Court of Queen's Bench of Alberta

Citation: Stoney Nakoda Nations v Canada, 2016 ABQB 193

Date: 20160405
Docket: 9901 03798
Registry: Calgary

Between:

**Stoney Tribal Council and
Bearspaw, Chiniki and Wesley Bands**

Plaintiffs/Respondents

- and -

**Her Majesty The Queen In Right of Canada,
Canadian Pacific Railway Company, and Encana Corporation
(formerly PanCanadian Petroleum Ltd.)**

Defendants/Applicants

And:

**Her Majesty the Queen in Right of Canada,
Canadian Pacific Railway Company,
Canadian Pacific Ltd.,
Fairmont Hotels and Resorts Inc., PanCanadian Petroleum Ltd.
and Encana Corp.**

Third Parties

The Attorney General of Alberta

Intervenor

**Reasons for Decision
of the
Honourable Mr. Justice P.R. Jeffrey**

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I. Introduction

[1] Encana Corporation ("**Encana**") and the Canadian Pacific Railway Company ("**CPR"**) apply for summary dismissal. They say the plaintiffs, Stoney Tribal Council representing the Chiefs, Councils and members of the Bearspaw, Chiniki and Wesley Bands (also known as the Stoney Nakoda Nations) ("**SNN**"), commenced this action after expiry of the applicable limitation period.

[2] The SNN are suing Encana and CPR for trespass and conversion of petroleum, natural gas and related hydrocarbons ("**PNG**") that they say is theirs. They say that Her Majesty the Queen **("Canada")** breached the duties she owed to the SNN in the late 1800s and early 1900s, by transferring without their consent, and otherwise transferring invalidly and unlawfully, their PNG to CPR, which were later conveyed to its wholly owned subsidiary, now Encana. Canada transferred to CPR portions of the SNN's reserve lands[1] (by issuing Orders in Council followed by 13 Letters Patent between July 10, 1893 and August 14, 1917 (the "**Railway Lands**"). The SNN say, further, that in fact the purported transfer was not effective at law and that they are still the lawful owners of the PNG and that they remained with the PNG or that it has reverted to the Reserve Lands. They later said there actually was never any transfer and that they continue to be the lawful owners of the PNG. The SNN allege that CPR and Encana have trespassed on and wrongfully removed PNG. The SNN claim various forms of redress. The SNN say, in the alternative, that if the conveyance of lands to the CPR validly included the PNG, then CPR did not properly compensate them at the time.

[3] The SNN say this is not an appropriate case for summary dismissal. They submit that a trial is necessary for the court to adjudicate the issues fairly. Further, they say the applicable limitation periods have not expired, but in any event are constitutionally inapplicable because in this case their effect would be to infringe or extinguish their Aboriginal rights, Aboriginal title, Aboriginal interests, reserve interest and treaty rights (the "**Aboriginal Rights**")[2] in the PNG.

[4] Encana says, in addition to the claims being out of time, that it cannot be a trespasser on its own property, property that is registered in its name. Encana says the SNN claims fail because of the indefeasibility of its title.

[5] The SNN say Encana cannot rely on indefeasibility since it was not a *bona fide* purchaser for value of the PNG, but rather received it in a non-arm's length transfer from CPR. In any event, they argue, the statutory indefeasibility doctrine is also constitutionally inapplicable because its effect in this case would be to extinguish their Aboriginal Rights in the PNG.

[6] Canada, also a defendant, has not applied for summary dismissal. Nevertheless it participated in these applications, as did the Attorney General of Alberta ("**Alberta**"), to respond to the SNN's

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[1] As mentioned later in this decision, in 1877, Canada and the SNN agreed on Canada setting aside lands for the use and benefit of the SNN and their members, designated as Indian Reserves Nos. 142, 142B, 143, 144, 144A and 216, at or near Morley, Alberta (the "**Reserve Lands**"), subject to the terms of Treaty No 7.

[2] These concepts are distinct. However, the SNN use them loosely and at times interchangeably. Since this decision does not turn on the determination of an exact Aboriginal right or interest, I use this defined term to encompass all such concepts.

challenges to the *vires* of their respective legislation. None of the findings of fact in this decision prejudice the positions of the SNN and Canada in the issues between them in this litigation.

[7] For the reasons that follow, I grant the application of the CPR, dismissing all claims against it, and deny the application of Encana.

II. Positions of the Parties

[8] Encana says the SNN's pleadings only claim damages and that claims for damages are subject to time limitations. Encana says the alleged causes of action arose in the 1800s and the early 1900s, when CPR acquired fully the PNG or, failing that, roughly 50 years ago when it acquired the PNG from CPR. It argues all claims against it are therefore time barred.

[9] Encana says, in any event of the claim only seeking damages and therefore being out of time, that any interest or right in PNG that the SNN may have once had was extinguished long ago by Canada's alienation to CPR. Encana says that the Letters Patent conveyed a fee simple interest to CPR. CPR thereby acquired a common law right of exclusive possession and ownership which, of itself, extinguished the SNN's Aboriginal Rights. If Encana shows this to the summary dismissal standard, then Encana's and CPR's Applications should be granted because the Aboriginal Rights would not have been extinguished by application of any legislation that the SNN impugn constitutionally, but by the alienation.

[10] Encana also relies on being the registered owner to the PNG on the certificate of title and argues s that its ownership interest is indefeasible regardless of whether the PNG were conveyed to CPR originally. Encana says that it purchased the mineral rights, as reflected in its titles, in the ordinary course of business and in good faith for valuable consideration. Encana argues that the SNN only claim damages and do not impugn Encana's title. Encana submits that the transaction that followed, passing the PNG from CPR to what is now Encana, makes it no longer possible to void the title and it remains valid. Encana argues that it cannot be a trespasser on or converter of the PNG because it has title to the PNG and even if the SNN were to challenge Encana's title, they are out of time. Encana argues that possession must be proved by either actual possession or that which derives by title.

[11] CPR agrees with Encana and adds that, in any event of those arguments, the trespass and conversion claims against it should also be dismissed summarily because whatever interest it had in the PNG was divested upon transfer to Encana's predecessor CPOG[3] in 1965. Therefore, there can be no claim against CPR for return of the PNG and any claim for damages against it expired by operation of limitations legislation years ago. Encana in its application relies upon the limitations legislation applicable at the time of the conveyance to the SNN. CPR supports Encana's argument, but also relies on limitations legislation applicable at the time of the commencement of this lawsuit.

[12] With respect to the SNN's claim against CPR in the alternative, for damages for under-compensation (if the Court finds that the PNG *were* included in the transfer to CPR), CPR says it is

[3] The application record suggests that PanCanadian Petroleum Limited was created in 1971 through the amalgamation of CPOG and PanCanadian Petroleum Limited and PanCanadian Energy Corporation was created in January 2002 by the amalgamation of PanCanadian Petroleum Limited and PanCanadian Energy Corporation; Encana was created in 2002 by the amalgamation of PanCanadian Energy Corporation and Alberta Energy Company.

subject to the limitations legislation applicable at the time the action was started and is therefore out of time.

[13] The SNN argue that what is being sought by CPR and Encana is, in effect, an extinguishment of the SNN's treaty rights and interest in the Reserve Lands and extinguishment of Her Majesty's interest in those Reserve Lands at the time of the conveyance to CPR. The onus, they say, is on the Applicants to prove that the SNN's Aboriginal Rights in the Reserve Lands were already extinguished, for example by operation of any of the various pieces of legislation such as the *Indian Act*, *Railway Act*, limitations legislation or by real property instrument. The SNN argue that regardless of how their Aboriginal Rights in the PNG within the Railway Lands is purported to have been extinguished, the Applicants bear the onus of proving that the Governor in Council clearly and plainly intended to extinguish the SNN's Aboriginal Rights in the PNG and, if so, must also prove that the Governor in Council had the requisite statutory authority to do so.

[14] Regarding the Applicants' limitations argument, the SNN say that limitations legislation is constitutionally inapplicable to their claims, since its application would extinguish their rights to the PNG, which the Applicants have failed to prove was previously extinguished. In oral argument the SNN claimed a continued treaty right to the PNG underlying the Railway Lands in circumstances where the lands were taken without consent or where fair value was not obtained on their behalf. They add that based on the Lieutenant Governor's account of the treaty negotiations and what was promised, the treaty rights include the right to reserve lands being set aside and the right to exclusive use and occupation for the SNN's benefit. The SNN further argue that it entails the right to have the Reserve Lands not sold or taken without the SNN's consent and if sold or taken with consent, then Canada needed to ensure fair compensation.

[15] The SNN add that what is critical here constitutionally is the *sui generis* interest in these lands, regardless of whether what was obtained by the CPR was fee simple, fee simple determinable, mere right-of-way, or some other property right, and regardless of how it was obtained. The Applicants not only need to show that there was an intention to extinguish SNN's Aboriginal Rights, but they also need to show that the intent was plain and clear.

[16] The SNN argue that considering the magnitude of the issues and the nature and strength of the evidence, it is not possible for the Court to adjudicate fairly and justly on this record. These factors warrant a trial not a summary process. They say in this case the Court should not adjudicate summarily:

> [...] due to the importance of the constitutional issues that have been raised by these Applications, not just to the parties but also to First Nations and society as a whole, granting a summary judgment at this stage on this record, would not be an appropriate remedy.

[17] Alberta opposes any finding of constitutional inapplicability of its legislation. It urges the Court to exercise restraint, deciding issues whenever possible without determining a constitutional question.

[18] Alberta says the constitutional issues are largely predicated on the existence of Aboriginal rights, Aboriginal title or treaty rights, but the SNN are not seeking any remedies that would require the Court to determine whether the lands are subject to Aboriginal rights, title or treaty rights and whether those alleged rights have been infringed or extinguished.

[19] Alberta submits that the SNN are not alleging treaty rights or Aboriginal interest to damages and argue that they cannot claim Aboriginal rights in a generic way. Alberta submits that there is nothing in the pleadings that relates to Aboriginal rights; therefore there can be no constitutional challenge that relates to Aboriginal rights. Similarly, with respect to treaty rights, Alberta submits that although there is a general statement from the SNN that the subject lands are reserve lands, in light of the pleadings, there is no specific treaty right alleged to be infringed. The SNN have failed to show how the specific legislation has infringed those rights.

[20] Alberta agrees with Encana that its mineral title to the PNG is indefeasible. It submits that if there were an issue regarding an alleged improper transfer of mines and minerals from the SNN, such an issue would be between that original grantor and the SNN. It does not follow through to impair the title of subsequent owners of the land.

[21] Alberta adds that issues of trespass are determined based on who has current possession, not who should have proper title, and the issue here is not whether the land should have been alienated but whether it was alienated. Alberta says whether the SNN still have an interest in the land is a factual matter that needs to be proven on the information that is before the Court and it has not been.

III. Test for Summary Dismissal

[22] Encana and CPR apply for summary dismissal pursuant to rule 7.3(1)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010, which states:

> 7.3 (1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> […]
>
> (b) there is no merit to a claim or part of it;

[23] The Alberta Court of Appeal summarized the test to be applied in such applications in *Maxwell v Wal-Mart*, 2014 ABCA 383:

> 11 Rule 7.3(1)(b) provides that a party may apply to the Court for summary judgment in respect of all or part of a claim where, among other reasons, there is no merit to the claim. […]
>
> 12 This test has been recently interpreted to be somewhat wider than the rule it replaced, which required an applicant to demonstrate that there was no genuine issue which could or should be put to trial. Under the new Rule, no genuine issue for trial exists where the judge is able to make a fair and just determination on the merits without a trial, because the summary judgment process allows him or her to make the necessary findings of fact, to apply the law to those facts and is a proportionate, more expeditious and just means to achieve a just result. Under the new Rule, summary judgment may be granted if a disposition that is fair and just to both parties can be made on the existing record: see *Windsor v Canadian Pacific Railway Ltd.*, 2014 ABCA 108 at para 13; *Combined Air Mechanical Services Inc v Flesch*, 2011ONCA 764 at paras 45-55, 108 OR (3d) 1.

[24] These comments derive from the Supreme Court of Canada's decision in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87:

> 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> 50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[25] The Alberta Court of Appeal in *WP v Alberta*, 2014 ABCA 404 at paragraph 26, has said the question now is whether there is:

> [A]ny issue of "merit" that *genuinely* requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily. [emphasis in original]

[26] A claim is without merit "if the facts and the law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high": *Access Mortgage Corporation (2004) Limited v Arres Capital Inc*, 2014 ABCA 280 at para 45 [*Access Mortgage*], citing *Beier v Proper Cat Construction Ltd.*, 2013 ABQB 351 at para 61.

[27] The Alberta Court of Appeal elaborated further in *776826 Alberta Ltd. v Ostrowercha*, 2015 ABCA 49, at paragraphs 9 to 12:

> 9 [...] From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.
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> 10 From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters -- matters which would usually require ordinary forensic testing through a trial procedure with viva voce evidence and which could not be resolved through the fair and just alternative -- the non-moving party's position viewed in the round has no merit in law or in fact.
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> 11 Stated another way, in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process". The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something

> will turn up at a trial, does not suffice. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case: see *Canada v Lameman*, 2008 SCC 14 at paras 10 to 11, [2008] 1 SCR 372.
>
> 12 The concept of "merit" in this respect is to be distinguished from the test for striking out pleadings under Rule 3.68 which involves deciding "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed": compare *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at paras 13 to 15, 85 CELR (3d) 39, under motion [2014] SCCA No 497 (QL).

[28] In *Access Mortgage*, the Alberta Court of Appeal adopted portions of a consolidation of summary judgment principles contained in a decision of this Court. Chief Justice Wittmann adopted them all in *Attila Dogan Construction and Installation Co. v AMEC Americas Limited*, 2015 ABQB 120 at paragraph 51 (affirmed, 2015 ABCA 406), as follows:

> First, the legal or persuasive burden rests on the moving party... The moving party must present the facts which, in combination with the applicable law, make its position unassailable if the nonmoving party does not contest the facts and the law...
>
> Second, the nonmoving party has no legal or persuasive burden to discharge... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party...
>
> Third, the motions court may not make findings of credibility and resolve contested fact issues... That a controversy over nonmaterial facts exists is irrelevant.
>
> Fourth, if the law is unclear, either because the moving party is seeking to extend the scope of a well established proposition or to make new law, a chambers judge may decline to resolve the dispute. This is so even though the trial judge is, arguably, in no better position to decide this challenging legal issue than the chambers judge. The chambers judge may legitimately conclude that her proper role is to identify unassailable positions, which assumes the law on the issue is settled, not develop the law in the course of a summary judgment chambers application.
>
> Fifth, a nonmoving party's argument that questioning or trial may produce evidence which assists the nonmoving party is without merit.

[29] This latter principle was affirmed as continuing to apply under the new approach to summary judgment applications in *CCS Corp. v Secure Energy Services Inc.*, 2014 ABCA 390 at paragraph 56:

> In oral argument, counsel for CCS mentioned there were other witnesses whom he would call at trial. But a party resisting summary judgment achieves nothing by suggesting that it will offer better evidence at trial; it must put its best foot forward for the application. See *Lameman (Papaschase Indian Band) v A-G Canada*, 2008 SCC 14, [2008] 1 SCR 372, 372 NR 239 (paras 11, 19); *Access Mortgage Corp (2004) v Arres Capital Inc*, *supra* (para 45); *Beaver Hills v Greenstreet Development Corp*, 2013 ABCA 360, [2013] AR Uned 425 (Oct 29). Suspicion is not enough: *Beaver Hills* case.

[30] In *Attila Dogan* at paragraph 52, Chief Justice Wittmann added the following to the list of principles, which amplifies the Supreme Court of Canada's element of proportionality in *Hryniak*, quoted above:

> [...] [T]he principle of proportionality will require that the procedure used to adjudicate the dispute should fit the nature of the claim, but proportionality has more than one aspect. The magnitude of the claim in terms of monetary value may have some place in this analysis, but the nature of the claim will as well. It has been recognized, for example, that disputes over the interpretation of an instrument, such as a contract, may lend themselves particularly well to summary judgment: *Tottrup v Clearwater (Municipal District 99)*, 2006 ABCA 380.

[31] When the legal issue is unsettled, complex and intertwined with the facts, "it is sometimes necessary to have a full trial to provide a proper foundation for the decision": *Tottrup v Clearwater (Municipal District 99)*, 2006 ABCA 380 at paragraph 11, affirmed post *Hryniak* by the Alberta Court of Appeal in *Windsor* and again in *Amack v Wishewan*, 2015 ABCA 147 at paragraph 36:

> Accordingly, a full trial will still be required where a summary record cannot fairly be used to decide legal issues which are unsettled, complex or intertwined with the facts: see *Gayton*, *supra* at para 11; *Condominium Corporation No. 0321365 v MCAP Financial Corporation*, 2012 ABCA 26 at para 5, 519 AR 322; *Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc*., 2012 ABCA 328 at para 6, 539 AR 68. This is consistent with the principle set out in *Hryniak* that summary judgment is appropriate where the motion judge is confident that he or she can fairly resolve the dispute: see paras 50, 57. If not so confident, then a trial is in order.

IV. SNN's claims against CPR and Encana

[32] Are SNN's claims against CPR and Encana limited to damages? A number of the parties say they are and that, as a consequence, many of the SNN responses to summary dismissal have no application here.

[33] In the context of an Aboriginal case, the Supreme Court of Canada has said that summary dismissal applications are judged on the basis of the pleadings and materials actually before the Court, not on suppositions about what might be pleaded or proved in the future: *Canada (AG) v Lameman*, 2008 SCC 14 at para 19. More recently the Supreme Court of Canada appears to have relaxed that somewhat, holding that a functional not technical approach should be taken to pleadings in Aboriginal cases: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, at paras 20-24. Regardless, the starting point for an application of this nature is to ascertain just what the plaintiffs are claiming.

[34] That is not so easy a task in this case. The SNN's pleadings and ever expanding "particulars" in this case resemble what Binnie J denounced in *Lax Kw'alaams Indian Band v Canada (AG)*, 2011 SCC 56:

> 41 [...] The trial of an action should not resemble a voyage on the *Flying Dutchman* with a crew condemned to roam the seas interminably with no set destination and no end in sight.

[35] The Alberta Court of Appeal had occasion to consider these very pleadings, though without the last nine years of added "particulars" and the most recent amendment to the Amended Statement of Claim. It observed in *Stoney Tribal Council v PanCanadian Petroleum Ltd.*, 2005 ABCA 204:

> 11 The wording and terminology of the amended statement of claim, and of the respondent plaintiffs' reply to demand for particulars, is at times vague or inclusive, not tending to restrict itself to any specifics. [...]
>
> [...]
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> 15 […] The amended statement of claim on its face seems to us to cry out for some particulars, if there is not to be endless discovery of unknown extent, and serious confusion at trial. Discoveries should not become a history seminar on the C.P.R. and land grants in Western Canada.

[36] Regrettably for the task at hand, the particulars supplied following the directions of the Court of Appeal added claims and broadened others. The "particulars" lack the precision and specificity necessary to clarify and bring focus to the claims. Encana's counsel called them "[I]ncoherent on their face".

[37] CPR also voiced this concern, arguing that the SNN used particulars to expand the nature of their claims, going against the nature of particulars. CPR acknowledged, however, that no party formally objected in that regard at the time the SNN filed and served its particulars, and no party pursued any remedy for the approach taken by the SNN.

[38] CPR argued that the SNN's expansive approach to particulars was further aggravated by the SNN then taking positions in argument on these applications that are contrary to allegations in their pleadings. CPR identified the following allegations in the SNN's briefs that contradict their pleadings:

(a) The mines and minerals underlying the Railway Lands were not acquired by CPR;

(b) CPR did not convey all of its mine and mineral interests in Alberta, including those underlying the Railway Lands, to CPOG in 1965; and

(c) Oil and gas may never have been produced from the Railway Lands by CPR, Encana's predecessors, Encana or anyone.

[39] Encana also submits that the SNN's claim is unclear and contradictory. It says the SNN in their pleadings concede that Canada conveyed the PNG to CPR, but the arguments later advanced were inconsistent with that concession. Encana argues that Further Reply (No.4) to Demand for Particulars is not an amendment to the Statement of Claim, and that without actually amending its Statement of Claim, the SNN's pleadings are deficient.

[40] The SNN explained that they made no admission in their pleadings but merely paraphrased what was purported to have been transferred in 1893 to 1917 and then later in 1965.

[41] Encana argues that the SNN have not pleaded any facts which would entitle them to bring an action for the recovery of land and that the SNN can only acquire status to maintain this action if they can successfully impugn Encana's title. Encana adds that the SNN's claim is one for damages and that there is no claim of treaty rights or Aboriginal rights. Encana says it enjoys indefeasible title.

[42] Alberta submits that recovery of land is not pleaded and only damages are claimed.

[43] Canada agrees with Encana, CPR and Alberta. It argues that on the face of the pleadings, the SNN are seeking damages and/or an accounting of damages and are not asserting any Aboriginal title or right.

[44] The SNN's Amended Amended Statement of Claim (the "**Statement of Claim**") seeks only damages and an accounting for trespass and conversion. They allege that Canada, in breach of duties it owed to the SNN, transferred the SNN's PNG to CPR. They allege that CPR and its affiliate Encana purport to have title to that PNG yet lawfully do not and, further, that they have trespassed by removing that PNG. The SNN also claim against CPR, in the alternative, that if the transfer by Canada to CPR did validly include the PNG, then CPR failed "to properly compensate" the SNN at the time. For this alternate plea the SNN also claim damages.

[45] However, at paragraph 19 the SNN add that under the *Railway Act* CPR was not permitted to take PNG, did not acquire any PNG, and was required to compensate the SNN for the lands taken:

> (a) CPR was only permitted to take Indian Reserve land for railway purposes with the consent of the Governor-in-Council;
>
> (b) Upon such consent, CPR was permitted to take only those lands and only those materials required for the construction and maintenance of the railway, which may include stone, gravel, sand or water, but not petroleum, natural gas, or related hydrocarbons (or all of those);
>
> (c) CPR did not acquire an interest in any minerals underlying Indian Reserve lands except those required for the construction and maintenance of the railway, which may include stone, gravel, sand, water, but not petroleum, natural gas, or related hydrocarbons (or all of those); and
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> (d) CPR was required to compensate the Bands for all Railway Lands taken.

