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Our File No.: 01919-0419-0001

August 6, 2015

VIA COURIER

Secretary
Canadian Transportation Agency
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
J8X 4B3

Dear Sirs/Mesdames:

Re: ***City of Vancouver v. Canadian Pacific Railway Co. et al.***
SCBC Vancouver Registry No. S-147640

Please find enclosed for filing the application of the City of Vancouver. A copy of the application is being served on counsel for the respondent Canadian Pacific Railway Company. We look forward to receiving confirmation that the application is complete or to addressing any issues you may identify.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Tim Dickson

TAD/bd
Enclosures

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

CITY OF VANCOUVER

APPLICANT

AND:

CANADIAN PACIFIC RAILWAY COMPANY

RESPONDENT

APPLICATION BY CITY OF VANCOUVER

Applicant:

City of Vancouver
453 W 12th Ave
Vancouver, BC V5Y 1V4

Att: **Francie Connell, City Solicitor**
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Respondent:

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TABLE OF CONTENTS

PART I - INTRODUCTION

1. The City of Vancouver (the "**City**") applies to the Canadian Transportation Agency (the "**Agency**") for orders in respect of what is called the "**Arbutus Corridor**", an abandoned portion of Canadian Pacific Railway's ("**CPR**") Marpole Spur running through the densely-populated west side of Vancouver.

2. In the late 1990s CPR concluded that rail operations could not be economic on the Arbutus Corridor and it last ran a train on the corridor in 2001. Since that time CPR has not conducted rail operations on the corridor, or marketed the availability of rail service, or even maintained the rail infrastructure. Indeed, until very recently, the corridor appeared to be vacant, abandoned land, and was treated as such by the public.

3. During this period, instead of dealing with the Arbutus Corridor as a railway, CPR has looked instead to selling or developing the land, and indeed it started the Division V discontinuance process. CPR first noted in its Three-Year Plan its intention to discontinue the corridor in 1999, and it maintained that intention until April of 2014. In 2003, CPR took the next step and made a s. 143 offer, which was not taken up.

4. At that point, the *Canadian Transportation Act* (the "***CTA***") imposed a binary choice on CPR: it had to either decide to continue operating the line, in which case it had to amend its Three-Year Plan to reflect its decision, or it had to make a s. 145 offer to governments. As is set out at length below, it is very clear that CPR did *not* choose to resume operating the line. Rather, it continued its efforts to sell the corridor, but without making a s. 145 offer.

5. The reason CPR made this choice is very clear. In 2000, the City passed its Official Development Plan (the "**ODP**"), which zoned the corridor as a public thoroughfare to be used only for transportation purposes (including rail transportation and greenways), and not for commercial or residential development. CPR challenged the ODP in court, but the ODP was ultimately upheld by the Supreme Court of Canada. It is plain from the evidence, which is summarized in some detail below, that CPR refused to make a s. 145 offer simply because it feared that the ODP would substantially decrease the corridor's

net salvage value, and it did not want to be subject to the Agency's determination in that regard.

6. As mentioned, over the course of the last decade CPR has not conducted any rail operations but has rather sought to sell the corridor, although without submitting to the mandatory process set out in Division V. In April of 2014, however, CPR changed course and amended its Three-Year Plan. It started informing local residents that, unless it reached a deal with the City to sell the land, then it would clear gardens that had been planted by local residents on the corridor, deny residents access to the land, and undertake the necessary reconstruction work on the rail infrastructure necessary to resume operations. In court proceedings in late 2014, CPR stated that it intends to use the corridor to store empty rail cars.

7. As will be seen below, the factual context strongly suggests that CPR's stated intention to resume rail operations on the corridor is simply a negotiating tactic aimed at pressuring the City to purchase the lands. The City submits that CPR's behaviour is entirely inconsistent with the scheme and purposes of the *CTA*. In abandoning rail operations on the corridor but refusing to follow the Division V process, CPR has fundamentally breached the Act and denied governments their statutory entitlement to acquire the corridor at its net salvage value. Further, resuming rail operations on the corridor – which has very deteriorated rail infrastructure and is unfenced and at-grade, with 37 public crossings in a densely populated urban environment – would pose very substantial safety risks for local residents in exchange for operational benefits to CPR that are marginal at best.

8. The City therefore applies to this Agency for relief. In particular, the City applies centrally for two orders:

   (a) An order cancelling CPR's April 14, 2014 amendment of its Three-Year Plan removing the Arbutus Corridor portion of the Marpole Spur from the list of lines it intends to discontinue; and

   (b) An order requiring CPR to make a s. 145 offer for the corridor at its net salvage value as of 2004, which was when the *CTA* mandated CPR to do so.

9. The balance of this application provides a brief statement of facts in Part II, followed by the identification of the issues in Part III. Part IV outlines the City's position on the merits of the application for each of the issues identified in Part III. The relief sought on this application is set out in Part V, some comments on issues related to process are provided in Part VI, and a list of the documents relied upon is included in Part VII.

PART II - STATEMENT OF FACTS

10. This portion of the submission provides a very general outline of the facts. More detail is provided in Part IV with respect to particular issues.

11. The Arbutus Corridor is an area of land running approximately from Milton Street, close to the north arm of the Fraser River, in the south, to a point close to the south end of the Burrard Street Bridge. It is approximately 6 miles long ("mile" references are used given the crossings are marked with "mileposts", with Milton Street being 5.82 and the Burrard Street Bridge being 0.0) and for most of its length approximately 66 feet wide.[1] To either side is extensive urban development.[2]

12. Running down the Corridor is a railway track which is the westerly segment of the Marpole Spur, which begins in New Westminster and runs west. Apart from that, the track on the Arbutus Corridor does not connect to any other rail lines.[3]

13. Use of the Arbutus Corridor for both passenger and freight service commenced in the early 1900s. However, passenger service ended in 1958, and one of the two sets of tracks originally located in the Corridor was removed. Since then, there has been only one set of tracks in the Corridor.[4]

14. By the mid-1980s, when CPR took over freight operations in the Corridor (it had earlier leased the Corridor, which it owned, to other operators), the freight traffic was modest.

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[1] Affidavit #1 of Jessi Halliday sworn October 29, 2014 ("**Halliday Affidavit #1**") [**Applicant's Book of Documents** ("**BOD**"), **Tab 2**], Exhibit "C" at p. 117. The City relies on various of the affidavits filed by the same parties in a recent proceeding before the BC Supreme Court; those affidavits are filed herewith.

[2] Affidavit #1 of Scott Edwards sworn October 29, 2014 ("**Scott Edwards Affidavit**") [**BOD Tab 4**] at para. 5.

[3] Halliday Affidavit #1 [**BOD Tab 2**], Exhibits "A", "D", "J", "V" and "W"; Affidavit #2 of Peter Judd sworn December 4, 2014 ("**Judd Affidavit #2**") [**BOD Tab 10**] at paras. 3-8, Exhibits "B", "C".

[4] Halliday Affidavit #1 [**BOD Tab 2**], Exhibits "A", "J", "V", "W".

Trains ran as needed to serve the Molson Brewery ("**Molson's**"), which is located at the north end of the Corridor, and a few other customers. From 1997, the only customer was Molson's and the prospects of increased freight activity were doubtful, including because of the limited amount of industrially zoned land in the area.[5] Further, operational issues including speed restrictions, grades and regular obstacles (such as parked cars) on the track made rail movements on the Arbutus Corridor laborious.[6]

15. CPR determined that rail use of the Arbutus Corridor was not cost-effective. A CPR consultant (KPMG) noted that the existing freight operation was "a chronic loss generator" and was "highly unlikely to generate a profit in the foreseeable future" – indeed, there was "no reasonably anticipated scenario under which the freight operation would operate other than at a loss in the future".[7] Further, KPMG concluded that "passenger operations cannot be conducted on a financially viable basis".[8] Also in 2000, Bunt & Associates Engineering Ltd. (additional consultants engaged by CPR), reached the same conclusion as in the KPMG analysis.[9] CPR adopted these views and became interested in developing the land.

16. By the time of a submission to a public hearing (likely in 1999 or 2000) on the then-proposed Arbutus Corridor Official Development Plan Bylaw, a CPR spokesperson, Andrew Massil, was saying:[10]

> As far as transportation use is concerned, we can unequivocally state that continued rail use is not, and cannot be, economic.
>
> Speaking first to freight, the operating costs of the freight service (let alone the costs of capital) have exceeded the revenues from that service for a number of years. Changes in the neighbourhoods through which the rail passes have occurred over the years. Industry has gone, with the exception of a single customer, and, due to changes to the area zoning from industrial to residential, will not be returning. So we have a situation where a freight use cannot be economic.

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[5] Halliday Affidavit #1, Exhibits "A", "B", "V", "W"; Affidavit #1 of Mark Mudie sworn October 29, 2014 ("**Mudie Affidavit #1**") **[BOD Tab 3]** at paras. 27-29.
[6] Mudie Affidavit #1 **[BOD Tab 3]** at paras. 30-31, 41-44.
[7] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "A" at pp. 32-33.
[8] *Ibid.*
[9] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "B" at pp. 91, 98, 102.
[10] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "C" at pp. 183-185.

> That leaves passenger service, and numerous studies have shown that passenger service cannot be economic.

17. In or about 2000, CPR distributed a flier (quoted more fully later in this submission) which included the following:[11]

> A New Vision
>
> Vancouver's character is changing and industry that the railway used to serve has all but disappeared. You will soon see the end of CPR's rail operations on the Arbutus Corridor.

18. In August 2000, CPR asserted that: "'Rail' use and 'transit' use cannot be conducted on [CPR's] Lands except at a loss".[12]

19. It became evident to CPR that an alternative way to meet CPR's obligations to Molson's, not including the use of the Arbutus Corridor, was required. CPR approached Molson's with a view to having Molson's continue to be a rail customer, but to receive and unload its product at a different location in the Lower Mainland and then receive the product at the plant by truck.[13]

20. CPR and Molson's undertook commercial negotiations to find an arrangement that would financially incent Molson's to receive its products differently and which would allow CPR to cease operations on the Arbutus Corridor. An agreement was reached between CPR and Molson's, for rail service to Molson's to cease.[14]

21. CPR issued a news release on May 30, 2001 entitled "CPR to End Freight Service on Arbutus Line":[15]

> Canadian Pacific Railway (CPR) has arranged with Molson Inc., its sole customer along the Arbutus line in Vancouver, to end rail shipments once Molson has completed the brewery modification necessary for it to receive shipments by truck. Molson's brewery conversion is expected to be complete by June 1 at which time the one-train-per-day service will cease. After decades of transporting rail cars to and from the Molson brewery, CPR announced in the fall of 1999 that freight operations on the Arbutus

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[11] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "D" at p. 214.
[12] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "C" at p. 159.
[13] Mudie Affidavit #1 **[BOD Tab 3]** at para. 34.
[14] Mudie Affidavit #1 **[BOD Tab 3]** at para. 35.
[15] Mudie Affidavit #1 **[BOD Tab 3]**, Exhibit "J"; Halliday Affidavit #1, Exhibit "T" at p. 488.

route were no longer economically viable, and that CPR planned to end the direct rail service once Molson found a suitable alternative.

