

**A Railway, a City, and the Public Regulation of Private Property:
*CPR v City of Vancouver***

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The Arbutus Corridor winds ten kilometres north-south through the west side of the City of Vancouver. Owned in fee simple by the Canadian Pacific Railway (CPR), this fifty to sixty-six foot-wide strip of land is, depending on one's perspective, forty-five acres of enormously valuable real estate, or a precious ribbon of automobile-free urban land (Figure 1). The CPR carved most of the corridor out of the provincial land that induced the company to move the terminus of its transcontinental railway from a planned location at the eastern end of Burrard Inlet to the western end—to what would become Vancouver. Built in 1902 to carry freight and passengers from the commercial centre of Vancouver to the northern arm of the Fraser River and beyond to the fish canning town of Steveston, the Arbutus Corridor line ceased passenger service in 1954, but continued to move freight until 2001. One year before the last train rolled along the line, and as the CPR explored development options, the city passed the Arbutus Corridor Official Development Plan (Appendix A). Intended to preserve the linear strip from development, the plan limited its use to a public thoroughfare, whether rail, transit, or bicycle, or some mix of park and paths that the city labelled a “greenway.” Automobiles were expressly excluded and other development would not be considered. The company turned to the courts, arguing that the city had taken its property for which compensation was due, and *CPR v City of Vancouver* was born.²

This chapter considers the intertwined histories of a railway company and a city that gave rise to *CPR v City of Vancouver*. It begins with the land grants that gave the CPR such a strong corporate presence in Vancouver. The company was one of the city's principal employers and by far its largest landholder, and it used its position to establish basic patterns of urban land use; industrial, commercial, and residential districts all followed the CPR's lead. As the city grew and the CPR sold its land, the company's influence waned, but it retained the capacity to shape the urban form when, in the early 1960s, the CPR turned, through its subsidiary, Marathon Realty, to real estate development. This chapter describes these initiatives, particularly those involving rail lands that were to be converted to other, usually residential uses. It then turns to the Arbutus Corridor, to the CPR's development planning, and to the city's official development plan.

The final two sections of this chapter analyse the progression of *CPR v City of Vancouver* to the Supreme Court of Canada (SCC) and then reflect on what the decision means for the city and what it reveals about the role of the courts in Canada as arbiters of the boundary between public regulation and private property. In its first engagement in nearly twenty years with the doctrine known in the United States as regulatory taking and in Canada, variously, as *de facto* expropriation, constructive taking, or *de facto* taking, the SCC, in a brief twelve paragraphs, ruled in *CPR v City of Vancouver* that public regulation of private property would amount to a taking of that property which warranted compensation only if the state effectively acquired the interest *and* prevented all reasonable uses of that interest by its owner.³ The Arbutus Corridor ODP did not meet either criteria and, as a result, could remain without the city having to

¹ I thank Shea Coulson and David Volk for their research assistance, George Macintosh, QC, for providing access to the appeal books in *CPR v Vancouver*, and Michael Begg, Cole Harris, Felix Hoehn and the editors of this volume for their comments on earlier drafts.

² *CPR v Vancouver (City of)*, [2006] 1 SCR 227, 2006 SCC 5 [*CPR SCC*].

³ *Ibid.*, at para 30.

compensate the company. The future uses of the land now rest with the city, which has broad scope to regulate its uses, and the CPR, which remains its owner. In the meantime, the forty-five acre corridor remains vacant, waiting agreement between private owner and public authority over its eventual use.

Beyond this particular outcome, *CPR v City of Vancouver* appears to confirm the reluctance of Canadian courts to patrol the regulation of private property. Indeed, the courts in Canada have seldom intervened to require public compensation for regulations that limit the uses of private property.⁴ This chapter concludes by locating that judicial reticence within a legal framework that does not include constitutional guarantees of rights to private property.

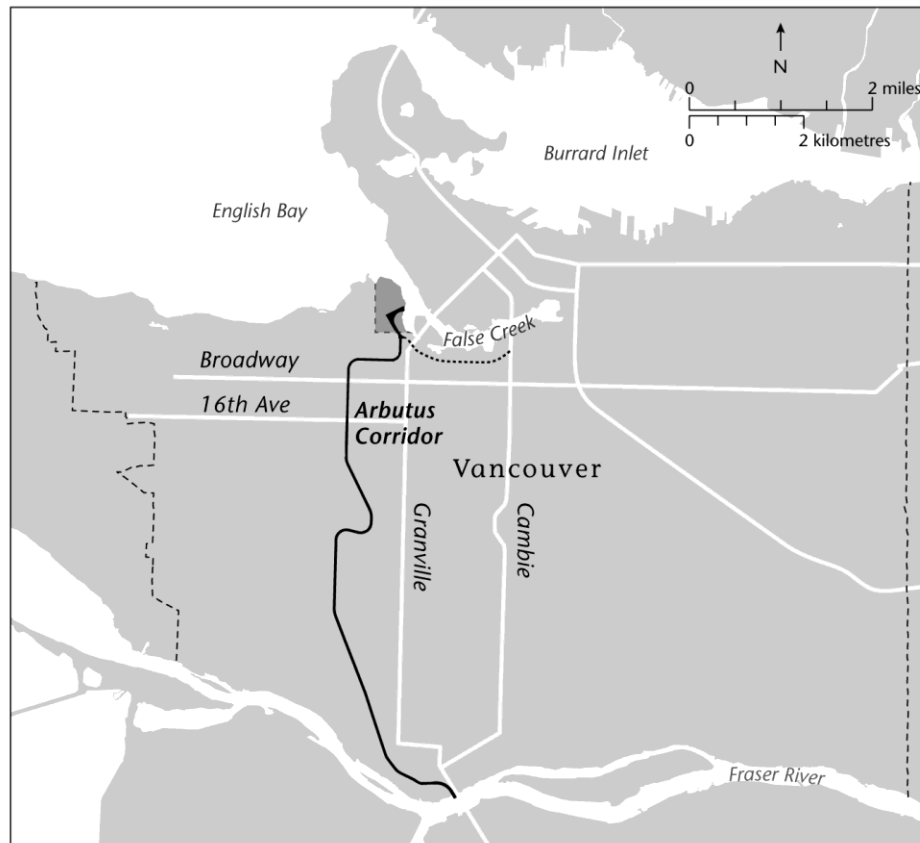


Figure 1.
Arbutus Corridor in the City of Vancouver

A. CPR and the Making of Vancouver

Once upon a time a city gave itself away in order that a great railway might be induced to establish its terminus there.⁵

⁴ The two most notable exceptions are *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101, [1978] 6 WWR 496 [*Manitoba Fisheries*] (see the chapter by Phillips & Martin in this volume) and *The Queen in Right of British Columbia v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1 [*Tener*].

⁵ W. Playfair, "Vancouver and the Railways," (June 1911) *British Columbia Magazine* at 498, quoted in J.M.S. Careless, "Aspects of Urban Life in the West, 1870-1914" in Gilbert A. Stalter & Alan F.J. Artibise, eds, *The Canadian City: Essays in Urban History* (Toronto: McClelland and Stewart, 1977) at 131.

The City of Vancouver arrived with the Canadian Pacific Railway, but might well have been otherwise.⁶ The town site of Port Moody at the eastern end of Burrard Inlet on the Pacific Ocean was to have been the transcontinental line's western terminus.

The Federal government had announced as much in 1881 when it passed the *CPR Act* and identified Port Moody as the end of the line.⁷ In anticipation of the railway's completion and the economic activity that a terminus would bring, investors and speculators acquired land in and around the town site, bidding up its value, even shutting out the railway builder itself. As a result, the CPR looked elsewhere for a location where it might benefit, as a landholder, from the economic activity that the railway would generate. Another small settlement which had emerged around the Hastings lumber mill and the adjacent Granville town site lay twelve miles west on Burrard Inlet. With a population of approximately 400 people in the early 1880s, Granville sat next to 480 acres of provincial government reserve (District Lot 541, Figure 2). Most of the surrounding land was subject to timber leases, but not otherwise alienated, and in 1885 the CPR received the government reserve and a larger parcel (District Lot 526) in exchange for extending the rail line to Granville. The two parcels, together 6,458 acres, comprised the largest land grant to the railway company in any Canadian city (Figure 2).⁸

⁶ This discussion of Vancouver's early history is drawn primarily from Norbert MacDonald, "The Canadian Pacific Railway and Vancouver's Development to 1900" (1977) 35 *BC Studies* 3 [MacDonald, "CPR and Vancouver"]; Robert A.J. McDonald, "City Building in the Canadian West: A Case Study of Economic Growth in Early Vancouver, 1886-1893" (1979) 43 *BC Studies* 3 [McDonald, "City Building"]; Frank Leonard, "'Diplomatic Forces of the new railroad': Transcontinental Terminus Entry at Vancouver and Seattle" (2007) 28 *Journal of Transport History* 21. See also Patricia E. Roy, *Railways, Politicians and the Development of the City of Vancouver as a Metropolitan Centre, 1886-1929* (M.A. Thesis, University of Toronto, 1963) [unpublished].