[46] By way of particulars the SNN further allege that any portion of the Railway Lands no longer used for railway purposes had to revert back to reserve status. They allege that under this scenario the purported conveyance of the PNG by CPR to its subsidiary, Encana's predecessor CPOG, triggered the reversion.

[47] The SNN acknowledge that their pleadings do not claim the recovery of the property. They say that is because the PNG were never conveyed or transferred to CPR in the first place (despite pleading that they were). The SNN submit that CPR only obtained a right-of-way and nothing more. They say they should not have to plead for recovery of what is and always has been theirs. They do not seek a declaration to that effect.

[48] The SNN say the "basket clause" at the end of their prayer for relief allows the Court to grant declaratory relief or any remedy that the facts pleaded support. The SNN also submit that what is important is that the material facts they pleaded support a cause of action.

[49] The SNN argue that the pleadings allege sufficient facts for the title to be declared void. The SNN refer to the following subparagraphs of paragraph 1 of the Further Reply (No. 4) to Demand for Particulars:

> k. In circumstances where CPR's statutory interest and title to the Railway Lands did not include the P & NG, any purported alienation, conveyance, transfer, assignment

> or any other disposition of the P & NG by CPR to Encana, through Encana's predecessors in title and interest, Canadian Pacific Oil and Gas Company and any of its successors, was unlawful and any such purported conveyance, transfer, assignment or any other disposition was void ab initio or, in the alternative, voidable.
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> […]
>
> n. In the alternative, If [*sic*] CPR did properly take and appropriate all or any portion of the Railway lands [*sic*], which is denied, and any such taking and appropriation of the Railway Lands included all or any portion of the P & NG, which is denied, then CPR's statutory interest and title to the P & NG was conditional and remained, at all material times, conditional on such P & NG continuing to be used for railway purposes.
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> o. CPR's statutory interest and title specifically excluded the right to alienate the said P & NG. Any alienation of the said P & NG by CPR is irrefutable evidence that the said P & NG was not required for railway purposes and in such circumstances title to the P & NG would revert to reserve status by operation of the underlying reversionary interest in favour of Her Majesty, on behalf of the Plaintiffs.
>
> […]
>
> r. In circumstances where any of CPR's activities or dealings were inconsistent with or contrary to the provisions of the Railway Acts, CPR's possession, use or occupation of the P & NG became unlawful and CPR's statutory interest and title was rendered void ab initio, or alternatively voidable, and the title to the P & NG would revert to reserve status by operation of the underlying reversionary interest in favour of Her Majesty, on behalf of the Plaintiffs.
>
> […]
>
> v. In circumstances where any of Encana's activities or dealings were inconsistent with or contrary to the provisions of the Railway Acts, which includes the purported alienation of the title by CPR to Encana, then Encana's possession, use and occupation of the P & NG became unlawful and Encana's statutory interest and title was rendered void ab initio, or alternatively voidable, and the title to the P & NG would revert to reserve status by operation of the underlying reversionary interest in favour of Her Majesty, on behalf of the Plaintiffs.

[50] The SNN's replies to demands for particulars also use the term "recovery". Counsel for the SNN in their later arguments relied on those instances to suggest that the SNN actually did plead for recovery of the PNG. Specifically, they refer to subparagraphs of paragraph 2 as well as paragraph 3.d. of the Further Reply (No. 4) to Demand for Particulars (emphasis added):

> 2.a. The Plaintiffs' claim against CPR includes an accounting, damages and the recovery of all P & NG that was taken and appropriated by CPR and was in the possession, use or occupation of CPR, whether such taking and appropriating and possession, use or occupation was unlawful or, alternatively, became unlawful due to CPR's subsequent conduct, as particularized in the pleadings and this Further Reply (No. 4).

> b. The Plaintiffs' claim against Encana includes an accounting, damages and the recovery of all P & NG that was in the possession, use and occupation of Encana, whether such possession, use or occupation was unlawful or, alternatively, became unlawful due to Encana's subsequent conduct, as particularized in the pleadings and this Further Reply (No. 4).
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> c. The Plaintiffs' claim for an accounting, damages and recovery of all P&NG includes all P & NG that currently underlies or remains part of the Railway Lands as well as all P & NG that was recovered, removed and sold that did underlie or was part of the Railway Lands, whether such recovery, removal and sale of the P & NG was conducted directly by CPR or Encana or by other third parties on behalf of CPR or Encana through any mineral leases or other forms of mineral dispositions purported to have been granted by CPR or Encana to any third parties from time to time.
>
> [...]
>
> 3.d. The Plaintiffs claim' [*sic*] for an accounting, damages and recovery includes all P&NG underlying the Railway Lands or forming part of the Railway Lands that has been recovered, removed and sold from any wells that may have operated on the Railway Lands from time to time, as well as all P & NG underlying the Railway Lands or forming part of the Railway Lands that has been recovered, removed and sold from any wells that may have operated outside of the Railway Lands, from time to time, where a proportionate share of the P & NG that is recovered, removed and sold from any such wells are apportioned to the Railway Lands pursuant to the terms of the applicable Unit Agreement or Unit Agreements.

[51] Some of those uses of the word "recovery" are not referring to the SNN's recovery of the PNG remaining *in situ*, but of the SNN's recovery of PNG already removed. Their pleadings use phrases such as "that has been recovered, removed and sold", "that was in the possession, use and occupation of Encana" and "that was taken and appropriated by CPR". These are references to PNG removed from the Railway Lands in the past, for which the SNN want to recover the lost value. Any such PNG already severed from the land is no longer available for return, so only damages can be pursued for that loss. See: *Stoney Tribal Council v PanCanadian Petroleum Limited*, 2000 ABCA 209 at para 27.

[52] Other uses by the SNN of the word "recovery" also do not refer to future return to the SNN of what they say is theirs, but refer to recovery of the PNG from out of the subsurface formations. That is, they refer to the production of the PNG, not the return of PNG. This appears in the Further Reply (No. 4) to Demand for Particulars, for example: "whether such recovery, removal and sale" and "exploring, drilling and recovering". When the word "recovery" appears in these particulars, claims for a declaration as to title or rectification of title or return to the SNN of the *in situ* PNG are not being made.

[53] However, when the SNN state at para 2(c) that they "claim for an accounting, damages and recovery of all P&NG" and that it "includes all P&NG that currently underlies or remains part of the Railway Lands", they are seeking the return of *in situ* PNG.

[54] There the SNN refer to the recovery of all *in situ* PNG as if they already pleaded the cause of action and are now merely particularizing it. Yet this is the very first mention of it. Until the Further

Reply (No. 4) to Demand for Particulars, they made no such plea. As previously mentioned above, however, the Applicants did not formally object to this obvious and significant expansion to the claims.

[55] Nevertheless, by that lone phrase at para 2(c) of the Further Reply (No. 4), in combination with the SNN's allegations of fact, including those related to possible grounds for any title presently held by CPR or Encana being void or voidable, I find that the SNN do expressly claim for more than just damages. They also seek the return of any PNG that remains *in situ*.

[56] I find the SNN's pleadings entail a foundation for more than just a claim in damages or an accounting against Encana and CPR. The SNN assert that the PNG were either always the SNN's property or reverted back from CPR for their benefit at the time CPR attempted to convey them to CPOG. In their various sets of meandering pleadings and expanding particulars, enough facts are pleaded to support the SNN's position that their interest in the PNG was not extinguished when Canada granted the Railway Lands to CPR from 1893 to 1917 and they now seek the full return of any PNG remaining *in situ*.

[57] The critical feature is not the prayer for relief, but the facts alleged: *Boreta v Jafar*, 2007 ABCA 212, [2007] SCCA No 439, leave to appeal to SCC refused, 32228 (24 January 2008) at para 12. In *PTL Bobcat and Landscape Services Ltd. v 1149218 Alberta Ltd.*, 2013 ABQB 158 at paragraph 28, the Court stated that "although it is advisable that the pleadings state the relief requested, an omission of that is not fatal i[f] the relief can be inferred from the pleadings."

[58] Since the SNN claim that the PNG never stopped being part of the Reserve Lands (or alternatively reverted to being part of the Reserve Lands or to Canada for the SNN's benefit as Reserve Lands), claim trespass and conversion of produced PNG, and claim recovery of *in situ* PNG, neither Encana nor CPR should be left with any doubt about the core allegations they are now called on to answer. The functional not technical approach to pleadings in Aboriginal cases endorsed by the Supreme Court of Canada in *Tsilhqot'in Nation* further compels this conclusion.

[59] Both Encana and Alberta also argue more generally that this is not an "Aboriginal case", but merely a case in which some of the litigants happen to be Aboriginal. That may have been true of the initial claim, but many of the particulars subsequently filed clearly assert "infringement of ... Treaty rights, Aboriginal title, Aboriginal rights and Aboriginal interests in the Reserve Lands"[4]: see Further Reply (No. 4) to Demand for Particulars at para 1) i, l, p, and t. Further, these summary dismissal applications accept just for purposes of these applications that the SNN had Aboriginal Rights to the PNG, but say they were alienated at the time of the transfer to CPR. In response to that claim the SNN say that granting summary dismissal would have the effect of extinguishing those prior Aboriginal Rights.

[60] In summary on this threshold issue, I find that the SNN claim the following relief. Against CPR they claim for damages and/or an accounting for unlawful possession, use or occupation, trespass and conversion (collectively, the "**Trespass Related**" claims). The SNN's claim in the alternative for an accounting by CPR for all PNG unlawfully removed from the Railway Lands is not a separate further cause of action, but a notice of the further step they intend to pursue to determine the quantum of damages if a "remedial order" (in the sense used in applicable limitations legislation)

[4] Again, for purposes of these applications, nothing turns on the significant distinctions between these concepts and so I have embodied them all within the defined term I use herein "Aboriginal Rights".

is granted based on one of the Trespass Related claims. Therefore, I find that all Trespass Related claims are claims for damages. They also claim for recovery of *in situ* PNG. In the alternative, if CPR validly received the PNG as part of its original acquisition of the Railway Lands, then the SNN claim for damages from CPR for it under-paying for lands that included mineral rights. Against Encana the SNN claim the Trespass Related claims and for return of *in situ* PNG.

[61] The SNN claims, therefore, are not limited to damages alone.

V. Claims against CPR

A. For Return of *in situ* PNG

[62] I find no merit to the claim against CPR for return of the PNG, since there is no evidence that CPR has any current interest in the PNG or in any way is in possession of the PNG. If after a trial in this matter it is determined that Canada still "own" the PNG for the benefit of SNN or a reversionary interest in the PNG was triggered, and they are entitled to return of any *in situ* PNG, it will not return from CPR.

[63] The latest that the CPR may have owned the PNG, if at all, was either around 1965 at the time of the *The Canadian Pacific Oil and Gas Limited Minerals Act*, SA 1965, c 106 (the "**CPOG Act**"), and associated agreements, or around January 19, 1977 in respect of Certificate of Title 13T3, when the agreed conveyance of Railway Lands PNG was finally effected by registration. The agreements and statute purported to transfer the beneficial title in the PNG to CPOG; the conveyance of legal title appears to have lagged after that date somewhat.

[64] From the record before the Court, only one of three possibilities occurred: (1) CPR never received title to the PNG; (2) CPR received title to the PNG in acquiring the full fee simple interest in the Reserve Lands and then later (at or after 1965) conveyed the PNG rights to CPOG; or (3) CPR received title to the PNG subject to a determinable reversionary interest which was either triggered in or around 1965 or conveyed there with the PNG. Put another way, either CPR never took title to the PNG in the first place, or it did take title but transferred it around 1965 or later upon registration. None of these possibilities result in CPR currently having an ownership interest to any PNG claimed by the SNN.

[65] CPR could only be at risk of having to return *in situ* PNG to the SNN if it currently has an interest in the Railway Lands' *in situ* PNG. Nothing on this record suggests that to be possible. The claim for return of *in situ* PNG against CPR is without merit, has no hope of succeeding and therefore is dismissed.

B. For Trespass Related Claims and the Claim in the Alternative

[66] The rest of the claims against CPR seek monetary damages as the remedy.

i. Are limitations laws applicable?

[67] The SNN do not say that limitations laws never apply to Aboriginal claimants or claims, but say that in this case they do not apply. They say that whether limitations legislation has the effect of extinguishing substantive rights remains a live issue in Canada and therefore their claims should not be dismissed summarily.

[68] It is correct that some uncertainty remains at law on whether limitations legislation is substantive or procedural. *Tolofson v Jensen*, [1994] 3 SCR 1022, and *Castillo v Castillo*, 2005 SCC

83, most notably, hold it is substantive. Some judicial comment restricts this to conflicts of laws cases; others extend it further: see for example *Heuman (Next Friend of) v Andrews*, 2005 ABQB 832; *Aucoin v Murray*, 2013 NSSC 37.

[69] Other cases conclude limitations legislation to be procedural only. In *Epcor Power LP v Petrobank Energy & Resources LTD*, 2010 ABCA 378, the Alberta Court of Appeal stated at paragraph 24:

> [...] [T]he limitation, to the extent it does apply, does not extinguish the claim or the dispute. At most it will act as a bar to recovery or a defence to the claim or a portion thereof. The dispute over the pricing mechanism on a go forward basis will remain.

The Court of Appeal did not appear to consider *Castillo* or *Tolofson*.

[70] In *Ravndahl v Saskatchewan*, 2007 SKCA 66 at paragraph 17, aff'd 2009 SCC 7, the Court made clear that constitutional claims are not immune from expiry and that limitations legislation is always applicable to the personal remedies aspect of a claim. In *Ravndahl*, the plaintiff lost her widow's pension in 1984 when she remarried. The *Charter* equality provision came into force in 1985 and the plaintiff commenced her claim in 2000 seeking an order reinstating her spousal pension and awarding damages and interest. McLachlin CJC, for the majority, stated at paragraphs 17 and 28 that limitations legislation applied to "personal remedies that flow from the striking down of an unconstitutional statute" and that the plaintiff's claims for personal relief were statute-barred considering that her cause of action arose in 1985, which was outside the 6-year limitation period. She also wrote:

> 27 It is important to distinguish the appellant's personal, or *in personam*, remedies, brought by her as an individual, from an *in rem* remedy flowing from s. 52 that may extend a benefit to the appellant and all similarly affected persons.

[71] Although it was not addressed by the Supreme Court in *Ravndahl*, the majority of the Court of Appeal in that case concluded that, after reviewing *Tolofson* and *Castillo*, "there would appear to be no authority to suggest that we now need to consider limitation periods to be substantive for the purposes of an application such as this": at para 17 (SKCA).

[72] In any event of this general uncertainty in the law, from the cases that follow the law is clear that claims for personal remedies brought by First Nations, such as the Trespass Related claims, are subject to time limitations legislation.

[73] In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, the Beaver Indian Band had entered into a treaty with the Crown in 1916. In exchange for surrendering Aboriginal title, the Band was given a parcel of land. In 1940 it surrendered the mineral rights to Canada "in trust to lease" for its benefit: at para 26. In 1945 the reserve lands were later sold to the Director of *The Veterans Land Act*, inadvertently inclusive of the mineral rights. They were then sold in parcels to various veterans by way of agreements for sale. One issue was whether the subsequent sale of the reserve to the Crown in trust to "sell or lease" included the mineral rights, considering the previous 1940 surrender of the mineral rights for "lease".

[74] Regarding the limitations issue, both the majority (at paragraph 23) and the dissent (at paragraphs 120-121) concluded that provincial limitations legislation applied to the Band's claim for

damages against the Crown for breach of fiduciary duty, regarding the mineral rights, by way of the *Federal Court Act*, RSC 1970 (2nd Supp), c 10, but determined that the Bands were not out of time:

> [120] The remaining issue is whether those claims regarding mineral rights which survive the 30-year limitation period are barred by other limitation periods. The parties treated this action as falling under s. 3(4) of the B.C. *Limitation Act* which prescribes a 6-year limitation for "[a]ny other action not specifically provided for". I am content to do the same.
>
> [121] [...] This section and its equivalents elsewhere embrace a broad definition of discoverability: see *M. (K). v. M. (H.)*, [1992] 3 SCR 6. The facts in the case at bar fall within it. Until approached by a member of the DIA in 1977, the Bands were ignorant of critical facts in the exclusive possession of the Crown: the fact that the mineral rights were transferred to the DVLA for no consideration; the fact that the DVLA had no right to that transfer; and the fact that the Crown had in its possession knowledge of its error and the potential value of the mineral rights while it was still within its power to rectify the error. The Bands became aware of the true facts only in 1977, placing their writ well within the applicable limitation period of 6 years.

[75] In *Blueberry*, McLachlin J (as she then was) rejected submissions that the provincial limitations periods should be relaxed or not applied. She stated at paragraph 122 that, in the context of that case, the arguments were unpersuasive and should not be further considered. On this issue the majority of the Court agreed with her.

[76] In *Lameman*, the plaintiffs sued on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136. In 1877, the Papaschase Indians adhered to Treaty No. 6 and were allotted a reserve. In 1886, Chief Papaschase and a number of other members of his Band surrendered their treaty rights and rights connected with the reserve in exchange for a payment. These members left the reserve. In 1889, the remaining members entered into an agreement to surrender their interest in the reserve to the government with a view to its sale or lease, on condition that the proceeds be held in trust and paid to Band members and their descendants. These people joined the Enoch Band. The Supreme Court of Canada considered an appeal of the summary dismissal of their claim based on limitations legislation. Among other things the plaintiffs claimed that (1) the government had wrongfully allowed the Band members to take the payment without properly advising them of the consequences, (2) the government had wrongfully pressured the members of the Band to dissolve the Band, (3) the government had failed to obtain a proper surrender of the reserve land, (4) the government had not sold it for market value, and (5) the government had breached its treaty obligations by not providing all the land to which the Band was entitled.

[77] The Court in *Lameman* recognized the practical issues that arise when such a claim is brought after many years:

> 12 We are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act*. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

> 13 This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:
>
> > Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

[78] In *Manitoba Métis Federation Inc. v Canada (AG)*, 2013 SCC 14, the appellants were seeking a declaration that: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

[79] McLachlin CJC and Karakatsanis J for the majority reiterated that limitations legislation generally applies to Aboriginal claims:

> 138 The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(l)(k) (emphasis added). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13. [emphasis in original]

[80] They found that the Métis claim based on the honour of the Crown was not barred by the provincial limitations law and that the Métis were entitled to a declaration that Canada failed to implement section 31 as required by the honour of the Crown: at paras 133-144. They concluded that although claims for personal remedies flowing from unconstitutional legislation are subject to limitation provisions, the appellants sought no personal relief and made no claim for damages or for land nor did they seek restoration of the title their descendants might have inherited had the Crown acted honourably. The majority of the Court was of the opinion that just as limitations legislation could not prevent the courts from issuing declarations on the constitutionality of legislation, limitations legislation could not prevent the courts from issuing a declaration on the constitutionality with respect to the Crown's conduct. The Métis sought this declaratory relief in order to assist them in extra-judicial negotiations with the Crown. They added that so long as the constitutional grievance at issue here remains unresolved, the goals of reconciliation and constitutional harmony remain unachieved.

[81] In addition, the majority was of the opinion that many of the policy rationale underlying limitations statutes did not apply in an Aboriginal context such as the one that was before the Court. They wrote:

> 141 Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, per McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:
>
> > The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification.
> >
> > [...]
>
> [...] The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.
>
> [142] In this case, the claim is not stale -- it is largely based on contemporaneous documentary evidence -- and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

[82] The majority of the Court stressed that a declaration is a narrow remedy and, in some cases, would be the only way to give effect to the honour of the Crown. Limitations provisions should not bar such declarations: at para 143.

[83] Very recently, in *Samson Indian Nation and Band v Canada*, 2015 FC 836 (under appeal), Russell J concluded that limitations legislation applies to claims by First Nations against Canada to constitutionally protected and Aboriginal rights: para 112. He also added that in his opinion, limitations do not apply to the cause of action but the remedy that is being sought: at para 129.

[84] The SNN submit that this case law is distinguishable and should not be followed. They say that these and similar cases share one or more of the following characteristics:

1) Limitations are applied in favour of Canada under the *Crown Liability and Proceedings Act*;

2) Limitations are applied in favour of Canada with respect to breach of trust or breach of fiduciary duty obligations;

3) There is a finding of fact that a First Nation actually surrendered for sale, or at least a finding of fact that at a minimum there was a very clear and plain intent that the First Nation surrendered for sale Reserve lands at issue;

4) The action is before the Federal Court;

5) The operability and applicability of the limitations provisions are not challenged.

[85] The SNN add that none of the Applicants' cases relate to the applicability of limitation periods where a First Nation claims that a third party is trespassing on its un-surrendered and unextinguished Reserve Lands and converting therefrom the petroleum and natural gas.

[86] I do not consider these points of distinction meaningful to the issue before me; I consider myself bound by the Supreme Court of Canada precedents. Provincial limitations legislation is constitutionally applicable to damages claims of First Nations, such as the Trespass Related claims. The operation of such legislation does not extinguish any underlying Aboriginal Right, but it limits the time within which proceedings may commence to claim damages as a remedy for a breach of any such right.

[87] The SNN have also argued that the doctrines of interjurisdictional immunity and paramountcy have the effect of removing the SNN's claims for damages from the application of limitations legislation: see generally on these doctrines: *Canadian Western Bank v Alberta*, 2007 SCC 22; and more recently, *Carter v Canada (AG)*, 2015 SCC 5.

[88] In *Canadian Western Bank v Alberta*, 2007 SCC 22, Binnie and LeBel JJ, writing for the majority, stated that resolution of cases relating to the constitutionality of legislation in relation to the division of powers need always begin with an analysis of the "pith and substance" of the impugned legislation: *Canadian Western Bank* at para 25. If the pith and substance relates to a matter that falls within the jurisdiction of the legislature by which it was enacted, then the courts will conclude that it is *intra vires*: *Canadian Western Bank* at para 26. At the end of a pith and substance analysis, the court may consider interjurisdictional immunity in appropriate circumstances: *Canadian Western Bank* at para 47.

[89] As stated in *Canadian Western Bank* at paragraph 32, "in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level". With this issue in mind, the courts have developed the doctrines of interjurisdictional immunity and federal paramountcy. The first doctrine is rooted in the exclusivity of the legislative powers (ss 91 and 92) by both levels of government under our Constitution. According to this first doctrine, there is "a basic, minimum and unassailable content" immune from the application of legislation that is enacted by the other legislative level: *Canadian Western Bank* at paras 33-34.