22. In the 2002-2006 period, during litigation brought by CPR regarding the City's Official Development Plan (which related to the Corridor), the various courts hearing the case noted that "CPR no longer needs a rail line running through the west side of Vancouver",[16] that the rail line was "abandoned",[17] and that "CPR has no desire to operate a railway there".[18] Instead along the Corridor, many people have parked their cars (including on land in the Corridor that CPR leases out for this purpose), walked and gardened for over a decade.

23. In October 1999, CPR placed the Arbutus Corridor portion of the Marpole Spur in the "To Discontinue" category of its Three Year Plan, which it said in that Plan "means that CPR intends to discontinue operating the line if it is not transferred". CPR called this the "formal commencement" of the discontinuance process.[19]

24. Subsequently, on September 9, 2003, CPR published legal "Notice of Sale and Discontinuance of Railway Line" under s. 143 of the *Canada Transportation Act*, stating in the Notice that "CPR intends to discontinue operating the line if no agreement is entered into to transfer the railway line as set out in the *CTA*". CPR imposed a deadline of November 10, 2003 for interested parties to make their interests known.[20] (The six-month period for negotiating an agreement therefore ended on May 10, 2004.)

25. In response to the Notice, CPR appears to have received one expression of interest, but that expression of interest was later withdrawn.

26. CPR neither amended its Three Year Plan to remove the Arbutus Corridor portion of the Marpole Spur from the "To Discontinue" category, nor offered it for sale under s. 145 of the *Canada Transportation Act*.

27. Over this time, the railway track on the Corridor physically deteriorated.

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[16] 2002 BCSC 1507 at para. 3.
[17] *Ibid.* at para. 82.
[18] 2006 SCC 5 at para. 28.
[19] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibits "C" at pp. 139, 176-178, "D" at p. 192, "L" and "O" at p. 432.

28. CPR and the City negotiated on and off for a number of years with respect to a sale of the Arbutus Corridor to the City. To date, those negotiations have been unsuccessful.[21]

29. In or around April 2014, CPR determined that it was highly unlikely that negotiations would lead to an agreement for sale of the Arbutus Corridor at the time.[22]

30. On April 16, 2014, CPR sent a letter to the Canadian Transportation Agency advising that "effective April 14, 2014", CPR "has removed the Marpole Spur – Mile 0.0 to Mile 5.82 (Vancouver) from the Three-Year Plan".[23]

31. Also at around this time, CPR undertook a survey of the Arbutus Corridor and launched a public relations and communications campaign referring to a program to use the Corridor in some unspecified way.[24] It suggested that this might be for training, welding or storage. It also commenced removing community gardens which had been planted on land within the Corridor, and indicated that it would spray herbicide along the Corridor "[t]o prevent the re-growth of more stubborn weeds on our right of way". The CPR Integrated Vegetation Management Plan lists certain herbicides which are not on the allowable list of herbicides found in the City's Health Bylaw, No. 9535 (s. 2.9 of which is entitled "Ban on pesticides").[25]

32. On August 26, 2014, the City and CPR reached an agreement to suspend CPR's activities along the Arbutus Corridor to allow for continued negotiations between the parties.[26] However, these negotiations were unsuccessful and on October 2014, the City commenced litigation against CPR in the Supreme Court of British Columbia seeking injunctive relief.

33. CPR agreed to defer herbicide use and, pending resolution of the City's planned application for an interlocutory injunction, other activities in the Corridor unless

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[20] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "O" at pp. 434, 440-441.
[21] Affidavit #1 of Peter Judd sworn October 28, 2014 (**"Judd Affidavit #1"**) **[BOD Tab 1]** at para. 8.
[22] Affidavit #1 of David Courville sworn November 24, 2014 (**"Courville Affidavit"**) **[BOD Tab 7]** at para. 32.
[23] Judd Affidavit #1 **[BOD Tab 1]**, Exhibit "H".
[24] Courville Affidavit **[BOD Tab 7]** at paras. 33-35.
[25] Courville Affidavit **[BOD Tab 7]**, Exhibits "W" and "AA"; Affidavit #1 of Carli Edwards sworn October 29, 2014 **("Carli Edwards Affidavit")** **[BOD Tab 5]** at paras. 4-6, Exhibit "E".
[26] Judd Affidavit #1 **[BOD Tab 2]** at para. 16.

otherwise agreed. After the City filed materials in support of its interlocutory injunction application, CPR filed responding affidavits setting out an apparent plan to use the Corridor for the storage of rail cars.

34. The City's application was heard in December 2014. At that time, CPR gave an undertaking not to operate trains on the Arbutus Corridor "unless and until Transport Canada has inspected that rail line and any issues identified by Transport Canada have been resolved in accordance with the procedures of the *Railway Safety Act* and any other applicable legislation".[27]

35. In its January 2015 determination, the BC Supreme Court was prepared to accept that the City had advanced a serious question to be tried, but in light of CPR's undertaking concluded that "the City will suffer no irreparable harm if the trains do not run until the required statutory approval is forthcoming". The Court therefore dismissed the City's interlocutory application, in an order made on January 20, 2015.[28] The action itself remains live.

PART III - ISSUES

36. Did CPR breach the *CTA* by failing to make an offer to governments in 2004 pursuant to s. 145? If so, what is the appropriate remedy?

PART IV - ARGUMENT

37. The City submits that CPR clearly and intentionally breached the Division V process when it refused to make a s. 145 offer in 2004. The City respectfully submits that, instead, CPR sought to sell the Arbutus Corridor outside of the Division V process in order to avoid the effects that the City's Official Development Plan would have on the net salvage value of the corridor. CPR's actions breached the mandatory process set out by Division V, and denied governments' statutory entitlement to receive an offer to acquire the corridor at net salvage value. The City submits that, in order to remedy its breach, CPR should be ordered to proceed to make a s. 145 offer. A brief summary of the City's

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[27] 2015 BCSC 76 at para. 83.
[28] 2015 BCSC 76.

position is set out in the following paragraphs, and the position is then developed more fully under the subsequent subheadings.

38. CPR first listed the Arbutus Corridor portion of the Marpole Spur for discontinuance in its Three-Year Plan on October 14, 1999. Later, it formally entered the Division V discontinuance process on September 9, 2003, when it placed in local and national newspapers its "Notices of Sale and Discontinuance of Railway Line" relating to the Arbutus Corridor. The deadline for responding to the notices was November 10, 2003, such that the six-month negotiation period stipulated by s. 144(4) of the *CTA* ended on May 10, 2004. At that point, CPR faced a choice: pursuant to s. 144(5), it could "decide to continue operating the railway line, in which case it is not required to comply with section 145, but shall amend its plan to reflect its decision", or, under s. 145, "[t]he railway company shall offer to transfer all of its interest in the railway line to the governments and urban transit authorities mentioned in this section for not more than its net salvage value to be used for any purpose".

39. CPR did *not* decide to continue operating the Arbutus Corridor portion of the Marpole Spur. It did not amend its three-year plan, let alone actually resume operations on the corridor. To the contrary, CPR maintained its intention to discontinue the Arbutus Corridor for the next decade, repeatedly advising the Agency and the public of that intention in every three-year plan during that time. CPR undertook no maintenance of the corridor, but rather allowed it to deteriorate into inoperability, just as it allowed pedestrians, cyclists and gardeners to treat the corridor as vacant land. At the same time, it continued on with its efforts to develop the land – challenging the ODP in court, and supporting a "visioning process" for the development of the corridor.

40. It is apparent from all of these facts that, in May of 2004, when the six-month negotiation period ended, CPR had *not* decided to continue operating the corridor as a railway. To the contrary, CPR was of the view that rail operations on the corridor were uneconomic, and instead it wished to develop the land for commercial and residential purposes. Indeed, the

Supreme Court of Canada made those observations with respect to CPR's intentions in 2006:[29]

> Like the Court of Appeal, I am not satisfied that the by-law prevents track maintenance or the operation of a railway on the corridor. Indeed, CPR has no desire to operate a railway there. Its real complaint is that the by-law prevents it from developing or using the corridor for economically profitable purposes.

41. The only conclusion that can be reached on the evidence, therefore, is that in May of 2004 – when the six-month negotiation period came to an end – CPR remained steadfast in its decision that rail operations were no longer viable on the corridor and that CPR would not resume them and would not amend its three-year plan. Given that intention, the *CTA* required CPR to offer governments the opportunity to acquire the Arbutus Corridor for its net salvage value. CPR did not make such an offer, and did not continue through the discontinuance process. Instead, it simply abandoned rail operations on the corridor while it continued to seek opportunities to sell or develop it outside of Division V of the *CTA*.

42. It is apparent why CPR did so. On April 7, 2004 – just over a month before CPR would have to make a s. 145 offer – the BC Court of Appeal overturned the BC Supreme Court's declaration that the ODP was invalid.[30] As the Supreme Court of Canada observed, the effect of the ODP "was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land."[31] Indeed, CPR argued in that court that the ODP means that CPR "cannot use the land for any economically viable purpose".[32]

43. In May of 2004, when the six-month negotiation deadline ended, following the BC Court of Appeal's judgment upholding the ODP, it is clear that CPR reached a critical decision. It determined that it would not make a s. 145 offer because it feared the application of the ODP would severely depress the net salvage value of the corridor. However, CPR also had no intention of recommencing operations on the corridor, and so it did not amend its three-year plan, or undertake any maintenance of the line, or run any operations on it. It is apparent that CPR decided instead simply to treat the corridor as no longer being a

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[29] 2006 SCC 5 at para 28.
[30] 2004 BCCA 192, reversing 2002 BCSC 1507.
[31] *Ibid.* at para 8.

railway. That is, it *de facto* discontinued the Arbutus Corridor, while it fought the ODP on appeal to the Supreme Court and continued to market the corridor outside of the Division V process.

44. CPR's refusal to make a s. 145 offer constitutes a breach of Division V of the *CTA*. As Federal Court of Appeal has noted in well-known decisions, Division V is a complete code and the steps set out in it are mandatory. CPR had no right to treat the corridor as discontinued and avoid making a s. 145 offer. Its actions deprived government bodies of the opportunity to acquire the corridor and that loss of opportunity requires a remedy.

45. The City's position is developed more fully under the subheadings that follow. These submissions first set out the Division V process and then overview the relevant facts. The submissions on the s. 145 issue conclude by addressing CPR's breach of the Division V process and the order required to remedy that breach.