⁷ *An Act Respecting the Canadian Pacific Railway*, Canada Statutes, 1881, c 1, Sch, s 1.

⁸ For a detailed study of the CPR land grant see Frank Leonard, "'So Much Bumph': CPR Terminus Travails at Vancouver, 1884-89" (2010) 166 *BC Studies* 7-38 [Leonard, "CPR Terminus"].

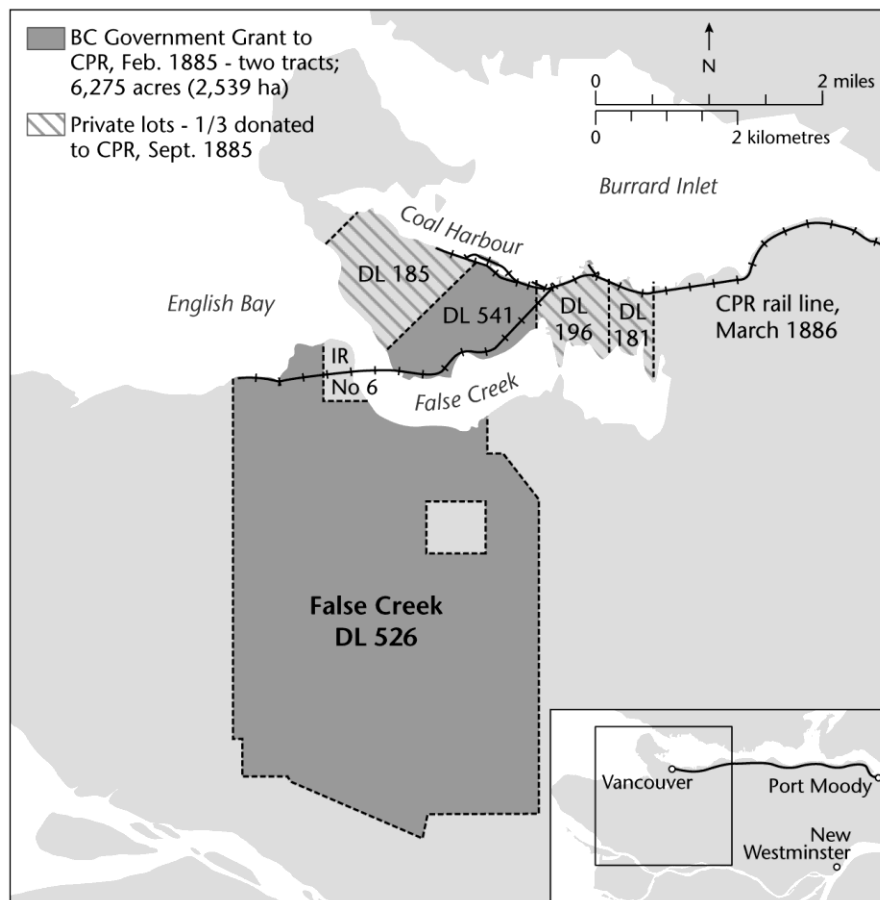


Figure 2.
CPR Land Grant, 1886.

(Source: Based on a map in Frank Leonard, “So Much Bumph’: CPR Terminus Travails at Vancouver, 1884-89” (2010) 166 BC Studies 7-38 at 13.)

The CPR set about maximizing the value of its land and building the City of Vancouver in the process. The city was not so much given away, as the epigram at the beginning of this section suggests, as it was created by the land grant to the railway, a sentiment captured and extolled as part of a reified colonial narrative of progress in the following inscription on a plaque in downtown Vancouver:

Here stood
HAMILTON
First Land Commissioner
Canadian Pacific Railway
1885
In the silent solitude
Of the primeval forest
He drove a wooden stake
In the earth and commenced
To measure an empty land
Into the streets of

VANCOUVER⁹

The provincial land grant established the CPR as the central force in Vancouver's early development. On the basis of this landed position, and wielding threats to move the terminus elsewhere, the CPR induced the existing land owners in lots 185, 196 and 181 on either side of its 480 acre parcel on the peninsula to give the company one-third of their holdings (Figure 2). The CPR then set about moving the locus of economic activity from the Hastings mill and the old Granville town site to its land—lot 541.¹⁰ The intent and effect was to increase the value of the CPR land grant, but the reorientation of the commercial centre also symbolized a shift in the economic base. Lumbering (the early industry around the inlet) remained important, and an industrial salmon fishery expanded rapidly at the mouth of the Fraser River, but work associated with the railway and with the sale and development of land quickly dominated the urban economy. "Railroad and real estate interests," suggests historian Robert McDonald, "rather than wholesale merchants, lumbermen or salmon canners were Vancouver's initial city-builders."¹¹ In these early years, real estate development and a range of supporting commercial activities underwrote Vancouver's economy, not the resource-rich hinterland. By 1891, after six years of rapid growth, the industrial camp of 400 had grown to a town of nearly 14,000.

As Vancouver grew, its relationship with the CPR changed. The city's early supplication and deference was replaced, by the early 1890s, with "a more matter-of-fact, businesslike tone."¹² The relationship became strained when, in 1892, Vancouver funded a competitor railway to build a link with the Northern Pacific Railway in Washington State. The link was not built, but the fact that Vancouver would encourage it revealed a different city from the one that just a few years earlier had so assiduously courted the CPR. Indeed, through much of the 1890s the city would battle with the railway company to the Supreme Court of Canada (SCC) over a right of public access across CPR land to the waterfront.¹³ The city eventually lost this dispute—the SCC denied it the right to extend Gore Avenue across company land—but access to the waterfront, much of it CPR controlled, remained disputed.

Following its early efforts in the commercial core, the CPR turned to subdividing and selling the large tract of land south of False Creek—lot 526 (Figure 2). It marked out a grid, establishing a pattern of numbered east/west avenues and named north/south streets. Ontario Street, the eastern boundary of the CPR land grant, marked the dividing line between a working class east and more affluent west.¹⁴ An increasingly dense network of electric street-rail lines, known as the inter-urban railway, served, and in some cases preceded, residential development. Replicating the federal and provincial governments' strategy of land for railways, the CPR gave lots to the Vancouver Electric Railway & Light Company in exchange for building and operating streetcar lines.¹⁵ In 1902, the CPR also built its own rail line from False Creek to Steveston, the

⁹ Plaque reproduced in Donald Gutstein, *Vancouver Ltd.* (Toronto: Lorimer, 1975) at 13 [Gutstein, *Vancouver Ltd.*]. See also R.E. Watters, ed, *British Columbia: A Centennial Anthology* (Vancouver: Evergreen Press, 1858) at 69.

¹⁰ See Angus Everett Robertson, *The Pursuit of Power, Profit and Privacy: A Study of Vancouver's West End Elite, 1886-1914* (M.A. Thesis, University of British Columbia, 1977).

¹¹ McDonald, "City Building", above note 6 at 28.

¹² MacDonal, "CPR and Vancouver", above note 6 at 24, 25.

¹³ *City of Vancouver v Canadian Pacific Railway Co.* (1894), 23 SCR 1.

¹⁴ See the series of maps, by decade, revealing the expanding city in Bruce Macdonald, *Vancouver: A Visual History* (Vancouver: Talon Books, 1992).

¹⁵ Norbert MacDonal, "A Critical Growth Cycle for Vancouver, 1900-1914" (1973) 17 BC Studies 26.

centre of the salmon-canning industry on the Fraser River. Operated by a subsidiary, the Vancouver & Lulu Island Railway, it began as a steam-hauled passenger and freight service, but was converted to an electric inter-urban line when the British Columbia Electric Railway Company took over its operation in 1905. Passenger service continued until 1954 and freight service until 2001. This was the line, the Vancouver portion of which is shown in Figure 1, which became known as the Arbutus Corridor.

B. CPR and the Re-Making of Vancouver

Statistically speaking, Vancouver is Canada's third largest urban area. In fact, Vancouver is nothing but an overblown company town. The company, of course, is CPR. Vancouver was a creation of the CPR and its fate has always been intimately tied to the railway company.¹⁶

The decision of the CPR to build its rail yards on the north shore or False Creek established the inlet and the land around it as the industrial workshop of Vancouver. By 1891, six of the eight sawmills in the city clustered around False Creek. They were followed by bricks, cement, lime, sand, and gravel works, and by manufacturers of furniture, doors, and windows, many of them serving the local market as the city grew rapidly around the inlet. In the early twentieth century, various metal works and machine shops located on False Creek, and then, with the outbreak of World War I, several shipbuilding yards.¹⁷ The large shipbuilding yards closed shortly after the war, and by the late 1920s parcels of vacant and under-utilized land marked an industrial region in decline. The depression of the 1930s only hastened False Creek's demise as the city's industrial workshop, and squatting communities settled portions of shoreline between industrial operations.¹⁸ World War II reversed the decline only temporarily. Shipping raw materials to the inlet and finished products out became increasingly difficult as the city grew around False Creek, and local residents were increasingly vocal about the problematic by-products of industry, particularly air and water pollution.

