and the Company should be unable to agree as to whether or not any work done or materials furnished under this contract are in fair conformity with such standard, or as to any other question of fact, excluding questions of law, the subject of disagreement shall be from time to time referred to the determination of three referees, one of whom shall be chosen by the Government, one by the Company, and one by the two referees so chosen, and such referees shall decide as to the party by whom the expense of such reference shall be defrayed. And if such two referees should be unable to agree upon a third referee, he shall be appointed at the instance of either party hereto, after notice to the other, by the Chief Justice of the Supreme Court of Canada. And the decision of such referees, or of the majority of them, shall be final.

4. The work of construction shall be commenced at the eastern extremity of the Eastern section not later than the first day of July next, and the work upon the Central section shall be commenced by the Company at such point towards the eastern end thereof on the portion of the line now under construction as shall be found convenient and as shall be approved by the Government, at a date not later than the 1st May next. And the work upon the Eastern and Central sections, shall be vigorously and continuously carried on at such rate of annual progress on each section as shall enable the Company to complete and equip the same and each of them, in running order, on or before the first day of May, 1891, by which date the Company hereby agree to complete and equip the said sections in conformity with this contract, unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods, or other causes beyond the control of the Company. And in case of the interruption or obstruction of the work of construction from any of the said causes, the time fixed for the completion of the railway shall be extended for a corresponding period.

5. The Company shall pay to the Government the cost, according to the contract, of the portion of railway, 100 miles in length, extending from the city of Winnipeg westward, up to the time at which the work was taken out of the hands of the contractor and the expenses since incurred by the Government in the work of construction, but shall have the right to assume the said work at any time and complete the same, paying the cost of construction as aforesaid in so far as the same shall then have been incurred by the Government.

6. Unless prevented by the act of God, the Queen's enemies, intestine disturbances, epidemics, floods or other causes beyond the control of the Government, the Government shall cause to be completed the said Lake Superior section, by the dates fixed by the existing contracts for the construction thereof; and shall also cause to be completed the portion of the said Western section now under contract, namely, from Kamloops to Yale, within the period fixed by the contracts therefor, namely, by the thirtieth day of June, 1885; and shall also cause to be completed, on or before the first day of May, 1891, the remaining portion of the said Western section, lying between Yale and Port Moody, which shall be constructed of equally good quality in every respect with the standard hereby created for the portion hereby contracted for. And the said Lake Superior section, and the portions of the said Western section now under contract, shall be completed as nearly as practicable according to the specifications and conditions of the contracts therefor, except in so far as the same have been modified by the Government prior to this contract.

7. The Railway constructed under the terms hereof shall be the property of the Company; and pending the completion of the Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed. And upon the completion of the Eastern and Central sections, the Government shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company, and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

8. Upon the reception from the Government of the possession of each of the aforesaid portions of the Canadian Pacific Railway, the Company shall equip the same in conformity with the standard herein established for the equipment of the sections hereby contracted for, and shall thereafter maintain and efficiently operate the same.

9. In consideration of the premises, the Government agree to grant to the Company a subsidy in money of $25,000,000, and in land of 25,000,000 acres, for which subsidies the construction of the Canadian Pacific Railway shall be completed and the same shall be equipped, maintained and operated,—the said subsidies respectively to be paid and granted as the work of construction shall proceed, in manner and upon the conditions following, that is to say:—

a. The said subsidy in money is hereby divided and appropriated as follows, namely:—

CENTRAL SECTION.

Assumed at 1,350 miles—		
1st—900 miles, at $10,000 per mile	$9,000,000	
2nd—450 " " 13,333 "	6,000,000	
		$15,000,000

EASTERN SECTION.

Assumed at 650 miles, subsidy equal to $15,384.61 per mile	10,000,000	
		$25,000,000

b. And the said subsidy in land is hereby divided and appropriated as follows, subject to the reserve hereinafter provided for:—

CENTRAL SECTION.

[illegible]	[illegible]	
[illegible]	[illegible]	
		[illegible]

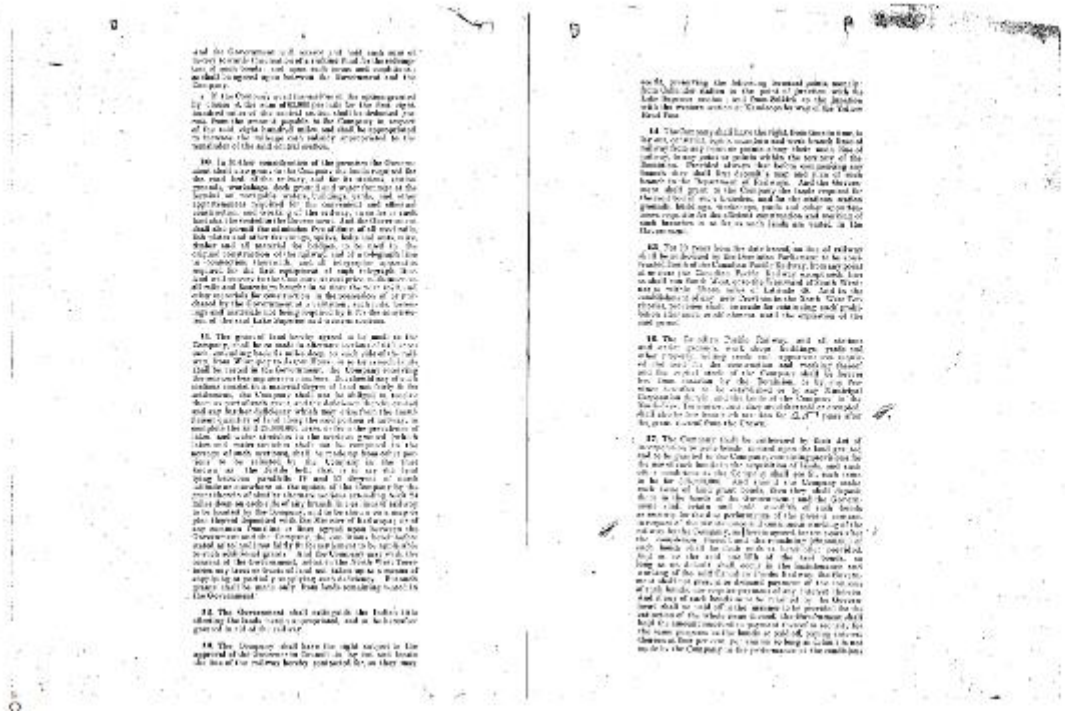
EASTERN SECTION.

Assumed at 650 miles, subsidy equal to [illegible] per mile	[illegible]	
		[illegible]

c. Upon the construction of any portion of the railway hereby contracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon, together with such equipment thereof as shall be required for the traffic thereon, the Government shall pay and grant to the Company the money and land subsidies applicable thereto, according to the division and appropriation thereof made, as hereinbefore provided; the Company having the option of receiving in lieu of cash, terminable bonds of the Government, bearing such rate of interest, for such period and nominal amount as may be arranged, and which may be equivalent according to actuarial calculation to the corresponding cash payment,—the Government allowing four per cent. interest on moneys deposited with them.

d. If at any time the Company shall cause to be delivered on or near the line of the said railway, at a place satisfactory to the Government, steel rails and fastenings to be used in the construction of the railway, but in advance of the requirements for such construction, the Government, on the requisition of the Company, shall, upon such terms and conditions as shall be determined by the Government, advance thereon three-fourths of the value thereof at the place of delivery. And a proportion of the amount so advanced shall be deducted according to such terms and conditions from the subsidy to be thereafter paid, upon the settlement for each section of 20 miles of railway, which proportion shall correspond with the proportion of such rails and fastenings which have been used in the construction of such section.

e. Until the first day of January 1882, the Company shall have the option, instead of issuing land grant bonds as hereinafter provided, of substituting the payments by the Government of the interest [illegible]



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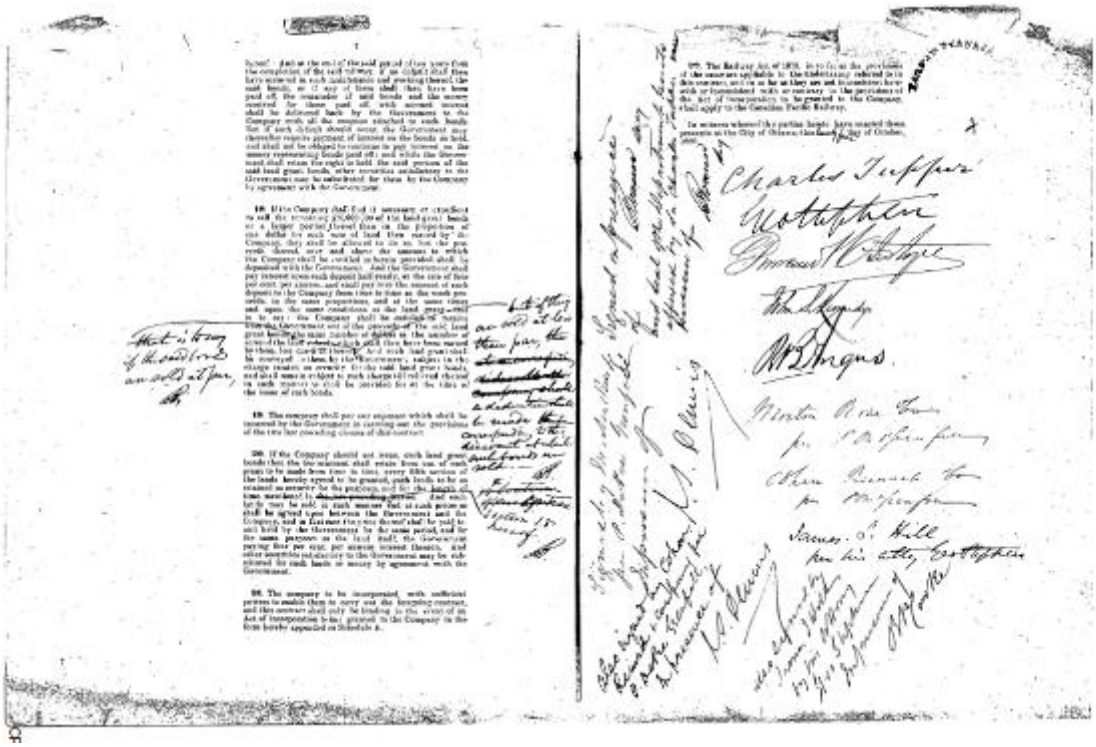


FC01071

Annex G: CPRC Charter

In witness whereof the parties hereto have executed these presents at the City of Ottawa, this twenty-first day of October, 1880.