A. The Division V Process

46. As the Federal Court of Appeal set out in *CN v. Canada (Transportation Agency)*, [2009] 1 F.C.R. 287, 2008 FCA 199 ["*CN*"] at para 32: "Division V provides a railway company, which follows the prescribed process, the right to abandon the operation of a railway line. This process takes place in accordance with precise time line."

47. The first step in the Division V process is to list the rail line on the railway company's "three-year plan". Section 142(2) states that "[a] railway company shall not take steps to discontinue operating a railway line before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months."

48. The next step in the process is to advertise the availability of the railway line for continued operations under s. 143 of the *CTA*. Section 143(1) provides: "The railway company shall advertise the availability of the railway line, or any operating interest that the company has in it, for sale, lease or other transfer for continued operation and its intention to discontinue operating the line if it is not transferred." Section 144(4) provides

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[32] *Ibid.* at para 27.

that "[t]he railway company has six months to reach an agreement after the final date stated in the advertisement for persons to make their interest known."

49. If an agreement pursuant to s. 143 is not reached during that time, then the railway company faces two options. First, instead of proceeding with the discontinuance process, it can decide to continue operations on the line. Section 144(5) sets out the railway's mandatory step if it chooses that option (underlining added): "If an agreement is not reached within the six months, the railway company may decide to continue operating the railway line, in which case it is not required to comply with section 145, but shall amend its plan to reflect its decision."

50. The second option is to continue with the discontinuance process, which entails offering the line for sale "for any purpose" (that is, not necessarily continued operations) at "net salvage value", with the offer being made to a number of government bodies, which are given cascading rights of first refusal in descending order of seniority (first, the federal Minister, if any of the criteria set out in s. 145(2)(a) are met; then the provincial minister responsible for transportation; then (since 2007) any relevant urban transit authority; and last any relevant municipality). Section 145(1) makes clear that such a step is mandatory, subject to the exception set out in s. 144(5):

> The railway company shall offer to transfer all of its interest in the railway line to the governments and urban transit authorities mentioned in this section for not more than its net salvage value to be used for any purpose if
>
> > (*a*) no person makes their interest known to the railway company, or no agreement with an interested person is reached, within the required time; or
> >
> > (*b*) an agreement is reached within the required time, but the transfer is not completed in accordance with the agreement.
>
> [Emphasis added]

51. The end of this discontinuance process is set out in s. 146(1):

> If a railway company has complied with the process set out in sections 143 to 145, but an agreement for the sale, lease or other transfer of the railway line or an interest in it is not entered into through that process, the railway company may discontinue operating the line on providing notice of the discontinuance to the Agency. After providing the notice, the railway

> company has no obligations under this Act in respect of the operation of the railway line and has no obligations with respect to any operations by any public passenger service provider over the railway line.

52. With respect to CPR's conduct in 2004, the key issue is what obligations Division V imposes once the six-month period for negotiations on a s. 143 offer passes. The Federal Court of Appeal addressed that issue in *CN*. In that case, CN and CPR owned a railway line in common and CN (which assumed conduct of the transfer/discontinuance process) made a s. 143 offer to transfer it for continued operations. A party ("SOLRS") expressed its interest within the window for doing so, and the parties began negotiations. They did not reach an agreement by the end of the statutory six-month period, and CN purported to extend the period for a further 25 days. On the last day of that extended period, SOLRS applied to the Agency for a determination of net salvage value and a declaration that CN was not negotiating in good faith. The Agency determined that it had the jurisdiction to determine the applications even though they were brought outside of the statutory six-month period, on the view that the parties, or the Agency, could extend that period.

53. The Federal Court of Appeal allowed the appeal. It held that the steps in Division V are mandatory and that neither the parties nor the Agency could extend the six-month deadline for s. 143 negotiations set out in the *CTA*. It stated:

> [37] Absent any such intervention [a finding by the Agency of bad faith against a party], subsection 145(1) of the *CTA* provides that "if ... no agreement with an interested person is reached, within the required time" ("*si* [...]*aucune entente n'est conclue dans le délai prescrit*"), the railway company must (i.e., "shall") offer the line for sale to the governments and relevant transit authorities for no more than its net salvage value (subsection 145(1)of the *CTA*). Alternatively, the railway company may decide at that juncture to continue to operate the line, a decision which if taken, effectively brings the process governed by Division V to an end (subsection 144(5)).
>
> [38] On the facts of this case, the appellants did not opt to continue to operate the line upon failing to reach an agreement within the six-month period. It follows that unless this period was validly extended, the appellants had, at this juncture, the obligation to offer the line for sale to the relevant public bodies at its net salvage value, and these public bodies had a corresponding right to acquire the line at that price.
>
> [words within square brackets added; underlining added]

54. The court went on later in its judgment to state:

> [48] Indeed, Division V is a complete code which operates in accordance with a definite time line. It is couched in mandatory terms and the detailed steps which must be followed leave no doubt about when the process begins and when it ends. Amongst those steps is the railway's obligation to offer the line for sale to the relevant public bodies for its net salvage value if no agreement is reached within the six-month period (subsection 145(2)). In my view, the corresponding right to acquire the line at its net salvage value which accrues to the relevant public bodies by the operation of subsection 145(1) at that juncture, eliminates the possibility that the parties on consent, or the Agency by order, could extend the six-month statutory period. **Neither the parties nor the Agency can effectively do away with the right which accrues to public bodies by the operation of the statute**.
>
> [Underlining and bolding added]

55. These statements from *CN* were affirmed in *Canadian National Railway Co. v. Greenstone (Municipality of)*, 2008 FCA 395. In that case, the company listed a line of railway, but offered only a shorter portion of that line for transfer under s. 143 and then under s. 145. The Agency held that, if the company wanted to amend the portion of the line to be discontinued, it had to return to the start of the discontinuance process, and list the appropriate portion of the line in its three-year plan for 12 months prior to making an offer. The Federal Court of Appeal dismissed the railway company's appeal. At paragraph 42, the court stated: "The discontinuance process, once engaged by the advertisement mentioned in subsection 143(1), is governed by short, strict and mandatory time-limits within which an agreement between purchasers and a railway company must be reached and the sale or transfer process completed." The court then quoted, with approval, paragraph 48 of its decision in *CN*. Later, at paragraph 56, it stated:

> Division V of the Act establishes a mandatory process for the discontinuance of railway lines. The appellant is under a clear and positive statutory duty to comply with the obligations therein that are imposed upon it. An interested or potentially interested buyer of the lines, such as the Municipality in the present instance, cannot through consent, its participation or its conduct in the process relieve a railway company of its statutory obligations: see *Kenora Hydro v. Vacationland Dairy*, [1994] 1 S.C.R. 80; *Canadian National Railway Company and Canadian Pacific Railway Company v. Canadian Transportation Agency, supra.*
>
> [Underlining added]

56. In short, Division V establishes a mandatory process that imposes certain obligations on railway companies and that creates entitlements for parties that might be interested in obtaining a railway line. After the s. 143 process has ended, the *CTA* presents a railway company with two options: either decide to continue operations (and so amend your Three-Year Plan to reflect that choice) or make a s. 145 offer to governments. There is no third option, and neither railway companies nor governments nor even the Agency itself is empowered to relieve the railway company of that binary choice.

57. Parliament imposed that binary choice because it recognized the very strong public interest in preserving railway rights-of-way for public purposes. If railway rights-of-way will not be used for railway operations, then Parliament determined that they must be made available to governments – who are likely to put them to other important public transportation uses – in exchange for their net salvage value, which can be determined by the Agency. Given the oligopolistic and regulated nature of the rail industry, the public importance of preserving railway corridors for transportation uses, and the fact that many rights-of-way were originally acquired by way of gift from governments, such a policy is eminently fair.

B. Further Details on Key Facts

58. The facts have been outlined in general terms above, and so not all of the facts and supporting evidence is reviewed here. However, certain further details on key factual issues are set out below.

(a) By 1999, CPR had determined that rail operations were no longer economic on the Arbutus Corridor and was planning for their termination

59. The history of the Arbutus Corridor is usefully summarized by the BC Court of Appeal in its judgment in the ODP Litigation[33] at paragraphs 3-13, as well as briefly in the Statement of Facts (Part II) above. The line was built in 1902. BC Electric operated a passenger service until the mid-1950s, after which BC Hydro continued operating a freight service until 1986.

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[33] 2004 BCCA 192.

60. When CPR resumed the operation of the line in 1986, demand for freight service was low.[34] By 1997, CPR had only one customer on the line, Molson's Brewery, and deliveries amounted to substantially less than one car per day (220 cars in 1998, and 214 in 1999).[35]

61. In 1999, CPR wrote to the City and advised that "Canadian Pacific Railway has determined that the portion of the Marpole Spur, generally referred to as the Arbutus Corridor, is not economically for rail use. As a result, CPR will be proceeding to discontinuance in the reasonably near future."[36] CPR's representative, Andrew Massil, met with the City Manager, Judy Rogers, in March of 1999 and made the same statement to her, and raised the possibility of acquisition of the corridor by the City.[37]

62. CPR also publicly announced in the fall of 1999 that freight operations on the Arbutus route were no longer economically viable and that CPR planned to end the direct rail service once Molson found a suitable alternative.[38] (That alternative was found in 2001, after CPR arranged for truck delivery to Molson's so that CPR could terminate its rail operations.[39])

63. CPR formally commenced the discontinuance process under Division V of the *CTA* on October 14, 1999, when it added the Arbutus Corridor to its three-year plan.[40]

64. Between January 1996 and the spring of 1999, Mark Mudie was CPR's District General Manager Field Operations for the BC District. During this time he was CPR's senior officer in British Columbia and provided the leadership and direction for all of CPR's operations in the province. It was during his tenure that CPR came to the conclusion that it needed to terminate rail operations on the corridor, and that year it began its discussions with Molson's to come to an agreement on alternative delivery.[41]

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[34] Halliday Affidavit #1 **[BOD Tab 2]**, Ex. "V".
[35] Halliday Affidavit #1 **[BOD Tab 2]**, Ex. "A" at p. 42.
[36] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "E" at p. 242.
[37] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "E" at pp. 243-244.
[38] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "T".
[39] *Ibid.*
[40] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "C" at p. 139; Exhibit "O" at p. 432; and Halliday Affidavit #1**[BOD Tab 2]**, Exhibit "L" at pp. 415-417.
[41] Mudie Affidavit #1 **[BOD Tab 3]** at paras. 1, 26, 33.