The city's initial response was to retain and revitalize the industrial character of the area. The influential Bartholomew Report, prepared for Vancouver's Town Planning Commission in 1928, recommended as much: "it [False Creek] should be encouraged as an industrial entity of extreme usefulness to Vancouver."¹⁹ As late as 1967, Vancouver city council passed a by-law declaring "the land abutting False Creek be retained as an industrial area."²⁰ This by-law was city council's response to a motion from Vancouver's elected parks board to establish a 1,000-foot-wide strip of parkland around the inlet, part of a foresighted effort to create a natural amenity that would attract residents to high-density, inner-city living.²¹ The parks board was not alone in beginning to re-think the uses of False Creek, and city council, not six months later, re-examined its recently stated intent to maintain False Creek's industrial character.²² Then in 1968, the city

¹⁶ Gutstein, *Vancouver Ltd.*, above note 9 at 11.

¹⁷ Robert K. Burkinshaw, *False Creek: History, Images, and Research Sources* (Vancouver: City of Vancouver Archives, 1984) at 28, 31 [Burkinshaw, *False Creek*].

¹⁸ See Jill Wade, "Home or Homelessness? Marginal Housing in Vancouver, 1886-1950" (1977) 25 *Urban History Review* 19.

¹⁹ Harland Bartholomew & Ass., *A Plan for the City of Vancouver, British Columbia, Including a General Plan of the Region, 1928* (Vancouver: Town Planning Commission, 1928), 147. See also Burkinshaw, *False Creek*, above note 17 at 41-42.

²⁰ City of Vancouver Archives, City Council Minutes, 24 October 1967, vol 97, at 140.

²¹ Burkinshaw, *False Creek*, above note 17 at 54.

²² *Ibid*

became one of the principal landowners around the inlet when it acquired most of the south shore of False Creek in a land swap with the provincial government. This led, beginning in 1974, to the city's redevelopment of the south shore and to what geographer David Ley describes as "a picturesque, medium-density, human-scale landscape, with mixed residential, commercial and leisure uses."²³ The federal government contributed as well, remaking its industrial land on Granville Island as public market.²⁴

The CPR was also beginning to rethink its large rail yard on the north shore of False Creek. In the early 1960s, as part of a significant corporate reorganization, the CPR created subsidiary companies to operate its component businesses. One was Marathon Realty, established to manage and develop land that the parent company did not require for its railway operations. In Vancouver, this included the remnants of the original land grant (several golf courses and a large 250-acre parcel in the middle of the original grant) and the expendable parts of its rail operations. Marathon Realty began with the non-railway lands, but then turned to its rail yards on False Creek.²⁵ In December, 1968, several months after the city reversed its industry-first policy for False Creek, Marathon Realty announced plans for a massive housing complex to occupy much of its rail yards.²⁶ False Creek, one of the early iterations of the proposal began, "is an unplanned conglomeration of logbooms, railyards, dilapidated buildings and congested waterways. It is the home of warehouses and industry dependent on rail and water transportation to service a complex urban structure, Vancouver. While the city grew around it with alarming speed, False Creek deteriorated."²⁷ The concept drawings and scale model proposed a modernist marvel of urban redevelopment, including twenty high-rise towers (averaging thirty-five stories) inter-mixed with terraced housing and parks, and served by an expressway: "In essence", said the designers, without any apparent irony, "a suburb of 20,000 people" in the heart of the city.²⁸

Marathon refined the proposal over the next few years, reducing the proposed residential development to 14,000 people and changing the mix of residential and commercial uses, but it was not until June, 1974, that the city rezoned the Marathon lands from "industrial" to "comprehensive development" so as to allow a development of this nature to proceed.²⁹ This rezoning, which massively increased the value of the land, provoked criticism that the company was the undeserving recipient of windfall profits, and the conclusion, expressed above, that Vancouver, Canada's third-largest city, remained a company town.³⁰ But Marathon Realty did

²³ David Ley, "Styles of the Times: Liberal and Neo-conservative Landscapes in Inner Vancouver, 1968-1986" (1987) 13 *Journal of Historical Geography* 40 at 42. Ley goes on to remark that the City's development was the "product of the ideology of liberal reform, emerging from the social innovation of the 1960s and reacting against the rationalism of an earlier general of municipal politicians, planners and designers."

²⁴ See the discussion of the development of False Creek South in John Punter, *The Vancouver Achievement: Urban Planning and Design* (Vancouver: UBC Press, 2003) at 34-47 [Punter, *Vancouver Achievement*].

²⁵ Gutstein, *Vancouver Ltd.*, above note 9 at 15-18, 84-89.

²⁶ The plans were reported in *The Province*, 7 and 8 December, 1968.

²⁷ *Proposal for the North Shore of False Creek, Vancouver, BC* (circa 1970 at 2), City of Vancouver Archives, Marathon Realty (Location # 925-F-6 file 1).

²⁸ *Ibid* at 18.

²⁹ See the discussion in Frederick Joseph Elligott, *The Planning Decision-Making Process of Vancouver's False Creek: A Case Study 1968-1974* (M.A. Thesis, University of British Columbia, 1977) at 44-143. For a brief account from someone who was involved as an academic and city councillor, see Walter G. Hardwick, *Vancouver* (Don Mills, ON: Collier-Macmillan Canada, 1974) at 94-97.

³⁰ Gutstein, *Vancouver Ltd.*, above note 9 at 11. See also Robert Chodos, *The CPR: A Century of Corporate Welfare* (Toronto: Lorimer, 1973).

not develop these lands. The city thought the proposed density too high and insisted on more non-market housing than Marathon was prepared to build.³¹ While the land lay in limbo, its remaining industry on short-term leases, the parcel came to the notice of the provincial government. In 1980, it acquired the large parcel on False Creek from Marathon Realty as the future site for the world exposition to be held in Vancouver in 1986. When Expo '86 ended, the province, in a controversial single transaction, sold the land to one of Hong Kong's most prominent and successful developers, Li Ka-shing. He would develop the property under the auspices of Concord Pacific.³² Marathon Realty turned its attention to the redevelopment of its land on the other side of the downtown peninsula at Coal Harbour.³³

Among its land holdings around False Creek, the CPR retained a rail line that extended parallel to the south shore of the inlet and behind the city-owned land at the waterfront (Figure 3). Known as the False Creek Right-of-Way, the spur, which connected to the Arbutus Corridor, had served the industries on the south shore of False Creek. The CPR decommissioned the line in 1989 and entered negotiations for its sale to the city which imagined this fifty-foot-wide strip as part of an electric streetcar network. Negotiations broke off in 1993, and in 1995 the CPR turned to the city to request that the right-of-way be re-zoned to permit multi-family housing. However, several parcels at the western end of the right-of-way were already zoned for commercial use and, early in 1995, the CPR sold a single lot to a private developer who built a coffee shop and leased it to Starbucks, effectively severing the right-of-way from the Arbutus Corridor (Figure 3).³⁴ Responding to criticism that the city had not acted early or quickly enough to forestall the sale and preserve the right-of-way, the city's Director of Land Use and Development argued that "a municipality cannot use its zoning powers to limit use of privately owned lands so as to preserve an historic corridor for future transportation purposes. The land on which the new Starbucks is being constructed could not be 'sterilized' as Ward [the critic] would seem to prefer."³⁵ The city would do just that several years later with the Arbutus Corridor. Yet, fearing loss of more of the False Creek right-of-way, the city acquired a portion of the remainder, approximately 1.5 kilometres, from the CPR for \$8.95 million.

One other parcel of CPR land needs mention before turning to the Arbutus Corridor. In 1886, to bring its line across False Creek to English Bay, the CPR expropriated a strip of land through Squamish Indian Reserve No. 6, False Creek.³⁶ The reserve, allotted in the 1860s and expanded by the federal/provincial Joint Indian Reserve Commission in 1876, sat at the entrance to False Creek and, after 1886, was surrounded by the CPR land grant (Figure 2).³⁷ Instead of

³¹ Punter, *Vancouver Achievement*, above note 24 at 187.

³² For a summary of the land transactions and the subsequent development of the neighbourhood known as False Creek North, see *Ibid* at 186-214. For an analysis of Li Ka-shing's acquisition and its subsequent effects on Vancouver, see Kris Olds, *Globalization and Urban Change: Capital, Culture, and Pacific Rim Mega-Projects* (Oxford: Oxford University Press, 2001) at 57-140.

³³ For an overview of the massive development project, see Punter, *Ibid* at 214-24.

³⁴ CPR SCC above note 2 (Affidavit, David Rudberg, General Manager of Engineering Services and City Engineer, Vancouver, 20 October 2000, Appellant's Appeal Book, pp 1902-14, at 1903-05). See also John Mackie, "New coffee shop site steams streetcar fans, who fear end to plan", *The Vancouver Sun* (19 July 1995) A3.