(Signed) CHARLES TUPPER,
Minister of Railways and Canals.
" GEO. STEPHEN,
" DUNCAN McINTYRE,
" J. S. KENNEDY,
" R. B. ANGUS,
" J. J. HILL,
Per pro. Geo. Stephen.
" MORTON, ROSE & Co.
" KOHN, REINACH & Co.,
By P. Du P. Grenfell.

Signed in presence of F. BRAUN, and Seal of the Department hereto affixed by Sir CHARLES TUPPER, in presence of

(Signed) F. BRAUN.

SCHEDULE A, REFERRED TO IN THE FOREGOING CONTRACT.

INCORPORATION.

Certain persons incorporated.

1. George Stephen, of Montreal, in Canada, Esquire; Duncan McIntyre, of Montreal, aforesaid, Merchant; John S. Kennedy, of New York, in the State of New York, Banker; the firm of Morton, Rose and Company, of London, in England, Merchants; the firm of Kohn, Reinach and Company, of Paris, in France, Bankers; Richard B. Angus, and James J. Hill, both of St. Paul, in the State of Minnesota, Esquires; with all such other persons and corporations as shall become shareholders in the Company hereby incorporated, shall be and they are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway Company."

Corporate name.

Capital stock and shares.

2. The capital stock of the Company shall be twenty-five million dollars, divided into shares of one hundred dollars each,—which shares shall be transferable in such manner and upon such conditions as shall be provided by the by-laws of the Company; and such shares, or any part thereof, may be granted and issued as paid-up shares for value *bonâ fide* received by the Company, either in money at par or at such price

Paid up shares.

price and upon such conditions as the Board of Directors may fix, or as part of the consideration of any contract made by the Company.

Substitution of company as contractors; and when.

3. As soon as five million dollars of the stock of the Company have been subscribed, and thirty per centum thereof paid up, and upon the deposit with the Minister of Finance of the Dominion of one million dollars in money or in securities approved by the Governor in Council, for the purpose and upon the conditions in the foregoing contract provided, the said contract shall become and be transferred to the Company, without the execution of any deed or instrument in that behalf; and the Company shall, thereupon, become and be vested with all the rights of the contractors named in the said contract, and shall be subject to, and liable for, all their duties and obligations, to the same extent and in the same manner as if the said contract had been executed by the said Company instead of by the said contractors; and thereupon the said contractors, as individuals, shall cease to have any right or interest in the said contract, and shall not be subject to any liability or responsibility under the terms thereof otherwise than as members of the corporation hereby created. And upon the performance of the said conditions respecting the subscription of stock, the partial payment thereof, and the deposit of one million dollars to the satisfaction of the Governor in Council, the publication by the Secretary of State in the *Canada Gazette*, of a notice that the transfer of the contract to the Company has been effected and completed shall be conclusive proof of the fact. And the Company shall cause to be paid up, on or before the first day of May next, a further instalment of twenty per centum upon the said first subscription of five million dollars, of which call thirty days notice by circular mailed to each shareholder shall be sufficient. And the Company shall call in, and cause to be paid up, on or before the 31st day of December, 1882, the remainder of the said first subscription of five million dollars.

Effect of such substitution.

Notice in Canada Gazette.

Further instalment to be paid up.

And rest of $5,000,000.

Necessary franchises and powers granted.

4. All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

Proviso.

DIRECTORS.

First directors of the company.

5. The said George Stephen, Duncan McIntyre, John S. Kennedy, Richard B. Angus, James J. Hill, Henry Stafford

ford Northcote, of London, aforesaid, Esquires, Pascoe du P. Grenfell, of London, aforesaid, Merchant, Charles Day Rose, of London, aforesaid, Merchant, and Baron J. de Reinach, of Paris, aforesaid, Banker, are hereby constituted the first directors of the Company, with power to add to their number, but so that the directors shall not in all exceed fifteen in number; and the majority of the directors, of whom the President shall be one, shall be British subjects. And the Board of Directors so constituted shall have all the powers hereby conferred upon the directors of the Company, and they shall hold office until the first annual meeting of the shareholders of the Company.

Number limited.

Majority to be British subjects.

Powers and term of office.

6. Each of the directors of the Company, hereby appointed, or hereafter appointed or elected, shall hold at least two hundred and fifty shares of the stock of the Company. But the number of directors to be hereafter elected by the shareholders shall be such, not exceeding fifteen, as shall be fixed by by-law, and subject to the same conditions as the directors appointed by, or under the authority of, the last preceding section; the number thereof may be hereafter altered from time to time in like manner. The votes for their election shall be by ballot.

Qualification of directors.

Alteration of number by by-law.

Ballot.

7. A majority of the directors shall form a quorum of the board; and until otherwise provided by by-law, directors may vote and act by proxy,—such proxy to be held by a director only; but no director shall hold more than two proxies, and no meeting of directors shall be competent to transact business unless at least three directors are present thereat in person, the remaining number of directors required to form a quorum being represented by proxies.

Quorum.

Proviso.

Three must be present.

8. The Board of Directors may appoint, from out of their number, an Executive Committee, composed of at least three directors, for the transaction of the ordinary business of the Company, with such powers and duties as shall be fixed by the by-laws; and the President shall be *ex officio* a member of such committee.

Executive committee.

President to be one.

9. The chief place of business of the Company shall be at the City of Montreal, but the Company may, from time to time, by by-law, appoint and fix other places within or beyond the limits of Canada at which the business of the Company may be transacted, and at which the directors or shareholders may meet, when called as shall be determined by the by-laws. And the Company shall appoint and fix by by-law, at least one place in each Province or Territory through which the railway shall pass, where service of process may be made upon the Company, in respect of any cause of action arising within such Province or Territory,

Chief place of business.

Other places.

Places for service of process, &c.

How to be notified.

and may afterwards, from time to time, change such place by by-law. And a copy of any by-law fixing or changing any such place, duly authenticated as herein provided, shall be deposited by the Company in the office, at the seat of Government of the Province or Territory to which such by-law shall apply, of the clerk or prothonotary of the highest, or one of the highest, courts of civil jurisdiction of such Province or Territory. And if any cause of action shall arise against the Company within any Province or Territory, and any writ or process be issued against the Company thereon out of any court in such Province or Territory, service of such process may be validly made upon the Company at the place within such Province or Territory so appointed and fixed; but if the Company fail to appoint and fix such place, or to deposit, as hereinbefore provided, the by-law made in that behalf, any such process may be validly served upon the Company, at any of the stations of the said railway within such Province or Territory.

Service of process thereat.

And if company fail to appoint places.

SHAREHOLDERS.

First and other annual meetings.

10. The first annual meeting of the shareholders of the Company, for the appointment of directors, shall be held on the second Wednesday in May, one thousand eight hundred and eighty-two, at the principal office of the Company, in Montreal; and the annual general meeting of shareholders, for the election of directors and the transaction of business generally, shall be held on the same day in each year thereafter at the same place unless otherwise provided by the by-laws. And notice of each of such meetings shall be given by the publication thereof in the *Canada Gazette* for four weeks, and by such further means as shall, from time to time, be directed by the by-laws.

Notice.

Special general meetings: notice.

11. Special general meetings of the shareholders may be convened in such manner as shall be provided by the by-laws: and except as hereinafter provided, notice of such meetings shall be given in the same manner as notices of annual general meetings, the purpose for which such meeting is called being mentioned in the notices thereof; and, except as hereinafter provided, all such meetings shall be held at the chief place of business of the Company.

Place.

Provision if a meeting be necessary before notice as aforesaid can be given.

12. If at any time before the first annual meeting of the shareholders of the Company, it should become expedient that a meeting of the directors of the Company, or a special general meeting of the shareholders of the Company, should be held, before such meeting can conveniently be called, and notice thereof given in the manner provided by this Act, or by the by-laws, or before by-laws in that behalf have been passed, and at a place other than at the chief place of business of the Company in Montreal before the enactment of a by-law

by-law authorizing the holding of such meeting elsewhere; it shall be lawful for the President or for any three of the directors of the Company to call special meetings either of directors or of shareholders, or of both, to be held at the City of London in England, at times and places respectively, to be stated in the notices to be given of such meetings respectively. And notices of such meetings may be validly given by a circular mailed to the ordinary address of each director or shareholder as the case may be, in time to enable him to attend such meeting, stating in general terms the purpose of the intended meeting. And in the case of a meeting of shareholders, the proceedings of such meeting shall be held to be valid and sufficient, and to be binding on the Company in all respects, if every shareholder of the Company be present thereat in person or by proxy, notwithstanding that notice of such meeting shall not have been given in the manner required by this Act.

Notices in such case.

Meetings always valid if all shareholders or their proxies are present.

13. No shareholder holding shares upon which any call is overdue and unpaid shall vote at any meeting of shareholders. And unless otherwise provided by the by-laws, the person holding the proxy of a shareholder shall be himself a shareholder.

Limitation as to votes and proxies.

14. No call upon unpaid shares shall be made for more than twenty per centum upon the amount thereof.

And as to calls.

RAILWAY AND TELEGRAPH LINE.

15. The Company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William on Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said Province; and also other branches to be located by the Company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid: and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said Company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the Company, shall constitute the line of railway hereinafter called THE CANADIAN PACIFIC RAILWAY.

Line and gauge of railway.

And of certain branches thereof.

Commencement and completion.

Other branches.

Name of railway.

Company may construct lines of telegraph or telephone, and work them and collect tolls.

16. The Company may construct, maintain and work a continuous telegraph line and telephone lines throughout and along the whole line of the Canadian Pacific Railway, or any part thereof, and may also construct or acquire by purchase, lease or otherwise, any other line or lines of telegraph connecting with the line so to be constructed along the line of the said railway, and may undertake the transmission of messages for the public by any such line or lines of telegraph or telephone, and collect tolls for so doing; or may lease such line or lines of telegraph or telephone, or any portion thereof; and, if they think proper to undertake the transmission of messages for hire, they shall be subject to the provisions of the fourteenth, fifteenth and sixteenth sections of chapter sixty-seven of the Consolidated Statutes of Canada. And they may use any improvement that may hereafter be invented (subject to the rights of patentees) for telegraphing or telephoning, and any other means of communication that may be deemed expedient by the Company at any time hereafter.

Subject to Con. Stat. Can., c. 67, ss. 14, 15, 16.