65. Mr. Mudie has confirmed that, when he left CPR in the spring of 1999, he turned over the responsibility of finding an economic use for the Arbutus Corridor to the properties group. At the time he left, CPR's corporate structure was comprised of three major groups: (a) commercial, including the marketing and sales of freight; (b) operations; and (c) finances/administration, which included at that time the real estate group. The real estate group was a small group left over from the former Marathon Realty, which was a Canadian Pacific Limited venture to develop properties.[42]

66. David Courville is CPR's Director of Real Estate. He does not deny that, since 1999, CPR's real estate branch has carried the responsibility for finding an economic use for the land, although he has deposed that "no leasing, sales or other property decisions raising any operational or engineering implications are made without engineering and operations' involvement and approval."[43] Indeed, CPR's correspondence referred to below confirms that it was CPR's real estate group that was dealing with the corridor throughout the years in question.

(b) Various public bodies were interested in protecting the Arbutus Corridor for transportation purposes

67. As noted above, CPR had resumed operation of the Arbutus Corridor in 1986. As the Court of Appeal observed in the ODP Litigation:[44]

> [9] By 1986, the City and other levels of government had recognized that the line was approaching the end of its useful life for CPR's rail operations and that the Corridor, which runs from the southern edge of downtown Vancouver to the Fraser River, was potentially an asset of unique importance for the public purposes of providing transportation.
>
> [10] By the 1990's, the public bodies having an interest in development of the corridor for public purposes included the provincial government, its transportation authority (TransLink) and the Greater Vancouver Regional District (GVRD). There was wide support for the principle of acquiring the corridor for public purposes but no consensus as to the specific uses to which it would be put or how the acquisition would be funded.

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[42] Mudie Affidavit #1 **[BOD Tab 3]** at para. 40.
[43] Courville Affidavit #1 **[BOD Tab 7]** at para. 22.
[44] 2004 BCCA 192.

68. As found by the Court of Appeal, there was widespread interest among public bodies in seeing the corridor protected for public uses.

(c) CPR plans for the sale or development of the corridor

69. CPR began a concerted effort to market its lands for acquisition or development in 1999 at the latest. As the BC Court of Appeal observed in the ODP Litigation:[45]

> In 1999, CPR took extensive steps to prepare to redevelop under existing zoning as soon as abandonment was completed. It put forward detailed proposals for various residential and commercial uses. Such proposals, had they come to fruition, would of course have destroyed the Corridor as a corridor. CPR also made clear its view that, if the City or any other public body wished to acquire the line, it was willing to sell at whatever price was determined by agreement or expropriation.

70. As noted above, in letters to the City CPR raised the possibility of the City acquiring the corridor. It also suggested the alternative of the "re-introduction of the Arbutus Corridor into adjacent neighbourhoods".[46] At a March 12, 1999 meeting, Andrew Massil – CPR's Regional Manager of the Real Estate Group for Western Canada – showed Judy Rogers, the City Manager, a draft visual concept plan to that effect.[47] CPR also outlined a community consultation program it intended to undertake in connection with that re-integration of the corridor with surrounding neighbourhoods.

71. That consultation began later in 1999 and continued into the spring of 2000. CPR distributed a flyer in connection with the consultation.[48] The flyer began:

> Vancouver's character is changing and industry that the railway used to serve has all but disappeared. You will soon see the end of CPR's rail operations on the Arbutus Corridor. Prior to removing the tracks, we are embarking on a six-month consultation program about new uses for the lands – there are about 45 acres that form the 10km route.

72. The flyer also indicated that CPR intended to use the public consultation to inform a redevelopment application that it would submit to the City in mid-2000:[49]

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[45] *Ibid.* at para 11.
[46] Halliday Affidavit #1 [**BOD Tab 2**], Exhibit "E" at p. 242.
[47] Halliday Affidavit #1 [**BOD Tab 2**], Exhibit "E" at pp. 243-244.
[48] Halliday Affidavit #1 [**BOD Tab 2**], Exhibit "D" at pp. 214-218.
[49] *Ibid.* at p. 218.

> **Next Step** *CPR's objective is to review the results of the community consultation by mid year 2000 with the intent of concluding a comprehensive land use plan for submission to the City of Vancouver as part of the further public process required for any redevelopment approvals.*
>
> **Further Consultation** *This consultation process meets the City of Vancouver's consultation guidelines and is in addition to further public process undertaken by the City in any redevelopment approvals process.*
>
> [Underlining added; bolding and italics in original]

73. In June of 2000, J.R. Walsh, CPR's Vice President of Real Estate, wrote to the City to provide an update on CPR's public consultation and its future plans.[50] CPR observed that it had completed two of the three rounds of consultation, and that it expected to complete the consultation program as a whole in the first week of July. It reported that 78% of respondents in Round One and 81% of respondents in Round Two felt that the lands should be purchased by a public body for public use.

74. CPR's June 2000 letter to the City also made clear that it intended to make a s. 143 offer very soon, followed (if no one accepted that offer) by a s. 145 offer to governments in about January of the following year. The letter stated in part:[51]

> Secondly, we wish to advise that we will soon be proceeding to the next step in the Discontinuance Process as required under the Canada Transportation Act (advertising pursuant to section 143 of the Act to determine whether there are any parties who have an interest in continued operations, and, if so, negotiating with those parties). This advice to you is specifically in response to your request of December 31st 1999 in which you ask for notice of when we plan to proceed to the next stage.
>
> ...
>
> The Canada Transportation Act process, as you know, gives governments the opportunity to purchase the property (lands and improvements) being discontinued. There is an hierarchy of offerings to governments and you, as a municipal government, would be formally able to make your decision after the thirty days has expired for the preceding level of government (in this case, provincial). At that time you would have thirty days to make your decision, conditional on the other levels not being interested.
>
> We anticipate that if there is no party interested in acquiring the property for continued rail operations, and if the more senior levels of governments

[50] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "C" at p. 180.
[51] *Ibid.*

> do not enter into the process, then the question of whether the City of Vancouver wishes to acquire the lands in question would be formally put to it under the Act in or about January 2001.
>
> You have of course been expressing public objectives as regards our lands for many years now, dating back at least to your October 21, 1986 resolution that the corridor:
>
> > *"be preserved as a potential rapid transit corridor between downtown Vancouver and Richmond, [and that] the City work with B.C. Transit and CP Rail to negotiate means of preserving the corridor, satisfactory to all parties".*
>
> By continuing to communicate with you and by providing you with early and full notice of our intentions throughout, we have sought to give you every opportunity to plan the orderly implementation of your objectives. The discontinuance process establish by the federal legislation creates the mechanisms to enable you to fulfill the objective of acquiring the corridor if you wish, or alternatively of deciding against that course and allowing us to proceed with development. Certainly after 15 years, and with the changes in the City that have made continued freight use non-viable, the time would seem to be ripe for the City's decision.
>
> Over and above the regular course established by the federal legislation that governs the discontinuance of rail use, but always of course conditional upon following all regulatory requirements to which we must adhere, we confirm that CPR continues to be open to discussing with you in advance of the date established by the legislation, your interest and intentions regarding the acquisition of all or part of our property.
>
> [Underlining added; italics in original]

75. In summary, by this letter CPR was giving notice to the City that it would soon be making a s. 143 offer, that if there was no acceptance of that offer it would make a s. 145 offer immediately after, and that it was willing to engage in discussions with the City outside of the timeline set by the *CTA*, to which it acknowledged it must adhere. CPR was also indicating that, if no one took up its offers under ss. 143 and 145, it would be seeking to redevelop the lands along the lines that it had been proposing to the City and discussing with the public in its consultations. As the Court of Appeal observed in the ODP Litigation: "Such proposals, had they come to fruition, would of course have destroyed the Corridor as a corridor."[52]

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[52] 2004 BCCA 192 at para. 11.

(d) The City passes the ODP; CPR does not make a s. 143 offer but instead challenges the ODP in court

76. The City passed the ODP on July 25, 2000. It did so in response to CPR's efforts to redevelop the land. The City did not have any plans at that time to acquire the land itself. Rather, the ODP was passed in order to ensure that the corridor was preserved for public transportation purposes, as opposed to be redeveloped for residential and commercial uses.

77. In the ODP Litigation, the Chambers Judge found:

> [53] The City currently has no plans to acquire this property and may not do so for many years to come, if at all. Presumably, if the City's discussions with any of Translink, the Federal Government, the Airport Authority, the GVRD or the Olympic Bid Group are fruitful then one or more of these entities may fund acquisition of the property for some form of public transportation. However, at this time, this is a mere hope on the City's part.
>
> [54] The City acknowledges that it passed this bylaw to ensure that CPR could not develop its property as it would otherwise be able to do. The City knew that CPR was in the process of decommissioning its rail line. Zoning bylaws permitted certain development upon the CPR property. The City was anxious to ensure that the CPR not develop any portion of its property. The City was unsure of the exact timing for decommissioning the rail line and enacted the AC ODP to ensure that the property was preserved for use only as a public thoroughfare.
>
> [Underlining added]

78. The City held a public hearing prior to enacting the ODP. CPR expressed vigorous opposition to the draft ODP at that public hearing, and argued that the ODP was unfair. CPR stated that the ODP "would have the effect of sterilizing the use of our lands", since the rail transportation it would allow to continue was no longer viable. CPR made that point very clear in its presentation: "As far as transportation use is concerned, we can unequivocally state that continued rail use is not, and cannot be, economic."[53]

79. Whereas in June of 2000 CPR had indicated that it would soon be making a s. 143 offer, followed by a s. 145 offer in January of 2001 if the s. 143 offer was not taken up,

following the passage of the ODP it suspended its plan to make the s. 143 offer and instead turned to challenging the ODP in court. CPR commenced its petition for judicial review challenging the ODP in August of 2000.

80. As part of its case, CPR commissioned a report from KPMG assessing the financial viability of continued freight service or potential passenger rail service along the Arbutus Corridor, including in the context of the ODP. KPMG very strongly concluded that neither was financially viable:[54]

> The existing freight operation on the Arbutus Corridor is a chronic loss generator and is highly unlikely to generate a profit in the foreseeable future.
>
> The revenues from freight service in the Arbutus Corridor only cover about 35% to 40% of the operating costs incurred to generate these revenues. The operating losses, as calculated by KPMG, were about $100,000 in 1998 and $75,000 in 1999.
>
> The 1998 and 1999 economic loss amounted to about $160,000 and $145,000 respectively, based on an analysis conducted using net book value of certain underlying assets. This amount is significantly understated in that it does not account for the current costs of replacing or revitalizing the non-land assets, or for the value of the underlying land.
>
> Freight use of the Corridor could not generate sufficient revenues to cover the cost of capital associated with the book value of....[text cuts off at bottom of page] constructing the line, or to set aside the funds, through depreciation reserves, to cover the future costs of replacing capital assets such as the rail, ties, ballast and signals.
>
> The only traffic carried by CPR along the Arbutus Corridor is to the Molson Brewery at the North end of the line. Given that there is no other economic activity along the Corridor, coupled with the future likelihood of the neighbouring area being used more for residential purposes than for industrial purposes, there is no reasonably anticipated scenario under which the freight operation would operate other than at a loss in the future.
>
> ....
>
> The analysis of the options for passenger operations in the Arbutus Corridor indicates that passenger operations cannot be conducted on a financially viable basis. Expected revenues would not even cover the operating costs, let alone allow for the recovery of the capital invested.
>
> ....