³⁵ Rick Scobie, "Land-law issues can be trickier than Robin Ward seems to realize", *The Vancouver Sun* (6 January 1996) D7, responding to Robin Ward, Architecture Column, *The Vancouver Sun* (9 December 1995) D3.

³⁶ For details of the expropriation see Leonard, "CPR Terminus", above note 8.

³⁷ On the construction of an Indian reserve geography in British Columbia, see Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

crossing the inlet to adjoin its land on the south shore of False Creek, something it could easily have done given that it owned most of the land around the inlet (Figure 2), the CPR expropriated 3.6 acres of Indian reserve. It reduced the reserve by another seven acres in 1901 to connect the Vancouver and Lulu Island Railway line (later the Arbutus Corridor) to the trestle bridge across False Creek. In 1913, the city and province induced the Squamish residents to leave the reserve; subsequently the reserve was further reduced for other purposes until, in 1947, it was formally surrendered.³⁸ That surrender and the circumstances leading to it precipitated a specific claim and legal action that, in 1999, produced a \$92.5 million settlement to compensate the Squamish Indian Band for the entire False Creek reserve, except the portion expropriated by the CPR.³⁹ When the federal government learned that the CPR had put its land in the former Indian reserve up for sale, it turned to the courts to recover the land on the grounds that the land reverted to Canada when the CPR ceased to use it for railway purposes. The Squamish, Musqueam, and Burrard Indian Bands claimed that if the land reverted to Canada, it did so as Indian reserve held in trust for the bands. In 2002, the British Columbia Court of Appeal ruled that the ten acres of land reverted to the Squamish as Indian reserve.⁴⁰ This decision also excised the first few hundred metres of the Arbutus Corridor from the city’s jurisdiction (Figure 3).

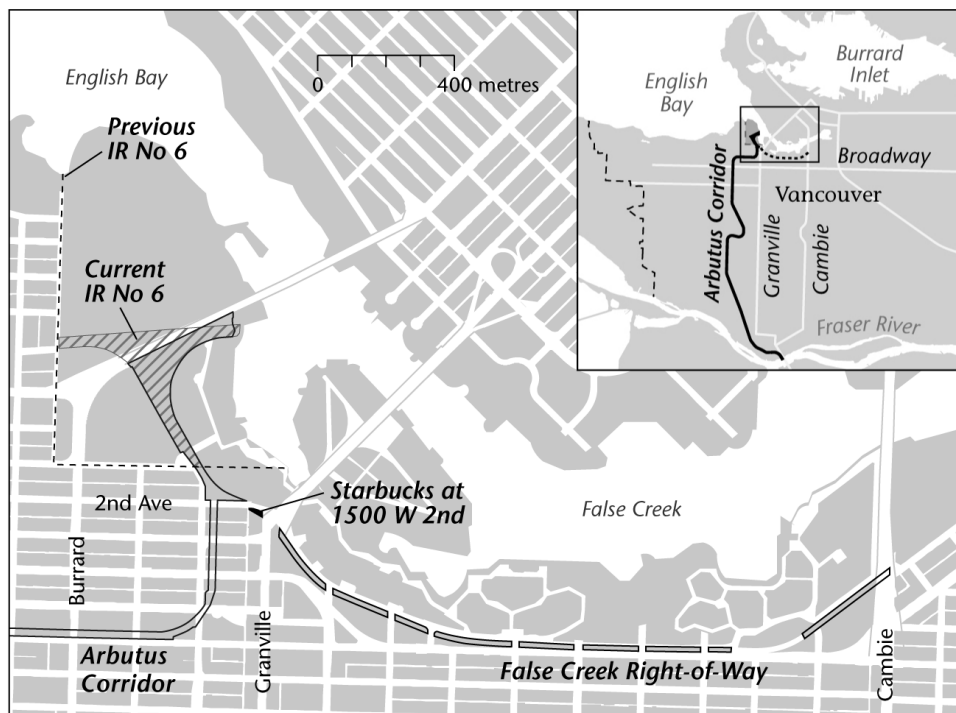


Figure 3. False Creek Right-of-Way.

In 1996, the city acquired the False Creek Right-of-Way between the Arbutus Corridor and Cambie Street from the CPR after the company sold a small segment to a developer who built a coffee shop and leased it to Starbucks, severing the right-of-way from the

³⁸ See Jordan Stanger-Ross, “Municipal Colonialism in Vancouver: City Planning and the Conflict over Indian Reserves, 1928-1950s” (2008) 89 *Canadian Historical Review* 541.

³⁹ The court cases included an action brought by the Squamish against Canada, begun in 1981, and then actions by the Musqueam and Burrard against Canada and the Squamish. The actions were combined in a single case, and then the Squamish claim against Canada settled after trial but before the Federal Court issued its decision. See *Squamish Indian Band v Canada* (2000), 207 FTR 1 (TD).

⁴⁰ *Squamish Indian Band v Canadian Pacific Ltd.* 2002 BCCA 478, 217 DLR (4th) 83.

Arbutus Corridor. In 2002, the British Columbia Court of Appeal ruled that 10 acres of CPR land, which had been Indian Reserve, should be reserve again. This decision removed the northern-most portion of the Arbutus Corridor from the city's jurisdiction.

Such was the urban, corporate, and political context from which the dispute over the Arbutus Corridor emerged. By the end of the 1970s it was clear that False Creek's industrial era was ending. The federal government and the city had re-made Granville Island as a public market and much of the inlet's south shore as a moderate-density residential neighbourhood with a mix of parks, townhouses, and apartments. The province had acquired most of the CPR's railway lands on the north shore for a world exposition, then for massive residential development. The transformation of False Creek from an industrial zone to a dense, residential neighbourhood has been hailed as a model of inner-city redevelopment,⁴¹ but it also sealed the fate of the Arbutus Corridor as a viable freight line. Without industrial customers, the CPR began looking at other uses for its forty-five acre corridor. Under the auspices of Marathon Realty, the CPR had become a land developer. Although its False Creek lands were developed by another firm, the company was working on other large development projects and the Arbutus Corridor presented such an opportunity.⁴² Finally, it was clear that the city was actively seeking to preserve the remaining rail corridors in the city. It had purchased the False Creek Right-of-Way from the CPR, but that was a relatively small parcel compared to the ten km, forty-five acre Arbutus Corridor, which, in 2000, the city regulated to preserve as a transportation corridor for trains, public transit, or human-powered locomotion.

C. The Arbutus Corridor Official Development Plan

With the demise of an industrial False Creek, the CPR concluded that the Arbutus Corridor was no longer economically viable for hauling freight. Recognizing this, and the possibility that this unique strip of land of land might again transport people by rail, city council passed a resolution in 1986 declaring that "the Arbutus rail corridor (V and LI Line) be preserved as a potential rapid transit corridor between downtown Vancouver and Richmond."⁴³ The council passed a similar resolution in 1992 "reiterat(ing) its desire to maintain the Arbutus right-of-way as a transportation corridor."⁴⁴ Over the next few years, a series of plans and policy statements—the Vancouver Greenways Plan (1995), the Vancouver Transportation Plan (1997), and the Vancouver Regional Context Statement Development Plan (1999)—announced a similar intention to preserve several rail corridors, including the Arbutus Corridor, for rail or transit, or as a greenway.⁴⁵ The Regional Context Statement of 1999, Vancouver's component of the greater metropolitan area's strategic plan, provided that "the existing rail corridors along the Arbutus corridor and Grandview Cut are considered for a combination of rail, transit and

⁴¹ Punter, *Vancouver Achievement*, above note 24.

⁴² In 1996, CP Ltd., the holding company for Marathon Realty and CPR, sold the real estate development and management company as part of its effort to focus on what it understood to be its core businesses.

⁴³ City of Vancouver Archives, City Council Minutes, 21 October 1986, at 7. "V and LI" refers to the Vancouver and Lulu Island Railway Company, a subsidiary of the CPR, that, in 1902, built the line that would become known as the Arbutus Corridor.

⁴⁴ *Ibid* 16 June 1992, pp. 4035, 4040.

⁴⁵ CPR SCC above note 2 (Appellant's Appeal Book, pp. 1338-53, Affidavit, Ann McAfee, Director of City Plans and Co-Director of Planning, City of Vancouver, 18 September 2000, at 1340-47).