As to future inventions.

POWERS.

Application of 42 V., c. 9.

17. "*The Consolidated Railway Act*, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.

Exceptions as to such application.

18. As respects the said railway, the seventh section of "*The Consolidated Railway Act*, 1879," relating to POWERS, and the eighth section thereof relating to PLANS AND SURVEYS, shall be subject to the following provisions:—

As to lands of the Crown required.

a. The Company shall have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the Company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways. But the provisions of this sub-section shall not apply to any beach or land lying East of Lake Nipissing except with the approval of the Governor in Council.

Plans and book of reference.

b. It shall be sufficient that the map or plan and book of reference for any portion of the line of the railway not being within any district or county for which there is a Clerk of the Peace, be deposited in the office of the Minister of Railways of Canada; and any omission, mis-statement or erroneous description of any lands therein may be corrected

by the Company, with the consent of the Minister and certified by him; and the Company may then make the railway in accordance with such certified correction.

Deviations from line on plan.

c. The eleventh sub-section of the said eighth section of the Railway Act shall not apply to any portion of the railway passing over ungranted lands of the Crown, or lands not within any surveyed township in any Province; and in such places, deviations not exceeding five miles from the line shown on the map or plan as aforesaid, deposited by the Company, shall be allowed, without any formal correction or certificate; and any further deviation that may be found expedient may be authorized by order of the Governor in Council, and the Company may then make their railway in accordance with such authorized deviation.

Deposit of plan of main line, &c.

And of branches.

d. The map or plan and book of reference of any part of the main line of the Canadian Pacific Railway made and deposited in accordance with this section, after approval by the Governor in Council, and of any branch of such railway hereafter to be located by the said Company in respect of which the approval of the Governor in Council shall not be necessary, shall avail as if made and deposited as required by the said "*Consolidated Railway Act*, 1879," for all the purposes of the said Act, and of this Act; and any copy of, or extract therefrom, certified by the said Minister or his deputy, shall be received as evidence in any court of law in Canada.

Copies thereof.

Registration thereof.

e. It shall be sufficient that a map or profile of any part of the completed railway, which shall not lie within any county or district having a registry office, be filed in the office of the Minister of Railways.

Company may take materials from public lands; and a greater extent for stations, &c. than allowed by 42 V. c. 9.

19. It shall be lawful for the Company to take from any public lands adjacent to or near the line of the said railway, all stone, timber, gravel and other materials which may be necessary or useful for the construction of the railway; and also to lay out and appropriate to the use of the Company, a greater extent of lands, whether public or private, for stations, depots, workshops, buildings, side-tracks, wharves, harbours and roadway, and for establishing screens against snow, than the breadth and quantity mentioned in "*The Consolidated Railway Act*, 1879,"—such greater extent taken, in any case being allowed by the Government, and shown on the maps or plans deposited with the Minister of Railways.

Proviso.

Limit of reduction of tolls by Parliament under 42 V., c. 9, s. 17, extended.

20. The limit to the reduction of tolls by the Parliament of Canada provided for by the eleventh sub-section of the 17th section of "*The Consolidated Railway Act*, 1879," respecting TOLLS, is hereby extended, so that such reduction may be to such an extent that such tolls when reduced shall not produce

produce less than ten per cent. per annum profit on the capital actually expended in the construction of the railway, instead of not less than fifteen per cent per annum profit, as provided by the said sub-section; and so also that such reduction shall not be made unless the net income of the Company, ascertained as described in said sub-section, shall have exceeded ten per cent. per annum instead of fifteen per cent. per annum as provided by the said sub-section. And the exercise by the Governor in Council of the power of reducing the tolls of the Company as provided by the tenth sub-section of said section seventeen is hereby limited to the same extent with relation to the profit of the Company, and to its net revenue, as that to which the power of Parliament to reduce tolls is limited by said sub-section eleven as hereby amended.

Reduction by Governor in Council extended in like manner

Restriction as to transfers of stock.

21. The first and second sub-sections of section 22, of "*The Consolidated Railway Act*, 1879," shall not apply to the Canadian Pacific Railway Company; and it is hereby enacted that the transfer of shares in the undertaking shall be made only upon the books of the Company in person or by attorney, and shall not be valid unless so made; and the form and mode of transfer shall be such as shall be, from time to time, regulated by the by-laws of the Company. And the funds of the Company shall not be used in any advance upon the security of any of the shares or stock of the Company.

Advances on, by company forbidden.

Transfer or transmission to non-shareholders subject to veto of directors, until completion of contract.

22. The third and fourth sub-sections of said section 22 of "*The Consolidated Railway Act*, 1879," shall be subject to the following provisions, namely,—that if before the completion of the railway and works under the said contract, any transfer should purport to be made of any stock or share in the Company, or any transmission of any share should be effected under the provisions of said sub-section four, to a person not already a shareholder in the Company, and if in the opinion of the board it should not be expedient that the person (not being already a shareholder) to whom such transfer or transmission shall be made or effected should be accepted as a shareholder, the directors may by resolution veto such transfer or transmission; and thereafter, and until after the completion of the said railway and works under the said contract, such person shall not be, or be recognized as a shareholder in the Company; and the original shareholder, or his estate, as the case may be, shall remain subject to all the obligations of a shareholder in the Company, with all the rights conferred upon a shareholder under this Act. But any firm holding paid-up shares in the Company may transfer the whole or any of such shares to any partner in such firm having already an interest as such partner in such shares, without being subject to such veto. And in the event of such veto being exercised, a note shall

Proviso: as to transfer by a firm to a partner.

be taken of the transfer or transmission so vetoed in order that it may be recorded in the books of the Company after the completion of the railway and works as aforesaid; but until such completion, the transfer or transmission so vetoed shall not confer any rights, nor have any effect of any nature or kind whatever as respects the Company. Note of transfer to be made and for what purpose.

23 Sub-section sixteen of section nineteen, relating to PRESIDENT AND DIRECTORS, THEIR ELECTION AND DUTIES; sub-section two of section twenty-four, relating to BY-LAWS, NOTICES, &c., sub-sections five and six of section twenty-eight, relating to GENERAL PROVISIONS, and section ninety-seven, relating to RAILWAY FUND, of "*The Consolidated Railway Act*, 1879," shall not, nor shall any of them apply to the Canadian Pacific Railway or to the Company hereby incorporated. Certain other provisions of 42 V., c. 9, not to apply.

24. The said Company shall afford all reasonable facilities to the Ontario and Pacific Junction Railway Company, when their railway shall be completed to a point of junction with the Canadian Pacific Railway, and to the Canada Central Railway Company, for the receiving, forwarding and delivering of traffic upon and from the railways of the said Companies, respectively, and for the return of carriages, trucks and other vehicles; and no one of the said Companies shall give or continue any preference or advantage to, or in favour of either of the others, or of any particular description of traffic, in any respect whatsoever; nor shall any one of the said Companies subject any other thereof, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; and any one of the said Companies which shall have any terminus or station near any terminus or station of either of the others, shall afford all reasonable facilities for receiving and forwarding all the traffic arriving by either of the others, without any unreasonable delay, and without any preference or advantage, or prejudice or disadvantage, and so that no obstruction may be offered in the using of such railway as a continuous line of communication, and so that all reasonable accommodation may, at all times, by the means aforesaid, be mutually afforded by and to the said several railway companies; and the said Canadian Pacific Railway Company shall receive and carry all freight and passenger traffic shipped to or from any point on the railway of either of the said above named railway companies passing over the Canadian Pacific Railway or any part thereof, at the same mileage rate and subject to the same charges for similar services, without granting or allowing any preference or advantage to the traffic coming from or going upon one of such railways over such traffic coming from or going upon the other of them, reserving, however, to the said Canadian Pacific Railway Company the right of making special rates for purchasers of land, or for immigrants Company to afford reasonable facilities to and receive the like from certain other railway companies. As to rates of carriage of traffic in such cases. Reservation as to purchasers of land, and emigrants.

immigrants or intending immigrants, which special rates shall not govern or affect the rates of passenger traffic as between the said Company and the said two above named Companies or either of them. And any agreement made between any two of the said companies contrary to the foregoing provisions, shall be unlawful, null and void.

Contrary agreements void.

Company may purchase or acquire by lease or otherwise certain other railways or amalgamate with them.

25. The Company, under the authority of a special general meeting of the shareholders thereof, and as an extension of the railway hereby authorized to be constructed, may purchase or acquire by lease or otherwise, and hold and operate, the Canada Central Railway, or may amalgamate therewith, and may purchase or acquire by lease or otherwise and hold and operate a line or lines of railway from the City of Ottawa to any point at navigable water on the Atlantic seaboard or to any intermediate point, or may acquire running powers over any railway now constructed between Ottawa and any such point or intermediate point : And the Company may purchase or acquire any such railway, subject to such existing mortgages, charges or liens thereon as shall be agreed upon, and shall possess with regard to any lines of railway so purchased, or acquired, and becoming the property of the Company, the same powers as to the issue of bonds thereon, or on any of them, to an amount not exceeding twenty thousand dollars per mile, and as to the security for such bonds, as are conferred upon the Company by the twenty-eighth section hereof, in respect of bonds to be issued upon the Canadian Pacific Railway. But such issue of bonds shall not affect the right of any holder of mortgages or other charges already existing upon any line of railway so purchased or acquired; and the amount of bonds hereby authorized to be issued upon such line of railway shall be diminished by the amount of such existing mortgages or charges thereon.

And borrow to a limited amount on bonds in consequence.

Not to affect prior mortgages.

Company may have docks, &c., and run vessels on any navigable water their railway touches.

26. The Company shall have power and authority to erect and maintain docks, dockyards, wharves, slips and piers at any point on or in connection with the said Canadian Pacific Railway, and at all the termini thereof on navigable water, for the convenience and accommodation of vessels and elevators; and also to acquire and work elevators, and to acquire, own, hold, charter, work and run steam and other vessels for cargo and passengers upon any navigable water, which the Canadian Pacific Railway may reach or connect with.

BY-LAWS.

By-laws may provide for certain purposes.

27. The by-laws of the Company may provide for the remuneration of the president and directors of the Company, and of any executive committee of such directors; and for the transfer of stock and shares; the registration and inscription

inscription of stock, shares, and bonds, and the transfer of registered bonds; and the payment of dividends and interest at any place or places within or beyond the limits of Canada; and for all other matters required by the said contract or by this Act to be regulated by by-laws: but the by-laws of the Company made as provided by law shall in no case have any force or effect after the next general meeting of shareholders which shall be held after the passage of such by-laws, unless they are approved by such meeting.