[90] In order to trigger the application of the doctrine of interjurisdictional immunity, a two-step test must be met. As reiterated in *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at paras 54-56 [*Ryan Estate*], the first step is to determine whether the provincial legislation trenches on the protected "core" of a federal competence. If it does, the second step is to determine whether the encroachment is sufficiently serious. This means that if it only affects the core it is not sufficient; it must "impair" it in order for this doctrine to apply.

[91] When interjurisdictional immunity is engaged, the impugned law is not rendered invalid. Rather, it is inapplicable to the extra-jurisdictional matter, and is read down in order to limit the scope of its application: *Ryan Estate* at para 57. As reiterated in *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 59, I note that, in fact, even absent conflicting legislation this doctrine may apply. It is not necessary that the government benefiting from the immunity to exercise its exclusive authority.

[92] The doctrine of federal paramountcy holds that where laws of federal and provincial levels conflict, federal law prevails: *Canadian Western Bank* at para 32.

[93] The SNN take no issue with the pith and substance of the limitations legislation relied upon. They concede that provincial legislatures have the authority to enact general limitations legislation under section 92 (13) (Property and Civil Rights in the Province) or section 92 (14) (Administration of Justice in the Province) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. Their issue is whether such legislation is applicable, or alternatively operable, to extinguish their interests in the Railway Lands' PNG. The SNN are not arguing that Aboriginal claims are never subject to limitations legislation. They are saying that in certain factual matrices, such as this case, where limitations legislation would operate to extinguish certain Aboriginal rights, especially Aboriginal or treaty rights to lands, no limitations legislation or prescription legislation apply.

[94] The SNN argue that if the Court concludes that limitations legislation specifically extinguishes their right and title, such that their right to recover the PNG is specifically extinguished, then it would be in a direct conflict with the Governor in Council's ability to control the disposition of lands, to control the use of lands, and the minister's inherent and legislative authority to control, manage and govern the disposition of lands and the use of lands. The SNN submit that the provincial legislation has the effect of extinguishing the SNN's Aboriginal interests in the PNG or any portion of its Reserve Lands, which is in direct conflict with provisions of the *Indian Act* that confirm Canada's authority to manage and administer.

[95] Although it is unnecessary to examine these arguments given the Supreme Court's pronouncements on the issue, the points were argued at some length by the SNN and so some comment is warranted.

[96] If the PNG were alienated, and the SNN right or interest to the PNG extinguished, then of course the two constitutional doctrines would be of no assistance to the SNN.

[97] More generally, it is now unclear as to whether the doctrine of interjurisdictional immunity applies to cases involving reserve lands for pre-1982 issues or to railway matters: *Tsilhqot'in Nation* ; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48. The Court in *Peter Ballantyne Cree Nation*, 2014 SKQB 327 at paragraphs 104-116, dealt with "the tension between the claim of a violation of a federally protected right and claim for damages and the province which seeks to regulate recovery of damages through imposition of limitation periods": at para 110. It found that the Court "is bound by this proclamation by the Supreme Court and the plaintiff is precluded from claiming interjurisdictional immunity by virtue of impairment of Aboriginal or treaty rights": at para 111. The Court concluded that the doctrine of interjurisdictional immunity does not apply where it relates to claims regarding Aboriginal reserve lands under section 35, given that "the courts have not drawn a distinction between Aboriginal title land and Aboriginal reserve land when determining whether these rights are protected under s. 35": at para 115. In other words, the doctrine of interjurisdictional immunity could still apply in cases where section 35 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, is not triggered or invoked. These three cases do not involve railways.

[98] Even if interjurisdictional immunity were to apply, the provincial limitations provisions in this case are of general application and do not relate to the unassailable core of Parliament's

exclusive jurisdiction under section 91 (24) of the *Constitution Act, 1867*. I agree with the Court in *Peter Ballantyne Cree Nation*, at paragraphs 126 and 127, that the provincial limitations provisions relied upon by CPR are not aimed at infringing the right of possession, or use and benefit of reserved lands or treaty rights. They are of general application aimed at regulating the time to commence any claim in order to ensure a fair balancing of interests between the parties. It bars the right to receive a remedy after a certain period of time. Therefore the doctrine of interjurisdictional immunity would not be triggered in any event.

[99] Further, the SNN's Notice of Constitutional Question was deficient with respect to the argument relating to section 92 (10) and impugning the applicability of Alberta limitations legislation: *R v Aberdeen*, 2006 ABCA 164; *REDM v Alberta (Director, Child Welfare Act)* (1988), 88 AR 346 (CA).

[100] The SNN have argued that the provincial limitations legislation goes to the core of the federal jurisdiction over railways under section 92 (1) (a) of the *Constitution Act, 1867*. I find it is unnecessary for me to decide this constitutional issue and, even if I had the discretion spoken of by Sopinka J in *Eaton v Brant (County Board of Education)*, [1997] 1 SCR 241 at paragraphs 53-55, I would exercise it in favour of not engaging on questions for which no notice was given. There was no consent and I am not satisfied that Alberta had *de facto* notice. I would add, however, that in light of *Clark v CNR*, [1988] 2 SCR 680, where it was clearly decided that provincial legislatures have the authority to enact general limitations legislation under sections 92 (13) and (14), it is doubtful that the doctrine of interjurisdictional immunity would be triggered in this case.

[101] Regarding paramountcy, provincial laws typically apply to Aboriginal matters including Aboriginal lands: see for example *Tsilhqot'in Nation* at paras 101-106. However, where valid federal and provincial enactments are contradictory, or where the provincial law frustrates the purpose of the federal legislation, then the provincial law will be read down to the extent of the inconsistency under the doctrine of federal paramountcy: *Ryan Estate* at paras 65-69; *Canadian Western Bank* at paras 69-75; *PHS Community Services Society*, 2011 SCC 44 at para 71; *Tsilhqot'in Nation* at para 130; see more recently *Alberta (AG) v Moloney*, 2015 SCC 51; *Saskatchewan (AG) v Lemare Lake Logging Ltd.*, 2015 SCC 53. In *Ryan Estate*, LeBel and Karakatsanis JJ reiterated, at paragraph 69, the "fundamental rule of constitutional interpretation" that where an enactment can be interpreted as not interfering with a provincial statute, this interpretation should be preferred over another applicable construction which would bring about a conflict. The onus is on the party relying on the doctrine of federal paramountcy: *Canadian Western Bank* at para 75.

[102] The SNN's Notice of Constitutional Question lacks the requisite specificity in respect of paramountcy also. In any event, in the context of the applicability of limitations legislation to monetary claims only, the SNN have failed to demonstrate any conflict or inconsistency between provincial limitations legislation and federal legislation: *Clark; Wewaykum; Lameman*.

ii. What are the applicable limitations laws?

[103] The *Limitation of Actions Act* was in force in Alberta at the time these claims were commenced (before March 1, 1999): *Limitations Act*, RSA 2000, c L-12.

[104] Sections 1(e), 4, 18 and 51 of the *Limitation of Actions Act*, RSA 1980 c L-15 provide:

1 (e) "land" includes

(i) corporal hereditaments, and

(ii) a freehold lease estate

or an interest therein;

[…]

4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:

[...]

(c) actions

(i) for the recovery of money, other than a debt charged onland, whether recoverable as a debt or damages or otherwise,
and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or

(ii) for an account or for not accounting, within 6 years after the cause of action arose;

[...]

18 No person shall take proceedings to recover land except

(a) within 10 years next after the right to do so first accrued to that person (hereinafter called the "claimant"), or

(b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to that predecessor.

[...]

51 Except as otherwise provided in this Part, an action for

[...]

(f) trespass or injury to real property or chattels, whether direct or indirect and whether arising from an unlawful act or from negligence or from breach of a statutory duty, or

(g) the taking away, conversion or detention of chattels.

may be commenced within 2 years after the cause of action arose, and not afterwards.

[105] At the time the SNN commenced their claims, in addition to the *Limitation of Actions Act* applying, the common law rule of discovery of a cause of action also applied. The Alberta Court of Appeal summarized it in *De Shazo v Nations Energy Company Ltd*, 2005 ABCA 241 [emphasis in original]:

> 26 [...] The common law rule was described by the Supreme Court of Canada in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224: "[A] cause of action arises for purposes of a limitation period when the material facts on which it [the cause of

> action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."
>
> 27 The Supreme Court revisited the common law discoverability rule in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, confirming that since the decisions in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2 and *Central Trust*, discoverability is a "general rule applied to avoid the injustice of precluding an action before the person is able to raise it.": *Peixeiro* at 563. The court emphasized the concept of *reasonable* discoverability: "In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration": *Peixeiro* at 565.
>
> [...]
>
> 31 The principle of discoverability does not require perfect knowledge. As this court noted in *Hill v. Alberta (South Alberta Land Registration District)* (1993), 100 D.L.R. (4th) 331 at 336 (Alta. C.A.) (leave to appeal to S.C.C. denied):
>
> > Even if the discoverability rule of limitations applies to this case (which I need not decide), it does not call for perfect certainty. It does not require discovery at all: it says something else will do instead. It suffices that "the material facts on which [the cause of action] is based ... ought to have been discovered by the plaintiff by the exercise of reasonable diligence...": *Central Trust v. Rafuse*... . If the plaintiff is told a fact by someone who is likely to know, surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty.

[106] The discoverability rule has an objective component also, as the Alberta Court of Appeal observed in *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29, at paragraph 33, 536 AR 401, leave to appeal to SCC refused, 34154 (23 February 2012), speaking of both the now codified version and its predecessor in the common law:

> Moreover, the discoverability principle, as applied to limitations has always been interpreted to include an objective component. That is, the wrong is assumed to be discovered when it would reasonably have been expected to be discovered: *Yugraneft Corp. v. Rexx Management Corp*., 2010 SCC 19, [2010] 1 S.C.R. 649 at para. 60; *Gayton v. Lacasse*, 2010 ABCA 123, 482 A.R. 179 at para. 20.

[107] For these claims' discoverability (the Trespass Related claims), the important date is when the SNN first knew, or by the exercise of reasonable diligence ought to have known, the material facts giving rise to the cause of action they now advance.

[108] CPR says that the SNN were out of time when they commenced this action for the Trespass Related claims; they knew or ought reasonably to have known the material facts the SNN say give rise to their Trespass Related claims long before they commenced this action. Therefore, they say those claims ought to be dismissed against them as being without merit. The SNN maintains they were not out of time.

iii. Procedural background

[109] The SNN commenced this action against CPR (and Canada) on February 26, 1999.

[110] Canada filed a demand for Particulars on May 15, 2001, to which the SNN replied on September 4, 2001.

[111] On September 28, 2001, the SNN filed an Amended Statement of Claim, adding PanCanadian Petroleum Limited (a predecessor to Encana) as a defendant.

[112] Canada filed its Statement of Defence on June 4, 2002.

[113] On October 28, 2002, Encana filed a demand for particulars, to which the SNN replied on January 8, 2004, and again on December 10, 2004.

[114] On December 4, 2002, Canada filed a Third Party Notice against CPR, Canadian Pacific Railway Limited, Canadian Pacific Limited, Fairmont Hotels & Resorts Inc, PanCanadian Petroleum Limited and Encana.

[115] CPR and Encana filed their Statements of Defence on February 4 and 8, 2005, respectively.

[116] On June 9, 2005, the Court of Appeal directed the SNN to amend their Amended Statement of Claim, which they did on November 15, 2012, by filing an Amended Amended Statement of Claim: *Stoney Tribal Council v PanCanadian Petroleum Ltd.*: 2005 ABCA 204. More specifically, the Court of Appeal granted the SNN leave to amend their Amended Statement of Claim with respect to:

> [8](b) [...] allegations against the appellant, whether trespass, removal, receipt of interests, or claims by it to title, or otherwise, and all claims for damages against the appellant, will be amended to restrict them to petroleum, natural gas, or related hydrocarbons (or all of those), and to exclude other minerals and to exclude surface rights from claims against the appellant.

[117] A Further Further Reply was provided by the SNN on October 6, 2008.

[118] A Further Further Further Reply was provided by the SNN on May 1, 2012, purportedly also in response to the 2005 Court of Appeal Order.

[119] A Further Reply (No. 4) to Demand for Particulars was provided by the SNN on September 21, 2012, in response to Encana's request for additional particulars sent on May 23, 2012. It is in this pleading that the SNN first include a claim for recovery of the PNG.

[120] No party formally objected that any of the particulars added new causes of action, that they extended beyond the requirements of the Court of Appeal's Order, or that they extend beyond the scope of any case management directive.

iv. Factual background

[121] In 1893 CPR paid $730.26 to Canada for 475.77 acres of land from the Stoney Reserve to be used for the railway right-of-way and station grounds at $1.25 per acre plus interest from the date of occupation to the date of payment.

[122] Compensation for other parcels of fee simple land ranged from $2 to $4 per acre: $2, $2.85-$3.39, and $4. The SNN argue those land purchases were relatively comparable and

contemporaneous and show that the $1.25 paid to the SNN could not have been payment for a fee simple title. They say that at the time they could not obtain replacement lands at $1.25 per acre.

[123] The land was registered in CPR's name under certificates of title 13T3 and 15T133, in 1916 and 1917 respectively.[5]

[124] Order-in-Council PC 10443, dated November 1942 approved, as at August 1, 1940, the surrender to "our Sovereign Lord the King" of the "petroleum and natural gas and mining rights" to Stoney Reserve Lands (Nos. 142, 142 B, 143 and 144) to lease. The Railway Lands were not excluded from this formal surrender, nor mentioned expressly in any way. The surrender also includes the "surface rights over such area of land within the said reserve as may be necessary for the mining thereof." Since there is no dispute at this time that the CPR owned the surface rights over the Railway Lands, it seems unlikely that this 1940 surrender included the Railway Lands.[6]

[125] CPR remained registered as owner on the title documents until after 1965 (when the CPOG Act was enacted). For example, Certificate of Title 13T3 remained in CPR's name until about January 19, 1977.

[126] At some point the mines and minerals underlying Plan RY10 became registered as Certificate of Title 13T3A in the Alberta land titles system. Certificate 931 289 034, which replaced Certificate 13T3, shows Canadian Pacific Limited as the owner of the surface rights and one of the certificates for 13T3A shows PanCanadian as the owner of the subsurface.

[127] A caveat was registered against CPR's title by Shell on January 4, 1972 regarding a claimed interest in an oil and gas lease between Shell and CPOG, reading:

> [...] CLAIMS AN INTEREST under a lease in writing dated the 1st day of November A.D. 1971, and made between CANADIAN PACIFIC OIL AND GAS LIMITED as Lessor, and SHELL CANADA LIMITED, as Lessee [...].[7]

CPR states that it did not enter into any leases with respect to these lands and did not authorize CPOG to do so. The SNN questioned on what authority CPOG would enter into a lease with Shell on CPR lands while CPOG was not a registered owner in 1971.

---

[5] I provide further detail and findings of fact in respect of these land transfers commencing at paragraph 203 below, in discussing the issue of whether the PNG was alienated from the SNN to CPR.

[6] One of the SNN's many arguments is that the 1942 Order-in-Council is the top and stronger title. Canada took the position that only mineral interests that were part of the reserve at the time of the 1940s events were surrendered. It submits that the Railway Lands and the mines and minerals therein were already transferred to CPR in 1893 by way of Letters Patent and Order in Council. Canada concludes that, therefore, the lands and mines and minerals therein did not constitute part of the reserve in 1940. CPR says that this Order-in-Council is at least strong evidence that the SNNs had an awareness of the mines and minerals interests on their reserve, and that was over 50 years before the lawsuit was commenced.

[7] As mentioned above, the application record suggests that PanCanadian Petroleum Limited was created in 1971 through the amalgamation of CPOG and PanCanadian Petroleum Limited and PanCanadian Energy Corporation was created in January 2002 by the amalgamation of PanCanadian Petroleum Limited and PanCanadian Energy Corporation; Encana was created in 2002 by the amalgamation of PanCanadian Energy Corporation and Alberta Energy Company.

[128] A "Memorandum - Government of Canada" from the Superintendent, Stony-Sarcee8 Indian Agency to the Chief, Reserves and Trusts", dated January 22, 1960, and regarding "Canadian Pacific Railroad Right – Stony Reserve" states:

> At a Stony Council meeting held at Morley on January 19, 1960, the Council requested that we endeavor to obtain for them details of the original agreement giving the C.P.R. a right of way across the Stony Reserve at Morley.
>
> Is it possible to provide the required information?

[129] A letter dated January 28, 1960 from the Chief, Reserves and Trust to the Superintendent, Stony-Sarcee Agency regarding "Canadian Pacific Right of Way – Stony Indian Reserve" states:

> We acknowledge your letter of January 22 advising that the Stony Council wishes information concerning the agreement by which the C.P.R. acquired a right of way over the Stony Reserve at Morley.
>
> Our records will be examined and such information as may be available will be sent to you for the information of the Council at an early date.

Therefore, by January of 1960 the SNN had inquired of Canada about how CPR acquired its right-of-way through the reserve.

[130] A February 3, 1960 "Memorandum - Government of Canada" responding to the "Superintendent, Stoney-Sarcee Indian Agency from the Chief, Reserves and Trusts" regarding "Canadian Pacific Right-of-way - Stony Indian Reserve" states:

> The Canadian Pacific right-of-way over Stony Reserve is covered by Order in Council P.C. 1614 dated June 2, 1893. This Order in Council authorized sale in accordance with the Indian Act of 475.71 acres to the C.P.R. for right-of-way and station grounds at an agreed compensation of $1.25 per acre with interest from the date of occupation to the date of payment. The total amount of money received from the Canadian Pacific Railway was $730.26.
>
> The land was conveyed to the C.P.R. by Letters Patent No. 17720 dated May 11, 1916.
>
> We trust the foregoing information will be of assistance to the Band Council.

[131] The SNN say there was no evidence that they received this response and, in any event, that it does not refer to mineral rights or interests. I find, however, that they did receive it, because item 14 of the February 10, 1960 minutes from a Stoney Council Meeting states:

> (14) C.P.R. Right of Way:
>
> Letter dated February 3, 1960, file 119/31-2-2 Dept. file 119/31-2-2 C.P. (Rl) giving the sale price of right of way through the Reserve @ $1.25 per acre – total $730.26 Order in Council 1614 dated June 2, 1893, conveyed to C.P.R. via letter Patent No. 17720 dated May 11, 1916.

---

[8] Stoney is sometimes spelled "Stoney" and other times "Stony" in the documents. Both spellings are used in this decision.

> […]
>
> Council requested every effort to be made to have a regular crossing installed east of Chiniquay station house in preparation for an additional school bus route.

[132] The last paragraph of a letter dated December 2, 1970, from an Edmonton law firm to the Assistant Deputy Minister (Indian and Eskimo Affairs) states:

> Further, I would also advise that I act for the Morley Band and have an authority from them to go through all files relevant to dealings with the land on the Morley Reserve. Accordingly, I would inquire as to whether you intend to compile these documents as well and supply me with copies of them, or whether I will be allowed to go through the Department's files in this area.

[133] Therefore the SNN had engaged legal counsel in 1970 to assess land matters on the reserve. Also, since 1970 the SNN's affiant, Mr. Getty, has been researching historical matters for the SNN. He requested permission from the federal government in 1982 to access files with respect to the CPR right-of way agreements with the view to facilitate negotiations with CPR.

[134] A letter from Lou Crawler Jr., Stoney Tribal Administrator to Mr. Kartushyn, Acting District Superintendent (Department of Indian Affairs) dated January 28, 1971 states:

> The Stoney Band Council would like the Indian Affairs to send them a copy of the original agreement which gave the C.P.R. right-of-way accross [*sic*] the Stoney Indian Reserve. They would like to have copies of any further agreements with the C.P.R. regarding the railway accross [*sic*] the reserve. In particular they are interested in agreements regarding roads accross [*sic*] the railway fenching [*sic*] along the railway, other rights-of-access, buildings belonging to the railway, ownership of land, etc.
>
> We would like this information as soon as possible since we are having a meeting with the C.P.R. superintendent scheduled for Feb 9, 1971. We would like this information before that date if possible as we want to understand our legal rights before we discuss certain problems with the C.P.R.
>
> Your immediate attention to this matter would be appreciated.

[135] Another letter dated January 28, 1971, was sent from Lou Crawler Jr. to D.G. Stewart, Superintendent, C.P. Rail stating:

> Dear Mr. Stewart,
>
> The Stoney Band Council would like you to attend their next council meeting on either Feb. 9 or Feb. 10, so they can discuss a number of matters with you.
>
> […]
>
> The Band would also like you to send them a copy of the original agreement in which the Stoney people gave the C.P.R right-of-way across [*sic*] the reserve. In particular, the Band Council would like to know under what conditions and agreements this land was given to the C.P.R for their use. They would appreciate it if you could send this information as soon as possible so that they can study the information before they meet with you to discuss it further.

[136] Item 4 of the March 31, 1971, minutes of a "Special Council Meeting" states:

> C.P.R. deal in 1984: Frank Powderface stated legal action could be taken because the Wesley Band Council did not sign the agreement at the time. Suggested Council hire a lawyer to look into this matter.

[137] The reference to "1984" is clearly a mistake, considering that the minutes are from 1971. The SNN say it is unknown as to what the "CPR deal" refers to and there is no indication this related to minerals.

[138] A letter dated April 1, 1971, from the Superintendent to Mr. Crawler raised the matter of ownership of mineral rights, stating:

> Herewith is a print of the plan registered in the Land Titles Office, Calgary, as RY 10 on January 15, 1895, also a copy of duplicate certificate of Title No. 13T3 both covering land for railway purposes through the Stoney Reserve as requested.
>
> Your question about purchasing the railway land outside the 200' right-of-way is being dealt with and you will be advised of a decision as soon as it can be determined. Your question also included the matter of who owned the mineral rights.

[139] I infer therefrom that prior to April 1, 1971, the SNN were alive to the possibility of an issue as to ownership of the PNG.

[140] The minutes from a general meeting dated November 3, 1971, also mentions minerals, stating:

> 2 [...] Minerals on C.P.R. - Mr. lger [*sic*] stated that minerals may still be retained by the band but said he was not sure. It has to be checked into.
>
> Re: court case for mineral rights dispute: Mr/ Elger was told that Ottawa has refused to give authority to Mr. Lloyd McKay to proceed with the court.