Greenways uses.”⁴⁶ In September, 1999, the city adopted this document as an Official Development Plan.⁴⁷

The 1999 Regional Context Statement was intended to situate Vancouver’s planning within the four broad goals of the region-wide strategic plan: 1) protect the green zone; 2) build complete communities; 3) achieve a compact metropolitan region; and 4) increase transportation choice.⁴⁸ The provision for the Arbutus Corridor was included within the first goal—to protect the green zone—and was an apparent restatement of existing policy. However, the choice of language—“considered for” rather than a stronger “designated for”—suggested that this was still a subject for discussion. Nonetheless, under the *Vancouver Charter* (the provincial statute conferring Vancouver’s municipal powers), the effect of adopting an official development plan (ODP) is to make it “unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan” and to prohibit city council from authorizing any development that is contrary to the plan.⁴⁹

As a result, even the language of “considered for” concerned the CPR. Earlier in 1999, the company had informed the city that the Arbutus Corridor was no longer “economically viable for rail use” and that it was planning to discontinue rail service. In doing so, the company suggested that it was “open to working with the city to develop a vision for future uses of the Arbutus Corridor lands” and that it “would like to explore options that might exist to achieve our respective objectives.” “One possible opportunity,” the company continued, “is for the re-introduction of the Arbutus Corridor into the adjacent neighbourhood in a way that achieves public objectives at no additional expense to taxpayers while achieving a fair return to CPR.”⁵⁰ Given this redevelopment plan, an ODP that appeared to limit the corridor to transportation was problematic. In October, 1999, the CPR filed a petition in the British Columbia Supreme Court to set aside the by-law adopting the Regional Context Statement as an official development plan.⁵¹ The company maintained that the ODP presented a “fundamental change” in city policy and an unacceptable limit on its use and development of the corridor.⁵² Among various grounds, the CPR claimed that the by-law “designates private lands for public use” and that it “constitutes a taking.”⁵³

At a meeting with city officials in March, 1999, before the city had made the Regional Context Statement an ODP, the CPR presented a “draft option for enhanced use of the Arbutus Corridor” and a plan for community consultation. The community consultation was part of a required process that the CPR hoped would lead the city to rezone the land to accommodate the proposed development. The draft included photographs of the corridor as it existed, accompanied

⁴⁶ Vancouver City Council Minutes, 26 January 1999, adopting the Regional Context Statement Development Plan, online: <http://vancouver.ca/ctyclerk/cclerk/990126/minutes.htm>.

⁴⁷ City of Vancouver, by-law No 8060, *Official Development Plan - Regional Context Statement* (14 September 1999), online: <http://vancouver.ca/ctyclerk/cclerk/990914/regmin.htm>.

⁴⁸ Greater Vancouver Regional District, *Livable Region Strategic Plan* (26 January 1996) at 9 online: <http://www.metrovancouver.org/about/publications/Publications/LRSP.pdf>.

⁴⁹ *Vancouver Charter*, SBC 1953, c 55, s 563.

⁵⁰ CPR SCC above note 2 (Appellant’s Appeal Book p 130, Supplementary Affidavit, Andrew Massil, Exhibit A, letter from Massil, CPR Regional Manager, Real Estate Group, to Judy Rogers, City Manager, 17 February 1999) [Massil, Supplemental. Affidavit].

⁵¹ *Ibid.*, (Appellant’s Appeal Book, pp 1637-67, Petition to the Supreme Court of British Columbia, 14 October 1999) [CPR Petition, 1999].

⁵² *Ibid.*, (Appellant’s Appeal Book, pp 1-28, Affidavit, Andrew Massil, 14 October 1999, at 22-23).

⁵³ CPR Petition above note 51, at 1643.

by a landscape architect's sketches of segments of the corridor with various combinations of residential and commercial space, green-way and bike-way routes, parks and community gardens.⁵⁴

In 2000, with its legal action over the Regional Context Statement on hold pending discussions with the city on the future of the Arbutus Corridor, the CPR forged ahead with a round of community consultation about the corridor and its proposed redevelopment. In June, the company informed the city that approximately eighty percent of those who participated in the consultation felt that the lands should be purchased by a public body for public use.⁵⁵ The public uses included greenways, but possibility also the route for the proposed Vancouver-Richmond transit line. The building of this line depended on significant provincial and federal support, and on the Vancouver Olympic bid, none of which had yet been secured, but the regional transit authority had also identified the Arbutus corridor as a viable route and sought to preserve it as an option.⁵⁶

It had become increasingly clear to the city that the CPR was preparing to sell or develop the Arbutus Corridor. The mooted price was \$100 million, a figure that the CPR never confirmed, but then the city did not seem inclined to negotiate for the corridor.⁵⁷ However, the city was concerned about the future of the corridor and that the possibility of a continuous transit line or greenway might be lost. The lots in the corridor north of 16th Avenue were already zoned for mixed residential, industrial and commercial uses so that once the CPR decommissioned the line it could apply for and would be entitled to receive development permits for projects that fit within the zoned uses. Remembering the Starbucks development on the False Creek Right-of-Way, which the city had been obliged to permit because it fit existing zoning, and fearing the same might happen again on parts of the Arbutus Corridor, city council adopted an Arbutus Corridor Development Plan in June of 2000, limiting the uses of the corridor to a public thoroughfare.⁵⁸ It also set in motion a process for public meetings so that the development plan might become a legally binding official development plan. In the meantime, council included a provision, permitted under the *Vancouver Charter*, which enabled the city to withhold requests for development permits pending the consideration of an official development plan.

Public hearings about the Arbutus Corridor ODP proceeded in July, as one scheduled evening for comment became four to accommodate all the speakers.⁵⁹ They included the CPR, which spoke out strongly against what it viewed as the sterilization of its property interests, but also many local residents who were concerned about the prospect of public transit, particularly elevated public transit, in their neighbourhood. Then on 25 July, 2000, council adopted the earlier development plan (approved in June) as the Arbutus Corridor Official Development Plan

⁵⁴ Massil, Supplementary Affidavit above note 50, Exhibit B, at 131-42.

⁵⁵ CPR SCC above note 2 (Appellant's Appeal Book, pp 544-46, letter from J.R. Walsh, Vice President Real Estate, CPR, to Judy Rogers, City Manager, City of Vancouver, 7 June 2000).

⁵⁶ *Ibid.*, (Appellant's Appeal Book, pp 502-04, memo from Ken Dobell, TransLink CEO, to TransLink Board of Directors 11 February 2000).

⁵⁷ Jason Proctor, "CPR plan off track", *The Province* (9 December 1999) A19; Karenn Krangle, "CPR's plans for arbutus corridor 'out of order'," *The Vancouver Sun* (8 January 2000) B3.

⁵⁸ Vancouver City Council Minutes, 13 June 2000, online: <http://vancouver.ca/ctyclerk/cclerk/000613/regmin.htm>. The approved Arbutus Corridor Official Development Plan online: <http://vancouver.ca/ctyclerk/cclerk/000613/p4.htm>.

⁵⁹ Vancouver, Special Council Meeting Minutes, 10, 12, 17 & 18 July, 2000, online: <http://vancouver.ca/ctyclerk/cclerk/000710/phmin.htm>.

(“Arbutus Corridor ODP”) (Appendix A).⁶⁰ The plan reserved the Arbutus Corridor as a greenway or for transportation, including rail, transit or cycling, but not for motor vehicles or for elevated transit such as the SkyTrain system. This last provision had been added after the public hearings, confirming for some that the city treated its more affluent west side differently from its east side, through which the SkyTrain already ran.⁶¹ At the public hearings a representative for the recently formed Arbutus Corridor Residents’ Association, organized to lobby against public transit on the Arbutus Corridor, suggested that the west side had been and should continue to be treated differently: “We are the people that live in your neighbourhood. We are dentists, doctors, lawyers, professionals, CEOs of companies. We are the creme de la creme in Vancouver. We live in a very expensive neighbourhood and we’re well educated and well informed. And that’s what we intend to be.”⁶² By weight of numbers, influence, or both, SkyTrain would not run through the city’s west side.

The Regional Context Statement ODP may have been of uncertain effect on the CPR’s rail line, but there was no doubt that the Arbutus Corridor ODP dramatically curtailed the company’s development options in the forty-five acre parcel. In a letter sent to the city between the passing of Arbutus Corridor Development Plan in June and the ODP in July, the company’s Vice President of Real Estate demanded the production of numerous documents and more time before the public hearing. He added, “(t)he taking of such sudden and drastic action breeds cynicism with our governmental institutions, and simply serves to discourage parties from acting in the cooperative and open fashion that the CPR has.” He continued that rail use in the corridor “can no longer be economically viable” and, therefore, “the bylaws amount to a downsizing to a public thoroughfare consisting of public uses and non-viable uses, all in the context of preserving the Corridor for future public use.”⁶³ In August, the CPR revived its court proceedings against the city, filing a new petition to quash the Arbutus Corridor ODP on the grounds that it was an unjustified and uncompensated taking of the CPR’s private property for a public purpose.

D. CPR v City of Vancouver

The CPR claimed that the process which produced the Arbutus Corridor ODP had been unfair, that the city had no jurisdiction to pass such a by-law, and that the by-law amounted to a taking of its property for which it should be compensated. At trial, heard over nine days in June 2002, Justice Brown conflated the issues into a single question: was the by-law within the powers granted to the city under the *Vancouver Charter*?⁶⁴ She concluded that it was not. “The *Vancouver Charter* does not give the city the power to use the vehicle of an official development plan to denude a private property of all use, except as a public thoroughfare, without acquiring title to the property, or reaching some agreement with the land owner.”⁶⁵ The city argued that, even if a taking had occurred, which it did not admit, then the *Vancouver Charter* excused the city from the need to compensate: under s. 569(1), a zoning by-law “shall be deemed as against

⁶⁰ City of Vancouver, by-law No 8249, *Arbutus Corridor Official Development Plan* (25 July 2000) [*Arbutus Corridor ODP*].