Must be confirmed at next general meeting.

BONDS.

28. The Company, under the authority of a special general meeting of the shareholders called for the purpose, may issue mortgage bonds to the extent of ten thousand dollars per mile of the Canadian Pacific Railway for the purposes of the undertaking authorized by the present Act; which issue shall constitute a first mortgage and privilege upon the said railway, constructed or acquired, and to be thereafter constructed or acquired, and upon its property, real and personal, acquired and to be thereafter acquired, including rolling stock and plant, and upon its tolls and revenues (after deduction from such tolls and revenues of working expenses), and upon the franchises of the Company; the whole as shall be declared and described as so mortgaged in any deed of mortgage as hereinafter provided. Provided always, however, that if the Company shall have issued, or shall intend to issue land grant bonds under the provisions of the thirtieth section hereof, the lands granted and to be granted by the Government to the Company may be excluded from the operation of such mortgage and privilege: and provided also that such mortgage and privilege shall not attach upon any property which the Company are hereby, or by the said contract, authorized to acquire or receive from the Government of Canada until the same shall have been conveyed by the Government to the Company, but shall attach upon such property, if so declared in such deed, as soon as the same shall be conveyed to the Company. And such mortgage and privilege may be evidenced by a deed or deeds of mortgage executed by the Company, with the authority of its shareholders expressed by a resolution passed at such special general meeting; and any such deed may contain such description of the property mortgaged by such deed, and such conditions respecting the payment of the bonds secured thereby and of the interest thereon, and the remedies which shall be enjoyed by the holders of such bonds or by any trustee or trustees for them in default of such payment, and the enforcement of such remedies, and may provide for such forfeitures and penalties, in default of such payment, as may be approved by such meeting; and may also contain, with the approval aforesaid, authority to the trustee or trustees,

Amount of bonds limited.

Mortgages for securing the same on all the property of the company.

Proviso: in case land grant bonds have been issued under section 30.

Evidence of mortgage and what conditions the bonds may contain.

Remedies of holders in default of payment.

tees, upon such default, as one of such remedies, to take possession of the railway and property mortgaged, and to hold and run the same for the benefit of the bondholders thereof for a time to be limited by such deed, or to sell the said railway and property, after such delay, and upon such terms and conditions as may be stated in such deed: and with like approval any such deed may contain provisions to the effect that upon such default and upon such other conditions as shall be described in such deed, the right of voting possessed by the shareholders of the Company, and by the holders of preferred stock therein, or by either of them, shall cease and determine, and shall thereafter appertain to the bondholders, or to them and to the holders of the whole or of any part of the preferred stock of the Company, as shall be declared by such deed: and such deed may also provide for the conditional or absolute cancellation after such sale of any or all of the shares so deprived of voting power, or of any or all of the preferred stock of the Company, or both; and may also, either directly by its terms, or indirectly by reference to the by-laws of the Company, provide for the mode of enforcing and exercising the powers and authority to be conferred and defined by such deed, under the provisions hereof. And such deed, and the provisions thereof made under the authority hereof, and such other provisions thereof as shall purport (with like approval) to grant such further and other powers and privileges to such trustee or trustees and to such bondholders, as are not contrary to law or to the provisions of this Act, shall be valid and binding. But if any change in the ownership or possession of the said railway and property shall, at any time, take place under the provisions hereof, or of any such deed, or in any other manner, the said railway and property shall continue to be held and operated under the provisions hereof, and of "*The Consolidated Railway Act*, 1879," as hereby modified. And if the Company does not avail itself of the power of issuing bonds secured upon the land grant alone as hereinafter provided, the issue of bonds hereby authorized may be increased to any amount not exceeding twenty thousand dollars per mile of the said Canadian Pacific Railway.

Right of voting may, in such case, be transferred to bondholders.

Cancellation of shares deprived of voting power.

Enforcing conditions.

Further provisions under mortgage deed.

Provision in case of change of ownership, &c., of Railway, in such case.

Increase of borrowing power if no land grant bonds are issued.

29. If any bond issue be made by the Company under the last preceding section before the said railway is completed according to the said contract, a proportion of the proceeds of such bonds or a proportion of such bonds if they be not sold, corresponding to the proportion of the work contracted for then remaining incomplete, shall be received by the Government, and shall be held, dealt with and, from time to time, paid over by the Government to the Company upon the same conditions, in the same manner and according to the same proportions as the proceeds of the bonds, the issue of which is contemplated by sub-section *d.* of Clause 9 of the said contract, and by the thirty-first section hereof.

Provision if such bonds are issued before completion of railway.

30.

Provisions as to issue of land grant mortgage bonds.

30. The Company may also issue mortgage bonds to the extent of twenty-five million dollars upon the lands granted in aid of the said railway and of the undertaking authorized by this Act; such issue to be made only upon similar authority to that required by this Act for the issue of bonds upon the railway; and when so made such bonds shall constitute a first mortgage upon such lands, and shall attach upon them when they shall be granted, if they are not actually granted at the time of the issue of such bonds. And such mortgage may be evidenced by a deed or deeds of mortgage to be executed under like authority to the deed securing the issue of bonds on the railway; and such deed or deeds under like authority may contain similar conditions and may confer upon the trustee or trustees named thereunder and upon the holders of the bonds secured thereby, remedies, authority, power and privileges and may provide for forfeitures and penalties, similar to those which may be inserted and provided for under the provisions of this Act in any deed securing the issue of bonds on the railway, together with such other provisions and conditions not inconsistent with law or with this Act as shall be so authorized. And such bonds may be styled Land Grant Bonds, and they and the proceeds thereof shall be dealt with in the manner provided in the said contract.

Evidence of mortgage and conditions.

Name of and how dealt with.

Issue of bonds in place of land grant bonds under agreement with Government.

31. The Company may, in the place and stead of the said land grant bonds, issue bonds under the twenty-eighth section hereof, to such amount as they shall agree with the Government to issue, with the interest guaranteed by the Government as provided for in the said contract; such bonds to constitute a mortgage upon the property of the Company and its franchises acquired and to be thereafter acquired—including the main line of the Canadian Pacific Railway, and the branches thereof hereinbefore described, with the plant and rolling stock thereof acquired and to be thereafter acquired, but exclusive of such other branches thereof and of such personal property as shall be excluded by the deed of mortgage to be executed as security for such issue. And the provisions of the said twenty-eighth section shall apply to such issue of bonds, and to the security which may be given for the payment thereof, and they and the proceeds thereof shall be dealt with as hereby and by the said contract provided.

To include franchise as well as property of company.

Section 28 to apply.

Facilities for issue of mortgage bonds as to seal and signatures.

32. It shall not be necessary to affix the seal of the Company to any mortgage bond issued under the authority of this Act; and every such bond issued without such seal shall have the same force and effect, and be held, treated and dealt with by all courts of law and of equity as if it were sealed with the seal of the company. And if it is provided by the mortgage deed executed to secure the issue of any bonds, that any of the signatures to such bonds or to the coupons thereto

thereto appended may be engraved, stamped or lithographed thereon, such engraved, stamped or lithographed signatures shall be valid and binding on the Company.

"Working expenses" defined.

33. The phrase "working expenses" shall mean and include all expenses of maintenance of the railway, and of the stations, buildings, works and conveniencies belonging thereto, and of the rolling and other stock and moveable plant used in the working thereof, and also all such tolls, rents or annual sums as may be paid in respect of the hire of engines, carriages or waggons let to the Company; also, all rent, charges, or interest on the purchase money of lands belonging to the Company, purchased but not paid for, or not fully paid for; and also all expenses of and incidental to working the railway and the traffic thereon, including stores and consumable articles; also rates, taxes, insurance and compensation for accidents or losses; also all salaries and wages of persons employed in and about the working of the railway and traffic, and all office and management expenses, including directors' fees, agency, legal and other like expenses.

Currency on which bonds may be issued.

34. The bonds authorized by this Act to be issued upon the railway or upon the lands to be granted to the Company, or both, may be so issued in whole or in part in the denomination of dollars, pounds sterling, or francs, or in any or all of them, and the coupons may be for payment in denominations similar to those of the bond to which they are attached.

Price and conditions of sale.

And the whole or any of such bonds, may be pledged, negotiated or sold upon such conditions and at such price as the Board of Directors shall, from time to time, determine.

May be exchanged for inscribed stock, &c.

And provision may be made by the by-laws of the Company, that after the issue of any bond, the same may be surrendered to the Company by the holder thereof, and the Company may, in exchange therefor, issue to such holder inscribed stock of the Company,—which inscribed stock may be registered or inscribed at the chief place of business of the Company or elsewhere, in such manner, with such rights, liens, privileges and preferences, at such place, and upon such conditions, as shall be provided by the by-laws of the Company.

Bonds need not be registered.

35. It shall not be necessary, in order to preserve the priority, lien, charge, mortgage or privilege, purporting to appertain to or be created by any bond issued or mortgage deed executed under the provisions of this Act, that such bond or deed should be enregistered in any manner, or in any place whatever.

Mortgage deed how deposited.

But every such mortgage deed shall be deposited in the office of the Secretary of State,—of which deposit notice shall be given in the *Canada Gazette*.

And agreements under s. 36.

And in like manner any agreement entered into by the Company, under section thirty-six of this Act, shall also be deposited

sited in the said office. And a copy of any such mortgage deed, or agreement, certified to be a true copy by the Secretary of State or his deputy, shall be received as *primâ facie* evidence of the original in all courts of justice, without proof of the signatures or seal upon such original. Certified copies.

36. If, at any time, any agreement be made by the Company with any persons intending to become bondholders of the Company, or be contained in any mortgage deed executed under the authority of this Act, restricting the issue of bonds by the Company, under the powers conferred by this Act, or defining or limiting the mode of exercising such powers, the Company, after the deposit thereof with the Secretary of State as hereinbefore provided, shall not act upon such powers otherwise than as defined, restricted and limited by such agreement. And no bond thereafter issued by the Company, and no order, resolution or proceeding thereafter made, passed or had by the Company, or by the Board of Directors, contrary to the terms of such agreement, shall be valid or effectual. Agreement with bondholders, &c., for restricting issues. Effect thereof.