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[53] Halliday Affidavit #1 [**BOD Tab 2**], Exhibit "C" at p. 184.
[54] Halliday Affidavit #1 [**BOD Tab 2**], Exhibit "A".

> The study indicates that the freight operation on the Arbutus Rail Line is historically a loss generator, and is highly unlikely to generate a profit in the foreseeable future.
>
> The creation and operation of a passenger rail system along the corridor would also be a significant loss generator for a private entity.
>
> Given the results of the analyses that have been undertaken, the operation of freight and/or passenger transportation services along the Arbutus Corridor by a private entity could not be profitable under any realistic set of assumptions.
>
> ....
>
> Our analysis reveals that the freight operation on the Arbutus Rail Line historically generates a loss, and given the limited potential for the level of freight use to change and for freight revenues to change, it is highly likely to continue to do so for the foreseeable future.
>
> The rail line generates revenues that are only about 35% to 40% of the direct operating costs of the rail line. The revenues do not even cover the costs of the crew, fuel and locomotive/car maintenance associated with the operation of the line.
>
> ....
>
> Based on the analyses that we have undertaken, it is clear that the Arbutus Corridor does not operate profitably, nor are there any likely circumstances in which it will operate profitably in the future.
>
> ....
>
> The analysis of the options for passenger operations in the Arbutus Corridor indicates that passenger operations cannot be conducted on a financially viable basis. Revenues would not even cover the operating costs, let alone allow for the recovery of the capital invested.

81. CPR also commissioned Bunt & Associates Engineering Ltd. to review the KPMG report, and they agreed with KPMG's conclusions:[55]

> In summary, the conclusion of the KPMG Study that rail freight operation to the Arbutus Rail Corridor is a "chronic loss generator" and unlikely to ever become profitable is reasonable.
>
> ....
>
> The main conclusion of the KPMG Study of the Arbutus Rail Corridor is that continued operation of a rail freight service, or alternatively the implementation of a rail passenger (transit) service or a combination of freight and passenger service, will generate financial losses for the CPR.

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[55] Halliday Affidavit #1 **[BOD Tab 2]**, Exhibit "B" at pp. 91, 98, 102.

> Our assessment of the KPMG Study is that this finding is based on reasonable assumptions and is therefore a valid conclusion.
>
> [Underlining added]

82. CPR's petition for judicial review was heard at first instance, in the Supreme Court of British Columbia ("BCSC"), in June of 2002.

(e) The ODP is set aside by the BCSC, after which CPR makes a s. 143 offer

83. The BCSC rendered its decision on CPR's judicial review on October 29, 2002. In the result, the court set aside the ODP on the basis that it was outside of the City's powers under the Vancouver Charter.[56]

84. Less than a year later, on September 9, 2003 CPR made a s. 143 offer, advertising the offer in local and national newspapers. The offer set a deadline of November 10, 2003 for the tender of expressions of interest, after which the six-month period for negotiations would begin. CPR's offer concluded by stating that "CPR intends to discontinue operating the line if no agreement is entered into to transfer the railway line as set out in the *CTA*."[57]

85. Days before formally making its s. 143 offer, CPR sent a notice to Vancouver residents informing them of its plans. The notice stated in part:[58]

> You may have heard through the news media recently that CPR is now moving to the next step in the process to formally "discontinue" railway train operations on the Arbutus rail line. As you may be aware, rail operations on the Arbutus line ended in 2001. While we have no preference for the future use of the land, we have taken steps to begin a process that we hope will result in the sale of the Arbutus land.
>
> ...
>
> [W]e are hopeful that the City of Vancouver will consider the purchase of the Arbutus property. Negotiation has always been our preference and the discontinuance process opens the door to negotiations that will be fair to all parties through an independent, federally mandated process. We are hopeful the future of the Arbutus property will be resolved soon.

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[56] 2002 BCSC 1507.
[57] Judd Affidavit #1 **[BOD Tab 1]**, Exhibit "G".
[58] Judd Affidavit #1 **[BOD Tab 1]**, Ex. "E".

86. CPR did receive, by the November 10, 2003 deadline, one expression of interest in response to its s. 143 offer.[59] Pursuant to s. 144(4) of the *CTA*, the parties therefore had six months to reach an agreement, which period ended on May 10, 2004.

87. CPR did not reach an agreement to transfer the corridor for continued operations pursuant to s. 143. The one expression of interest that CPR had received was withdrawn before May 10, 2004.

(f) The Court of Appeal allows the appeal and upholds the ODP; CPR breaches the CTA by not making a s. 145 offer

88. As just discussed, the six-month period for negotiations on the s. 143 offer expired on May 10, 2004. Pursuant to s. 144(5), after that point, CPR was obliged to either a) decide to continue (in this case, resume) operating the railway line, in which case "it shall amend its plan to reflect its decision"; or b) make a s. 145 offer.

89. CPR did neither and thereby breached the *CTA*.

90. The reason for CPR's refusal to make a s. 145 offer is clear. On April 7, 2004 – just over one month before its obligation to make a s. 145 offer arose – the BC Court of Appeal allowed the City's appeal in the ODP Litigation and upheld the ODP, and dismissed CPR's cross-appeal on all grounds. Thereafter, CPR sought leave to appeal to the Supreme Court of Canada, which was granted on December 16, 2004.

91. CPR did not make a s. 145 offer after the May 10, 2004 deadline, or at any point following. The reason is obvious: it feared that the effect of the ODP would be to substantially reduce the value of the corridor, and it did not want to be subject to the Agency's net salvage value determination in such circumstances.

92. The evidence is very that CPR also did *not* decide to resume operations on the Arbutus Corridor at that time:

(a) If it decided to resume operations, then pursuant to s. 144(5) of the *CTA* CPR had a positive obligation to amend its three-year plan to reflect that decision. It did not

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[59] Affidavit #1 of Wayne Carten sworn November 24, 2014 ("**Carten Affidavit #1**") **[BOD Tab 9]** at para. 3.

do so. To the contrary, every three-year plan filed with the *CTA* over the following decade indicated that CPR intended to discontinue the Arbutus Corridor within the three years covered by each plan. It was only on April 14, 2014 that CPR finally decided to amend its three-year plan.

(b) CPR's appeal in the ODP Litigation was heard by the Supreme Court of Canada on November 9, 2005. The Supreme Court issued its decision dismissing the appeal on February 23, 2006. In its decision, the Court stated:

> [27] CPR argues there is a presumption that the Legislature intended any taking of property to be compensated. It argues that the ODP By-law, by limiting its use, constitutes an effective taking of its land. It cannot use the land for any economically viable purpose. It cannot, it says, even run a railway because the by-law precludes maintenance of its track. In these circumstances, the City has effectively "taken" its land and must compensate it, CPR urges.
>
> [28] Like the Court of Appeal, I am not satisfied that the by-law prevents track maintenance or the operation of a railway on the corridor. **Indeed, CPR has no desire to operate a railway there. Its real complaint is that the by-law prevents it from developing or using the corridor for economically profitable purposes**. This amounts, it argues, to a *de facto* taking of its land, requiring compensation.
>
> [Emphasis added]

(c) Over the course of the *decade* following the expiry of the six-month negotiating period on May 10, 2004, CPR did not undertake any activities at all related to the resumption of operations on the Arbutus Corridor. For instance:

(i) As set out above, CPR did not amend its three-year plan; rather it continued to indicate that the Arbutus Corridor portion of the Marpole Spur would be discontinued.

(ii) CPR did not advertise the availability of rail service on the corridor or make any efforts toward attracting customers.

(iii) While CPR appears to have inspected the corridor periodically, it did not engage in any maintenance of the line. As a result, the rail infrastructure physically deteriorated into inoperability. 80% of the railway ties became cracked or rotten,[60] CPR itself expected that it would have to replace 1,500-2,000 of them,[61] some of the crossings were paved over, the automatic warning systems no longer worked, and the rail was rusted. By CPR's own admission, it would need to spend hundreds of thousands of dollars to reconstruct the corridor, just in order to be able to store rail cars on the line (also by its own admission, if it were to seek to carry freight it would have to do far more reconstruction work than it plans).

(iv) CPR acquiesced in the public using the corridor as if it were public land. Pedestrians and cyclists have grown accustomed to using the corridor as a greenway, and gardeners planted extensive gardens up to – and even between – the rails. Until CPR began clearing blackberry bushes and one of the areas of gardens in August of 2014, the whole corridor had the appearance of vacant land – essentially, of an abandoned railway.

(d) Rather taking steps to resume operations, CPR instead continued to plan for the sale or redevelopment of its land. For instance, in 2006 CPR initiated a "visioning" process for the Arbutus Corridor. The multidisciplinary team that completed the resulting report[62] recommended a "sustainability" vision that involved the City acquiring the land and selling a portion of the lands for limited development in order to pay for the acquisition. The core of the team's sustainability vision was that the corridor would be preserved for future transportation uses, while allowing for the development of parks and green spaces and residential and commercial development in the near term.

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[60] Affidavit of Floris van Weelderen, sworn October 29, 2014 ("**Van Weelderen Affidavit**") [**BOD Tab 6**] at para. 6(e), Exhibit "E".
[61] Affidavit #1 of John Cummings, sworn November 24, 2014 ("**Cummings Affidavit**") [**BOD Tab 8**] at para. 36.
[62] Courville Affidavit [**BOD Tab 7**], Exhibit "M".

93. In 2014, in an affidavit filed in court by CPR, Wayne Carten, CPR's Director of Line Restructuring, deposed as follows:[63]

> After the September 9, 2003 advertisement of CP's offer to sell for ongoing railway operations, under s. 143(1), CP took no further steps under the *CTA* towards a potential transfer or discontinuance of the Arbutus Line. For *CTA* purposes, CP chose to continue operating the Arbutus Line rather than offer to transfer its interest to governments and urban transit authorities under s. 145.

94. The first sentence of that quotation is correct, but the statement that "For *CTA* purposes, CP chose to continue operating the Arbutus Line" is plainly wrong. There is no sense whatever in which CPR chose to continue operating the line, as the evidence reviewed above demonstrates. Instead, CPR chose to continue to seek to sell or develop the corridor but without making a s. 145 offer to governments. In short, CPR chose to simply ignore its statutory obligation to offer the corridor for sale to governments pursuant to s. 145.