⁶¹ Michelle Cook, “Council rules out SkyTrain along Arbutus: The line will be preserved as a transportation corridor despite objections by CP Rail”, *The Vancouver Sun* (26 July 2000) A1.

⁶² Pete McMartin, “Crème erred in failing to let money talk: A woman in Kerrisdale comments on the Arbutus Corridor and breaks the code of the rich”, *The Vancouver Sun* (13 July 2000) A3.

⁶³ Massil, Supplementary Affidavit above note 50, Exhibit 348, pp 583-89, J.R. Walsh, CPR VP Real Estate, to Judy Rogers, City Manager, 21 June 2002, at 584.

⁶⁴ *CPR v Vancouver (City of)* (2002), 47 Admin LR (3d) 56, 2002 BCSC 1507 at para 55.

⁶⁵ *Ibid* at para 76.

the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning,” and further, that “no compensation shall be payable by the city”. However, Justice Brown concluded that this provision was insufficiently specific and that the legislature would need “much clearer language” to enable the city to designate private land as a public thoroughfare without compensating the private owner. In doing so, she presented the following scenario:

The City's interpretation leads to this result: a person may acquire a bare lot in the City of Vancouver which is zoned for residential development and is in every respect appropriate for residential development. Before that development occurs, the City may pass an official development plan which designates that particular lot as a public park, even though it remains zoned for residential development. Thereafter, the owner of that property may not develop the property in any way other than as a public park. The City need not acquire that property and may never acquire the property because the City is not compelled to undertake any of the developments shown on the plan. The individual has been deprived of all of the benefits of ownership of that land and has only the burden of paying taxes and, presumably, maintaining the property. Should the individual fail to keep the grass cut, the City would be able to cut the grass and charge the individual with the expense of doing so.⁶⁶

This scenario blanched the corporate personality of the CPR or the uniqueness of the Arbutus Corridor from the case before the court, but it revealed for Justice Brown “an absurd result.” “Legislation,” she concluded, “should not be interpreted to produce an absurd result.”⁶⁷ However, rather than declare, as the CPR had requested, that the Arbutus Corridor ODP constituted a taking for which compensation was due, she ruled that the by-law creating the ODP was invalid and set it aside.

The CPR felt vindicated, and representatives of the business community and development industry expressed their strong support for the decision.⁶⁸ However, the city appealed, and the British Columbia Court of Appeal granted the appeal. Justice Esson, joined by Justice Donald and with whom Justice Southin (in separate reasons) concurred, found that the city had ample authority under the *Vancouver Charter* to pass the Arbutus Corridor by-law.⁶⁹ Moreover, he held that the by-law, while perhaps “unfair” from the CPR’s perspective, was an entirely appropriate response given the public interest in preserving the corridor, the uncertainty of eventual uses and of funding for them, and the CPR’s move to redevelop the land.⁷⁰ Having established the validity of the by-law, Justice Esson, in a few short paragraphs and without citing case law, concluded that the Arbutus Corridor ODP did not amount to expropriation or a taking of private property that entitled the CPR to compensation.⁷¹ He then considered and dismissed the CPR’s procedural arguments: that the city had failed to disclose pertinent documents, that the city had provided

⁶⁶ *Ibid* at para 78.

⁶⁷ *Ibid* at para 79.

⁶⁸ Neal Hall, “Court thwarts city plans for public use of Arbutus strip”, *The Vancouver Sun* (31 October 2002) B1; Wyng Chow, “Chamber of Commerce applauds Arbutus decision”, *The Vancouver Sun* (1 November 2002) C4; Maureen Enser, Urban Development Institute, “CPR’s win on Arbutus a good sign for all land owners”, *The Vancouver Sun* (7 November 2002) A23.

⁶⁹ *CPR v City of Vancouver* 2004 BCCA 192 at para 28 [*CPR* (BCCA)]. See Ryan Goldvine, “In Good Faith to Whom?: An Analysis of Judicial Deference to Municipal Authority and the Dispute Over the Arbutus Corridor” (2006) 11 *Appeal* 39 for an analysis of the case following the BCCA decision.

⁷⁰ *CPR* (BCCA), *Ibid* at para 41.

⁷¹ *Ibid* at paras 68-70.

inadequate notice of the public hearings, and that the city had improperly changed the wording of the by-law after the public hearings. Justice Esson also dismissed the argument that the city had improperly attempted to depress the value of the land in order to acquire it more cheaply.

Justice Southin concurred, but clearly thought the city should move to acquire the land. By the time the BCCA issued its decision in April 2004, the Olympics had been awarded to Vancouver, and Cambie Street had been announced as the route for the Vancouver-Richmond transit line. The Arbutus Corridor would not be needed as the main north-south public transit thoroughfare. Given this development, Justice Southin, in her acerbic fashion, wrote “the bylaw in issue now can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use.”⁷² “The shareholders of the CPR,” she continued, “ought not to be expected to make a charitable gift to the inhabitants,” and the city should move to acquire the land or the province should intervene to impose a settlement.⁷³ Although not agreeing with Justice Brown at trial that the by-law produced an absurd result, she did think “[t]he present impasse is an absurdity unworthy of this Province which, on its way to the 2010 Olympic Games, is asserting to all and sundry that it is a marvellous place.”⁷⁴

Between trial and appeal, the CPR had applied to the city for permits to build twenty-four residences on parcels at the north end of the corridor. It was, claimed the CPR, a signal to the city that the company intended to sell the land, either to the city or, were it not prepared to pay market value, to another purchaser. The city refused the applications, announcing that it would not process them, unless forced by a court order, while the Arbutus Corridor ODP by-law remained before the courts.⁷⁵ However, it was also clear that relations between the CPR and the city were strained beyond what one would expect from litigation. Justice Esson noted that “this proceeding has been litigated with an intensity which seems somewhat inconsistent” with a dispute over the interpretation of a municipal charter.⁷⁶ Construed as an exercise in statutory interpretation, the intensity may well have been surprising, but is less so if one understands the case, which the parties did, as a dispute over the rights of a holder of private property and the capacity of a public body to exercise its authority over those rights. Moreover, the dispute over the Arbutus Corridor had not arisen in isolation. The city was understandably vigilant, perhaps even distrustful of the CPR after the company “Starbucked” the False Creek Right-of-Way in clear contravention of the city’s desire to keep that corridor intact. For its part, the CPR perceived that the city had not engaged in what the company thought were good-faith attempts to find a compromise that respected its property interests in the Arbutus Corridor while achieving the city’s goals to enhance public amenities.

Opposition to the Court of Appeal’s decision was as quick as its sources were predictable. The CPR announced immediately that it would appeal to the Supreme Court of Canada (SCC);⁷⁷ the Business Council of British Columbia suggested that the decision would “have a chilling effect on investors” and that it continued “a slow erosion of property rights in

⁷² *Ibid* at para 117.

⁷³ *Ibid* at paras 118-19.

⁷⁴ *Ibid* at para 120.

⁷⁵ See Frances Bula, “West-side rail line eyed for housing”, *The Vancouver Sun* (5 September 2003) B1; and “Vancouver won’t process CP applications for development along Arbutus corridor”, *The Vancouver Sun* (11 September 2003) B3.

⁷⁶ CPR (BCCA) above note 69 at para 86.

⁷⁷ Maurice Bridge, “CPR vows to appeal Arbutus ruling”, *The Vancouver Sun* (8 April 2004) B.1.

B.C.”;⁷⁸ the Chamber of Commerce wondered “whose rights might other B.C. municipalities trample tomorrow”;⁷⁹ and a former director of the Urban Development Institute, the association of real estate developers, concluded that the municipal legislation, as interpreted by the courts, “denies property rights to owners of land, regardless if the landowner is the CPR or an ordinary Vancouver homeowner.”⁸⁰

The litigation would continue with the CPR seeking and receiving leave to appeal to the SCC. Once there, Chief Justice McLachlin, writing for the court, framed the appeal around three questions, the second of which brought the issue of private property and public authority to the fore:

1. Was the ODP By-law beyond the statutory powers of the City?
2. If not, must the City compensate CPR for the land?
3. Should the by-law be set aside for procedural irregularities?⁸¹

On the first and third questions, the SCC agreed with the BCCA: the *Vancouver Charter* provided the city with ample authority to pass the by-law⁸² and there were no procedural irregularities that required setting aside the by-law.⁸³ On the question of compensation, which had been argued before but never squarely engaged by the lower courts, the SCC took the opportunity to make its first statement on the law of *de facto* expropriation or regulatory taking—the SCC used the hybrid “*de facto* taking”—since its 1985 decision in *British Columbia v Tener*.⁸⁴

In an efficient twelve paragraphs, the SCC set out the test for *de facto* taking and concluded that it had not been met. The Court drew, briefly, on a trio of cases, including its decisions in *Manitoba Fisheries Ltd. v The Queen*⁸⁵ and *Tener*, and the Nova Scotia Court of Appeal in *Mariner Real Estate Ltd. v Nova Scotia*,⁸⁶ to hold that a *de facto* taking required: “(1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.”⁸⁷ Of the first requirement, the SCC held that “(t)he City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land;” it had not acquired a beneficial interest.⁸⁸ Of the second requirement, which it drew from *Mariner*, the SCC held that the by-law did not prevent the CPR from using the land as it had done since 1902—as a railway—and therefore that not all reasonable uses had been removed. Moreover, the SCC went on to say that even if the CPR could make out a claim for *de facto* taking at common law, the provisions in the *Vancouver Charter* immunized the city from such a claim.⁸⁹ Although evincing

⁷⁸ Jerry Lampert, “Who’s being railroaded? Business council fears investors will be scared off without guaranteed property rights”, *The Vancouver Sun* (17 April 2004) C9.