37. The Company may, from time to time, issue guaranteed or preferred stock, at such price, to such amount, not exceeding ten thousand dollars per mile, and upon such conditions as to the preferences and privileges appertaining thereto, or to different issues or classes thereof, and otherwise, as shall be authorized by the majority in value of the shareholders present in person or represented by proxy at any annual meeting or at any special general meeting thereof called for the purpose,--notice of the intention to propose such issue at such meeting being given in the notice calling such meeting. But the guarantee or preference accorded to such stock shall not interfere with the lien, mortgage and privilege attaching to bonds issued under the authority of this Act. And the holders of such preferred stock shall have such power of voting at meetings of shareholders, as shall be conferred upon them by the by-laws of the Company. Company may issue guaranteed or preferred stock to a limited amount. Not to affect privileges of bondholders. Voting.

EXECUTION OF AGREEMENTS.

38. Every contract, agreement, engagement, scrip certificate or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the Company, by any agent, officer or servant of the Company, in general accordance with his powers as such under the by-laws of the Company, shall be binding upon the Company; and in no case shall it be necessary to have the seal of the Company affixed to any such bill, note, cheque, contract, agreement, engagement, bargain or scrip certificate, or to prove that the same was made, drawn, accepted or endorsed, as the case may be, in pursuance Contracts, bills, &c., by its agents to bind the company. Proof thereof.

Non-liability of such agents.

pursuance of any by-law or special vote or order; nor shall the party so acting as agent, officer or servant of the Company be subjected individually to any liability whatsoever, to any third party therefor: Provided always, that nothing in this Act shall be construed to authorize the Company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money, or as the note of a bank, or to engage in the business of banking or insurance.

Proviso: as to notes.

GENERAL PROVISIONS.

Reports to Government.

39. The Company shall, from time to time, furnish such reports of the progress of the work, with such details and plans of the work, as the Government may require.

Publication of notices.

40. As respects places not within any Province, any notice required by "*The Consolidated Railway Act*, 1879," to be given in the "Official Gazette" of a Province, may be given in the *Canada Gazette*.

Form of deeds, &c., to the company.

41. Deeds and conveyances of lands to the Company for the purposes of this Act, (not being letters patent from the Crown) may, in so far as circumstances will admit, be in the form following, that is to say:—

Form.

"Know all men by these presents, that I, A. B., in consideration of paid to me by the Canadian Pacific Railway Company, the receipt whereof is hereby acknowledged, grant, bargain, sell and convey unto the said The Canadian Pacific Railway Company, their successors and assigns, all that tract or parcel of land (*describe the land*) to have and to hold the said land and premises unto the said Company, their successors and assigns for ever.

"Witness my hand and seal, this day of one thousand eight hundred and

"Signed, sealed and delivered in presence of } A.B. [L.S.]

"C. D.
"E. F."

Obligation of the grantor.

or in any other form to the like effect. And every deed made in accordance herewith shall be held and construed to impose upon the vendor executing the same the obligation of guaranteeing the Company and its assigns against all dower and claim for dower and against all hypothecs and mortgages and against all liens and charges whatsoever and also that he has a good, valid and transferable title thereto.

CHAP.

Annex H: *CBCA* Articles and Certificate of Continuance

FC01121

CANADA

Certificate of Continuance

Canada Business Corporations Act

Certificat de prorogation

Loi sur les sociétés commerciales canadiennes

CANADIAN PACIFIC LIMITED
CANADIEN PACIFIQUE LIMITEE

Name of Corporation – Dénomination de la société

34916-0

Number – Numéro

I hereby certify that the above-mentioned Corporation was continued under Section 181 of the Canada Business Corporations Act as set out in the attached articles of Continuance.

Je certifie par les présentes que la société mentionnée ci-haut a été prorogée en vertu de l'article 181 de la Loi sur les sociétés commerciales canadiennes, tel qu'indiqué dans les clauses de prorogation ci-jointes.

Frederick H. Sparling

Director – Directeur

May 2, 1984

Date of Continuance – Date de la prorogation

JB0052
CPFED0060_0001

FC01121

CANADA BUSINESS CORPORATIONS ACT

FORM 11

ARTICLES OF CONTINUANCE
(SECTION 181)

LOI SUR LES SOCIÉTÉS COMMERCIALES CANADIENNES

FORMULE 11

CLAUSES DE PROROGATION
(ARTICLE 181)

1 — Name of Corporation / Dénomination de la société

Canadian Pacific Limited / Canadien Pacifique Limitée

2 — The place in Canada where the registered office is to be situated / Lieu au Canada où doit être situé le siège social

City of Montreal, Quebec

3 — The classes and any maximum number of shares that the corporation is authorized to issue / Catégories et tout nombre maximal d'actions que la société est autorisée à émettre

The annexed Schedule "A" is incorporated in this form

4 — Restrictions if any on share transfers / Restrictions sur le transfert des actions s'il y a lieu.

Not applicable

5 — Number (or minimum and maximum number) of directors / Nombre (ou nombre minimum et maximum) d'administrateurs

The minimum number of directors shall be 3 and the maximum number shall be 24

6 — Restrictions if any on businesses the corporation may carry on / Limites imposées quant aux activités que la société peut exploiter, s'il y a lieu.—

Not applicable

7 — (1) If change of name effected, previous name / (1) Si changement de dénomination, dénomination antérieure

Not applicable

(2) Details of incorporation / (2) Détails de la constitution

The annexed Schedule "B" is incorporated in this form

8 — Other provisions if any / Autres dispositions s'il y a lieu

The annexed Schedule "C" is incorporated in this form

Date	Signature	Description of Office — Description du poste
May 2, 1984	"F.S. BURBIDGE"	Chairman and Chief Executive Officer

FOR DEPARTMENTAL USE ONLY	À L'USAGE DU MINISTÈRE SEULEMENT
Corporation No. — N° de la société	Filed — Déposée

JB0052
CPFED0060_0002

SCHEDULE "A" to the Articles of Continuance of
Canadian Pacific Limited — Canadien Pacifique Limitée

SHARES

The Corporation is authorized to issue

1) 100,000,000 Ordinary Shares without nominal or par value,

2) a number of Preference Shares without nominal or par value such that the amount of preference stock outstanding may equal but shall not exceed at any time ½ the aggregate amount of the ordinary stock then outstanding and that the authorized capital of the Corporation shall be decreased by preference stock of the Corporation surrendered in consideration of preferred shares of the Corporation and cancelled prior to its continuance under the Canada Business Corporations Act, for such purpose each Canadian Dollar Preference Share and each Sterling Preference Share being deemed to be the equivalent of $3 and £1 respectively of preference stock and each Ordinary Share being deemed to be the equivalent of $5 of ordinary stock, and

3) a number of cumulative redeemable Preferred Shares without nominal or par value issuable in series equal to 25,000,000 less the number of 7¼% Cumulative Redeemable Preferred Shares, Series A of the Corporation redeemed or purchased for cancellation prior to its continuance under the Canada Business Corporations Act.

1. **Ordinary Shares**

The Ordinary Shares shall have attached thereto the following rights, privileges, restrictions and conditions:

a) The holders of the Ordinary Shares are entitled to vote at any meeting of shareholders of the Corporation except at separate meetings of or on separate votes by the holders of another class or series of shares.

b) The holders of the Ordinary Shares are entitled to receive any dividend declared by the Corporation except dividends declared on another class or series of shares.

c) Subject to the rights of the holders of the shares of other classes, the holders of the Ordinary Shares shall be entitled to receive the remaining property of the Corporation on dissolution.

2. **Preference Shares**

The Preference Shares shall have attached thereto the following rights, privileges, restrictions and conditions:

a) Preference Shares heretofore or hereafter issued either in Canadian or United States currency or Sterling money of Great Britain may, at the request or with the consent of any holder of any such Preference Shares, be converted or reconverted by the Corporation from one into another of the said currencies or money on such terms as the directors of the Corporation may from time to time prescribe. Preference Shares issued in Canadian currency shall be designated Canadian Dollar Preference Shares and Preference Shares issued in Sterling money of Great Britain shall be designated Sterling Preference Shares.

b) The voting rights attached to the Preference Shares shall be that every Canadian Dollar Preference Share and every Sterling Preference Share shall give the same rights as to voting as are given by an Ordinary Share.

c) As to dividends the Preference Shares shall take priority over Ordinary Shares up to, but not exceeding 4% per annum, being $0.12 per Canadian Dollar Preference Share per annum and £0.04 per Sterling Preference Share per annum, and shall not receive at any time a dividend at a higher rate than 4% per annum or in excess of these amounts. Dividends on the Preference Shares shall not be cumulative and if for any period or periods the dividends on such Preference Shares be less than 4% per annum, being $0.12 per Canadian Dollar Preference Share per annum or £0.04 per Sterling Preference Share per annum, the deficiency or any part of it shall not be made good afterwards. A holder of a fraction of a Preference Share is entitled to receive a dividend in respect of that fraction.

d) No Preference Shares shall affect the lien created by any mortgage, debenture or bond issued by the Corporation.

e) The rights of the holders of the Preference Shares on dissolution shall be determined on the basis of the provisions applicable to the preference stock of the Corporation immediately preceding its continuance under the Canada Business Corporations Act and in accordance with the provisions applicable to the other classes of shares of the Corporation and for that purpose each Canadian Dollar Preference Share shall be

SCHEDULE "A" (continued)

SHARES (continued)

2. **Preference Shares (continued)**

deemed to be $3 of such preference stock and each Sterling Preference Share shall be deemed to be £1 of such preference stock and the provisions applicable to the Ordinary Shares and the Preferred Shares shall be deemed to be those applicable to the ordinary stock and the preferred shares respectively of the Corporation immediately preceding such continuance.