95. Indeed, in an affidavit filed in court by CPR, David Courville, CPR's Director of Real Estate, deposed that "[i]n or around April 2014, CP determined that a sale of the Arbutus Corridor to the City appeared unlikely to be achieved in the foreseeable future." Obviously that statement reflects the fact that, prior to that time, CPR had been entirely focused on the sale of the corridor and, contrary to Mr. Carten's statement in his affidavit, CPR had *not* decided at any time prior to April 2014 to resume operations on the corridor for the purposes of the *CTA*.

(g) CPR finally amends its three-year plan, starts threatening the resumption of operations and the clearing of the gardens, and puts pressure on the City to purchase the corridor outside of the Division V process

96. Following its determination that it was unlikely to succeed in selling the corridor to the City outside of the *CTA* process, CPR amended its three-year plan on April 16, 2014.[64]

97. CPR thereafter began a communications program directed at local residents and the wider Vancouver population. As will be seen, three themes characterized CPR's notices to residents:

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[63] Carten Affidavit #1 **[BOD Tab 9]** at para. 6.
[64] Judd Affidavit #1 **[BOD Tab 1]**, Ex. "H".

(a) First, none of CPR's notices in 2014 identified the *purpose* for which CPR intended to reactivate the Arbutus Corridor. Indeed, CPR only ever did so in court proceedings in the fall of 2014. It would appear that CPR's decision to amend its three-year plan and recommence operations on the corridor was not motivated by any particular operational need.

(b) Second, the notices carried with them the warning that resuming operations would mean that certain amenities associated with the corridor that local residents enjoyed – using it for walking, cycling, and gardening – would come to an end. In particular, the notices demanded that residents remove any encroachments on the corridor and warned that the gardens would be cleared beginning in August of 2014.

(c) Third, the notices communicated that CPR would prefer to negotiate the sale of the property and that the loss of residents' use of the corridor could be prevented by the City raising its offered purchase price.

98. In May 2014, CPR issued a letter to residents along the Arbutus Corridor.[65] A similar, but not wholly identical, letter was issued to local schools.[66] The letter includes the following (underlining added):

> You may have noticed activity on the CP rail line in your community since the beginning of April. Canadian Pacific workers have been using a brush cutter to ensure clear passage for movement beside and on the tracks in preparation for a survey of the land which comprises the Arbutus Corridor.
>
> Over the coming weeks, CP employees and contractors will gather pertinent information about CP land and tracks in the Corridor. This surveying work includes placing stakes along property lines and assessing the current track condition. Running trains requires the tracks to meet specific safety requirements and this survey will enable our engineering services team to quickly make any necessary repairs to this line so trains may pass.
>
> <u>For many years now, CP has been involved in conversations to convert the Arbutus Corridor for a number of combined public uses, such as a</u>

[65] Judd Affidavit #1 **[BOD Tab 1]**, Exhibit "I".
[66] *Ibid.*, Exhibit "J".

> greenway, public transportation, community gardens and Eco Density development. Despite our efforts, the company and other parties have been unable to achieve a plan for the disposition of this valuable asset.
>
> As a result, the company must look at optimizing the use of this corridor. This includes running CP trains.
>
> As activity along the Corridor increases, we ask residents to be vigilant and cautious as our employees and contractors conduct their work.
>
> Our track network and adjacent right of way, which in this area is 66 feet wide, is private land owned by CP and reserved solely for railway use. The right of way is our means of accessing the track for maintenance, surveying and other purposes, and any unauthorized access is considered trespassing.

99. CPR issued a further letter to local residents in June 2014.[67] The letter states in part (bolding in original, underlining added):

> Track assessment will continue in the coming weeks followed by track maintenance. To complete this work safely and in a timely fashion, CP employees and contractors must be able to quickly cut back any vegetation and work with no encumbrances. We have identified many unauthorized encroachments along the Arbutus corridor that lie within CP property. **We ask those with any personal items, such as sheds or other structures, vehicles, storage containers and/or gardens, to please remove anything within the margins of CP land no later than July 31, 2014.**
>
> After July 31, any unauthorized property remaining within the boundaries of our right-of-way will be removed as warranted by our track maintenance work.
>
> Surveying stakes have been placed along the borders of our property for your reference. For a more detailed map of CP property lines along the corridor, visit our website: www.cpr.ca and search "Arbutus."
>
> The Arbutus corridor is a valuable asset for CP; therefore, as with all our assets, we must optimize its use on behalf of our shareholders. CP has discussed the future of the Arbutus line with the City of Vancouver for several years. Unfortunately, discussions have now ended without compromise. CP remains open to further discussions but,

[67] Judd Affidavit #1 **[BOD Tab 1]**, Exhibit "K".

> failing that, we must move forward with our operational options.

100. Also in or about June 2014, CPR issued a "Public Notice", which also asked residents to remove encroachments by July 31, 2014 and warned that otherwise they would be removed "as warranted by our track maintenance work".[68]

101. In August 2014, CPR issued a further letter to local residents, stating in part (underlining added):[69]

> In my previous letter sent in June, we asked those who had items located on CP property along the Arbutus Corridor to please remove these items by the end of July. I would like to take this opportunity to thank the people who followed through on this request – this is the first important step in preparing our rail line for safe operations.
>
> Since my last letter, we have also had the chance to speak with a number of residents and community garden societies. CP has been impressed with the degree of understanding shown regarding our obligations to maximize the use of this valuable asset.
>
> The next step in returning the rail line along the Arbutus Corridor to operating standards has already begun. CP employees and contractors are making their way along the corridor identifying needed track improvements and removing items which still remain on our property. We are testing crossing signals, and assessing pedestrian and vehicle crossings to understand where, if any, maintenance is required. We will also be replacing tracks and ties where necessary. Heavy machines are used for some of this work and we ask you use the same caution as around a construction site.
>
> To prevent the re-growth of more stubborn weeds on our right of way, we will be spraying herbicide where necessary. In Canada, CP uses herbicides approved by the Pest Management Regulatory Agency. The list of herbicides which may be used in BC is outlined in our approved Integrated Vegetation Management Plan (IVMP). A copy of this plan is available on our website, cpr.ca.
>
> This work will continue throughout August and into September. Our goal is to have the entire line ready for train operations in the fall.
>
> I have expressed the importance of safety in my past letters and I would like to once again reinforce this message: it is not safe to be on or near the railroad tracks at any time. At the same time you place yourself in danger, you also endanger our employees and contractors. Safety is a core

[68] *Ibid.*, Exhibit "L".
[69] *Ibid.*, Exhibit "M".

> foundation at CP and is present in everything we do – please respect our right to a safe work environment and ensure your personal safety as well.
>
> New 'No Trespassing' signs have been placed along our right of way as a reminder to stay back from the rail line and law enforcement has communicated their support to enforce this jurisdiction.
>
> Please direct any questions about CP's activity in your community to our Community Connect line at community_connect@cpr.ca or 1 800 766 7912. Questions regarding the future use of this land as it pertains to the Arbutus Corridor Official Development Plan can be directed to the City of Vancouver.

102. On August 26, 2014, the City and CPR reached an agreement to suspend CPR's activities along the Arbutus Corridor in order to allow for continued negotiations between the parties. Those negotiations are subject to a confidentiality agreement.[70]

103. On or about September 12, 2014, CPR issued a news release stating that "after meeting today with senior City representatives, CP remains extremely disappointed that the City of Vancouver continues to significantly undervalue this corridor. The Arbutus Corridor remains a valuable asset to the railway and as such CP will resume work to return the corridor to operating standards in the coming days."[71]

104. On September 22, 2014, CPR placed a full page letter in the *Globe and Mail*, the *Vancouver Sun* and the *Province*. The full text of the letter states (underlining added):[72]

> ***Clarity and Context***
>
> On CP's Discussions with the City of Vancouver over the Arbutus Corridor
>
> Much has been written and reported in recent weeks on the future of the Arbutus corridor, an 11 km rail line owned by CP that runs from False Creek to the Fraser River in Vancouver, and is the subject of ongoing discussions between CP and the city.
>
> Many of those reports have been contradictory, and, at times, inflammatory. I would like to provide the context and clarity necessary for residents, and all stakeholders, to fully understand the issue.
>
> The corridor, zoned by the city expressly for transportation, is the property of CP and has fallen into disuse over the past decade as the company and

[70] *Ibid.* at para. 16.
[71] *Ibid.*, Exhibit "O".
[72] *Ibid.*, Exhibit "P".

City of Vancouver have sought to come to an agreement for its sale and disposition. During that time, CP has put forth a variety of proposals, some of which would involve no cost to the citizens of Vancouver, including a plan that would see small portions of the corridor rezoned for development by CP with the remainder donated to the city for the recreation and enjoyment of its citizens.

The proposal was part of a Visioning Process undertaken in 2006 with the direct involvement – and endorsement – of community groups that represent the residents along the corridor.

A land swap was another option tabled by CP, which would see a number of parcels of unused City land traded for the corridor.

These proposals, and others, have been rejected.

At the heart of the issue is the value of the corridor. Based on independent third-party appraisals using the value of adjoining lands – the standard method for assessing this type of rail corridor – the Arbutus corridor has been valued at more than $400 million. As this was done a number of years ago, the value is significantly higher today. Recognizing the importance of this property to the citizens of Vancouver, CP has been prepared to accept far less in order to reach an agreement. The City of Vancouver has, in turn, offered only a fraction of that discounted price.

We were disappointed last week to be asked back to the table only to find the city not prepared to move reasonably forward on its position. We fear that due to internal city politics, the council is not able to reach a fair and equitable settlement. CP management has a responsibility to its shareholders to generate a return on its assets. Simply put, we must get fair value for our property or put it to use.

The new CP is not a company that will let this corridor lay dormant while discussions with the city drag on for another decade. If there is no agreement we will use it for rail operations, and expect to have the rail line up to operating standards later this fall.

Contrary to many reports, CP has been and continues to be flexible in its approach. The company stands ready to sell this asset, but at a fair price, or to find a creative solution that satisfies all stakeholders at no cost to the citizens of Vancouver.

E. Hunter Harrison
Chief Executive Officer
Canadian Pacific

105. Above, we identified three themes in these notices:

(a) The purpose for which CPR intended to use the corridor was not identified with any specificity. Rather, CPR simply said it would use the corridor for "running CP trains" and "rail operations".

(b) Recommencing rail operations on the corridor means that the gardens and other encroachments will be cleared, and trespassing will be prohibited.

(c) CPR is willing to sell the land to the City of Vancouver if it will raise its price, and the public can direct its questions about the future of the land to the City.

106. Other factual points also emerge from the notices:

(a) CPR acknowledges that it had been seeking to sell the corridor over the course of the past decade.