⁷⁹ John Winter, “This may be the thin edge of the wedge”, *The Vancouver Sun* (27 April 2004) A18.

⁸⁰ Bob Ransford, “CPR ruling isn’t good for property owners”, *The Vancouver Sun* (1 May 2004) I14.

⁸¹ *CPR SCC* above note 2 at para 10.

⁸² *Ibid* at paras 11-26.

⁸³ *Ibid* at paras 38-62.

⁸⁴ *Tener*, above note 4.

⁸⁵ *Manitoba Fisheries* above note 4. See the chapter by Phillips & Martin in this volume.

⁸⁶ *Mariner Real Estate Ltd. v Nova Scotia (AG)* (1999), 177 DLR (4th) 696 (NSCA).

⁸⁷ *CPR SCC* above note 2 at para 30.

⁸⁸ *Ibid* at para 33.

⁸⁹ *Vancouver Charter*, above note 49, s 569 (1): Where a zoning by-law is or has been passed, amended, or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this Part, any property thereby affected shall be

sympathy for the CPR's position at the beginning and end of her judgment, Chief Justice McLachlin held that the by-law was valid and that the city was not required to compensate the company for the restrictions on its use of the land.

City councillors were understandably pleased that the city's zoning power had been upheld. Business and developer organizations, on the other hand, called for legislative change to reduce municipal power because of the threat it posed to private property.⁹⁰ The CPR, which had initiated another visioning process for the Arbutus Corridor before the SCC released its judgment, felt it was back where it had been in 1999 when it told the city of its intent to sell the land.⁹¹ In some ways it was, although, as an editorial in *The Vancouver Sun* suggested, the decision relieved the city of any pressure to negotiate: the land would remain zoned as a public thoroughfare, but the CPR had no intention of reviving passenger or freight rail service, and the city was not ready to purchase the land for what the CPR believed it was worth, so nothing would happen.⁹² Indeed, nothing has happened.

E. "Trespassers All": Reflections on an Urban Landscape and a Constitution without Property

In May, 2001, the last train rolled along the Arbutus Corridor. Vancouverites who use the corridor— "trespassers all"— do so with impunity. However, it is not obvious that one is a trespasser when walking, running or biking along the Arbutus Corridor, as many do. The tracks are still in place, increasingly rusty from lack of use and overgrown in places with blackberry brambles, but the "Private Property No Trespassing" signs that once announced its perimeter have all but disappeared. There are no fences (Figure 4). Even if one knows that the CPR holds title to the land, the trespasser label hardly seems to apply. Garden plots occupy stretches of the municipal boulevards that border the corridor, their edges marking a boundary between public and private land that is otherwise indistinct. Generally the gardens occupy city land, but, in a few places, gardeners have used the rails themselves as one side of a raised bed.⁹³

deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof.

⁹⁰ Jerry Lampert, "Concept of private land must have meaning", *The Vancouver Sun* (20 March 2006) A9.

⁹¹ Mark Hume, "Vancouver wins right to decide fate of line", *The Globe and Mail* (24 February 2006) S1.

⁹² *The Vancouver Sun* (25 February, 2006) C6.

⁹³ On the capacity of gardening and public to establish claims of ownership see Nicholas Blomley, "Un-real Estate: Proprietary Space and Public Gardening" (2004) 36 *Antipode* 614-41. On Vancouver's community gardens, see Ashleigh Keall, "Conceptions of Property in Community Gardens" (2007) [unpublished term paper, copy with the author].



Figure 4. The Arbutus Corridor, looking north towards 16th Ave., shortly after the SCC decision in February 2006. Photograph Glen Baglo, *The Vancouver Sun*.

Discussions between the city and the CPR over the corridor have occurred sporadically since the SCC decision, but without any sense of urgency, at least not from the city.⁹⁴ The last visioning process, commissioned by the CPR but conducted independently by an eminent panel of academics, planners and others, recommended in 2007 that the corridor and adjacent city streets should be used “to accommodate a continuous greenway and possible future transportation route with carefully considered opportunities for development in select locations.”⁹⁵ The panel imagined that residential and commercial development along portions of the corridor would generate the funds for the city to acquire the land and build the recommended public infrastructure. Moreover, this development could fit with the city’s “EcoDensity Initiative” to add affordable housing in ways that reduced the ecological footprint of the city’s

⁹⁴ Naoibh O’Connor, “Arbutus Corridor’s fate in limbo”, *Vancouver Courier* (16 May 2008) 18; “One track minds”, *Vancouver Courier* (14 May 2010) 1.

⁹⁵ Arbutus Lands Advisory Panel, “Arbutus Lands Visioning Process Final Report” (16 April 2007) at 28. The advisory panel included Dr. Nola-Kate Seymour, Dr. Patrick Condon, Dr. John Robinson, Dr. Warren Gill, Dr. Tsur Somerville, Ken Cameron, Jim Fulton, Heather Redfern, Jim O’Dea, Marta Farevaag, and the Honourable Mike Harcourt. Thanks to James Hoggan & Associates, one of the project team members, for supplying a copy of the report. See also the work of the Society for Promoting Environmental Conservation, “All Aboard the Arbutus Corridor” design contest in 2004 online: <http://www.spec.bc.ca/ArbutusCorridor/index.html>.

residents.⁹⁶ The panel also suggested that the development could be a showcase for sustainable urban infill development when attention turned to Vancouver for the 2010 Winter Olympics. However, perhaps because of that event and the city's preoccupation with its development of an athlete's village on False Creek, the Arbutus Corridor received relatively little of the city's attention. The SCC's decision in *CPR v City of Vancouver* did not require it.

If little has happen to much-debated urban land since the SCC decision, what has been the effect of *CPR v City of Vancouver* on the law of constructive taking? Perhaps most importantly, the fact that the SCC declined to construct a taking for which the city would have to compensate the owner confirms that the courts will continue to play a relatively small role in balancing the interests of private property owners and public authorities, much smaller than they do in the United States. In the United States, the doctrine has developed under the constitutional protection for property—"nor shall private property be taken for public use, without just compensation"⁹⁷—and the U.S. Supreme Court's 1922 decision in *Pennsylvania Coal v Mahon* "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" requiring compensation.⁹⁸ Since that decision, and many others which have followed it, the spectre of regulatory taking and the possibility that a court will order compensation has loomed over municipal zoning and a great many other actions by public authorities in the United States that have the capacity to limit the rights of private property.

"At some point," writes Bruce Ziff in a re-phrasing of *Penn Coal*, "admittedly hard to locate, excessive regulation must be seen as equivalent to confiscation,"⁹⁹ and in a small handful of cases Canadian courts have ordered compensation for a constructive taking.¹⁰⁰ But unlike the United States, where judicial review of the actions of public authorities has played an important role in determining that location, in Canada it hardly has. Canadian courts, while consistently expressing sympathy for property owners, seem reluctant to intervene. Gregory Alexander, in using Canada as an example of a liberal constitutional democracy without constitutional protection for private property, notes "surprisingly little case law" on how much state interference with the traditional incidents of ownership is too much.¹⁰¹ However, the lack of judicial involvement is a function of the absence of constitutional protection for private property. In her comparative analysis of constructive takings law in the United States, Australia, and Canada, Donna Christie suggests that "the constitutionalization of property enshrines the courts, rather than legislative bodies, as the primary arbiters of the private property/public interest conflict."¹⁰² This has certainly been the result with the rights that did end up in the *Charter of*

⁹⁶ Vancouver City Council Minutes, 18 July 2006, online: <http://vancouver.ca/ctyclerk/cclerk/20060718/documents/regularminutes.pdf> adopting the principles to guide the development of an "Eco-density charter," and 10 June 2008, online:

<http://vancouver.ca/ctyclerk/cclerk/20080610/documents/regmins.pdf> adopting the EcoDensity Charter.

⁹⁷ US Const amend V, § 1.