3. **Preferred Shares**

The Preferred Shares shall have attached thereto as a class, the following rights, privileges, restrictions and conditions; and reference to one class or a series of shares ranking on a parity with another class or series of shares shall mean ranking on a parity with respect to payment of dividends:

a) **Preferred Shares Issuable in Series.** The Preferred Shares may be issued from time to time in one or more series of such numbers of shares, with such designations and with such rights, privileges, restrictions and conditions attaching thereto as shall be prescribed hereby or from time to time before issuance by any resolution or resolutions providing for the issue of any series which may be passed by the directors of the Corporation.

b) **Each Series of Preferred Shares to Rank on a Parity With Other Series.** The Preferred Shares of each series shall rank on a parity with the Preferred Shares of every other series, provided, however, that when in the case of any of such shares any fixed cumulative dividends are not paid in full in accordance with their respective terms, the Preferred Shares of all series shall participate ratably in respect of the dividends to be paid in respect of all Preferred Shares (including all unpaid accumulated dividends which for such purpose shall be calculated as if the same were accruing up to the date of payment) in accordance with the sums which would be payable thereon if all such dividends were declared and paid in full in accordance with their respective terms.

c) **Preference as to Dividends.** The Preferred Shares shall be entitled to preference over the Ordinary Shares, and any other shares of the Corporation ranking junior to the Preferred Shares, with respect to priority in payment of dividends and may also be given such other preferences over the Ordinary Shares and any other shares of the Corporation ranking junior to the said Preferred Shares as may be fixed in the case of each such series; provided that no dividend shall at any time be declared or paid or set apart for payment on any of the Preferred Shares unless the dividend for the then current half-year on the Preference Shares of the Corporation shall have been declared and paid or funds for the payment thereof set apart.

d) **Purchase for Cancellation.** Subject to the provisions of the Canada Business Corporations Act and to the provisions relating to any particular series of Preferred Shares, the Corporation may at any time or times purchase (if obtainable) for cancellation the whole or any part of the Preferred Shares of any series outstanding from time to time in the market upon any recognized stock exchange if listed or dealt in by the members thereof, or by invitation for tenders addressed to all the holders of record of the said series of Preferred Shares outstanding at the lowest price or prices at which in the opinion of the directors such shares are then obtainable but such price or prices shall not in any case exceed the redemption price current at the time of purchase for the shares of the particular series purchased plus costs of purchase together with an amount equivalent to all unpaid accumulated dividends which for such purpose shall be calculated as if the preferential dividends were accruing up to the date of purchase. If upon any invitation for tenders under the provisions of this paragraph Preferred Shares of a series are tendered to the Corporation in excess of the number of Preferred Shares of such series which the Corporation is prepared to purchase then the Preferred Shares of such series to be purchased by the Corporation shall be purchased as nearly as may be pro rata to the number of shares of such series tendered by each shareholder who submits a tender to the Corporation, provided that when shares are tendered at different prices, the prorating shall be effected with respect to the shares in each price range successively commencing with the shares offered at the lowest price.

e) **Redemption.** Subject to the provisions of the Canada Business Corporations Act and except in the case of shares purchased on the market or by invitation for tenders as aforesaid and subject to the provisions relating to any particular series, the Corporation may at any time or times redeem the whole or any part of the Preferred Shares of any series by giving to each person who at the date of giving such notice is the holder of Preferred Shares to be redeemed at least 30 days' notice in writing of the intention of the Corporation to redeem such Preferred Shares. Such notice shall be given by posting the same in a postage paid registered letter addressed

SCHEDULE "A" (continued)

SHARES (continued)

Preferred Shares (continued)

to each holder of such Preferred Shares to be redeemed at the last address of such shareholder as it appears on the books of the Corporation; provided, however, that accidental failure to give such notice to 1 or more of such holders shall not affect the validity of such redemption as to the other holders, but upon such failure being discovered notice shall be given forthwith and shall have the same force and effect as if given in due time. Such notice shall set out the number of Preferred Shares held by the person to whom it is addressed which are to be redeemed and the series thereof and the redemption price. Such notice shall also set out the date on which redemption is to take place, and on and after the date so specified for redemption the Corporation shall pay or cause to be paid to the holders of such Preferred Shares to be redeemed the redemption price of such shares on such redemption date on presentation and surrender, at the registered office of the Corporation or at any other place or places within Canada designated by such notice, of the certificate or certificates for such Preferred Shares so called for redemption. From and after the date specified in any such notice, the Preferred Shares called for redemption shall cease to be entitled to dividends and the holders thereof shall not be entitled to exercise any of the rights of shareholders in respect thereof unless payment of such redemption price shall not be duly made by the Corporation upon presentation and surrender of the certificates in accordance with the foregoing provisions. The Corporation may include in such notice a statement that the money required for the payment of the redemption price has been deposited or will be deposited at the opening of business on the date of redemption or on a specified date prior to such date with a specified chartered bank or banks in trust for the respective holders of such shares to be paid to them respectively upon surrender to such bank or banks of the certificate or certificates representing the same, and upon such deposit or deposits being made such shares shall be deemed to be redeemed and all rights of the holders of such shares as against the Corporation shall be limited to receiving the amount so deposited without interest, and such holders shall cease to be entitled to dividends or to exercise any rights as holders of such Preferred Shares so redeemed. In case a part only of the Preferred Shares of any particular series is at any time to be redeemed, the shares so to be redeemed shall be selected by lot, in single shares or in units of 10 shares or less, in such manner as the directors in their sole discretion shall by resolution determine. If a part only of the Preferred Shares represented by any certificate shall be redeemed, a new certificate for the balance shall be issued.

f) **Payment on Reduction of Capital.** In the event of any reduction of the capital of the Corporation, the holders of the Preferred Shares shall be entitled to receive, in priority to any payment of capital to the holders of the Ordinary Shares or any other shares of the Corporation ranking junior to the Preferred Shares, an amount equal to the redemption price that such holders would have received if their shares had been redeemed pursuant to the preceding paragraph hereof on the effective date of such reduction of capital, but shall have no further right to participate in the profits or assets of the Corporation.

g) **No Voting Rights Except as Specified.** Holders of Preferred Shares shall not have any voting rights and shall not be entitled to receive any notice of or attend any meeting of the shareholders of the Corporation except:

i) the right to attend and vote at general meetings on any question directly affecting any of the rights or privileges attached to the Preferred Shares and in that case there shall be 1 vote for each share; but no change adversely affecting the rights or privileges of any series of Preferred Shares shall be made unless sanctioned by at least ⅔ of the votes cast at a special meeting of the holders of the issued and outstanding Preferred Shares of such series duly called for considering the same; and

ii) if and whenever the Corporation shall be in default in paying dividends on the Preferred Shares and such default shall have continued for 2 years or more, whether or not such dividends are earned or declared, then and so long thereafter as any dividend remains in arrears, the holders of Preferred Shares shall be entitled as a class to elect 3 members of the board of directors of the Corporation.

h) **Dissolution.** The rights of the holders of the Preferred Shares on dissolution shall be determined on the basis of the provisions applicable to the preferred shares of the Corporation immediately preceding its continuance under the Canada Business Corporations Act and in accordance with the provisions applicable to the other classes of shares of the Corporation and for that purpose each Preferred Share shall be deemed to be 1 such preferred share and the provisions applicable to the Ordinary Shares and the Preference Shares shall be deemed to be those applicable to the ordinary stock and the preference stock respectively of the Corporation immediately preceding such continuance.

SCHEDULE "A" (continued)

SHARES (continued)

Preferred Shares, Series A

The first series of Preferred Shares of the Corporation consists of a number of shares designated "7¼% Cumulative Redeemable Preferred Shares, Series A" (hereinafter referred to as the "Series A Preferred Shares") equal to 5,600,000 less the number of 7¼% Cumulative Redeemable.Preferred Shares, Series A of the Corporation redeemed or purchased for cancellation prior to its continuance under the Canada Business Corporations Act, which Series A Preferred Shares shall have attached thereto as a series the following rights, privileges, restrictions and conditions in addition to those attaching to the Preferred Shares as a class:

aa) **Dividends.** The holders of the Series A Preferred Shares shall be entitled to receive and the Corporation shall pay to them as and when declared by the directors out of the moneys of the Corporation properly applicable to the payment of dividends, by cheque of the Corporation payable at par at any branch in Canada of the Corporation's bankers for the time being fixed preferential cumulative cash dividends in the amount of 72.5 cents per share per annum which shall accrue and be cumulative from January 1, 1972, and shall be payable semi-annually on the 28th days of January and July.

The holders of the Series A Preferred Shares shall not be entitled to any dividends other than or in excess of the fixed preferential cumulative cash dividends herein provided for.

If on any dividend payment date, the Corporation shall not have paid dividends in full on all Preferred Shares then outstanding, such dividends or the unpaid part thereof shall be paid on a subsequent date or dates in priority to dividends on any other shares of the Corporation, and no dividends shall be declared or paid on or set apart for any such other shares unless all unpaid accumulated dividends on the Preferred Shares then outstanding shall have been declared and paid or provided for at the date of such declaration or payment or setting apart; provided that no dividend shall at any time be declared or paid or set apart for payment on any of the Preferred Shares unless the dividend for the then current half-year on the Preference Shares of the Corporation shall have been declared and paid or funds for the payment thereof set apart.

bb) **Redemption.** Subject to the provisions of the Canada Business Corporations Act, the Corporation shall have the right to redeem the whole or from time to time any lesser number of the Series A Preferred Shares then outstanding on payment for each share to be redeemed of $10, without premium, together with an amount equal to all accrued and unpaid dividends on such Series A Preferred Shares, whether or not earned or declared, which dividends for such purpose shall be treated as accruing to the date of redemption, the whole constituting the redemption price.

cc) **Purchase Fund.** So long as any of the Series A Preferred Shares are outstanding the Corporation shall on January 1 in each year commencing in the year 1972 enter on its books to the credit of a purchase fund an amount of $2,000,000 to be used for the purchase of Series A Preferred Shares in such year, provided that:

i) if on the 31st day of December in the preceding year there shall remain at the credit of the purchase fund (after giving effect to any outstanding commitments for the purchase of Series A Preferred Shares) an amount which the Corporation has not been obligated by the provisions of this paragraph (cc) to apply to the purchase of Series A Preferred Shares, such amount may be applied in reduction of the amount which the Corporation would otherwise be required by the foregoing provisions of this paragraph to credit to the purchase fund on such 1st day of January; and

ii) the cost of Series A Preferred Shares theretofore redeemed or purchased by the Corporation otherwise than by application of moneys at the credit of the purchase fund may be applied at the option of the Corporation, in whole or in part at any time and from time to time to the extent not theretofore so applied, to the reduction of the amount at the credit of the purchase fund.

The amount from time to time at the credit of the purchase fund shall be applied by the Corporation with reasonable despatch to the purchase of Series A Preferred Shares to the extent available in the market upon any recognized stock exchange if listed or dealt in by the members thereof at the lowest price or prices at which in the opinion of the directors such shares are then obtainable and the purchase fund shall be reduced by the amount so applied, provided that

A) the Corporation shall not be obligated to purchase such shares at a price in excess of $10.00 per share plus reasonable costs of purchase.

SCHEDULE "A" (continued)

SHARES (continued)

Preferred Shares, Series A (continued)

B) the Corporation shall not be obligated to purchase such shares if and so long as such purchase would be contrary to any applicable law.