[141] A letter dated April 16, 1975, from Mr. Wayne E. A. Getty, Co-ordinator, Economic Development (Stoney Tribal Administration) was sent to Mr. MacArthur, Lands officer (Department of Indian Affairs and Northern Development), though not addressing the PNG nevertheless demonstrates an awareness by the SNN of issues of the ownership of mines and minerals more generally:

> There are a number of problems which we would like you to look into for us ... as follows:
>
> [...]
>
> 2. There are a number of areas within the reserve – such as in the center of Rabbit Lake reserve and in the east part of the reserve near the Coppick Ranch- -where the band does not apparently have a title to a small parcel of land, but to get that parcel the owner has to cross through the reserve. We would like you to determine the exact status of these pieces of land: who owns title and also who owns the mines and minerals on these pieces of land. A related concern is that our present information indicates that there are some portions of reserve land, again particularly at the east end, where the band appears not to own the mineral rights even though they own the surface rights. Would you please check into this and find out if there are any such

> areas; and if there are who does now own the mineral rights and exactly why the band does not own the mineral rights.

[142] A letter dated May 31, 1976 from the Richard A. Turcotte, Land Management Officer (Blackfoot/Stoney/Sarcee District) to Sykes Powderface, Band Manager refers to the 1893 Order in Council and May 11, 1916 Letters Patent and states: "Please note that the Letters Patent contain the word 'absolute purchase'". The SNN note that the Letters Patent do not mention mines and minerals and that the Order in Council does not contain the term "absolute purchase" or "mines and minerals".

[143] A letter from Jeffrey Perkins, Stoney Tribal Administrator to Mike Stroick, Superintendent, Calgary Division, dated April 18, 1978**,** states:

> The Stoney Tribe herewith makes claim to $47,338.43 in unpaid interest pursuant to the C.P.R. right-of-way transaction made between the C.P.R. and Indian Affairs Branch in 1893.
>
> C.P.R.'s occupation of the right-of-way commenced with its survey by divisional surveyor, C.A.E. Shaw in the spring of 1883. Order-in-council P.C. 1614, which authorizes the transfer, states that the C.P.R. was to pay for the right-of-way "at the rate of $1.25 per acre plus interest from the date of occupation to the date of payment." The payment was acknowledged by Indian Affairs Branch on May 16, 1893. However, interest on the principle included in the payment had been calculated only from May 15, 1889. Please find attached our calculations respecting the value of this unpaid debt.
>
> Thank you for your prompt attention to this matter.

[144] Jeffrey Perkins also wrote to Mike Stroick at CPR a few months later, on July 17, 1978, stating:

> We have not received payment for our claim of $47,338.43 submitted to you on April 18, 1978.
>
> Could you let us know what Canadian Pacific is doing about it, please.

[145] These demands demonstrate the SNN had sufficient knowledge from which to identify any claim for damages arising out of the compensation CPR paid for its original purchase. This is separate from any claim to under-compensation for mines and minerals, if the Court accepts that the SNN up to that time still had no awareness that Encana's predecessors in title claimed title to the mines and minerals.

[146] An unsigned draft of the Band Council Resolutions dated March 1981 refers to "mineral rights underlying the C.P.R. railway right-of-way" and states (emphasis added):

> 1. Whereas by authority of Order-in-Council P.C. 1614 dated June 2, 1893. 475.71 acres of Stoney Reserve land were expropriated for sale to the Canadian Pacific Railway Company for a railway right-of-way and station grounds on the Stoney Indian Reserve; and
>
> 2. Whereas this land was conveyed to the C.P.R. by Letters Patent No. 17720, dated May 11, 1916; and

3. Whereas the only compensation paid by the C.P.R. for land taken was $1.25 per acre, plus interest from date of occupation to the date of payment, for a total of $730.26 with no provision for any subsequent review and compensation; and

4. Whereas at a meeting of the Stoney Band Council held at Morley, Alberta on January 21, 1981, representatives of the Canadian Pacific Railway Company, G.R. Younger – Division Engineer and M.M. Stroick – Superintendent in Calgary, confirmed that the land being held by the C.P.R. within the Stoney Indian Reserve is in excess of their present requirements for a railway right-of-way and station grounds in lite [*sic*] of changeover to diesel power; and

5. Whereas such excess land is required by the Stoney Band for pasture and other purposes; and

6. Whereas the railway has divided the Reserve and resulted [*sic*] in damage and frequent loss of livestock due to poorly maintained fences;

[…]

Therefore we resolve as follows:

1. That the Department of Indian & Northern Affairs – Lands, immediately initiate and assist the Stoney Band in negotiations with the C.P.R. land holding within the railway right-of-way between the East and West boundaries of the Stoney Indian Reserve.

2. That a survey of the new C.P.R. Railway right-of-way boundaries within the Stoney Indian Reserve Nos. 142, 143, and 144, be carried out under the direction of G.E. Olsson, Regional Surveyor – Alberta, Dept. of Energy, Mines and Resources, at no cost to the Stoney Indian Band;

3. That title to the relinquished land consisting of 50 ft. more or less on the north and south of the railway and the station grounds, be transferred without cost to the Stoney Indian Band.

4. That it be reaffirmed that the mineral rights underlying the C.P.R. railway right-of-way within the Stoney Reserve boundaries were never surrendered to the C.P.R. and remain the [sic] property of the Stoney Indian Band.

5. That the Stoney Band Council negotiate with the C.P.R. representatives for construction of new fences, cattle guards, etc. on the north and south sides of the railway along the newly surveyed boundary.

[147] On the third and separate page of this same exhibit (the unsigned minutes) – with no heading or any context indicating that it is part of the draft or something else – the following resolutions are provided (emphasis added):

3. That title to the relinquished land consisting of 50 feet more or less on the North and South of the existing railway and station grounds including surface and mines and minerals shall be transferred to Her Majesty the Queen in Right of Canada for and on behalf of the Stoney Indian Band free and clear of encumbrance at and for the purchase price of $1.00 and without further cost and expense to the Stoney Indian Band.

> 4. That it be reaffirmed that the mines and minerals underlying the CPR railway right of way and station grounds within the Stoney Reserve boundaries were never surrendered to the CPR and remain the sole property of Her Majesty the Queen in Right of Canada for and on behalf of the Stoney Indian Band and further that such mines and minerals be transferred to Her Majesty the Queen in Right of Canada as aforesaid at and for the purchase price of $1.00 and without further cost to the Stoney Indian Band.

[148] The signed resolution dated April 2, 1981, unlike the above unsigned draft, does not refer to the mines and minerals. However this is of no consequence to the discoverability issue. I have no doubt that by the meeting these minutes reflect, in April 1981, the SNN at the highest levels were thinking about the CPR's original grant of the railway right-of-way and the contested ownership of the associated mines and minerals. Nothing the SNN have adduced in evidence offers any alternate inference for these recorded statements.

[149] Over these prior to that meeting the SNN made various inquiries about the CPR right-of-way, how CPR had obtained its interest, what compensation it paid for that interest when it was granted by Canada, and about the ownership of mineral rights.

[150] Furthermore, shortly after the meeting reflected by those minutes, a letter dated April 23, 1981, signed by W. A. Kostel, Land Administrator (Blackfoot, Stoney, Sarcee District) to Mr. Turcotte (Head, Land Transactions), on an Indian and Northern Affairs Canada letterhead regarding "Stoney Band Council Resolution No. 1981-8, dated April 2, 1981 C.P.R. Relinquishment [...]" states:

> […]
>
> The Stoney Band have specifically requested that lands personnel comprising of Messrs. R.A., Turcotte, D.N. Killips, and myself be involved with negotiations between the Band and the C.P.R. officials. Undoubtedly, the Band's lawyer, Mr. Robert Smith will also become involved as and when the situation warrants his input.
>
> In any event, you will note from the enclosed land title searches covering the lands in question, that the surface is registered to Canadian Pacific Limited under Title No. 13 T 3 and the minerals are registered to PanCanadian Petroleum Limited under Title No 13 T 3A. The Stoney Band Council and Mike Kartushyn, the Stoney Tribal Administrator, are aware this resolution pertains to surface only as they were also supplied with copies of both titles.
>
> Following discussions by Mr. M. Kartushyn with the Stoney Band Council and their lawyer, Mr. R. Smith, it was decided that a request for the mineral rights underlying these lands will be made during the course of negotiations when the excess land holdings have been identified. They realize that another resolution dealing with the minerals question would be required.

[151] The SNN argue that this letter is internal to Canada and is hearsay. They add that "[t]here's no other evidence that was submitted by Stoney Nation that would corroborate what was being discussed in this particular letter." The SNN also note that this letter does not discuss the production of mines and minerals.

[152] The authenticity of the letter is not challenged; it offers an explanation for the changes to the minutes between the unsigned draft and the final version and shows Canada's understanding of the

situation and of the SNN's knowledge; it is consistent with the SNN's prior inquiries and the theme of their efforts. However, I agree that there is no evidence that SNN had any knowledge of this letter and I give it limited weight only to the issue of what Canada knew and thought that the SNN knew at that time.

[153] On April 13, 1982, B.M. Charchun from Land Records/ Surveys Officer (Reserves and Trusts Alberta Region) wrote to Mr. Ryan (Indian Lands Registry Reserves and Trusts) to request photocopies of the following documents with respect to Stoney Reserve Lands which "will be required not only by the Band but by the Band's legal representative for litigation purposes with Canadian Pacific Railway Company": 1) Surrender document dated 1894 August 15 and OCPC No. 259 dated 1895 January 30, both registered as No. 8511-282; 2) Letters Patent No. 11160 dated 1895 February 26 issued to the Canadian Pacific Railway for the ballast pit; 3) Quit Claim Deed dated 1934 May 21 as per registered instrument No. 8543-283; 4) OCPC No. 1330 dated 1934 June 25 as per registered instrument No. 8544-284 which includes the aforementioned Letters Patent.

[154] On May 6, 1982, Mike Kartushyn (Stoney Tribal Administrator), wrote to the Chiefs and Councilors regarding "CPR Railway Right-Of Way and Stoney" and "Stoney Indian Reserve – Morley":

> At the request of the Stoney Oil & Gas Committee, Mr. Wally Dombroski from Indian Minerals West, Calgary, Alberta, prepared a statement of estimated gas royalties received by the CPR in 1980 from their participation in the Jumping Pound West Units 1 and 2. This is by virtue of the fact that the sub surface rights underlying the railway right-of-way were transferred to the CPR when title was conveyed to the CPR in 1916. The sub surface rights were immediately registered under the title of Pan Canadian. You will note that in 1980, the estimated loss to the Stoney Indian Band was $155,661.30. While the CPR may not be receiving the same percentage of royalties that are being paid to the Stoney Indian Band, nevertheless this figure reflects the actual loss of revenues to the Stoney Band in 1980.

[155] Therefore, by no later than May 6, 1982, the SNN were aware that third parties, and particularly Canada, considered the ownership of these mines and mineral rights belonged to CPR.

[156] The SNN say that "at no time were there any oil or gas wells drilled on the Railway Lands" and that they would have no reason to believe that CPR or CPOG was claiming an interest in mineral rights under the Railway Lands. However, the foregoing findings of fact and the associated series of records demonstrate conclusively to the contrary, that they did have reason.

v. Are these claims out of time and therefore without merit?

[157] It is clear from the documents reviewed above that the material facts necessary to know a Trespass Related claim may lie against CPR were known, and were certainly able to be known with reasonable diligence, in the early 1980s at the latest.

[158] During the 1960s, 1970s and 1980s the SNN periodically turned their minds to how CPR acquired the Railway Lands and the underlying mines and minerals, particularly 13T3A. The deletion of the references to mines and minerals by April 1981, from the draft Band Council Resolutions of March 1981, clearly demonstrate they were aware of the facts from which the Trespass Related claims arise. The May 1982 letter similarly demonstrates the SNN's knowledge of CPR or its subsidiaries asserting ownership of the mines and minerals.

[159] I agree with the SNN that some documents are unclear as to whether they knew about the mines and minerals, or whether some of the earlier SNN documents were referring to the mines and minerals. But by 1982 I have no doubt the SNN had knowledge of the material facts to bring their claims against CPR, or by then they ought to have been discovered by the SNN through the exercise of reasonable diligence. The SNN have not pointed to any evidence that would hint otherwise. The SNN have not refuted this evidence.

[160] This, at the very latest, triggered the start to the limitation period. The Trespass Related claims were not commenced until 17 years later, in 1999, which is well beyond the two- and six-year limitation periods under ss 4 and 51 of the *Limitations of Actions Act*. Those claims against the CPR are therefore without merit. The effect of the application of limitations legislation as a valid defence for CPR does not extinguish any rights to the PNG since, as explained above, CPR does not currently have the title to them. Therefore, a finding that the SNN are out of time (or would be out of time regardless of the other issues addressed later) with respect to CPR cannot have the effect of extinguishing any underlying rights to the PNG.

[161] This conclusion is apart from CPR's argument that it conveyed the PNG under the Railway Lands in 1965, and that this was confirmed publicly by act of the provincial legislative assembly under the *CPOG Act*. It argued that SNN's claims against it are time-barred since it has not had any interest in the disputed mines and minerals since April 12, 1965 at the latest.

[162] The SNN respond that CPOG received no greater interest in the PNG that CPR had, and it had none, therefore the SNN had no cause for concern in 1965.

[163] The *CPOG Act* affected far more lands within Alberta than just the Railway Lands. If it were limited to the Railway Lands, CPR's argument would be more persuasive, as regardless of whether the SNN believed it owned the PNG, an agreement and the statute dedicated to the PNG, purporting to convey them from CPR to CPOG, would likely be sufficient notice to commence the limitation period. However, whether the Railway Lands' PNG aggregated with many other land parcels was sufficient to apprise the SNN and start the limitation period need not be answered given my conclusion above that it was triggered by 1982 at the latest.

[164] The SNN claim in the alternative, if I find that the PNG underlying the Railway Lands were alienated to CPR, that CPR failed to compensate properly the SNN for that purchase. This claim for "under compensation" is also a claim for damages. The amount of compensation paid by CPR for the Railway Lands was known by Canada acting on behalf of the SNN, and therefore by the SNN, or it was at least readily knowable by the SNN, shortly after it was paid. Over 100 years has passed since the 13T3 land sale, before the SNN filed their Statement of Claim. Even if the SNN did not know the compensation originally paid was for the entire fee simple, the revelation of CPR having acquired that greater interest came in 1982 at the latest, as explained above, if not earlier in 1965. This was longer than 6 years before the filing of the Statement of Claim in 1999: *Limitation of Actions Act*, s. 4. This claim in the alternative also has no hope of succeeding, is without merit and statute-barred.

VI. Claims against Encana

A. For Return of *in situ* PNG

i. Overview

[165] Encana's main reason for saying the SNN claims should be dismissed summarily is that SNN's Aboriginal interest in the PNG was extinguished by alienation at the time of the original transfers of lands. It says that the land transfers conveyed the entire fee simple interest to CPR. It adds that even if that alienation gave the SNN a cause of action against CPR as acquisitor, the SNN had to commence their lawsuit before the expiry of the time prescribed in the then prevailing limitations legislation.[9] They failed to do so until this lawsuit which, say both Encana and CPR, is out of time and therefore doomed to fail.

[166] Encana submits all the information needed for this alienation determination is already before the Court and that it compels the conclusion that the PNG were alienated from the SNN about 100 years ago. In light of the legislation and case law, it continues, there is no doubt that CPR was fully within its power as owner in 1965 to further alienate the PNG to Encana's predecessor. It argues that in light of federal legislation, coupled with an agreement ratifying the statute authorizing actions to be taken thereunder, proof that those actions were taken by way of the granting of the Letters Patent in accordance with the agreement in the legislation, the taking out of the titles, the involvement of various federal ministers, including the Superintendent of Indian Affairs, and Getty's affidavit, it is clear that the mines and minerals were intended to be included in the transfers.

[167] The SNN submit that the title to the PNG was never conveyed to CPR and that the PNG remained part of their Reserve Lands ever since, or it was conveyed initially but only for so long as required for railway purposes, and has since reverted back, after CPR demonstrated by its conveyance of them that the PNG was no longer needed for railway purposes. The SNN also say any purported alienation from them of the PNG would have extinguished their Aboriginal Rights. They say that the test at law for extinguishing Aboriginal Rights requires proof of "clear and plain intent" and that it is not met here. At a minimum, it argues, the issue will require trial to be determined. They say that SNN's Aboriginal Rights were not extinguished back then.

[168] Encana submits that in light of the current *Indian Act* and historical Indian Acts, the lands at issue here are not reserve lands. Encana says the SNN have admitted that the lands are no longer

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[9] Encana relies on the limitation period in force at the time of the first transfer. *The Real Property Limitation Act*, 1833 3 & 4 Will IV, c 27 (UK) provided for a 20-year limitation period, which was reduced to 12 years under the *Real Property Limitation Act*, 1874, 37 & 38 Vic 1874, c 57 (UK):

> After the commencement of this Act no person shall make an entry or distress, or bring an action suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have the first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

vested in the Crown; they have been "conveyed away," referring to Further Further Further Reply to Demand for Particulars.

[169] Encana submits that if the lands are not reserve lands, then there is no constitutional issue and this fully answers the SNN's claims.

[170] Of note, Canada pleads that mines and minerals underlying the Railway Lands were transferred to CPR and that Aboriginal title has already been legally extinguished. It also pleads that CPR was subject to a restriction on alienation and that to the extent that the Railway Lands were taken from the Reserve lands, CPR obtained a statutory interest in the nature of a fee simple determinable. That is, if the subject lands ceased to be used for railway purposes, "they will revert back to Canada, free and clear of any interest that the Bands or the Plaintiff may have had in the Alleged Railway Lands."

ii. Factual and legislative background

[171] In 1877, Canada and the SNN agreed on Canada setting aside Reserve Lands for the use and benefit of the SNN and their members, subject to the terms of Treaty No 7.

[172] For purposes of these Applications, no party took issue with the SNN's ownership of and Aboriginal Rights in the PNG under the Reserve Lands prior to the conveyance to CPR next described.

[173] In 1881, CPR was incorporated under *An Act Respecting the Canadian Pacific Railway*, 1881, 44 Vic c 1 (the "***CPR Act***"), the terms of which also ratified an agreement between CPR and Canada pursuant to which CPR would construct, maintain and operate a transnational railway in perpetuity.

[174] The *CPR Act* comprises six sections, plus the CPR contract and agreement ("**CPR Contract**") and the Articles of Incorporation of CPR. The latter sets out the powers of the company and refers to the CPR Charter later granted.

[175] The preamble to the CPR Act states, in part:

> And whereas the Parliament of Canada has repeatedly declared a preference for the construction and operation of such Railway by means of an incorporated Company aided by grants of money and land, rather than by the Government, and certain Statutes have been passed to enable that course to be followed, but the enactment therein contained have not been effectual for that purpose; […].

[176] Sections 1 and 2 of the *CPR Act* state:

> 1. The said contract, a copy of which with schedule annexed, is appended hereto, is hereby approved and ratified, and the Government is hereby authorized to perform and carry out the conditions thereof, according to their purport.
>
> 2. For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule

to the said contract and to this Act appended, and such charter, being published in the Canada Gazette with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.

[177] Pertinent clauses of the CPR Contract state:

> 9. In consideration of the premises, the Government agree to grant to the Company a subsidy in money of $25,000,000 and in land of 25,000,000 acres, for which subsidies the construction of the Canadian Pacific Railway shall be completed and the same shall be equipped, maintained and operated - the said subsidies respectively to be paid and granted as the work of construction shall proceed,[…]
>
> 10. In further consideration of the premises, the Government shall also grant to the Company the lands required for the road-bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land shall be vested in the Government. […]
>
> 11. The grant of land, hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper House, in so far as such lands shall be vested in the Government – […] But such grants shall be made only from lands remaining vested in the Government.
>
> 12. The Government shall extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway.
>
> 14. […] the Government shall grant to the Company the lands required for the road-bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.
>
> 22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the Company, shall apply to the Canadian Pacific Railway. […]

[178] Sections 17 and 18 of the CPR Charter (which are almost identical to sections of Schedule "A" to the CPR Contract) have similar effect:

> 17. "The Consolidated Railway Act, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith.
>
> 18. As respects the said railway, the seventh section of "The Consolidated Railway Act, 1879," relating to POWERS, and the eighth section thereof relating to PLANS AND SURVEYS, shall be subject to the following provisions: –
>
> a. The Company shall have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the

> same shall be vested in Us, and shall not be required by Us, to such extent as shall be required by the Company for its railway and other works, and shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways. But the provisions of this sub-section shall not apply to any beach or land lying East of Lake Nipissing except with the approval of our Governor General in Council.
>
> […]

[179] Schedule "A" to the CPR Contract also contains the following:

> 19. It shall be lawful for the Company to […] lay out and appropriate to the use of the Company, a greater extent of lands, whether public or private, for stations, depots, workshops, buildings, sidetracks, wharves, harbours and roadway, and for establishing screens against snow, than the breadth and quantity mentioned in "The Consolidated Railway Act, 1879," - such greater extent taken, in any case being allowed by the Government, and shown on the maps or plans deposited with the Minister of Railways.

[180] Section 7 of *The Consolidated Railway Act,* SC 1879, c 9 ("*Railway Act 1879*") requires the consent of the Governor in Council before a railway company may take and appropriate for its use any lands vested in Her Majesty as have not been granted or sold (emphasis added):

> 7. The Company shall have power and authority, - -
>
> 1. To receive, hold and take all voluntary grants and donations of land or other property made to it, to aid in construction, maintenance, and accommodation of the railway; but the same shall be held and used for the purpose of such grants or donations only;
>
> 2. To purchase, hold and take of any corporation or person any land or other property necessary for the construction, maintenance, accommodation and use of the railway, and also to alienate, sell or dispose of the same;
>
> 3. No railway company shall take possession of, use, or occupy any lands vested in Her Majesty without the consent of the Governor in Council; but with such consent any such company may take and appropriate for the use of their railway and works, but not alienate so much of the wild lands of Crown lying on the route of the railway as have not been granted or sold, and as may be necessary for such railway, as also so much of the public beach, or of the land covered with the waters of any lake, river, stream, or canal, or of their respective beds, as is necessary for making and completing and using their said railway and works, subject, however to the exceptions contained in the next following subsection […].