⁹⁸ *Pennsylvania Coal Co. v Mahon*, 260 US 393 (1922) at 415.

⁹⁹ Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol 3 (Oxford: Hart, 2005) at 347 [Ziff, "'Taking' Liberties"].

¹⁰⁰ *Manitoba Fisheries*, above note 4; *Tener*, above note 4; *Casamiro Resources Corp. v British Columbia (AG)* (1991), 80 DLR (4th) 1, 55 BCLR (2d) 346 (CA); *Rock Resources Inc. v British Columbia* (2008), 229 DLR (4th) 115, [2008] 8 WWR 680, 2003 BCCA 324, leave to appeal to SCC refused, [2003] SCCA No 375. See Raymond E. Young, "Canadian Law of Constructive Expropriation" (2005) 68 Sask L Rev 345.

¹⁰¹ Gregory S. Alexander, *The Global Debate over Constitutional Property* (Chicago: University of Chicago Press, 2006) 43.

¹⁰² Donna R. Christie, "A Tale of Three Takings: Taking Analysis in the Land Use Regulation of the United States, Australia, and Canada" (2007) 32 Brook J Int'l L 343 at 373 [Christie, "Three Takings"]. See also

Rights and Freedoms; the courts have become much more active than they were pre-*Charter* in patrolling the lines that mark the boundaries between individual rights and state authority.¹⁰³ “Canada’s decision,” she continues, “not to constitutionalize property manifested the nation’s intention that both the public and private aspects of property should continue to be fully realized through federal and provincial legislative action” rather than the courts.¹⁰⁴ How accurately the absence of a right to private property among enumerated constitutional rights reflects or manifests a national intention is debateable, and there have been various attempts since the *Charter* was adopted in 1982 without protection for private property to insert that protection,¹⁰⁵ but the non-constitutional nature of property rights in Canada has situated the balancing of public regulation and private property in legislatures and the democratic process, and not in the courts.

From various perspectives, some argue that this is as it should be. To constitutionalize property rights, suggests Jennifer Nedelsky, is to reinforce the idea of property rights as prior to the state, to place inappropriately the burden of justifying any interference in those rights for public purpose on government, and to establish an irresolvable conflict between private and public interests.¹⁰⁶ Others suggest that property owners are not a minority that need constitutional protection from systematic majoritarian bias against their interests.¹⁰⁷ In fact, property owners enjoy substantial statutory, if not constitutional, protection of their property rights in the expropriation acts that compel compensation, usually at market value, when the state takes private property. The acts are generally silent on the question of constructive taking: the provision in the *Vancouver Charter*, which expressly precludes a finding of a taking when the city regulates property, is rare.¹⁰⁸ Courts will still intervene when the regulation amounts to a complete or virtually complete confiscation of property rights; *CPR v City of Vancouver* affirms this, although it also confirms that the standard for establishing constructive taking will be difficult to meet.

Russell Brown has argued that courts need to become more involved in light of what he perceives to be “the unavoidable and likely imminent influence of NAFTA” in the realm of takings.¹⁰⁹ As one of the many foreign investment protection agreements that Canada has signed, the North American Free Trade Agreement (NAFTA) provides that expropriation of a property interest or “measures tantamount to expropriation” will give rise to a right to compensation for

Rachelle Alterman, ed, *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights* (Chicago: American Bar Association, 2010).

¹⁰³ Although see the more nuanced view of the changing role of the court from the former SCC Chief Justice who led the court through the transition: Brian Dickson, “The *Canadian Charter of Rights and Freedoms*: Dawn of a New Era? (1994) 2 Rev Constit Studies 1.

¹⁰⁴ Christie “Three Takings,” above note 102, 375-76 (emphasis in original).

¹⁰⁵ See Alexander Alvaro, “Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms” (1991) 24 Canadian Journal of Political Science 309; Jean McBean, “The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights” (1988) 26 Alta L Rev 548.

¹⁰⁶ Jennifer Nedelsky, “Should Property Be Constitutionalized? A Relational and Comparative Approach” in G.E. van Maanene & A.J. van der Walt, eds, *Property Law on the Threshold of the 21st Century* (Apeldoorn, Netherlands: Maklu, 1996) 417 at 422. See also Joel Bakan, “Against Constitutional Property Rights,” in Duncan Cameron & Miriam Smith, *Constitutional Politics* (Toronto: James Lorimer, 1992) at 117. Richard W. Bauman, “Property Rights in the Canadian Constitutional Context” (1992) 8 S Afr J on Hum Rts 344 offers a somewhat more equivocal view.

¹⁰⁷ See Dan Cole, “Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis” (2007) 15 Sup Ct Econ Rev 141.

¹⁰⁸ *Vancouver Charter*, above note 89.

¹⁰⁹ Russell Brown, “The Constructive Taking at the Supreme Court of Canada: Once More, Without Feeling” (2007) 40 UBC L Rev 315 at 342 [Brown, “Constructive Taking”].

foreign investors.¹¹⁰ Some have suggested that this provision imports the U.S. law of regulatory taking into Canada, at least for foreign investors.¹¹¹ Ziff recommends vigilance, but offers a more ambiguous reading of the emerging body of NAFTA tribunal decisions, suggesting that it is not clear that the protections for foreign investors will diverge sharply from those for their domestic counterparts.¹¹² In either event, Brown castigates the SCC for its failure in *CPR v City of Vancouver* to take on or, at least, to construct a more robust doctrine of constructive taking.¹¹³ The SCC's analysis of *de facto* taking in *CPR v City of Vancouver*, while more expansive than that offered in the lower courts, is certainly truncated. Partly, this may reflect a court that is led by a consensus-building chief justice with a penchant for crisp judgments. However, it is the absence of property rights in the constitution that has prevented the courts from becoming the principal arbiters in the balancing of property rights and public regulation. It may be the insertion of these rights in quasi-constitutional documents, such as NAFTA, that eventually compels greater domestic judicial attention.

In the meantime, the Arbutus Corridor remains a private rail corridor, although one that is not likely to be so used again. Public transit once seemed a likely use, but the choice of a different route for the main north-south line means that the Arbutus Corridor would be no more than a secondary route for public transit, if so used at all.¹¹⁴ When the CPR and the city will return to negotiations over the parcel remains an open question, as do the results of those negotiations. Would the City want to acquire the land and direct its redevelopment as it did in the 1970s with the False Creek South neighbourhood? Would it acquire the land and then offer parcels on long-term leases to developers as it did with the Olympic village site in the 2000s? Would the CPR or another owner work with the city to develop a mix of privately held buildings and public amenities, as occurred on the former Expo lands on the north shore of False Creek? What occurs, and how, is a major decision that, after *CPR v City of Vancouver*, lies primarily with the city. For such an important parcel of land, this is how it should be. However, the SCC decision does not change the fact that the CPR, as owner, continues to lay claim to the Arbutus Corridor. The appropriate realms of the public and the private require continuing and repeated negotiation.

¹¹⁰ *NAFTA Between the Government of Canada, the Government of Mexico and the Government of the United States* (17 December 1992) Can TS 1994 No 2, 32 ILM 289, art 1110(2).

¹¹¹ David Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 UTLJ 499; Vicki Been & Joel C. Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine" (2003) 78 NYUL Rev 30.

¹¹² Ziff, "Taking' Liberties", above note 99 at 358.

¹¹³ Brown, "Constructive Taking", above note 109 at 335.

¹¹⁴ The 2007 Arbutus Lands Report, above note 95, considered and rejected a light rail option.

Appendix A

Arbutus Corridor Official Development Plan¹¹⁵**Section 1 Background****1.1 Application**

This plan applies to those lands in the City of Vancouver described as the Arbutus Corridor within the boundaries shown on Maps 1 to 25 attached to this plan.

1.2 Intent

The intent of this plan is to provide a context for the future of the Arbutus Corridor.

The Arbutus Corridor has been used for many years for a rail line and this plan accommodates this use, but also provides for a variety of other uses.

This plan is derived from broad public processes associated with the following existing City plans:

- (a) CityPlan,
- (b) Vancouver Transportation Plan, and
- (c) Vancouver Greenways Plan,

which plans determined the importance of providing corridors for improved rapid transit and opportunities for increased walking and biking as part of the City's transportation network.

Section 2 Designations**2.1 Designations for the Arbutus Corridor**

This plan designates all of the land in the Arbutus Corridor for use only as a public thoroughfare for the purpose only of:

(a) transportation, including without limitations:

- (i) rail;
- (ii) transit; and
- (iii) cyclist paths

but excluding:

- (iv) motor vehicles except on City streets crossing the Arbutus Corridor; and
- (v) any grade-separated rapid transit system elevated, in whole or in part, above the surface of the ground, of which one type is the rapid transit system known as "SkyTrain" currently in use in the Lower Mainland;

(b) greenways, including without limitation:

- (i) pedestrian paths, including without limitation urban walks, environmental demonstration trails, heritage walks and nature trails; and
- (ii) cyclist paths.

¹¹⁵ *Arbutus Corridor ODP*, above note 60.