Any amount or amounts credited to the said purchase fund need not be kept separate from the other moneys of the Corporation and pending the application thereof as hereinbefore provided may be employed in the business of the Corporation.

dd) **Purchase for Cancellation.** Any purchases of Series A Preferred Shares for cancellation shall be made pursuant to paragraph d) of the conditions relating to the Preferred Shares as a class.

ee) **Authorization by Holders of Series A Preferred Shares.** No deletion or variation of any rights, privileges, restrictions or conditions attaching to the Series A Preferred Shares as a series shall be made by the Corporation without, but may be made with, the authorization of the holders of the Series A Preferred Shares; the authorization of the holders of the Series A Preferred Shares may be given by at least ⅔ of the votes cast at a meeting of the holders of the outstanding Series A Preferred Shares duly called for that purpose upon at least 21 days' notice; each holder of a Series A Preferred Share shall be entitled to 1 vote at any such meeting in respect of each Series A Preferred Share held and the presence in person or by proxy of the holders of at least 20% of the Series A Preferred Shares then outstanding shall constitute a quorum for any such meeting; provided that if at any such meeting a quorum is not present within 30 minutes after the time appointed for such meeting it shall be adjourned to such date not less than 15 days thereafter and to such time and place as may be designated by the chairman of the meeting and not less than 7 days' notice shall be given of such adjourned meeting; at such adjourned meeting the holders of Series A Preferred Shares present or represented by proxy shall constitute a quorum and a resolution passed by at least ⅔ of the votes cast at such adjourned meeting shall constitute the authorization of the holders of the Series A Preferred Shares; subject to the foregoing, every such meeting shall be called and held in accordance with the by-laws of the Corporation.

SCHEDULE "B" to the Articles of Continuance of
Canadian Pacific Limited — Canadien Pacifique Limitée

Incorporated by Letters Patent bearing date the 16th day of February, 1881, issued by His Excellency the Governor General of Canada under the Great Seal of Canada pursuant to an Act of the Parliament of Canada being Statutes of Canada (1881), 44 Victoria, Chapter 1 assented to on the 15th day of February, 1881, together with amending and supplementary Acts and Letters Patent.

SCHEDULE "C" to the Articles of Continuance of
Canadian Pacific Limited — Canadien Pacifique Limitée

1. The provisions of the charter of the Corporation including its Act of incorporation and all amendments thereto and its Letters Patent and all Letters Patent supplementary thereto (hereinafter referred to in this Schedule as the "Charter") continue to apply amended as required to conform to the Canada Business Corporations Act, except as otherwise provided herein and as to matters provided for by that Act, provided that these articles shall not make any amendment to the Charter of the nature referred to in subsection 170(1) of that Act that affects the preference stock or preferred shares of the Corporation other than an amendment required to conform to that Act.
2. Ordinary Shares may be issued in such amounts and at such times and to such persons and for such consideration and for such purposes as the directors may from time to time determine.
3. The directors of the Corporation shall each hold at least 2,000 Ordinary Shares of the Corporation.

SCHEDULE "C" (continued)

4. The directors may issue Preference Shares for any purpose involving the raising of new capital, the expenditure of which shall have been previously authorized by the shareholders at an annual or special meeting, in such portions, at such times, and at such prices respectively as the directors may from time to time by resolution determine.

5. The Corporation may, if the directors so determine, issue Preference Shares which it has been or may be at any time empowered to issue either in Canadian or United States currency or Sterling money of Great Britain.

6. The Corporation may at any time and from time to time on such terms and conditions as the directors of the Corporation may from time to time prescribe issue any of the Preferred Shares of the Corporation in consideration of the surrender of any Preference Shares of the Corporation, provided that what would be the par value of any such Preferred Shares so issued if each of them were a preferred share having a par value of $10 shall not exceed what would be the par value of the Preference Shares so surrendered, for such purpose each Canadian Dollar Preference Share and each Sterling Preference Share being deemed to be $3 and £1 respectively of preference stock. Any Preference Shares so surrendered shall be cancelled and the authorized and issued capital of the Corporation shall be thereby decreased.

7. When, in accordance with any right of redemption or purchase for cancellation reserved in favour of the Corporation in the provisions attaching to them, Preferred Shares are redeemed or purchased for cancellation, they shall thereby be cancelled and the authorized and issued capital of the Corporation shall thereby be decreased.

8. Except to the extent otherwise required by the Canada Business Corporations Act, Preference Shares and Preferred Shares shall be issued in accordance with the provisions applicable to the preference stock and preferred shares respectively of the Corporation immediately preceding its continuance under the Canada Business Corporations Act and for such purpose each Canadian Dollar Preference Share shall be deemed to be $3 of such preference stock, each Sterling Preference Share shall be deemed to be £1 of such preference stock and each Preferred Share shall be deemed to be 1 such preferred share.

9. The Corporation may continue to issue consolidated debenture stock and bonds, debentures or other securities collateral to or in lieu of any consolidated debenture stock as contemplated by the Charter amended as aforesaid. Except to the extent required to conform to the Canada Business Corporations Act and as otherwise provided herein, no security or security interest heretofore outstanding shall be affected by the continuance of the Corporation.

10. The holders of shares of a class or series shall not be entitled to vote separately as a class or series pursuant to section 170 of the Canada Business Corporations Act upon a proposal to amend the articles to:
    a) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class,
    b) effect an exchange, reclassification or cancellation of all or part of the shares of such class, or
    c) create a new class of shares equal or superior to the shares of such class;

    provided, however, that this section shall not be interpreted as affecting any right to vote that is conferred by the Charter.

11. Upon issuance of a certificate of continuance continuing the Corporation under the Canada Business Corporations Act,
    a) each $5 share of ordinary stock shall constitute 1 Ordinary Share,
    b) each $3 of preference stock theretofore denominated in Canadian currency shall constitute 1 Canadian Dollar Preference Share and each £1 of preference stock theretofore denominated in Sterling money of Great Britain shall constitute 1 Sterling Preference Share, provided that fractional Preference Shares shall be issued for amounts of preference stock of less than $3 or £1, and
    c) each 7¼% Cumulative Redeemable Preferred Share, Series A shall constitute 1 Series A Preferred Share.

12. The Corporation shall continue to have, hold and enjoy all rights, licences, franchises, powers, privileges, authorities and immunities heretofore granted to or conferred upon it by law or contract.

Annex I: Excerpts of Illustrated Catalogue of CPRC Facilities

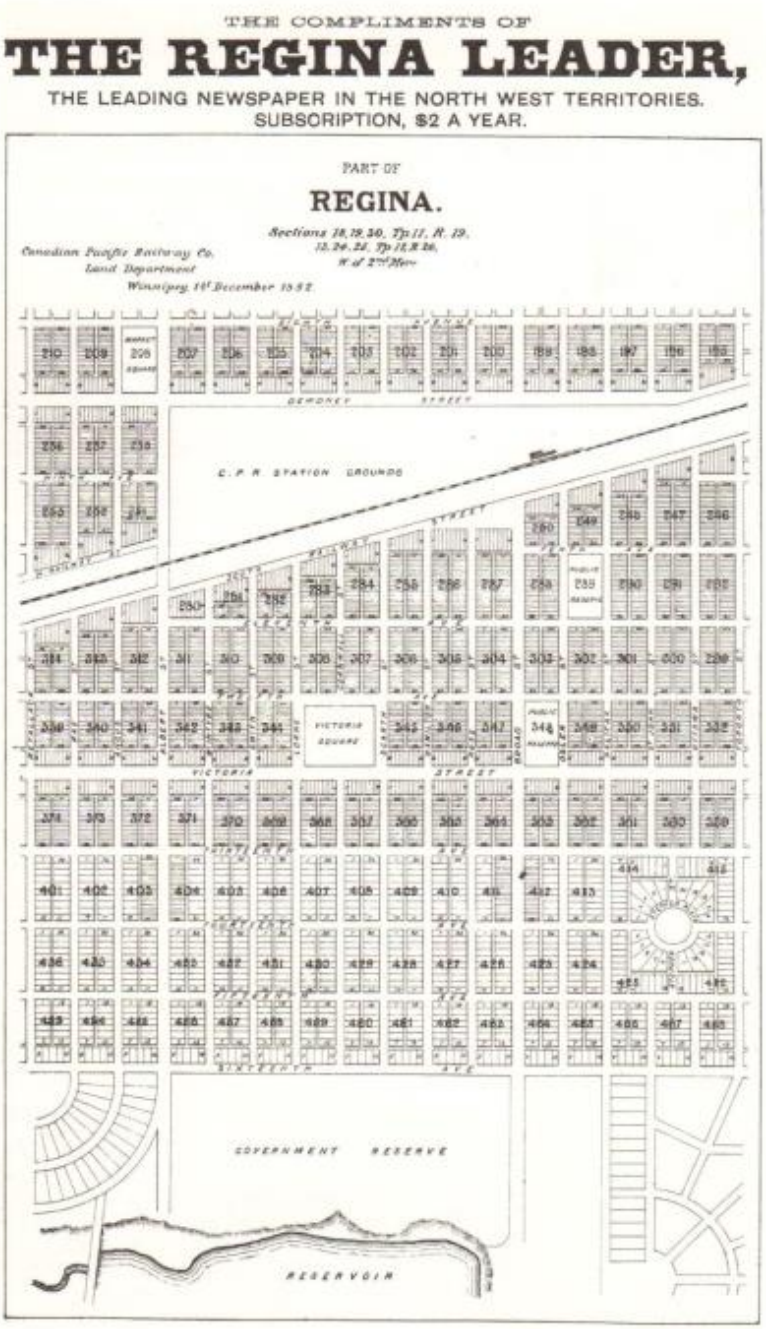
I-1:

#7 WINNIPEG, Prov. of Manitoba when CPR was built (Division point), in 1884:

The huge CPR passenger and freight station and division offices building for this major division point. The wooden building standing beyond is the 2-storey CPR dining hall serving passenger trains.

I-2:

#13 REGINA, Prov. of Saskatchewan but in the District of Assiniboia NWT when CPR was built (Station), circa 1883-84:



A real estate advertisement showing the size of the station grounds in this city, about the equivalent of 14 city blocks.

I-3:

#9 ROSSER, Prov. of Manitoba when CPR was built (Station), in 1900:

A typical Prairie windmill-powered water pump and adjacent locomotive fuel water tower, with the freight and passenger station way beyond, and a private grain elevator on CPR land.