[181] The SNN submit that in light of section 7, lands taken and appropriated for railway and works could not be alienated, thus the Governor in Council could not consent to an absolute fee simple being granted; in this case it needed to be a lesser interest in the land. I disagree. Subsection 7(3) does not restrict the Governor in Council from alienating such land by grant or sale; it restricts a railway company from alienating land still vested in Her Majesty the Queen, without the Governor in Council's consent. This restriction does not apply to land received from Her Majesty the Queen by grant or sale. The present case involved a sale of land. Section 7(3) does not inform the question at

issue in this case, of *what* was sold to CPR, whether it was just the surface, a fee simple determinable, or the entire fee simple.

[182] In the years soon after the *CPR Act*, the CPR constructed its railway across the Reserve Lands. The precise timing is not evident from the record but would have to have been before July 1886. It was very likely prior to November 1885, and as early as 1883. Approval was granted for construction between Calgary and Padmore in August of 1883 and the CPR railhead is recorded as having passed the Morley Station in September of 1883. According to the findings of the British Columbia Court of Appeal in *Canada (Attorney General) v Canadian Pacific Ltd*, 2002 BCCA 478 [*Squamish*] at paragraph 42:

> The last spike had been driven at Craigellachie in November 1885 but the railway was then by no means complete. The claim to completion could be made on July 4, 1886 when the first scheduled passenger train arrived in Port Moody.

[183] Sections 35 of the *Indian Act*, RSC 1886, c 43, as amended by SC 1887 c 33, s 5 required the consent of the Governor in Council for the taking of any reserve land for any railway, and the payment of compensation for it and any damage occasioned thereby:

> 35. No portion of any reserve shall be taken for the purposes of any railway road or public work without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and the benefit of any Indian who has improvements thereon. This iteration of the *Indian Act* also includes ss 38 and 39, which provides that reserve lands can be sold, alienated or leased only if first released or surrendered to the Crown:
>
> 38. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act [...]
>
> 39. No release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian shall be valid or binding, except on the following conditions: –
>
> (a.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question […].

[184] A few years later, the *Indian Act*, RSC 1906, c 81, ss 46 as amended by SC 1911, c 14, s 1 and 48, coming into force May 19, 1911, no longer had a surrender requirement:

> 46. No portion of any reserve shall be taken for the purpose of any railway [...] without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve; and in any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.
>
> […]
>
> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

[185] There does not appear to be any dispute between the parties that there was never a surrender by the SNN before the conveyance to CPR.

[186] Section 99 of *An Act Respecting Railways*, SC 1888, c 29, ("***The Railway Act, 1888***") contains wording very similar to section 7(3) of the *Railway Act, 1879*. It, and section 101, state (emphasis added):

> 99. No company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, as also so much of the public beach, or the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making and completing and using its said railway and works; and whenever any such lands are vested in Her Majesty for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.
>
> […]
>
> 101. No company shall take possession of or occupy any portion of <u>any Indian reserve</u> or lands without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or

> occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor, as in other cases.

[187] Sections 170, 172 and 175 of the *Railway Act*, RSC 1906, c 37 state (emphasis added):

> 170. The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.
>
> 2. All such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby.
>
> 172. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
>
> 2. Any Company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.
>
> 3. The company may not alienate any such lands so taken, used or occupied.
>
> 4. Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.
>
> [...]
>
> 175. No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.
>
> 2. When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

[188] I accept as fact for the purposes of these Applications the following evidence from the SNN's affiant:

> On 1 November 1887, William Pearce, Superintendent of Mines, Interior Department, Calgary, wrote to A.M. Burgess, Deputy Minister of Interior, referring to an earlier letter by Pearce raising two questions, "…whether the land grant for station or right of way purposes to the Canadian Pacific Railway Company carried with it any minerals thereunder, and if so what ones, and also the other point as to whether the land grant of that Corporation carried with it the minerals, I may state that section 11 of the Act would, I think, imply that the land grant did not carry with

it the mineral right.[”] He noted that the U.S. government retained the mineral lands in grants unless they were specifically included in the grant.

On 16 November 1887, A.M. Burgess, Deputy Minister of the Interior, wrote to Thomas White, Minister of the Interior about the questions raised by Pearce on November 1, asking, since the question did not arise in any practical form at present, whether to ask for a decision of the Justice Department.

On 17 December 1887, A.M. Burgess, Deputy Minister of the Interior drafted a letter to A. Power, Acting Deputy Minister of Justice asking, “…(i)Whether or not the land grant to the Canadian Pacific Railway Company carried with it the right to any minerals therein, and if so to what minerals (ii) whether or not the minerals go with the land granted to that Company for right of way or station purposes… [”]. He repeated the statements made by Pearce on Nov. 1 1887, that section 11 of the CPR Act implied the land grant did not include minerals and the US Government usually retained any mineral land.

On 10 March 1888, B. Sedgwick, Deputy Minister of Justice, wrote to A.M. Burgess, Deputy Minister of the Interior, about a letter from P.B. Douglas of the Interior asking if a special form of patent was necessary when granting a road bed to the CPR. He stated that under clause 10 of the CPR contract: “…there may be a question as to whether or not the Government has undertaken to grant the fee simple to the Company or only a right of way. If your Department does not desire to raise this question and admits the right of the Company to a grant in fee simple, then the form of patent answered to your letter of the 30th November is sufficient for that purpose. If, however, your Department wishes to raise that question, it may be raised by preparing and tendering to the Canadian Pacific Ry. Company, in response to any application from them for a patent, a Patent assigning to them a right of way instead of an indefeasible estate.”

Also on 10 March 1888, B. Sedgwick, Deputy Minister of Justice replied to the letter of December 17, 1887 from A.M. Burgess Deputy Minister of the Interior, asking:

> “…(1)Whether or not the land grant to the Canadian Pacific Railway Company carries with it the right to any minerals therein, and if so, to what minerals? And (2) Whether or not the minerals go with the land granted to that Company for right of way or station purposes? In reference to the first question, I am of opinion that, if the Patents issued by your Department to the Canadian Pacific Railway Company are in the usual form, in that case the Patentee takes all the minerals which may be in the lands granted, except gold and silver. The answer to the second question depends upon the terms of the Patent. If the lands therein referred to have been granted under the ordinary Patent, the answer given to the first question applies to this. As I have stated in another letter to your Department today it is at least questionable that the Company was entitled to an absolute interest in the lands acquired for road bed and stations. That, however, is a matter for future consideration, and the question you

> ask will not apply to cases where Patents have already issued for other lands in the terms stated."
>
> On 27 March 1888, A.M. Burgess, Deputy Minister of the Interior, replied to the second letter (above) of March 10, 1888, from B. Sedgwick, Deputy Minister of Justice, enclosing, "… a specimen of the patent issued to the Canadian Pacific Railway Company, which you will see is not on the ordinary form but is a special form furnished for that purpose by the Department of Justice. No doubt this will enable you to answer definitely whether or not the land grant to the C.P.R. carries with it the right to any minerals, and if so, what minerals."
>
> On 28 March 1888, B. Sedgwick, Deputy Minister of Justice acknowledged A.M. Burgess' letter (above) of Mar. 27, 1888, with "… the form of Patent by which the Crown conveys lands to the Canadian Pacific Ry. Company. I am directed to state that, lands patented to the Company by an instrument in the form mentioned carry with them all minerals that may be found there in except gold and silver."
>
> On 7 April 1888, A.M. Burgess wrote to H.H. Smith, Commissioner of Dominion Lands, Winnipeg, and passed along this opinion, noting that he had never doubted that the minerals did go with the land grant.

[189] Those communications were not referring to the Railway Lands that are the subject of this case, which Canada later sold to CPR, but the lands Canada granted to CPR pursuant to the *CPR Act*. The reference in those communications to section 11 refers, I find, to section 11 of the CPR Contract appended to the *CPR Act*.[10]

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[10] Section 11 of the CPR Contract appended to the *CPR Act* states:

> The grant of land hereby agreed to be made to the Company, shall be so made in alternate sections of 640 acres each, extending back 24 miles deep, on each side of the railway, from Winnipeg to Jasper House, in so far as such lands shall be vested in the Government, the Company receiving the sections bearing uneven numbers. But should any such sections consist in a material degree of land not fairly fit for settlement, the Company shall not be obliged to receive them as part of such grant, and the deficiency thereby caused, and any further deficiency which may arise from the insufficient quantity of land along the said portion of railway, to complete the said 25,000,000 acres, or from the prevalence of lakes and water stretches in the sections granted (which lakes and water stretches shall not be computed in the acreage of such sections), shall be made up from other portions in the tract known as the fertile belt, that is to say, the land lying between parallels 49 and 57 degrees of north latitude, or elsewhere at the option of the Company, by the Grant therein of similar alternate sections extending back 24 miles deep on each side of any branch line or lines of railway to be located by the Company, and to be shown on a map or a plan thereof deposited with the Minister of Railways ; or of any common front line or lines agreed upon by the Government and the Company, the conditions hereinbefore stated as to lands not fairly fit for settlement to be applicable to such additional grants. And the Company may, with the consent of the Government, select in the North-West Territories any tract or tracts of land not taken up as a means of

[190] Communications specific to the Railway Lands acquisition came later. February 1, 1889, C. Drinkwater, CPR secretary to J.R. Hall Esq., Secretary, Department of the Interior, requested the Railway Lands:

> I have the honor to enclose herewith plan and description of land required for Right of Way and Station grounds on the main line through the Stony Indian Reserve, Townships 24, 25 and 26, Ranges 6, 7 and 8 West of the 5th Meridian in the District of Alberta.

[191] In March of 1889, CPR wrote again to Canada regarding the right of way and station grounds:

> I beg to return herewith the tracing forwarded with your letter of the 1st instant, showing the land required for Right of Way and Station Grounds through the Stoney Indian Reserve, the same having been signed by a Dominion Land Surveyor as requested.
>
> I beg to say that the Company is prepared to pay $1.00 per acre for this land and to add that taking into consideration the benefits [sic] to the adjoining lands caused by the construction of the Railway, and the quality of the land taken, this price is considered adequate compensation.

[192] The SNN also mentioned the following letter dated May 11, 1889, from the Deputy Superintendent General to the Superintendent General regarding compensation:

> The Canadian Pacific Railway have applied for a patent for the land taken by them for right of way and station grounds on the Stoney Reserve in Alberta and they have offered $1.00 per acre for the same. Reed reports that he considers that $1.25 would be a reasonable rate, but rather than enter into a troublesome dispute he would recommend the acceptance of the offer of the C.P.R.
>
> It appears to me that we ought to get at least $2.00 an acre for this land. The passage of the Railway through the Reserve is a positive disadvantage instead of a benefit, and the station being on the Reserve is also an injury as it affords the Indians a means of leaving the Reserve which they would not otherwise have. I do not see why we should accept less than $2.00, which is the price of Dominion lands in the N.W.T.

[193] On March 20th, 1893, CPR forwarded to Canada a cheque "for the sum of $594.71 in compensation for the land taken for right of way and station grounds in the Reserve".

[194] The SNN say that in light of ss. 35 – 39, 99 and 101, their land could not be sold, leased or alienated without a prior surrender by them.[11]

[195] Nevertheless, Canada transferred the Railway Lands to CPR by issuing Orders in Council followed by 13 Letters Patent, between July 10, 1893 and August 14, 1917. CPR had already used the Railway Lands for the construction, maintenance and operation of its transnational railway. Fee

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> supplying or partially supplying such deficiency. But such grants shall be made only from lands remaining vested in the Government.

[11] See above at paras 183 & 186.

simple title to the Railway Lands was registered to CPR on the later dates indicated below in parentheses.

Date	Event
June 2, 1893	Order in Council PC 1614
July 10, 1893 (Re-issued in 1916)	Patent #13T3 (Registered June 29, 1916)
August 6, 1901	Patent #BA-111 (Registered May 21, 1902)
August 6, 1901	Patent #BA-113 (Registered May 21, 1902)
August 9, 1901	Patent #BA-120 (Registered May 21, 1902)
August 10, 1901	Patent #BA-119 (Registered May 21, 1902)
October 3, 1901	Patent #BA-118 (Registered May 21, 1902)
August 5, 1902	Patent #BA-131 (Registered September 19, 1902);
September 17, 1902	Patent #CI-196 (Registered June 30, 1905)
February 1, 1904	*Railway Act* of 1903, s 132
March 17, 1904	Patent #BU-159 (Registered August 5, 1904)
March 17, 1904	Patent #BU-160 (Registered August 5, 1904)
March 17, 1904	Patent #BU-161 (Registered August 5, 1904)
September 1905	Alberta becomes a province
October 21, 1905	Patent #CI-217 (Registered March 19, 1906)
January 31, 1907	*Railway Act*, 1906
May 19, 1911	*Indian Act*, RSC 1906, c 81, ss 46 and 48 as amended by SC 1911
May 11, 1916	Re-issue of Patent #13T3
June 29, 1916	13T3 Registered
August 14, 1917	Patent #15T133 (ballast pit #2[12], registered October 1, 1917)

[196] The transfers of lands were registered at the land titles office, first in the territorial (federal) office and later, after Alberta became a province in 1905, in the provincial office. The registration of letters patent was provided for by legislation. Section 39 of *The Land Titles Act*, SC 1894, c 28 (federal) of 1894 stated:

> 39. Whenever any land is granted in the Territories by the Crown, the letters patent therefor, when issued, shall be forwarded from the office whence the same are issued to the registrar of the registration district in which the land so granted is situated, and the registrar shall retain the letters patent in his office; and a certificate of title, as provided by this Act, with any necessary qualification, shall be granted to the patentee.

[197] Section 26 of *The Land Titles Act*, SA 1906, c 24 (Alberta) stated:

[12] Ballast pit # 1 (Order in Council PC 259 dated January 30, 1895) is a parcel of land which is not part of the Railway Lands. I return to the circumstances around PC 259 later in this section on the facts.

> 26. Whenever any land is granted in the Province by the Crown and the letters patent therefor have been forwarded from the office whence the same are issued to the registrar of the registration district in which the land so granted is situated, the registrar shall retain the letters patent in his office; and a certificate of title, as provided by this Act, with any necessary qualification shall be granted to the patentee[...]

The same principle is embodied in the current *Land Titles Act*, RSA 2000, c L-4, at s 29.

[198] Indefeasibility provisions were present under both the federal (pre-Alberta) and 1906 provincial legislation. They provided as follows:

The Land Titles Act (Federal)

> 55. The owner of land for which a certificate of title has been granted, shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests, as are notified on the folio of the register which constitutes the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded, and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act.
>
> 2. Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title, has held such possession.
>
> [...]
>
> 57. Every certificate of title granted under this Act shall (except in case of fraud, wherein the owner has participated or colluded), so long as the same remains in force and uncancelled under this Act, be conclusive evidence in all courts as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land, by wrong description of boundaries or parcels included in such certificate of title, and except as against any person claiming under a prior certificate of title granted under this Act in respect of the same land ; and for the purpose of this section that person shall be deemed to claim under prior certificate of title who is holder of, or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument […].

The Land Titles Act, 1906 (Alberta)

> 42. The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has

> participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.
>
> (2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title, has held such possession
>
> […]
>
> 44. Every certificate of title granted under this Act shall (except in case of fraud, wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against Her Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land, by wrong description of boundaries or parcels included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act in respect of the same land ; and for the purpose of this section that person shall be deemed to claim under prior certificate of title who is holder of, or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

[199] The initial certificates of title for the lands referred to in the Letters Patent were issued in the name of CPR. These certificates of title all provide that "Canadian Pacific Railway Company is now the owner of an estate in fee simple".

[200] The Orders-in-Council and Letters Patent upon which those registrations were based were not so clear, which I describe below in respect of the two conveyances that were the main focus during the parties' arguments. Those were for land parcels 13T3 and 15T133. The parties' briefs and oral arguments make clear that although they refer to the multiple transfers between 1893 and 1917 itemized above, the main focus is on the right-of-way and ballast pit lands. For instance, during oral argument, counsel for the SNN characterized the lands at issue as follows:

> There are 13 letters patent that are -- that have been referred to, and I believe 79 parcels of land that it relates to. My Lord, from Stoney Nation's point of view it appears, based on the evidence, that really the only letters -- the only Orders in Council and letters patent and certificates of title that are of significant concern are the ones dealing with the right of way and the ones dealing with the ballast pit that are on the Reserve. All of the other lands appear to be subsidy lands that were granted off Reserve.
>
> Now, we don't have, necessarily, perfect affirmation on the part of Encana as to what they're claiming, but it's -- in their undertaking responses they do suggest that they aren't claiming anything that is on Reserve with respect to the subsidy lands. There are portions of the subsidy lands that abut against the Reserve but they're not actually claiming into the Reserve. And I'm not sure how they'd be able to do so, in any

event, but that was part of their original affidavit and their original particulars that were provided by Encana.

[201] Similarly, counsel for Encana said the following in oral argument:

> Now, as I understood my learned friend's submissions on the purchase point, My Lord, and let me just stop and say, I think the only real ground of contention between us seems to be on these two purchased properties. Certainly that's all the Getty [SNN's affiant] affidavit addresses and I don't think -- I may be wrong, but I don't think Mr. Osvath [SNN's counsel] put anything to you with respect to the 11, just the two, perhaps I'm subject to being corrected on that, but I think that's the case.

[202] Therefore, for the purpose of the Encana Application I too now focus only on land parcels 13T3 and 15T133.

a. Land Parcel 13T3

[203] A report from the Superintendent General of Indian Affairs sent to His Excellency the Governor General in Council, dated May 20, 1893, states:

> The undersigned has the honour to submit herewith a tracing of a plan showing the land taken by the Canadian Pacific Railway Company for right of way and station grounds on the Stony Indian Reserve in the North West Territories. The area of the land taken is 475.77 acres; and the Company has paid therefor at the rate of $1.25 an acre, plus interest from the date of occupation to the date of payment, the amount from the Company being $730.26.
>
> The undersigned would respectfully recommend that the consent of Your Excellency in Council, as required under Section 35 of the *Indian Act* as amended by Section 5, CAP. 33, 50-51 Vic., be given to the taking of this land by the Canadian Pacific Railway Company.

[204] Order in Council PC 1614 dated June 2, 1893, was then issued. It states:

> On report dated 20th May, 1893, from the Superintendent General of Indian Affairs submitting herewith a tracing of a plan showing the land taken by the Canadian Pacific Railway Company for right of way and station grounds on the Stony Indian Reserve in the North West Territories. The area of the land taken is 475.77 acres, and the Company has paid therefor at [*sic*] the rate of $1.25 an acre, plus interest from the date of occupation to the date of payment, the amount received from the Company being $730.26.
>
> The Minister recommends that the consent of Your Excellency in Council, as required under Section 35 of the Indian Act as Amended by Section 5, Cap: 33, 50-51 Vic, be given to the taking of this land by the Canadian Pacific Railway Company.
>
> The Committee submit the same for Your Excellency's approval.
>
> [Signature]
>
> Clerk of the Privy Council to the Honourable The Superintendent General of Indian Affairs

This preceded the re-issue of Letters Patent 13T3 by many years.

[205] Letters Patent 13T3 signed on May 11, 1916, states (the underlined portions correspond to the handwritten words inserted in the original form):

CANADA

[Signature]

DEPUTY GOVERNOR

George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas KING, Defender of the Faith, Emperor of India.

To all to whom these Presents shall come ---- GREETING:

Whereas the Lands hereinafter described are part and parcel of those set apart for the use of the Stony Indians AND WHEREAS WE have thought fit to authorize the sale and disposal of the Lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, in such a manner as We shall be pleased to direct from time to time: AND WHEREAS Canadian Pacific Railway Company, have contracted and agreed to and with Our Superintendent General of Indian Affairs duly authorized by Us in this behalf, for the absolute purchase at and for the price and sum of Seven hundred and thirty dollars and twenty-six cents of lawful money of Canada, of the Lands and Tenements hereinafter mentioned and described, of which We are seized in right of Our Crown.

Now Know Ye that in consideration of said sum of Seven hundred and thirty dollars and twenty-six cents by them the said Canadian Pacific Railway Company to Our said Superintendent General of Indian Affairs in hand well and truly paid to Our use at or before the sealing of these Our Letters Patent, We by these Presents, do grant, sell, alien, convey and assure unto the said Canadian Pacific Railway Company, their Successors, and assigns for ever; all those Parcels or Tracts of Land, situate, lying and being in the Stony Indian Reserve, in the Province of Alberta in our Dominion of Canada

Containing together by admeasurement Four hundred and Seventy-five acres and Ninety-three hundredths of an acre, be the same more or less.

Composed of all those portions of the Stony Indian Reserve in the Province of Alberta taken for Right of Way and Station Grounds of the Main Line of the Canadian Pacific Railway, as shown on a Plan of Survey thereof Signed by George A. Bayne, Dominion Land Surveyor and Registered in the Land Titles Office of the Southern Alberta Land Registration District as No. Ry. 10. A copy of the said Plan being of Record in the Department of Indian Affairs under Number 631-A.

To have and to hold the said parcels or Tracts of Land hereby granted, conveyed and assured unto the said Canadian Pacific Railway Company, their Successors, and Assigns forever: SAVING, EXCEPTING AND RESERVING, NEVERTHELESS,

unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Parcels or Tracts of Land hereby granted as aforesaid.

GIVEN under the Great Seal of Canada :-- Witness, JAMES FUIDGE CROWDY, ESQUIRE, [...] Governor General and Commander-in-Chief of Our Dominion of Canada.

At OTTAWA, this Eleventh day of May, in the year of Our Lord, one thousand nine hundred and Sixteen, and in the Seventh year of Our Reign.

Ref. No. 17,720

Sale No. 2

BY COMMAND,

[Signature]

ACTING Under-Secretary of State.