(b) CPR also acknowledges that it only recently came to the decision to recommence rail operations. As it stated in its June notice (underlining added): "CP has discussed the future of the Arbutus line with the City of Vancouver for several years. Unfortunately, discussions have now ended without compromise. CP remains open to further discussions but, failing that, we must move forward with our operational options." And as Mr. Harrison stated in his September public letter: "The new CP is not a company that will let this corridor lay dormant while discussions with the city drag on for another decade. If there is no agreement we will use it for rail operations, and expect to have the rail line up to operating standards later this fall."

(h) CPR's purported plans for the Arbutus Corridor

107. The evolution and nature of CPR's plans for the Arbutus Corridor have been tellingly peculiar.

108. As noted earlier in this submission, in the spring and summer of 2014 CPR stated no concrete plan for use of the Corridor. Leading up to the filing of the City's application for an interlocutory injunction in October 2014, the City understood that CPR might use the corridor for any of storage, training or welding.

109. However, by November 2014, CPR seemed to have properly jettisoned the notion of training or welding on the Arbutus Corridor. (The problems with these uses are noted below, in the context of CPR's post-hearing revival of these options.) By the time that CPR filed its responding affidavits in the court proceeding, it purported to plan to use the Corridor simply for the storage of rail cars.

110. Use of the Arbutus Corridor for storage was itself a sharp departure from CPR's past conduct, and the idea was at odds with the problems that the area would pose for such a use. As Mr. Mudie, CPR's former District General Manager Field Operations for the B.C. District attested: "At no time during my tenure as District General Manager would any serious consideration have been given to storing cars for any purpose on the Arbutus Corridor. The severe grade, the number of crossings and the population density of the area would have ruled out any such possibility. A simple act of vandalism by releasing a hand brake on a stored car could easily result in a wide array of unintended and very serious consequences".[73] In this regard:

(a) Portions of the Arbutus Corridor have descending mountain grades of over 2%. A 2% grade means that there is an elevation difference of two feet per 100 feet travelled. We understand that there are only six locations in British Columbia where there is railway track on descending grades of 2% or greater, with the Arbutus Corridor being one of them. The Arbutus Corridor is the only location on CPR's network west of Revelstoke that has mountain grades of 2% or greater. As a comparison, the descending grade in place at the Lac Megantic incident was only 1.3%.[74]

(b) While not denying grades in excess of 2% on some portions of the Arbutus Corridor, CPR says that portions of the Arbutus Corridor have grades of less than 1.8%. While a 1.8% grade is less severe than a 2% grade, it is still a very material grade. For instance, there are no grades greater than 1.3% on CPR's Cascade

[73] Mudie Affidavit #1 **[BOD Tab 3]** at para. 73.
[74] Mudie Affidavit #1 **[BOD Tab 3]** at paras. 42-43; Affidavit #2 of Mark Mudie sworn December 4, 2014 ("**Mudie Affidavit #2**") **[BOD Tab 11]** at para. 8.

Subdivision (North Bend, in the Fraser Canyon, to Vancouver) or greater than 1.2% on its Thompson Subdivision (Kamloops to North Bend).[75]

(c) While there are special instructions and train handling and braking restrictions in place from regulators for operations on descending mountain grades of 2% or greater, they are there to protect legitimate operations to meet railway obligations to customers, not for uses such as storage which could and should be occurring in other locations.[76]

(d) Hand brakes are not locked, and it is therefore relatively easy to release them. A stronger child with some dexterity would be able to do so. The Arbutus Corridor is unfenced and commonly used by pedestrians, and several secondary schools are located either immediately beside it or near it.[77]

(e) In order for derails to mitigate the risk of runaway stock they must be installed properly and not onto defective ties, of which there are thousands on the corridor. In any event, derails will not address the risk of cars becoming running away during the loading/unloading process.[78]

(f) Between January 2000 and December 2012 CPR itself had 76 incidents in Canada of runaway rolling stock, including 22 incidents of runaway "cut of cars" (an assembly of two or more rail cars).[79]

(g) The consequences of a runaway rail car would be extremely serious. The TTX cars which CPR has suggested would be stored come in several variations of weight and length, with the lightest single car (even without cargo) weighing approximately 64,000 pounds (about 29 tonnes) and the heaviest weighing up to approximately 230,000 pounds (about 104 tonnes). Presumably more than one rail car would be stored together. The cumulative weight of these assemblages of rail cars could be very significant. Further, many of the crossings along the

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[75] Mudie Affidavit #2 [**BOD Tab 11**] at para. 7.
[76] Mudie Affidavit #1 [**BOD Tab 3**] at para. 74.
[77] Mudie Affidavit #2 [**BOD Tab 11**] at para. 6(b).
[78] Mudie Affidavit #2 [**BOD Tab 11**] at para. 6(c).
[79] Mudie Affidavit #2 [**BOD Tab 11**] at para. 9.

Arbutus Corridor are well frequented by vehicles and pedestrians that could be struck without any warning if an uncontrolled or unintended movement of a rail car occurred. The vehicles carry combustible fuel and on occasion may carry additional cargo.[80]

(h) The number of crossings (nearly 50[81]) along the Arbutus Corridor would mean that numerous cuts of cars would be required for storage on the Arbutus Corridor to occur. The notion seemed inefficient at best.

111. Further oddities were apparent in the details of CPR's plan. CPR indicated that it would use manual protection at crossings while moving rail cars in and out of their storage positions, contrary to various crossing-related orders that refer to automatic protection.[82] The City of Vancouver's very experienced General Manager of Engineering Services, who has worked as an engineer with the City since 1982, notes that manual protection could be hazardous and confusing, putting both rail crew and traffic at risk; would require trains to proceed more slowly and as such potentially cause crossings to be occupied for longer periods, blocking routes used by emergency vehicles; and as part of a regular operational plan was unprecedented in the City. In his experience as an engineer with the City since 1982 he is not aware of any other circumstance in Vancouver in which a railway's regular operational plan has contemplated the repeated movement of rail cars over numerous crossings with only manual crossing protection.[83]

112. More generally, the slow speed that CPR indicated that trains would use to move into and out of storage positions could also result in emergency vehicles being blocked when travelling down the routes that cross the Arbutus Corridor. Depending on the length of a train, it may take time to communicate with and then get a crew member to walk to a point where rail car separation (to free a crossing) could be achieved. The grade, whether ascending or descending, also has to be factored in. If the cars are being pushed down the grade by a locomotive and an emergency separation is required, that would require

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[80] Mudie Affidavit #2 [**BOD Tab 11**] at para. 6(a).
[81] van Weelderen Affidavit [**BOD Tab 6**], Exhibit "E" at pp. 18-19.
[82] See certain of the orders at Judd Affidavit #2 [**BOD Tab 10**], Exhibit "E" and Cummings Affidavit [**BOD Tab 8**], Exhibit "I1".
[83] Judd Affidavit #2 [**BOD Tab 10**] at paras. 12-15.

separating some cars from the locomotive and from the air brakes it is providing, and appropriate hand brakes to be applied. This would be a tedious and time consuming exercise if the separated cars were to be properly secured.[84] The City of Vancouver's General Manager of Engineering Services has attested that blockage of any road crossings along the Arbutus Corridor would significantly increase the response time of emergency vehicles and put life safety at risk.[85]

113. After the BC Supreme Court rendered its decision on the City's interlocutory injunction application, CPR suddenly purported to revert to considering a wider range of options for use of the Arbutus Corridor than it had advanced in court. A CPR spokesperson was described in a *Globe and Mail* article on January 23, 2015 as having said on January 22 that "the company is taking a few weeks to decide how to use the corridor, working through options that could include training runs, storing rail cars, and welding".[86]

114. The options of training and welding on the Arbutus Corridor also do not make sense. As Mr. Mudie, CPR's former District Manager, has noted:

(a) training with respect to the operation of a train generally takes place in a classroom, in a simulator, and then through the placement of the trainee with and under the guidance of a more experienced employee on an actual train in real train service. Correspondingly, in Mr. Mudie's experience, CPR never ran special training trains. Using a simulator is far preferable to a special training train; on a simulator, derailments and accidents can simply be erased with the push of a button. Further, training on the substantial grades found in the Arbutus Corridor would be particularly questionable and unsafe.[87]

(b) Welding rail, in turn, is a noisy and dusty process that can generate obnoxious fumes. There are better locations to do this than urban areas. Mr. Mudie is not

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[84] Mudie Affidavit #2 **[BOD Tab 11]** at para. 17.
[85] Judd Affidavit #2 **[BOD Tab 10]** at para. 11.
[86] Ian Bailey, "CP proceeds with Arbutus plan, will seek regulatory approval", *The Globe and Mail* (23 January 2015) **[BOD Tab 12]**.
[87] Mudie Affidavit #1 **[BOD Tab 3]** at paras. 68, 74.

aware of any CPR welding facility or training facility for welding located in a residential area.[88]

115. Further, since the decision, CPR has cleared track not simply where it had indicated in its court-filed evidence that it initially intended to store cars (south of King Edward Avenue), but along the whole length of the Arbutus Corridor.

116. The risks entailed by any of the uses that CPR has raised would not be offset by tangible benefits. This reality is reinforced by the fact that CPR had not sought to engage in any of these uses in the past, and indeed would have been content to sell the Corridor. Use of the Corridor for rail purposes has at best marginal utility to CPR. During the December 2014 hearing in BC Supreme Court, CPR counsel repeatedly made clear that CPR did not "need" the Corridor.

C. Conclusions on the Facts

117. In summary, the evidence discloses the following:

(a) By the late 1990s, CPR had come to the firm conclusion that rail operations – be it freight or passenger – could no longer be economically viable. On October 14, 1999 it first listed the Arbutus Corridor portion of the Marpole Spur as "to be discontinued" on its three-year plan.

(b) Various government bodies had, since at least 1986, long been interested in preserving the Arbutus Corridor for transportation purposes.

(c) As of the late 1990s, CPR began looking to either sell or redevelop the corridor, and in 1999 it made extensive efforts toward redevelopment. If they had been carried out, its plans to redevelop the lands would have destroyed them as a corridor.

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[88] Mudie Affidavit #1 **[BOD Tab 3]** at para. 69.

(d) The City passed the ODP on July 25, 2000. It did so in response to CPR's redevelopment plans, in order to preserve the corridor for future transportation use.

(e) Prior to the passage of the ODP, CPR had intended to make a s. 143 offer, after which – if that offer were not taken up – it would make a s. 145 offer by approximately January 2001. Following the enactment of the ODP, it decided not to make such an offer, but rather to challenge the ODP in court.

(f) In correspondence and presentations to the City, and in its evidence in the ODP Litigation, CPR stressed that rail operations of any kind were not economically viable on the Arbutus Corridor and that it had to look instead to sale or development of its lands.