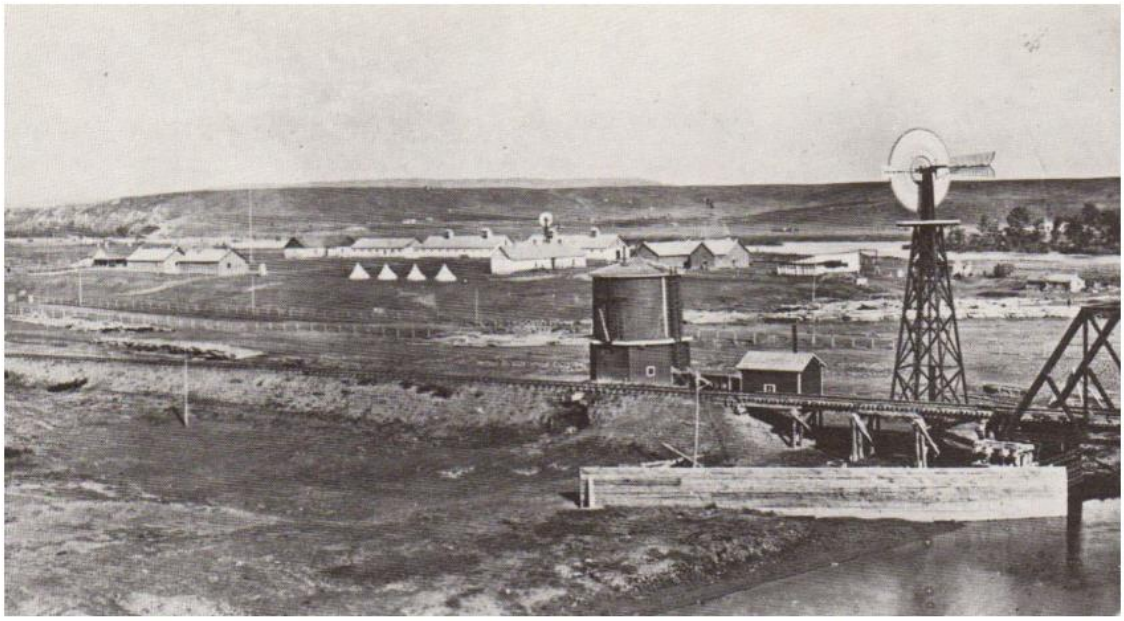
I-4:

#18 CHAPLIN, Prov. of Saskatchewan but in the District of Assiniboia NWT when CPR was built (Station), in 1900:

Small passenger and freight station with agent's family lodgings adjacent instead of above. As was sometimes the case, the rest of the station grounds are taken up with locomotive refueling facilities: water tower on the left, with coal bins and a 2-storey fuel woodshed on the right. The remains of the windmill water pump stands beyond.

I-5:

#21 CALGARY, Prov. of Alberta but in the District of Alberta NWT when CPR was built (Station), circa 1883:



The typical CPR refueling facility which dotted the Prairie landscape every 20 miles or so (32 km): A windmill powered water pump, pump house and water tower to feed each locomotive's voracious appetite for water to make steam power for its propulsion cylinders.

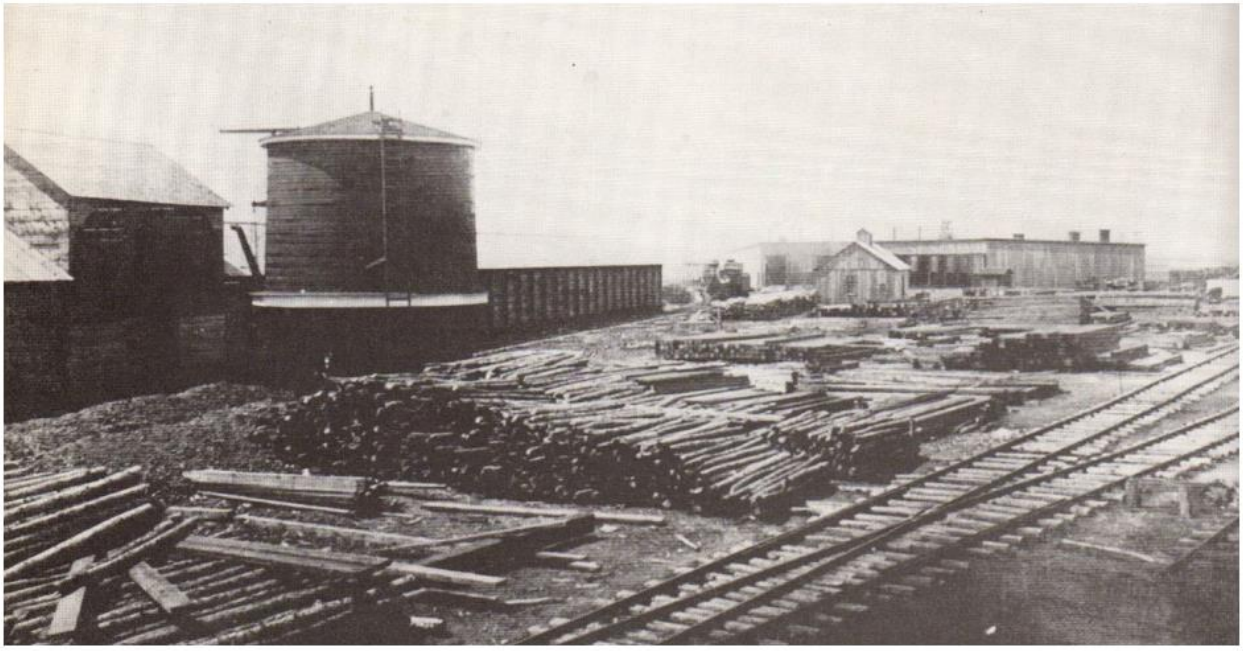
I-6:

#20 MEDICINE HAT, Prov. of Alberta but in the District of Assiniboia NWT when the CPR was built (Division point), in 1900:

From right to left: the locomotive roundhouse and turntable for maintenance and light repairs, divisional offices, a huge locomotive refueling facility with giant water tower and coal sheds (plus sand for locomotive sand dome), a major freight yard behind, and farther to the left, the passenger station and 2-storey dining hall building.

I-7:

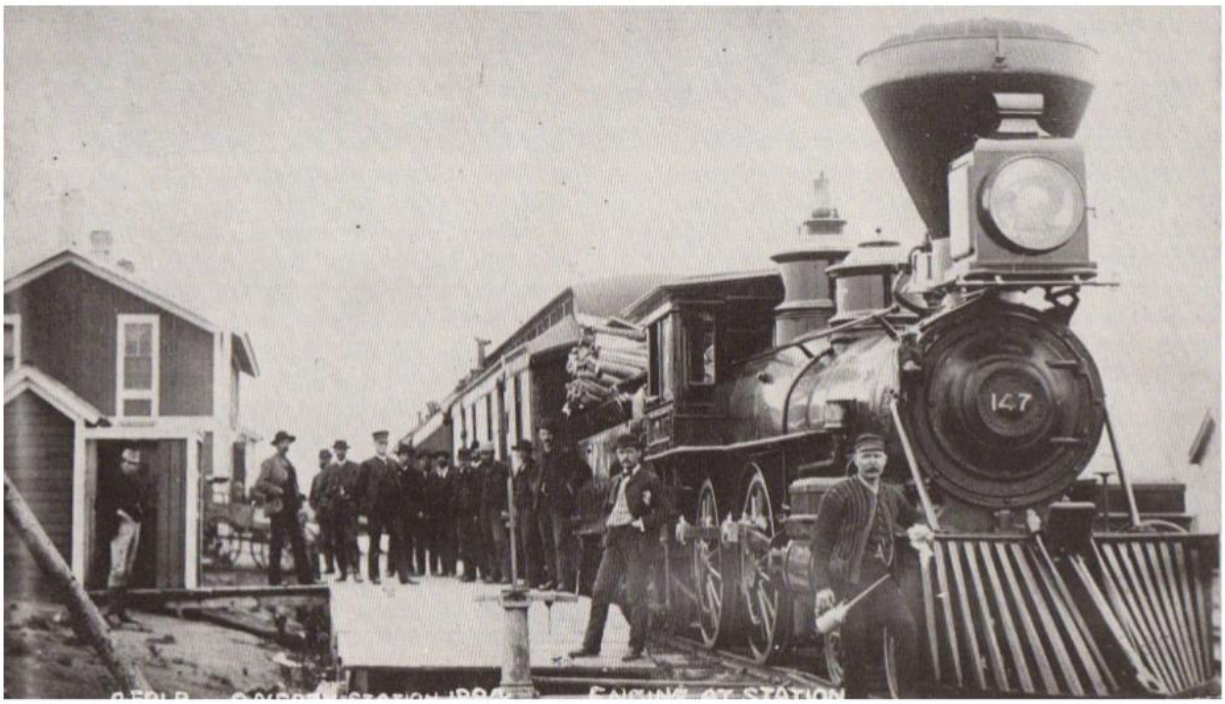
#17 MOOSE JAW, Prov. of Saskatchewan but in the District of Assiniboia NWT when CPR was built (Division point), circa 1883:



On left are the refueling facilities: woodshed and water tower. In the background is the locomotive roundhouse for light repairs and maintenance, with a supplies shed in foreground. The foreground is full of telegraph poles, timber bridge construction supplies and railway ties for building the main line.

I-8:

#26 TYPICAL CPR WOOD-BURNING STEAM LOCOMOTIVE (Calgary, NWT, in 1884):



The locomotive tender is stacked high with a fresh load of wood, which will be burnt in the firebox just ahead of the locomotive cab. The tender also has a water tank, requiring constant re-fueling, for conversion to steam in the boiler and fed to the propulsion cylinders below, connected to the drive wheels with rods. Waste wood smoke is evacuated via the large funnel stack, with a sand dome behind for sanding the rails, via a pipe, for better traction when needed, plus a steam dome behind it with its safety pressure valve. These locomotives required constant refueling with water and wood supplied along the line at facilities as seen in the above illustrations.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1359-07
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF SASKATCHEWAN
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 5-8, 14-16, 19, 2020 NOVEMBER 9, 23, 2020 FEBRUARY 23-26, 2021 MARCH 1-2, 5, 2021
JUDGMENT AND REAONS:	DINER J.
DATED:	SEPTEMBER 29, 2021

APPEARANCES:

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Brian Pel	FOR THE PLAINTIFF
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