[Signature]

Acting-Deputy of the Superintendent General of Indian Affairs

Recorded in the Department of Indian Affairs

the 16, May 1916

Liber 42 Folio 43

[Signature]

Registrar of Indian Lands Patents

[206] I find this 1916 re-issued Letters Patent mirrors the one first issued in 1893 by Canada, except as to the description of the specific lands. A direction from the Deputy Superintendent General of Indian Affairs dated May 6, 1916, regarding the issuance of the Letters Patent dated May 6, 1916, states:

> WHEREAS a wrong description based upon a plan finished by Canadian Pacific Railway Company, has been found to exist in the body of the Indian Lands Patent issued to that Company dated the Tenth day of July 1893, in which the land is described as situate, lying and being in the undivided Stony Indian reserves, Numbered 142 and 144 in the District of Alberta, and Dominion of Canada, composed of the Right of way and Station Grounds of the Canadian Pacific Railway, as set forth and shewn on a plan of record in the Department of Indian Affairs under Refernce [*sic*] No. 55,405. Whereas in truth and in fact it should have been described as those portions of Stony Indian Reserve in the Province of Alberta, taken for Right of Way and Station Grounds, of the Main Line of the Canadian Pacific Railway, as shewn on a plan of record in the Department of Indian Affairs, under Number 631-A.
>
> NOW THEREFORE by and in virtue of the powers and duties vested in the Supt. General of Indian Affairs, by the Indian Act, 1906, I hereby direct the said defective

Letters Patent to be cancelled, and a Minute of such cancellation to be made in the margin of the Registry thereof, and correct Letters Patent to be issued in their stead.

[207] The Certificate of Title for 13T3 states (the underlined portions correspond to the handwritten words found in the original document):

Certificate of Title

Issued on instrument registered at 3^{12} o'clock p.m., on the 29 day of June A.D. 1916.

Number 3602 Book BO Folio 115

[Signature]

AD Registrar A.L.R.D.

Assce. Fund Value

Unearned Inc. Value

Land Registration District

Refer Cert. No.

This is to Certify that Canadian Pacific Railway Company is now the owner of an estate in fee simple of and in those portions of the Stony Indian Reserve in the Province of Alberta taken for Right of Way and Station Grounds of the Main Line of the Canadian Pacific Railway as shown on a Plan filed in the Land Titles Office for the South Alberta Land Registration District as "Ry 10" containing for Right of Way Four hundred and thirty two and five hundredths (432.05) acres more or less and for Station Grounds Forty three and eighty eight hundredths (43.88) acres more or less.

The land herein complied containing together Four hundred and seventy five and ninety three hundredths (475.93) acres more or less.

subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this twenty-ninth day of June A.D. 1916

[Signature]

Registrar,

P.O. Address

Land Registration Districts

[208] At the top left of the certificate, s 43 of the *Land Titles Act* is stamped, as follows:

LAND TITLES ACT, Sec. 43.—The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to—

(a) Any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

(b) All unpaid taxes;

(c) Any public highway or right-of-way or other public easement, howsoever created upon, over or in respect of the land;

(d) Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same;

(e) Any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner;

(f) Any right of expropriation which may by statute or ordinance be vested in any person, body corporate, or His Majesty;

(g) Any right-of-way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

[209] Sometime later the mines and minerals to the 13T3 land were registered separately under Certificate of Title 13T3A in the Alberta Land Titles Registry. No separate Letters Patent were issued for them. The application record does not reveal when 13T3A came into existence. A Certificate of Title dated November 18, 1993, indicates PanCanadian Petroleum Limited as registered owner in fee simple of all mines and minerals under the 13T3A Certificate of Title, curiously, "on 29/06/1916". The most recent Certificate of Title provided to this court, current as of July 10, 2012, indicates that Encana is the owner of 13T3A "on 29/06/1916" and that the data was updated by change of name.

[210] The SNN also submit that while the Land Sales System database contains no entry with respect to CPR's interest in the Right of Way and Station grounds, a search conducted on June 20, 2014, of the section 21 register of the *Indian Act*, RSC, 1985, c I-5 identifies registration number 8510-282 in reference to order PC#1614. The Instruments Remarks read as follows:

> PC #1614 AUTHORIZES TRANSFER OF LAND SILENT AS TO MINES & MINERALS – SEE LETTERS PATENT REF #17720

[211] The section 21 register, also known as the "Indian Lands Registry" ("**ILR**"), was mandated by section 21 of the *Indian Act* of 1951 and section 43 of the *Indian Act*, RSC 1886, c 43. Section 21 requires a record be kept in the Department of transactions relating to lands in reserve, and indicated the types of transactions to be recorded. Section 21 states:

> There shall be kept in the Department a register, to be known as the Reserve Lands Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

[212] The parties disagree on the effect of the ILR.

b. Land Parcel 15T133

[213] Order in Council PC 1584, dated June 15, 1917, states:

> The Committee of the Privy Council have had before them a Report dated 6th June, 1917, from the Superintendent General of Indian Affairs, stating that application has been made to the Department of Indian Affairs by the Canadian Pacific Railway Company to purchase 57 acres of land more or less, in the Stony Indian Reserve, near Morley, in the province of Alberta, the same being required for ballast pit purposes and being shown on a plan, No. 1648, of record in the survey branch of the Department of Indian Affairs bearing a certificate of the Board of Railway Commissioners for Canada that the area applied for is required for railway purposes.
>
> The Minister recommends as the land has been paid for in full by the Railway Company at the valuation of $25.00 per acre placed thereon by the Department of Indian Affairs, that, under the provisions of Section 46 of the *Indian Act* as amended by Sec. 1 of Chapter 14, 1-2 George V. authority be given for the sale of the said 57 acres to the Canadian Pacific Railway Company.
>
> The Committee concur in the foregoing and submit the same for approval.

[214] Letters Patent 15T133, signed on August 14, 1917, states (the underlined portions correspond to the handwritten words found in the original document):

> CANADA
>
> *[Signature]*
>
> DEPUTY GOVERNOR
>
> George the Fifth, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas KING, Defender of the Faith, Emperor of India.
>
> To all to whom these Presents shall come---- GREETING:
>
> Whereas the Lands hereinafter described are part and parcel of those set apart for the use of the Stony Indians AND WHEREAS WE have thought fit to authorize the sale and disposal of the Lands hereinafter mentioned, in order that the proceeds may be applied to the benefit, support and advantage of the said Indians, in such a manner as We shall be pleased to direct from time to time: AND WHEREAS The Canadian Pacific Railway Company, have contracted and agreed to and with Our Superintendent General of Indian Affairs duly authorized by Us in this behalf, for the absolute purchase at and for the price and sum of One thousand Four hundred and Twenty-five dollars of lawful money of Canada, of the Lands and Tenements hereinafter mentioned and described, or which We are seized in right of Our Crown.
>
> Now Know Ye that in consideration of said sum of One thousand Four hundred and Twenty-five dollars by them the said The Canadian Pacific Railway Company to Our said Superintendent General of Indian Affairs in hand well and truly paid to Our use at or before the sealing of these Our Letters Patent, We by these Presents, do grant, sell, alien, convey and assure unto the said The Canadian Pacific Railway Company,

their Successors, and assigns for ever; all that Parcel or Tract of Land, situate, lying and being in the Stony Indian Reserve, near Morley, in the Province of Alberta in our Dominion of Canada.

Containing by admeasurement Fifty-seven acres more or less.

Composed of a ballast pit adjoining the right of way of the Canadian Pacific Railway main line and which may be described as follows, commencing at a point on the Northerly limit of the said right of way for main line opposite Station 2360t19 as shown on plan Number 631-A of record in the Department of Indian Affairs, which plan is certified to be a true copy of part of the plan of the Right of Way of the Canadian Pacific Railway, filed in the Land Titles Office in and for the Land Registration District of Southern Alberta as Number Ry. W.10; thence in a Westerly direction a distance of Thirteen hundred and Fifty-two feet and Eight-tenths of a foot to a point Four hundred and Fifty feet measured at right angles from the said North limit of the right of way; thence Westerly parallel to the said North limit a distance of Four thousand Three hundred and Fourteen feet; thence Southerly, making a Southeasterly angle of One hundred and Fifty-nine degrees Fifteen minutes thirty seconds a distance of Twelve hundred and Twenty feet and Six-tenths of a foot to the said North limit of the said Right of Way; thence Easterly along the said North limit Six thousand Seven hundred and Sixty-nine feet and three tenths of a foot to the place of beginning, as the said parcel of land is shown on a plan of land in Stony Indian Reserve, Township Twenty-five, Range seven, West of the Fifth Meridian, Alberta, required for a ballast pit Laggan subdivision of the Canadian Pacific Railway by C. D. Brown, Alberta Land Surveyor, dated at Winnipeg Twenty-first December 1916, of record in the Department of Indian Affairs under Number 1648 and certified to be a true and correct copy of instrument Number R.W. 82 registered in the Land Titles Office in and for the Land Registration District of Southern Alberta.

To have and to hold the said parcel or Tract of Land hereby granted, conveyed and assured unto the said The Canadian Pacific Railway Company, their Successors, and Assigns forever: SAVING, EXCEPTING AND RESERVING, NEVERTHELESS, unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Parcel or Tract of Land hereby granted as aforesaid.

GIVEN under the Great Seal of Canada: -- Witness, JAMES FUIDGE CROWDY, Esquire, [...]; Governor-General and Commander-in-Chief of Our Dominion of Canada.

At OTTAWA, this Fourteenth day of August, in the year of Our Lord, one thousand nine hundred and Seventeen, and in the Eighth year of Our Reign

Ref. No. 17,965

Sale No. 5.

BY COMMAND

[Signature]

Under-Secretary of State.

[Signature]

Deputy of the Superintendent General of Indian Affairs.

Recorded in the Department of Indian Affairs

the 27th August 1917.

Liber 43 Folio 151

[Signature]

Registrar of Indian Lands Patents

[215] The Certificate of Title for 15T133 states (the underlined portions correspond to the handwritten words found in the original document):

Certificate of Title

Issued on instrument registered at 11^{47} o'clock a.m. on the 1 day of October A.D. 1917.

Number 7707 Book BQ Folio 249

[Signature]

Registrar A. L. R. D

Assce. Fund Value

Unearned Inc. Value

Land Registration District

Refer Cert. No.

This is to Certify that The Canadian Pacific Railway Company is now the owner of an estate in fee simple of and in that position of the Stony Indian Reserve near Morley, in the Province of Alberta, in Township Twenty five (25), Range (7), West of the Fifth meridian, in the Province of Alberta, composed of a Ballast Pit, adjoining the Right of Way, by the Canadian Pacific Railway Company's Main Line, as sworn on a plan of record in the Land Titles Office, for the South Alberta Land Registration District as: "RW. 82." containing Fifty-seven (57) acres, more or less.

subject to the encumbrances, liens and interests notified by memorandum underwritten or endorsed hereon, or which may hereafter be made in the register.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this First day of October A.D. 1917

Registrar,

P.O. Address

Land Registration District

[216] The wording of Section 43 of the *Land Titles Act* is also stamped at the top left of this Certificate of Title.

[217] A Certificate of Title, current as of October 4, 2012, indicates that the "registered owner(s)" of "All mines and minerals within, upon or under: the ballast pit site […]" regarding title number 15T133A is "Encana Corporation […] (data updated by: change of name […])" as of "01/10/1917".

c. Discussion

[218] The SNN refer the Court to Order in Council PC 259 (dated January 30, 1895) to show that at about the same time as and unlike PC 1614, one of the key parcels at issue in this case and that I will come to shortly, the Governor in Council used specific language of sale. This parcel of land is not part of the Railway Lands. The SNN say that in PC 259 the Governor in Council used express language to sell reserve lands. PC 259 reads (emphasis added):

> On a report dated 23rd January 1895 from the Superintendent General of Indian Affairs submitting herewith a tracing on which is shown in red a parcel of land required by the Canadian Pacific Railway Company in the Stony Reserve, on the Bow River, near Morleyville, in the North West Territories for use as a ballast pit. The parcel of land contains 34.27 acres, and the Railway Company tendered $200.00 in payment for the same.
>
> The Minister considers that this amount is a fair equivalent for the land: but as under Section 35 of the Indian Act, as amended by Section 5, Chapter 33, 50, 51 Vic, no portion of any Reserve can be taken for the purposes of any railway without the consent of the Governor in Council, it is necessary that such sale be authorized by Your Excellency in Council.
>
> The Minister considers that the sale of the land is in the interest of the Indian owners of the Reserve, and he recommends that the necessary authority be given.

[219] Thereafter, Letters Patent were issued for PC 259, but it is illegible and so of no assistance in the analysis. But in the case of PC 259, Canada inquired as to whether the land required by CPR for a gravel pit should be sold or leased to CPR. A letter dated July 30, 1894, stated that "It is understood that the land is worth from $2.00 to $3.00 per acre" and that "It will be necessary that the Indians should be seen in the matter with a view of ascertaining their willingness to surrender either for sale or lease".

[220] On August 16, 1894, TP Wadsworth, Chief Inspector sent surrender papers to the Indian Commissioner and stated that the land would make an excellent ballast pit, but also added that the "price of $2.00 or $3.00 per acre was perfectly absurd; the price that the CPR would probably place upon whole sections of land further away from the RY than this in question […]". It appears that surrender was sought but was subsequently cancelled, because the Chief Inspector did not possess the necessary authority to take the surrender. This parcel of land was sold for $200, more than $1.25 per acre that was tendered by CPR for the right-of-way lands. The SNN say this is significant when determining intent.

[221] The SNN state that if a party searches the Land Sales System for lands purchased by CPR by way of absolute surrenders, only a single entry appears with respect to the SNN's Reserve Lands,

being the August 15, 1894, surrender of those 34.27 acres. The record also does not indicate that any interest in the PNG was transferred; the ILR for this transaction includes the following:[13]

> PC #259 AUTHORIZES SALE OF LAND TO THE CANADIAN PACIFIC RAILWAY COMPANY FOR A BALLAST PIT – SILENT AS TO MINES & MINERALS – LETTERS PATENT REF #11160 Quit Claim REG #8543-283.

[222] The SNN say that although the register reflects the Governor in Council's clear and plain intent to authorize the sale of the surface interest in that portion of the Reserve Lands to CPR, it does not reflect any clear and plain intent to transfer any interest in the PNG to CPR.

[223] Order-in Council PC 10443 reads as follows:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Mines and Resources is pleased to accept the attached surrender dated August 1, 1940, of the petroleum and natural gas and the mining rights in connection therewith on the Stony Indian Reserves Numbers 142, 142(b), 143 and 144, in the Province of Alberta and Dominion of Canada, containing together by admeasurement some eighty-two thousand, five hundred acres, be the same more or less, which has been duly executed in accordance with the provisions of the Indian Act and Regulations, by the members of the Stony Band of Indians, in the said Province, in order that the said petroleum and natural gas and the mining rights in connection therewith may be leased for their benefit and it is hereby accepted as provided by Section 51(4) of the Indian Act Chapter 98, R.S. 1927.
>
> His Excellency in Council is pleased, hereby to order that the said petroleum and natural gas and the mining rights in connection therewith be disposed of in accordance with the provisions of the regulations established under authority of Section 50, subsection (2) of the said Act, together with such surface rights over such area of land within the said reserve as may be necessary for the mining thereof.

[224] The "attached surrender" document provides (emphasis added):

> KNOW ALL MEN BY THESE PRESENTS that We, the undersigned Chief and Principal men of the Stony Band of Indians, resident on our Reserves near Morley in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, do hereby release, remise, surrender quit claim and yield up unto our Sovereign Lord the King, his heirs and successors forever, the oil and gas rights on the Stony Indian reserves Numbers 142, 142B, 143 and 144, in the Province of Alberta and Dominion of Canada, containing together by admeasurement some eighty-two thousand five hundred acres, more or less.
>
> TO HAVE AND TO HOLD the same unto His said Majesty the King, his heirs and Successors forever, in trust to lease the petroleum and natural gas mining rights to such person or persons, and upon such terms and conditions as the Government of

[13] The Land Sales System, distinct from the ILR, is a database of information on "Indian lands" that were patented, sold or surrendered.

> the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> And upon the further condition that all moneys received from the leasing thereof shall be credited to us in the usual way.
>
> And We, the said Chief and Principal men of the said Stoney Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing of the said oil and gas rights and the disposition of the moneys derived therefrom.

iii. Were the PNG alienated to CPR?

a. Parties' positions

[225] Encana claims ownership of the PNG because of what it says is an indisputable historical fact. It says the language used in the Letters Patent and Certificates of Title conveyed fee simple title to CPR, which included mines and minerals and therefore the PNG. It says these acts effected a complete alienation of the PNG from the SNN, extinguishing all interests the SNN had to the lands. CPR acquired a common law right of exclusive possession, which of itself extinguished Aboriginal title.

[226] Therefore, Encana continues, the passage of time is not the root of Encana's ownership, so its rights are not dependant on any provincial statute – not limitations legislation and not land titles legislation – the constitutional applicability of which the SNN now challenge. Encana says it relies on such legislation as a shield and not a sword. Its ownership of the PNG came about by their alienation to CPR, followed half a century later by the subsequent conveyance by CPR to Encana's predecessor.

[227] The SNN say the wording of the Orders in Council prevail. It says that wording did not alienate the PNG and is certainly not so indisputable as to warrant summary dismissal of its claim for return of the PNG from Encana. No interest in the PNG was conveyed to CPR as part of the Railway Lands; the PNG has always been part of the Reserve Lands. Encana is holding the PNG unlawfully.

[228] The SNN say that the governing federal legislation, in particular the *Railway Act*, resulted in the interests that CPR obtained in the Railway Lands by expropriation (for a right-of-way, station grounds, and ballast pit) was a statutory interest and was subject to two conditions: that the lands expropriated had to be 1) used for railway purposes and 2) could not be alienated. By 1893, sections 38, 99 and 101 meant their reserve land could not be sold, leased or alienated without their prior surrender.

[229] The SNN say that the following facts are critical to the Court's assessment with respect to a reasonable interpretation of Order-in-Council PC 1614 and the intent of the Governor in Council:

a. CPR requested a right-of-way for its mainline and station grounds and presumably Canada determined that that was in the public interest;

b. Canada was to impair minimally and to preserve to the greatest extent possible SNN's Aboriginal interest in the Railway Lands;

c. Canada did not obtain a surrender from SNN to lease, sell or alienate any interest in the Reserve Lands;

d. The compensation paid by CPR was significantly less than the fair market value of other fee lands available for purchase at that time; and

e. Consenting to a sale of a fee simple interest in their lands was *ultra vires* the Governor-in-Council's authority.

[230] They argue that based on:

a. the governing statutory powers;

b. CPR's actual requirements, including whether PNG is necessary for the construction, operation and maintenance of a mainline and station grounds in 1893;

c. the monetary compensation tendered;

d. the duty of minimal impairment;

e. the specific language of PC 1614;

f. the descriptor used for the lands in the letters patent as opposed to a metes and bounds description; and

g. the presumption that the Governor in Council acted *intra vires* its legislative powers;

the Court can reasonably conclude that, not only the most reasonable interpretation, but also the correct legal interpretation of PC 1614 is that CPR was granted an easement or licence for a right-of-way for the mainline and station grounds through the Reserve Lands. At the very least, Encana's position is not unassailable and its application for summary dismissal should be denied.

[231] The SNN argue that, as a result, the limited interests open to CPR to take, and that the Governor in Council could authorize, by PC 1614 are as follows:

a. a grant of a right-of-way, in the nature of an easement or licence, to use or occupy the lands necessary for the railway and works in relation to the mainline and the station grounds;

b. such an easement or licence would not extend to or include the PNG;

c. in the alternative, a fee simple determinable interest with respect to the surface only, but no interest with respect to PNG;

d. in the further alternative, if PNG were intended to be included in any grant in PC 1614, then any such estate was limited to a fee simple determinable by statutory requirement; and,

e. in the further alternative, the interest that could have been authorized and taken is a triable issue.

[232] With respect to PC 1584, the SNN acknowledge that, by 1917, the *Indian Act* and the *Railway Act* had both been amended. They agree that the Governor in Council had the statutory

authority to sell reserve lands without a prior surrender. They concede that this was the Governor in Council's intent with respect to the lands to be taken for this Order in Council. The SNN argue that considering the clarity of the *Railway Act* amendment, unless expressly conveyed, CPR was not entitled to any minerals except those that were "necessary to be dug, carried away or used in the construction of the works". They say that in the case of PC 1584, it may be inferred that a grant of an interest greater than an easement may have been required to allow CPR to use lands designated for a ballast pit that requires the removal of stone and gravel. But, they continue, CPR did not obtain any interest in the PNG within the ballast pit land. The SNN argue that despite the clear and plain intent of the Governor in Council to sell the surface interest, the Governor in Council did not have the statutory authority to transfer an absolute fee simple estate, under section 172 of the *Railway Act*, RSC 1906, c 37. Section 46 of the *Indian Act*, expressly referred to in the Order in Council, provides that "no portion of any reserve shall be taken for the purpose of any railway […] without the consent of the Governor in Council". Any interest or estate obtained by CPR in this specific parcel of the ballast pit land remains subject to the restraint on alienation and the condition that such interest or estate must continue to be used and be necessary for the railway. The interest granted to CPR, they say, was at most a fee simple determinable.

[233] The SNN argue that any certificates of title, regardless of whether such certificates could have been or should have been issued under the Alberta Land Titles system, could not include mines and minerals and any successor title remains subject to Canada's original statutory reservation of the mines and minerals. They say, therefore, that if any certificate of title to mines and minerals was issued, it was an error and remains subject to correction.

[234] The SNN argue that the most important document is the Order in Council and argue that the Governor in Council cannot exceed its authority and that the Superintendent General of Indian Affairs cannot override and expand upon the scope or power of the Governor in Council. They submit that the Court should not interpret Orders in Council in a way that is *ultra vires* of the Governor-in-Council's powers and conversely should prefer an interpretation *intra vires* of its powers.

[235] The SNN comment that there is no language of sale in the Order in Council PC 1614 only of "land taken" and "right of way", although they do not challenge that such language is in the Letters Patent. The SNN argue that this Order in Council does not reflect any "clear and plain intent" to extinguish any of the SNN's interest in the PNG nor does it reflect any intent that an interest in the Reserve Lands is to be sold to CPR.

[236] The SNN pointed to the communications between CPR and Canada early 1889, which they say is indicative that CPR did not contemplate the mines and minerals, and the Indian registry which they say does not reflect the transfer of any interest in the PNG to CPR.