(g) After it succeeded in having the ODP set aside in BC Supreme Court, CPR did offer a s. 143 offer, along with development permit applications. While an expression of interest was received by the November 10, 2003 deadline, no agreement was reached in the six month period for negotiations, which ended May 10, 2004.

(h) As of May 10, 2004 or thereabouts, the *CTA* required CPR to either amend its three-year plan to reflect a decision to continue operations or make a s. 145 offer to governments. Approximately one month before that date, however, the BC Court of Appeal allowed the City's appeal in the ODP Litigation and upheld the ODP. CPR did not make a s. 145 offer.

(i) Following May 10, 2004, CPR also did not decide to "continue" (resume) rail operations on the corridor. The evidence that CPR did not make such a decision until April of 2014 at the earliest is overwhelming.

(j) Over the decade from May 2004, CPR continued to seek to persuade the City to purchase the corridor, but outside of the Division V process.

(k) In April of 2014, CPR did amend its three-year plan to remove the Arbutus Corridor portion of the Marpole Spur from the lines it planned to discontinue. It

then began informing residents that, unless the City offered more for the lands, the gardens would be cleared and use of the corridor for walking and cycling would be prohibited.

(l) CPR offered no specific explanation of what it intended to use the corridor for until the court proceedings brought by the City. In those proceedings, it told the court that it would use the corridor to store cars on a long-term basis. After court, a CPR representative told the media that CPR was also considering other uses, including training drivers and welding rails.

118. The City respectfully submits that the following conclusions are inescapable on the totality of the evidence.

119. ***First, it is very clear that in the summer of 2000 CPR did not proceed with its plans to make a s. 143 offer – likely followed by a s. 145 offer – because it did not want the City's ODP to be factored into the net salvage value of the lands***. CPR had advised the City that it was going to make such offers, but it suspended that plan immediately after the ODP was passed. CPR still intended to sell or redevelop the corridor; that was a major theme of its judicial review of the ODP. But it was not willing to make the offers while the ODP was in place. Later, after it succeeded in having the ODP set aside in BC Supreme Court, CPR did make an offer. However, it did not follow up with a s. 145 offer because in the interim the BC Court of Appeal restored the ODP. Thereafter, CPR continued to seek to negotiate the sale of the corridor of the lands to the City, but outside of the Division V process.

120. ***Second, it is absolutely clear that, as of May 10, 2004, CPR had no intention of resuming operations on the Arbutus Corridor***. It did not make any such decision until April of 2014 at the earliest. However, CPR also did not make a s. 145 offer, because of the Court of Appeal's restoration of the ODP. In or about May of 2004, CPR simply decided that it would maintain its abandonment of rail operations on the Arbutus Corridor while seeking to sell or redevelop the lands outside of the Division V process.

D. CPR's Breach of Division V and the Required Remedy

121. The City respectfully submits that CPR's actions in 2004 and the decade following constitute a clear and flagrant breach of Division V of the *CTA*.

122. Specifically, on or about May 10, 2004 ss. 144(5) and 145(1) imposed on CPR the obligation to decide to either (a) continue (resume) operations or (b) make a s. 145 offer. CPR did neither. It had no intention whatsoever of continuing operations; it was firmly of the view that rail operations could not be economically viable, and accordingly it did not amend its three-year plan (until a *decade* later) and thereafter did not maintain the corridor as a railway. However, CPR also chose not to make a s. 145 offer because of its fear that the City's ODP would lower the net salvage value of the corridor. Instead, CPR decided to continue to seek to sell the corridor to the City, but without following the process set out in Division V.

123. This is a very clear breach of Division V. It is also a serious one, as the Federal Court of Appeal's jurisprudence reviewed above demonstrates. As that court stated in *CN*, Division V is a "complete code" and the steps within it are mandatory. Those steps do not just create obligations on railway companies with which they must comply, but they also create entitlements for other parties. Section 145, for instance, does not only create a procedural obligation for CPR, it grants to governments a positive entitlement to receive an offer to acquire, for any purpose, a railway line that is intended to be discontinued. The fact that CPR removed the Arbutus Corridor from its Three-Year Plan in 2014 does nothing to cure CPR's breach of Division V. It is not a technical breach that CPR can fix a decade later by amending its plan. CPR clearly made the decision in 2004 not to continue operating the corridor as a railway, which triggered the governments' entitlement to an offer to acquire it, which CPR knowingly and purposefully denied them.

124. The City respectfully submits that the only order sufficient to remedy CPR's breach of the *CTA* is an order requiring CPR to make a s. 145 offer. As seen above, it was CPR's refusal to make such an offer that constitutes its breach of the *CTA*. Because of CPR's breach, governments were denied the opportunity to purchase the corridor on the basis of net salvage value, an opportunity CPR was obliged to provide and the governments were

entitled to receive under the *CTA*. CPR's breach must be remedied. As the Court stated in *CN*, "[n]either the parties nor the Agency can effectively do away with the right which accrues to public bodies by the operation of the statute."

125. Further, the offer that the Agency ought to order CPR to make should be referenced for the purposes of valuation to 2004, which is when CPR ought to have made the offer pursuant to the Division V process. That is, the government entities listed in s. 145 were entitled to receive an offer to acquire the corridor based on its net salvage value in 2004. The s. 145 offer that CPR should be ordered to make should therefore also be referenced to the corridor's 2004 net salvage value; only such an offer can properly remedy CPR's breach.[89]

126. The Agency clearly has the jurisdiction to make such an order pursuant to ss. 26, 27(1) and 37 of the *CTA*:

> **26.** The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.
>
> **27.(1)** On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.
>
> **37.** The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

127. These powers are broad and provide the Agency with the necessary jurisdiction. In Decision No. 357-R-2007, which concerned CN's breach of the Division V process, the Agency, after referring to s. 37, stated at paragraph 13 that, "[t]herefore, the Agency can ensure compliance with the transfer and discontinuance process, upon application by a party." Given the substantial valuation issues that would be raised by such a s. 145 offer, it would undoubtedly be essential for any recipient seriously considering CPR's offer to have available the process set out in s. 146.3, which was added to the *CTA* in 2007. While

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[89] The question of whether interest would be owing on the net salvage value amount, if the offer is taken up, is one that the Agency could determine at a later date.

the *valuation* of the s. 145 offer should be referenced to 2004, the City submits that, on both plain and contextual readings of the *CTA*, s. 146.3 would and should apply to any s. 145 offer arising from this application. The City would be pleased to provide further submissions on that issue if that would be helpful.

128. The City also respectfully submits that, as an ancillary order, the Agency should cancel CPR's April 14, 2014 amendment of its Three-Year Plan removing the Arbutus Corridor portion of the Marpole Spur from the list of lines it intends to discontinue.

PART V - RELIEF SOUGHT

129. The City respectfully requests that the following relief be granted:

(a) An order cancelling CPR's April 14, 2014 amendment of its Three-Year Plan removing the Arbutus Corridor portion of the Marpole Spur from the list of lines it intends to discontinue.

(b) An order that, pursuant to s. 145, CPR make an offer to governments to transfer the Arbutus Corridor portion of the Marpole Spur – specifically, from MP 0.32 to MP 5.53 – for not more than its net salvage value as of 2004.

PART VI - PROCESS ISSUES

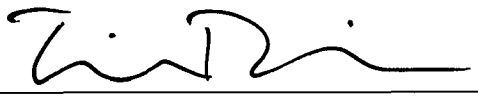
130. This application raises unique, complex and important issues relating to the purpose of Part III, Division V of the Act and to the scope of the Agency's remedial powers. The City is not aware of any similar application having been determined by the Agency. In these circumstances, the City submits that it would be appropriate for the Agency to hold an oral hearing, pursuant to its powers under s. 25 of the Act and ss. 4 and 6 of its Rules.

131. If the Agency grants the relief sought in this application, then the result will be that CPR will make an application pursuant to s. 145 of the Act. It is likely that any government respondent considering accepting the offer would apply under s. 146.3 of the Act for a determination of the net salvage value of the corridor. Such a valuation process would involve considerable complexity, and the City anticipates that a number of issues relating to that process would need to be addressed in case management conferences. Those

issues, however, can and should be left until after the Agency's determination of the present application.

132. CPR has been conducting some work on the Arbutus Corridor to ready it for the recommencement of rail operations. Pursuant to s. 28(2) of the Act, the Agency has the power to make interim orders: "The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application." The City is not asking at this time for any injunctive relief to preclude CPR's rail operations. Transport Canada is currently reviewing certain safety issues related to CPR's plans for the corridors, which will likely take some time to resolve. Given that state affairs, the City is not now asking for an injunction, but it respectfully reserves its rights to do so later, should rail operations become imminent or should CPR not respond to this application in a timely way.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Counsel for the Applicant
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Ludmila B. Herbst and
Tim A Dickson

Dated: August 6, 2015

PART VII - DOCUMENTS

No.	Description		Date	Page No.
	Exhibit "I2"	Correspondence regarding recent water main work by GVWD around 60th Avenue	November 24, 2014	94
	Exhibit "J"	Excerpts for CPR's SPC01 Right-of-Way Maintenance Circular	April 1, 2000	95
	Exhibit "K"	Section 11 of the *Railway Safety Act*	1985	104
9.	Affidavit #1 of Wayne Carten sworn November 24, 2014			
	Exhibit "A"	Excerpt from Canada Gazette	October 14, 2000	1
	Exhibit "B"	CPR Notice	September 9, 2003	3
	Exhibit "C"	Letter from CPR to Secretary of the CTA	April 16, 2014	4
	Exhibit "D"	Letter from CPR to Minister of Transport	November 14, 2013	6
10.	Affidavit #2 of Peter Judd sworn December 4, 2014			
	Exhibit "A"	Three Form A freehold transfers in connection with CPR sale to KCC	1995	1
	Exhibit "B"	Google image of Starbucks on West 2nd	undated	5
	Exhibit "C"	Google map of 1500 West 2nd area	undated	6
	Exhibit "D"	Email exchange between TAD and Simon Coval	October 24, 2014	7
	Exhibit "E"	Various Orders of the Board of Transport Commissioners for Canada and Canadian Transport Commission	1965-1979	15
11.	Affidavit #2 of Mark Mudie sworn December 4, 2014			

No.	Description		Date	Page No.
	Exhibit "A"	Emergency Directive pursuant to s. 33 of the *RSA*	October 29, 2014	1
	Exhibit "B"	Excerpt from Transport Canada's Rail Safety Management Systems Guide	undated	7
	Exhibit "C"	CBC News "Rail safety map"	December 3, 2013	11
	Exhibit "D"	Excerpt from Canadian Rail Operating Rules	undated	13
	Exhibit "E"	Excerpt from TTX website	undated	26

12. Ian Bailey, "CP proceeds with Arbutus plan, will seek regulatory approval", *The Globe and Mail* (23 January 2015)