[237] The SNN also referred to the higher compensation that was paid to other vendors for lands inclusive of mineral rights around the same time. They argued that the Court should therefore infer that the compensation paid by CPR to the SNN was not intended to compensate the SNN for a complete extinguishment of its interest in the Railway Lands, but was compensation for significantly less interest or estate. The SNN submit that the compensation paid was for the interest which was requested – lands it required for a right-of-way, which would only require an easement or a licence. The SNN argue that since the *Indian Act* in force in 1893 required a surrender prior to any sale of

reserve land, the Governor in Council could not authorize a sale, lease or alienation (even if expropriated) without that surrender. Thus the interest granted had to be a lesser interest.

b. Discussion

[238] To determine the nature and extent of a railway company's interest in land, relevant statutes, documents, subsequent actions and declarations of the parties should be considered: *Paul v CPR*, [1988] 2 SCR 654 at page 665.

[239] Aboriginal interests in reserve land are inalienable except to the Crown: *Osoyoos Indian Band v Oliver (Town), 2001 SCC 85 at para 42*.

[240] Prior to 1982, Aboriginal Rights could be extinguished by surrender to the Crown, as well as unilaterally extinguished by federal legislation. This changed with section 35 of the *Constitution Act, 1982*, by which Aboriginal Rights then existing were accorded constitutional protection; no longer could they be unilaterally extinguished by federal action. Aboriginal Rights could be justifiably limited for substantial and compelling public objectives.

[241] In *Mitchell v MNR*, [2001] 1 SCR 911, McLachlin CJC wrote the following for the majority:

> 10 Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.).
>
> 11 The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act*, 1982, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuukw*, *supra*.

[242] The question I am addressing now, whether the PNG were alienated from the SNN by conveyance to the CPR, falls into the third category of paragraph 10 as described by McLachlin,

CJC in *Mitchell* above, that is, whether the government extinguished the SNN's rights to the PNG. Encana says it did by its alienation of the PNG to CPR; the SNN say not. There is no question here of any incompatibility with any Crown assertion of sovereignty (the first of the 3 categories in *Mitchell*), or of any voluntary surrender by the SNN before the conveyance to CPR (the second of the 3 categories in *Mitchell*). No party suggests that the SNN voluntarily surrendered the PNG prior to the sales to CPR or the 13T3 or the 15T133 lands.

[243] The SNN's acknowledgement of the amendments to the *Indian Act* by 1917 removing the requirement of surrender by them before Canada could sell their lands is of no consequence on these applications, for reasons I will come to shortly. Were these issues determinable on standard common law principles alone, then the wording used in the Letters Patent,[14] of such things as "all" and "forever", informed by the words "fee simple" in the Certificates of Title,[15] would militate in favour of a conclusion that Canada intended to, and did, convey the PNG to CPR. If in that way Canada did sell the PNG to CPR without prior surrender, Canada may be liable to the SNN for doing so, but the third party purchaser CPR would continue to enjoy full ownership of the PNG for which it appears thereby to have bargained.

[244] Determining just what CPR acquired in this case, however, requires considerations beyond traditional principles of property law. In *Osoyoos* the majority of the Supreme Court of Canada stated, at paragraph 43:

> First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land: *St. Mary's Indian Band, supra*. Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land: see *Blueberry River Indian Band*, supra, at para. 7, per Gonthier J. This is as true of the Crown's purpose in making a grant of an interest in reserve land to a third party as it is of an Indian band's intentions in surrendering land to the Crown. (emphasis added)

[245] Among other consequences, this means determining whether the SNN's Aboriginal Rights to the PNG were alienated also requires consideration of the test for extinguishment. For purposes of this decision, I have nevertheless addressed that separately from this portion of my reasons which, with respect to alienation, considers whether the evidence of Canada's intent is such that the SNN claim should be dismissed summarily.

[246] For one of the two conveyances at issue here the land was described in metes and bounds terminology. In *Osoyoos*, the majority of the Court suggested that the use of metes and bounds description versus a reference only to a right-of-way and a survey plan indicates a different intention regarding what is being transferred:

> 87 The use of the term "land" is not determinative of the scope of the interest being conveyed because the legal definition of "land" includes "interests in land". This is true of the definition found in legal dictionaries and virtually every statutory definition, federal or provincial, of the term "land". Furthermore, the recitals state that the Minister "has applied for the lands hereinafter described" and that the Governor General in Council "is pleased hereby to consent to the taking of the said

[14] *Supra* at paras 205 & 214.
[15] *Supra* at paras 207 & 215.

> lands". Thus, the recitals clearly refer to the Description as containing the details of the interest in land being transferred. In this connection, it is most significant that the Description uses the term "rights-of-way", rather than referring to the metes and bounds of parcels of land.

[247] In this case, one of the conveyances (by Letters Patent 13T3) was of lands described therein by reference to what CPR had earlier been taken for right-of-way and station ground purposes, not by metes and bounds.[16] That suggests only a surface interest was intended to be conveyed, according to the reasoning in *Osoyoos*. The second parcel was described in the Letters Patent (15T133) by metes and bounds,[17] favouring a conclusion that the full fee simple, inclusive of PNG was intended to be, and was conveyed in that instance.

[248] Despite the apparent differences in the nature of the property rights transferred by Letters Patent, for each parcel of land the ensuing Certificate of Title registered the entire fee simple in the name of CPR.[18]

[249] However, at the time of those registrations, section 170(2) of the *Railway Act*[19] was in force and had the effect of entitling a railway company, as registered owner of land that had previously been reserve lands, to the underlying mines and minerals if and only if they were "expressly named" as included. In the case of both the 13T3 lands and the 15T133 ballast pit lands, the Certificate of Title did not expressly name the mines and minerals (or as a subset thereof, the PNG) as thereafter being owned by CPR. Therefore, by operation of law, on this record it does not appear so conclusive as to warrant summary dismissal of the SNN's claim for *in situ* PNG, that Canada intended the PNG be alienated from the SNN to CPR at the time of CPR's purchase of Railway Lands. This is provided that the federal *Railway Act* was in fact operative in the face of any contrary provisions of other federal law or the provincial *Land Titles Act*, such as perhaps those on indefeasibility.

[250] Encana says section 170(2) of the *Railway Act* does not apply here, by operation of the *CPR Act*. Encana argued that (i) the *Railway Act of 1879* Act applies, not the Railway Act of *1906 Act*, and the 1879 Act did not contain a deeming provision like section 170(2); (ii) as a "special act" the *CPR Act* superseded the more general *Railway Act* and that, in any event, (iii) by its express terms it takes precedence over the *Railway Act* on this issue. Specifically, clause 22 of the CPR Contract incorporates by reference the provisions of *The Railway Act* of 1879 except where they are inconsistent with the *CPR Act*, and Encana says that Clause 12 of the CPR Contract required Canada to extinguish the Indian title to the Railway Lands.[20]

[251] I do not agree with Encana's conclusion. I agree that the *CPR Act* is a special act that overrides legislation of general application to the extent of any conflicts between them: *British Columbia (AG) v Canada (AG)*, [1994] 2 SCR 41 at 52, Lamer CJ, dissenting on other grounds. I do not agree that the *CPR Act*, and more specifically the CPR Contract approved thereby, expressly applies to this issue. On the record before me, Clause 12 of the CPR Contract is not triggered; therefore there is no inconsistency between it and either the *Railway Act of 1879* or the *Railway Act*

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[16] *Supra* at para 205.
[17] *Supra* at para 214.
[18] *Supra* at paras 207 & 215.
[19] *Supra* at para 187.
[20] *Supra* at para 177: "12. The Government shall extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway."

of 1906. In this regard I agree with Esson JA who, writing for the British Columbia Court of Appeal in *Squamish*, concluded at paragraph 93 that Clause 12:

> […] was not intended to have application to reserve lands and that the reference in it to 'Indian Title' was then understood as referring to the usufructuary title recognized in such cases as *St. Catherine's Milling and Lumber Company* […].

[252] Esson JA elaborated as follows, at paragraph 94:

> There was ample room for application of Article 12 because of the enormous areas granted to CPR along the route of its right of way across the territories which now comprise the provinces of Manitoba, Saskatchewan and Alberta and the railway belt in British Columbia. Express provisions for the taking of reserve lands were to be found in the *Indian Act* and the *Railway Act* (see paras. 21 and 22, supra). Article 12 cannot have been intended to override that legislation.

[253] Further, Encana has not demonstrated to the summary dismissal standard that the 13T3 and 15T133 lands are caught by the phrase in Clause 12 "herein appropriated, and to be hereafter granted in aid of the railway". Absent further evidence, that phrase refers to the specific Crown lands contemplated to be conveyed to CPR as part of the consideration for promising the railway (the lands "herein appropriated") and to the specific identified Crown lands on which CPR would build the railway or require for that construction and operation (the lands "hereafter granted *in aid of* the railway"). The aforementioned two parcels of land do not fall in either category. They were purchases of reserve lands, not grants of land from the Crown that were part of the consideration for CPR undertaking construction and operation of its railway and they were not lands later or "hereafter" granted.

[254] From considering the entirety of the CPR contract, Clause 12 thereof does not apply to land over which Canada held the legal title but not the beneficial interest. It does not apply to land that CPR would have to purchase. It only applied to lands Canada would grant to CPR as described in the CPR Contract. Reserve land was not among those lands. No section of the *CPR Act*, including any clause of the CPR Contract or of Schedule A thereto, dealt with the acquisition of reserve land and therefore, based on the record before me, I am unable to conclude that the SNN's Reserve Lands were lands "herein appropriated". Therefore, I am also unable to find any conflict between the *CPR Act* and the *Railway Act of 1906*. On this record it is not without merit for SNN to say that subsection 170(2) of the *Railway Act* of 1906 applied at the time of the registration or, at the very least, that it informs the context.

[255] In 1940, the SNN surrendered to the Crown the Reserve Lands PNG. Canada argues that only mineral interests that were part of the reserve at the time were surrendered. It maintains that the Railway Lands' mines and minerals were already transferred to CPR in 1893 by way of Letters Patent and Order in Council. Canada concludes, therefore, that the lands and associated mines and minerals did not constitute part of the reserve in 1940.

[256] The SNN note that the "Railway Lands through the Stoney Reserves were not excepted from this surrender" and infer therefrom that they were the SNN's immediately prior thereto and believe they continue to hold an entitlement to them.

[257] The 1940 surrender was broad, encompassing 82,500 acres of the Reserve Lands. By it the SNN did:

> [...] release, remise, surrender quit claim and yield up unto [the Crown] ... the oil and gas rights... in trust to lease the petroleum and natural gas mining rights ….

[258] The associated Order in Council in 1942 went further than that and said the surrender was:

> …together with such surface rights over such area of land within the said reserve as may be necessary for the mining thereof…

[259] That made practical sense as without surface rights the oil and gas would be less accessible and the purpose of possible leases thereof impeded if not thwarted. Therefore the surrender of the "mining rights", in my view, necessarily entailed the associated surface right over the oil and gas *in situ*. The relevance is this. At the time, CPR owned the surface rights to the Railway Lands. The SNN could not surrender the surface access to the Railway Lands' PNG and so the PNG at issue in this action, *in situ* under the Railway Lands, could not have been a part of the surrender. That does not inform the question of who owned the *in situ* PNG under the Railway Lands. It just suggests the PNG at issue in this case was not part of the surrender.

[260] In result, Encana has not met its burden to show Canada intended alienation of the PNG to CPR and that SNNs' position is without merit.

[261] The current record lacks persuasive evidence of the necessary intention to convey the PNG, or express inclusion of the PNG in the conveyance, to sustain Encana's position that the SNN were dispossessed of the Railway Lands' PNG or whether there was alienation of the PNG upon an acquisition by CPR. The nature of the transactions between Canada and CPR regarding the SNN's interest at the time of the transfers remains insufficiently clear to warrant dismissing summarily the SNNs' claim to recover the *in situ* PNG. Whether the Railway Lands' PNG were originally transferred to CPR is an issue that does not lend itself to a fair and just determination summarily on this record. Therefore, I dismiss Encana's Application on this ground.

iv. Are Encana's titles indefeasible?

a. Parties' positions

[262] Encana also argues that the fee simple titles now registered in its name are indefeasible, pursuant to the provincial land titles legislation.[21] The initial registration in the name of Encana's predecessor CPOG occurred sometime between 1965 and 1977.[22] These certificates of title appear to now satisfy the *Railway Act* requirement of expressly naming the minerals interest, although as Encana points out, Encana does not meet the definition of "railway company" to which section 170 and similar sections in subsequent railway acts apply.

[263] Encana relies on indefeasible title and says it is a *bona fide* purchaser for value. Encana says that it purchased the mineral rights it owns, as reflected in its titles, in the ordinary course of business and in good faith for valuable consideration. Encana submits that even if it were to concede that there was a mistake with CPR's title, which it does not, it was valid, but voidable in light of section 132 of the *Railway Act* of 1903 (subsequently section 170). Encana submits that the fact

[21] Certificates of Title 13T3A and 15T133A (titles to the mineral interests, inclusive of the PNG) are now registered in Encana's name.
[22] *Supra* at para 63.

that its purchase transaction followed the conveyance to CPR makes it no longer possible to void its title and it remains valid. Alberta submits that if there is an issue regarding an alleged improper transfer of mines and minerals from the SNN, the issue is potentially between the original grantor and the SNN. It does not follow through subsequent owners of the land.

[264] The SNN allege that CPR created a wholly owned subsidiary, CPOG, for the specific purpose of holding, developing and exploiting CPR's purported mineral rights. The SNN add that CPR was fully aware, or should have been fully aware, of the statutory interest and title in the PNG underlying the Railway Lands, including the express condition that the occupation, use or possession of the lands was for railway purposes and that there was an express restriction on CPR's ability to alienate the Railway Lands. The SNN state that CPOG was not an innocent arm's length, third party purchaser for value of the PNG, and that "CPOG's successors in title remained wholly owned or majority controlled subsidiaries of CPR until, at the earliest, on or about October, 2001 when PanCanadian Energy Corporation became a 100% publically owned company". [23]

[265] The SNN allege that the purported alienation, conveyance, transfer assignment or other disposition of the PNG to CPOG by CPR, in or about 1965, was for less than market value. They allege that Encana is an affiliate of CPR and claims title to the Railway Lands' PNG "through a non-arms' length transaction."

[266] The SNN acknowledge the concept of corporate veil, but add that the *CPOG Act* provides for the property conveyed to be subject to the same rights and liabilities as that of CPR which include all of the rights and liabilities under the *Railway Act*. They say that in light of the *CPOG Act*, the onus in this case remains on Encana to show that it acquired the titles by *bona fide* purchase for value. The *CPOG Act* expressly excludes the PNG if the PNG were not part of the original grant.

[267] Encana says that the fact that there may have been a relationship or some affiliation between CPOG and CPR and the possibility that they were at non-arm's length are irrelevant. What matters is the passage of value. Encana says that the Court should not enter into enquiries to the adequacy of consideration.

b. General principles

[268] The Torrens System of land registration is statute based. It was first introduced in the North-West Territories in 1886 by *The Territories and Real Property Act*, 1886, c 26. Under the Torrens System, registration creates legal ownership of the land or of an interest in said land. A certificate of title is conclusive proof of ownership: Alberta Law Reform Institute, Limitations Act: *Adverse Possession and Lasting Improvements*, Final Report No 89 (Edmonton: Alberta Law Reform Institute, 2003) at 7 [ALRI 2003 Report]. The introduction of the Torrens System was intended to facilitate transfers, simplify the procedure and provide certainty to the title and ownership of land: Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 480; *Turta v Canadian Pacific Railway*, [1954] SCR 427 at 442 & 443.

[23] The SNN allege that on or about 1971 through the amalgamation of CPOG and PanCanadian Petroleum Limited, PanCanadian Petroleum Limited was created. They allege that Pan Canadian Energy Corporation was created on or about January 2002 by the amalgamation of Pan Canadian Petroleum Limited and PanCanadian Energy Corporation. The SNN further allege that Encana was created on or about January 2002 by the amalgamation of PanCanadian Energy Corporation and Alberta Energy Company.

[269] Two key principles of the Torrens System are the mirror principle and the curtain principle. The mirror principle refers to the idea that the register mirrors all rights in relation to a particular parcel of land and accurately reflects a person's title, subject only to fraud and certain statutory exceptions. Thus, an individual could examine an abstract of title for a specific parcel of land and see listed all of the interests that pertain to that parcel, and rely on it: Ziff at 481. The curtain principle refers to the transactional certainty to third party purchasers or encumbrancers dealing with the registered owner. The purpose of the curtain principle is to prevent prior claims being acted upon after a specified event, which in the case of land titles is the issuing of a new certificate of title: ALRI 2003 Report at 7. An individual wishing to acquire an interest in land can rely on the register to determine any existing interests in the particular parcel of land. Under the curtain principle, there is no need to second-guess the government records as to the validity of the rights listed on the register as "a curtain is supposed to be brought down on these past dealings": Ziff at 481.

[270] At the core of the Torrens System is the concept of indefeasibility and "[a] title is indefeasible when it cannot be vitiated by some antecedent act that might undermine the validity of current rights": Ziff at 483. An owner of a parcel of land whose name is on the certificate of title has an indefeasible title against all the world, subject to fraud or certain specified exceptions: Ziff at 481; *Turta* at 443. It is a lowering of the curtain on past transactions: Ziff at 483. Where registration protects against subsequent claims, indefeasibility protects against prior claims: ALRI 2003 Report at 8.

[271] Under the Torrens System, a certificate of title is conclusive proof of ownership. However, trespass to land is not concerned with title or ownership; it is concerned with legal possession of the land: Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 111. In order for a plaintiff to maintain an action for trespass, the plaintiff must show that he or she had possession of the land in question: Gerald HL Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto: Carswell, 2010) at 41. The New Brunswick Court of Appeal in *Legere v Caissie* (1958), 15 DLR (2d) 424 (NBCA) at 37 adopted Halsbury's definition of the principles relating to possession:

> Actual possession is a question of fact: it consists of two elements, the intention to possess the land and the exercise of control over land to the exclusion of other persons. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; possession means possession of that character of which the land is capable.
>
> Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong-doer. A mere trespasser cannot, however, by the very act of trespass immediately and without acquiescence give himself possession.

[272] Possession gives the possessor property rights that will be protected against those with inferior property rights: Klar at 112. Proof of ownership through title is a strong *prima facie* proof of possession, and a person with title may be *presumed* to be in exclusive possession of the land: Klar at 112; see also *Spearwater v Seaboyer* (1984), 65 NSR (2d) 280. This presumption may lead to a finding of implied possession: Michael A Jones et al, eds, *Clerk and Lindsell on Torts*, 21st ed (London: Thomson Reuters, 2014) at 1229. Nonetheless, a trespass claim could fail where contrary evidence regarding the possessor of the land is adduced: Klar at 112. Put in the context of this case, this means for instance that possession by virtue of being currently named as the registered owner could, subject to available defences, still lead to a finding of trespass.

[273] In both *Turta* and *Kaup v Imperial Oil Ltd.*, [1962] SCR 170, the Supreme Court of Canada examined indefeasibility. A key principle that emerges from these two cases is that indefeasibility protects the title of a *bona fide* purchaser for value, such as in *Turta*, but not that of a volunteer, such as in *Kaup*. In *Turta*, the Court held that where an error is made in the certificate of title, it can be corrected in some instances, unless the error is relied upon by a *bona fide* purchaser for value. *Turta* relied upon the certificate of title at the registrar reserving coal but not petroleum and he provided consideration for the transfer of land. The subsequent correction of the certificate of title made by the registrar was of no effect because the registrar did not have the authority to make such a correction, as it prejudiced the rights conferred for value: at 449. In *Kaup*, the Court held that an error in registration does not automatically create indefeasible title such that the beneficiary of that error can convey a greater title than he or she actually acquired: at 171. In *Kaup*, Mrs Kaup transferred the property from herself to herself and Mr. Kaup and for no consideration, thus the Kaups were volunteers, not *bona fide* purchasers for value, and therefore their title was not indefeasible: at 171 & 177.

c. Evidence

1. Agreement of 1958

[274] On June 9, 1958, CPR granted an option to CPOG to purchase any or all of CPR's mineral lands in Alberta, Saskatchewan and Manitoba under the terms of an option agreement.

[275] This agreement came into being only a few months after the release of *Canada (Attorney General) v Canadian Pacific Railway Co (Re Railway Act 1952 (Canada))*, [1958] SCR 285. There, it was conceded before the Supreme Court that, if valid, CPR was bound by section 198 of the *Railway Act* and did not have mines and minerals in light of that section.

[276] The 1958 Agreement provides:

> NOW THEREFORE, THE PARTIES HERETO COVENANT AND AGREE AS FOLLOWS:
>
> 1. In consideration of an option granted and the undertaking given by the Oil Company to the Railway Company as set forth in paragraphs 2 and 3 hereof respectively, the Railway Company hereby grants to the Oil Company the sole and exclusive option as and from the effective date of this agreement for a term of twenty-one (21) years of purchasing from time to time any and all of the said mineral lands belonging to the Railway Company, including the interests of the Railway Company in reservation agreements, leases and related agreements covering any of such mineral lands so purchased at the price of One Dollar ($1.00) per acre.
>
> 2. In consideration of the option granted by the Railway Company to the Oil Company as set forth in paragraph 1 hereof, the Oil Company hereby grants to the Railway Company the sole and exclusive option as and from the effective date of this agreement for a term of Twenty-one (21) years of purchasing from the Oil Company from time to time the capital stock of the Oil Company at the price of One Dollar ($1.00) per share.
>
> 3. The Oil Company agrees that it will in an expeditious and practical manner, either directly or indirectly, at no expense to the Railway Company, explore for and

> develop the mineral resources in any mineral lands acquired hereunder; market and sell the products thereof; and if and to the extent required by the Railway Company will manufacture, refine and transport the products, by-products, and derivatives thereof.
>
> 4. All purchases of mineral lands hereunder shall be evidence by registerable transfers and any disposition of the Railway Company's interests in reservation agreements, leases and related agreements shall be in the form of an assignment set forth in Schedule A annexed hereto and made a part hereof. All transfers and assignments hereunder shall be prepared by the Railway Company at the expense of the Oil Company.
>
> [...]
>
> 7. Any and all title searches and registration fees of mineral lands transferred and interests therein assigned as aforesaid shall be at the Oil Company's expense and the Railway Company shall be under no obligation to produce abstracts of title or other documents pertaining thereto except such as are in its possession.
>
> 8. Notwithstanding anything in this agreement, it is expressly understood by the Oil Company that the Railway Company does not purport to warrant or guarantee that it has perfect title to any of the mineral lands mentioned in the first recital hereof, that all transfers and assignments hereunder shall be subject to any and all of the Railway Company's defects in title thereto, that the Oil Company shall not have any right of recourse against the Railway Company for any defects in title to mineral lands transferred or assigned as aforesaid or any matter or thing ensuing therefrom and that no transfer or assignment as aforesaid shall convey any right, title or interest to the surface of such lands unless the Railway Company is the owner thereof in which case the Railway Company hereby consents to the entry, use and taking of the surface of such lands to the extent necessary for the purposes of the Oil Company.

[277] The SNN submit that because of paragraph 3, it does not appear as if CPR is transferring its entire control of the lands to CPOG. They say that this clause demonstrates that CPR maintained some level of control or discretion over the minerals that CPR transferred to its subsidiary, Encana's predecessor in interest under the 1958 Agreement. For instance, paragraph 3 provides: "to the extent required by the Railway Company, will manufacture […]". The SNN also note paragraph 8, which they say means that CPOG expressly agreed to be subject to any liability and all the railway company's defects in title. Also referring to paragraph 3, Encana submits that when the SNN say that $1.00 per acre is inadequate, they are leaving out the commerciality of the transaction. Encana further notes that the consideration also includes an option on the part of CPR to acquire shares in the capital stock of CPOG.

[278] Regarding paragraph 4, Encana submits that it provides in no uncertain terms that the recipient of these minerals is concerned with ensuring that it is going to have the title registered.

[279] Based on paragraph 7, Encana submits that there was, in fact, reliance on the Register.[24]

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[24] Encana also refers to *Darnley v Tennant*, 2006 ABQB 575 at paragraphs 23 and 26 to say that the onus is on SNN to show that Encana's predecessor gave no value and that a "purchaser for value can rely on the register without having to show subjective reliance or change of position". It also refers

2. Agreement of 1963

[280] The Agreement of 1963 is an amendment to the Agreement of 1958, by which CPOG exercises the option and purchases some mineral lands.

[281] CPR submits that by this agreement, CPR and the Calgary and Edmonton Railway transferred a large portion of their mine and mineral interests in Alberta to CPOG under the terms of an agreement dated December 31, 1963.

[282] Paragraph 1 of the 1963 Agreement provides:

> 1. The Oil Company hereby purchases from the Railway Company the mineral lands belonging to the Railway Company and to The Calgary and Edmonton Railway Company as follows:
>
> > The mineral lands set forth in Schedule "A" attached to this Agreement excepting therefrom the mineral lands set forth in Schedule "B" attached to this Agreement.
>
> And containing 10,921,822 acres more or less at the price of One Dollar ($1.00) per acre now paid by the Oil Company to the Railway Company (receipt whereof is hereby acknowledged).

[283] The SNN reply that the transfer effected by the 1963 Agreement at law could not have included the PNG. The SNN say this agreement does not include any of the PNG that was purported to be included in Certificates of Title 13T3 and 15T133 (they are not listed on Schedule A).

[284] The SNN submit that since the CPR refused to provide an explanation as to why these lands were omitted from Schedule "A" [25], the Court may draw an adverse inference that CPR did not hold an interest in the PNG or at least they say it is a triable issue.

3. CPOG Act 1965

[285] In 1965, Alberta enacted the *CPOG Act*, a private act, which provides that CPR's interests in the mines and minerals in the Province of Alberta are vested in CPOG.

[286] The *CPOG Act* provides as follows:

> WHEREAS Canadian Pacific Oil and Gas Limited has by its petition prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the petition:

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to *Darnley* at paragraph 26 to say that to impose subjective reliance is inconsistent with Torrens principles.

[25] The specific undertaking was: "To make reasonable inquiries and to review CPR's records to determine and advise what information CPR has with respect to why the right-of-way land and the station ground lands and Ballast pit lands were excluded from Schedule A in 1963.
Basis of objection: Question is not relevant to the issues on the motion and would be too onerous to answer."

THEREFORE, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:

1. All mines and minerals or any of them, any interest in mines and minerals or any of them and any right pertaining to or associated with mines and minerals or any of them owned or held by Canadian Pacific Railway Company or by The Calgary and Edmonton Railway Company in the Province are hereby vested in Canadian Pacific Oil and Gas Limited.

2. Upon written application of Canadian Pacific Oil and Gas Limited to that effect accompanied by such fees as may be fixed by the Lieutenant Governor in Council, the Registrar of Land Titles for the appropriate Land Registration District shall register Canadian Pacific Oil and Gas Limited as the owner of mines and minerals or any of them, of any interest in mines and minerals or any of them and of any right pertaining to or associated with mines and minerals or any of them which prior to the coming into force of this Act stood in the name of Canadian Pacific Railway Company or of The Calgary and Edmonton Railway Company.

3. Canadian Pacific Oil and Gas Limited shall not acquire any better title to the mines and minerals or any of them, to any interest in mines and minerals or any of them and to any right pertaining to or associated with mines and minerals or any of them vested in Canadian Pacific Oil and Gas Limited under section 1 of this Act than that which Canadian Pacific Railway Company or which The Calgary and Edmonton Railway Company had immediately prior to the vesting of such mines and minerals or any of them, of any such interest in mines and minerals or any of them and of any such right pertaining to or associated with mines and minerals or any of them in Canadian Pacific Oil and Gas Limited.

4. Upon the coming into force of this Act, Canadian Pacific Oil and Gas Limited shall have the same rights and liabilities in claims, demands, causes of action, securities, complaints, debts, obligations, contracts, actions, applications or other matters relating to the mines and minerals or any of them, to any interest in mines and minerals or any of them and to any right pertaining to or associated with mines and minerals or any of them vested in Canadian Pacific Oil and Gas Limited under section 1 of this Act as Canadian Pacific Railway Company or as The Calgary and Edmonton Railway Company had at or before the coming into force of this Act.

[287] The SNN submit generally that the *CPOG Act* is a private act and where there is ambiguity, it needs to be interpreted against CPOG. SNN are not party to this private act and they submit that it should not infringe upon theirs or Canada's rights. The SNN also submit that the *CPOG Act* cannot serve to extinguish any interest in the SNN's lands. They argue that on April 12, 1965, Encana was put in the shoes of CPR under the *CPOG Act* and that it should be subject to the same claims, rights and liabilities as CPR and that it remains subject to the obligations under the Railway Acts. The SNN say that the "curtain" and "mirror" principles of the Torrens System are not applicable to titles resulting from the statute. Relying on the *CPOG Act*, the SNN argue that Encana cannot rely upon the face of the register and the Land Titles legislation. The SNN submit that in light of the *CPOG Act*, Encana is precluded by these legislative provisions from availing itself of the "curtain" and the "mirror" upon which a true *bona fide* purchaser for value that relied on the face of the register for its title could rely, to cure any defects in title.

[288] The SNN argue that contrary to Encana's position, Alberta has not guaranteed any mineral interests that CPOG obtained through the operation of the *CPOG Act* and Encana's title to the PNG, as a result of the legislation, is no better than CPR's title. Encana is subject to the correction of any errors in the original Crown grant, as though it was the original grantee. The SNN argue that Encana is now fully exposed to and subject to not only CPR's rights but also CPR's liabilities and that the certificates of title are not conclusive.

[289] Alberta submits that the intent of the *CPOG Act* is obvious. Alberta says that the intent is the confirmation of the commercial transaction between CPR and Encana for the transfer of mines and minerals located in the province of Alberta.

[290] The SNN argue that the *CPOG Act* specifically prevents the *Land Titles Act* from making bad titles good and it makes clear that CPOG shall have the same rights and liabilities in claims and demands. Thus, even if Encana can show that it is a *bona fide* purchaser for value, the SNN say that Encana is in the same position that CPR was in. Encana did not obtain any better title than CPR and its rights and liabilities are identical to those of CPR.

[291] Encana says that the entire purpose of the legislation, as set out in section 1 of the *CPOG Act*, was to vest of all of the mines and minerals previously held by CPR in CPOG. They argue that it would be a surprising interpretation of the Alberta legislature's intent that no such mines and minerals were actually received. Encana submits that nothing in the *CPOG Act* exempts the operation of the statutory regime in force in Alberta respecting land titles or limitations nor does it exempt from common law principles generally.

[292] Alberta submits that the *CPOG Act* was merely a mechanism to confirm the transaction and establish a process to determine the fees relating to registration of interests. Alberta submits that section 2 of the *CPOG Act* directs the Registrar of Land Titles to register the land to Encana and sets a mechanism to establish the cost for the change and registration. Sections 3 and 4 expressly state that the *CPOG Act* grants no better interest in the mines and minerals to Encana than the former titleholder had and stipulate that their liabilities also remain the same as before. Alberta argues that the SNN's interpretation of the *CPOG Act* is not plausible nor does it raise a constitutional issue.

4. Agreement of 1969

[293] A Further agreement was formed between CPR [referred to below as "the Railway Company"], the Calgary and Edmonton Railway Company and CPOG [referred to below as "the Oil Company"], dated December 31, 1969, which refers to the 1958 and 1963 agreements as well as to the *CPOG Act*. It provides as follows:

> […]
>
> WHEREAS by further Agreement to Purchase dated the 31st day of December, 1963 the Oil Company purchased 10,921,822 acres more or less from the Railway Company as set forth in Schedule "A" attached to the said further Agreement to Purchase excepting therefore the mineral lands set forth in Schedule "B" attached to the said further Agreement to Purchase; and
>
> […]

> WHEREAS the Railway Company and the Oil Company have agreed that their respective current records shall accord to Schedule "A" attached hereto as determined through data processing; and
>
> WHEREAS the Railway Company and the Oil Company now wish to evidence the acreage so transferred or sold by this Agreement; and
>
> WHEREAS the Oil Company has on various occasions paid the Railway Company a sum calculated at the rate of One Dollar ($1.00) per acre for mineral lands purchased by the Oil company from both or either of the Railway Company and C & E totalling Twelve Million Seven Hundred and Eighty-nine Thousand Seven Hundred and twelve Dollars ($12,789,712.00).
>
> […]
>
> 1.That it is conclusively deemed that the Railway Company and C & E have transferred to the Oil Company under this and the aforesaid Agreements a total of Twelve Million Eight Hundred and Eight Thousand Four Hundred and Fifty-two (12,808,452) acres more particularly described and set forth in Schedule "A" hereunto annexed.
>
> 2. That the Oil Company shall pay to the Railway Company forthwith after the execution of this Agreement the outstanding difference between the sums already paid and the amount of Twelve Million Eight Hundred and Eight Thousand Four Hundred and Fifty- Two Dollars ($12,808,452) being calculated on the basis of One ($1.00) Dollar per acre for the lands as set forth in Schedule "A" attached hereto.
>
> […]

[294] The SNN explain that Schedule "A" of the 1969 Agreement does not include 100% of the Railway Lands. They say that CPR confirmed that the lands with respect to the ballast pit were included in the 1969 Agreement (15T133), but not the entirety of the lands with respect to the railway right-of-way (13T3). The SNN say the issue as to what CPR intended to transfer (whether everything or not) is a triable issue.

[295] The SNN note that in each of the amendments to the 1958 Agreement, the agreed upon purchase price for the PNG, to the extent that such PNG was intended to be or could be subject to these agreements, was $1.00 per acre. The SNN argue that this was significantly below market value for mineral interests. For example, they refer to a mineral lease on 320 acres of the SNN's reserve lands entered by Shell on March 18, 1953, that paid a bonus of $3,200, a yearly rental of $320 and a royalty interest with respect to natural gas produced from these lands. They argued:

> Well, My Lord, whether it's a transaction between -- related companies can have transactions that are *bona fides* but, My Lord, when companies paying a dollar an acre for lands in -- in 1958 for mineral rights, when three years before that lands in the -- in close proximity were generating $10 bonuses and $1 yearly rental, and a 15 percent royalty, for an acre of land, I'm not sure how a Court can conclude that that was for valuable consideration. And again, just as in *Kaup* the lands were transferred for a dollar. Here the lands were transferred for a dollar an acre. And, My Lord, the volume of land transferred makes no difference. 12 million acres of land for $12 million, I am not sure how that can be determined to be valuable consideration.

> And, My Lord, again what's interesting is that in the *Mathias* case, there the parties did in fact determine that Courts can -- Court did consider whether or not fair market value was paid for the lands that were transferred in *Mathias* and I can't find the -- we'll find the reference for that, My Lord, and what the Court was considering in that case was – was whether or not fair -- whether there was a difference between fair market value for fee simple absolute versus fair market value for fee but there was actual evidence with respect to what the fair market value was of the property in that instance for the taking. And here --

[296] Encana submits that it is unknown as to what kind of allocation the $12 million was for and that in any event there is no concept of fair market value or even market value in the *Land Titles Act*. Encana submits that in light of the 1969 Agreement, especially referring to clauses 1 and 2, there is no doubt that CPOG was a purchaser for value in acquiring the mineral rights from CPR.

d. Conclusion with respect to indefeasibility

[297] Whether Encana's titles to the PNG are indefeasible cannot be decided summarily. It is an issue that does not lend itself to adjudication that is fair and just to the parties on the present record. That is, I am not confident that I can fairly resolve the dispute on the basis of indefeasibility, in light of this record.

[298] First, CPR could not convey to CPOG a greater interest than it owned and that interest is uncertain as determined above. That uncertainty alone is not dispositive of the indefeasibility issue, but does invite greater caution. Even if Encana's title is indefeasible, it is unclear whether that title included the PNG or not.

[299] By way of example, if Encana's titles are indefeasible, are they the titles that derived from the registration in CPR's name, that said CPR owned the "fee simple" interest, or was it from the titles registered in CPR's name that by operation of the *Railway Act* and silence on the inclusion of any PNG, excluded them. If the latter, upon conveyance of those titles to Encana's predecessor, which was not a railway company, did the silence in CPR's title as to the inclusion of any mines and minerals result in the PNG no longer being excluded from the registration? If not, did that occur later, upon the repeal of the *Railway Act*? These are complex issues of fact and law ill-suited for summary determination.

[300] Second and relatedly, indefeasibility protects the title of a *bona fide* purchaser for value, but not of a volunteer. Consequently, an erroneous registration does not automatically create indefeasible title such that the beneficiary of that error can convey a greater title than was actually acquired. Here it is not sufficiently certain to me that Encana's predecessor, CPOG, was a *bona fide* purchaser for value rather than a volunteer. The SNN have raised sufficient doubt in that regard that the issue cannot be said to be without merit.

[301] I note parenthetically that, in light of *Chippewas of Sarnia Band v Canada (AG)* (2000), 51 OR (3d) 641 (CA), [2001] SCCA No 63, leave to appeal to SCC refused, 28365 (8 November 2001), [2002] 3 CNLR, reconsideration by SCC refused, 28365 (13 June 2002), even if Encana's argument of *bona fide* purchaser for value prevailed, it would not necessarily be a full answer. In *Chippewas*, the Court wrote:

> 309 […] It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would

> constitute an unwarranted denial of a fundamental right. It is unnecessary to consider that possibility on the facts of the case before us.

[302] Third, and more generally, whether Encana's titles are indefeasible is not "unassailable", to use the words endorsed by the Alberta Court of Appeal: *Access Mortgage* at paras 61 & 66. The timing of the transfer(s) lacks clarity, the relationship between CPR and CPOG lacks clarity, and the exact content of the transfer (which lands were included in the transfer between CPR and CPOG at what time) lacks clarity. The legal effect of CPR potentially remaining on title after enactment of the *CPOG Act*, inconsistent with the suggestion of a transfer in 1965, detracts from the certainty necessary for summary disposition. The legal effect of the change of control of CPOG over time may ultimately assist Encana, but at this stage just adds a layer of complexity that militates further against summary dismissal.

[303] Encana says, in effect, none of that matters; all that matters is the clear registration on title of the PNG in Encana's name. I cannot agree in these circumstances. As stated, enough uncertainty surrounds what the titles themselves represent, plus the *prima facie* evidence that CPR as vendor and Encana's predecessor as purchaser were not necessarily at arm's length, as well as the issue as to whether Encana's predecessor gave value or was a volunteer, that dismissal now would be unjust.

[304] Fourth, whether Encana's titles are indefeasible on this record calls for complex determinations on legal issues that are intertwined with varying degrees of social, historical, legislative and corporate facts. As indicated earlier, in such cases a full trial is required where the record cannot be used to fairly decide legal issues that are unsettled, complex, or intertwined with facts: *Templanza v Wolfman*, 2016 ABCA 1 at para 20; *Amack* at para 36; *Tottrup* at para 11.

v. Has Encana proven extinguishment of Aboriginal Rights?

[305] The SNN also argued that Encana cannot succeed in its application for summary dismissal, because doing so would have the effect of extinguishing their Aboriginal Rights in the PNG and Encana has not satisfied the test.

[306] The test for extinguishment of an Aboriginal right by government is proof of a clear and plain intent to extinguish: *R v Sparrow*, [1990] 1 SCR 1075 at 1099. That is also the test for whether land has been removed from reserve land: *Osoyoos* at paras 47 & 56-57.

[307] Proving such "clear and plain intent" for events so dated presents a difficult task. The Ontario Court of Appeal said in *Chippewas:*

> [240] […] these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right. McLachlin J.'s comments in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 652 (dissenting, but not on this point) are also helpful to understand what is required to meet the "clear and plain" test:
>
> > For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra* at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test is clear evidence that [the government] actually considered the conflict between its intended action on the one hand

> and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

[308] In respect of the position that the Railway Lands' PNG was alienated to the CPR, therefore, it must be demonstrated that the government or legislators had clearly in mind the effect on SNN Aboriginal Rights as they dealt away some or all of the SNN's property.

[309] Here there is no persuasive evidence of the requisite clear and plain intent to alienate the Railway Lands' PNG to CPR along with the surface rights, or in so doing to extinguish the SNN's Aboriginal Rights to it. Encana says the Letters Patent and Certificates of Title show that clear and plain intent. I disagree. Those documents offer no evidence that Canada "actually considered" the conflict between the conveyance to CPR of mines and minerals and the obligations to the SNN. From the Orders in Council the most that can be inferred as to intent is that Canada, by the Governor in Council, was aware of the need for its consent prior to the respective conveyances. That does not go far enough to demonstrate that Canada actually consented or intended to sell the *PNG* with the other property rights being conveyed, or that Canada actually considered the conflict between such a sale to CPR and the SNN's interests.

VII. Matters Not Addressed

[310] The SNN say that Encana's arguments relating to alienation and indefeasibility cannot succeed also because the effect would be to extinguish their Aboriginal Rights to the *in situ* PNG, yet the legislation Encana relies on for those arguments (limitations legislation for the first and land titles legislation for the second) cannot have that effect constitutionally.

[311] Since I have not agreed that Encana's alienation or indefeasibility arguments compel summary dismissal, the issue as to the constitutional applicability of the provincial legislation does not arise. In *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, Sopinka J, writing for the majority of the Court, stated:

> 9 The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

[312] I refrain from addressing the constitutional applicability issue also because if the Court concludes following a subsequent hearing, or at trial, that there was alienation and extinguishment of Aboriginal Rights, the Court may not need to determine the constitutional questions relating to limitations legislation.

[313] I do note that the issue as to whether provincial limitations legislation is constitutionally applicable if it extinguishes Aboriginal Rights has been alluded to in at least two other contexts. First, the Ontario Court of Appeal commented in *Chippewas* at paragraph 241:

> While in an appropriate case a general limitations statute can bar a claim for damages arising from the loss of aboriginal or treaty rights […], different considerations apply where it is contended that the statute itself extinguished the aboriginal or treaty right.

[314] Second, in *Lameman* the Supreme Court of Canada concluded provincial limitations legislation applied to the Aboriginal claim before it, but expressly observed at paragraph 9 that "no notice of a constitutional question was given, and that no constitutional challenge lie before the Court."

[315] Next, Encana may be in a position to have dismissed as against it some of the monetary damages claimed, as falling outside an applicable provincial limitation period, for the same reasons I have dismissed all claims against CPR for damages. I am not comfortable doing so on the basis of current counsel submissions and, in any event, the current evidentiary record does not enable it to be done definitively. This decision is without prejudice to any such future request by Encana.

[316] Finally, since they received no more than passing comment from the parties, not any direct submissions, I make no determination summarily on the basis of any equitable defence[26] or possible differential application of Aboriginal laws adverse to Encana as a "third party", not the Crown.[27]

VIII. Conclusion

[317] For the foregoing reasons, I grant CPR's Application. CPR has no current interest in the *in situ* PNG, so any claim against it for recovery of *in situ* Railway Lands' PNG is pointless. The rest of the claims against CPR are only for damages, are out of time and are therefore without merit, regardless of the alienation and indefeasibility arguments in which it agreed with Encana. The very latest the SNN discovered or ought to have discovered the basis of their potential damages claims against CPR was 1982, well outside the applicable limitation period. Applying the statutory limitation period does not have the effect of extinguishing any Aboriginal Rights since these claims against CPR are for damages alone.

[318] The claim against Encana for recovery of *in situ* Railway Lands' PNG is not dismissed at this time. The factual record is insufficient to allow the fair and just resolution of the issues of alienation and indefeasibility, the grounds Encana advanced as the basis for its application.

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[26] See for example in *Chippewas* at para 306: "To the extent that the Chippewas assert a claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences."

[27] See for example *Manitoba Metis* at para 142: "In this case, the claim is not stale — it is largely based on contemporaneous documentary evidence — and no third party legal interests are at stake."

[319] Because of those conclusions, the constitutional issues do not require determination at this time.

[320] If the parties cannot agree on costs, they may be spoken to in the context of ongoing case management.

Heard by oral and written submissions between the 21st day of January, 2014 and the 28th day of August, 2015.
Dated at City of Calgary, Alberta this 5th day of April, 2016.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

A.P. Argento/A. Stephenson
for the Applicant (Defendant) Canadian Pacific Railway

W. McCachen/D. Samuelson/J. Leci
for the Applicant (Defendant) Encana Corp.

W.T. Osvath/B. Barrett
for the Respondents (Plaintiffs) Stoney Tribal Council and Bearspaw, Chiniki and Wesley Bands

R.Lee
for the Defendant Her Majesty the Queen

N. Dobson
for Alberta Attorney General