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(b) Submission by Transnet

2.5 Transnet Freight Rail Legal Services made a submission to the SALRC in which it supports the repeal of the Acts enumerated above, except the Railway Construction Act of 1961 (Act 57 of 1961); Railway Construction Act 5 of 1965; Railway Construction Act 17 of 1966; and the Second Railway Construction Act of 1963 (Act 58 of 1963). The reason advanced by Transnet is that these Acts ratified certain agreements which contain provisions which are operative for periods which have not yet expired. The Railway Construction Act of 1961, for example, has five sections and a Schedule. Section 1 empowers the President to cause to be constructed and equipped a railway line at a cost not exceeding the specified amount of money. Section 2 provides that the cost of construction shall be defrayed out of loans raised by the President and appropriated by Parliament. Section 3 confers on the President powers set out in the Railway Expropriation Act of 1955. Section 4 confirmed and ratified the agreement entered into by the Government and the Corporation which petitioned the Government to build the railway line in question. Section 5 contains the short title. The schedule to the Act contains a translation of the agreement between the Government and the Corporation. Clause 9 of this agreement provides that:

> "The Corporation agrees that if at a future date within fifty years of the date of opening of the railway for public traffic, the traffic falls off to such an extent that the total volume of traffic carried over the railway line is, in the opinion of the Administration after consultation with the Corporation, insufficient to justify the operation of the railway, the Administration shall have the right to uplift the whole or any portion of the railway, and if so uplifted, to recover from the Corporation an amount equal to the total of the original cost of construction and any amount subsequently expended on the railway (including expenditure financed from the Administration's Renewals Fund of Betterment Fund)..."

2.6 All the other Railway Construction Acts listed in paragraph 2.5 above are similar to the Railway Construction Act of 1961, and contain provisions identical to the provision quoted in the preceding paragraph.[1] Therefore, the response of the SALRC below applies to all the Acts listed above.

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[1] In respect of the Railway Construction Act 5 of 1965, clause 10 of the Agreement provides: "for the period between thirty years but within fifty years of the date of opening of the railway line for public traffic". The Railway Construction Act of 1966 provides in clause 10 of the Agreement: "for the period between thirty years but within fifty years of the date of opening of the railway line for public traffic". The Second Railway Construction Act of 1963 provides in clause 9: "for the period between thirty years but within fifty years of the date of opening of the railway line for public traffic."

(c) SALRC's response to the submission made by Transnet

2.7 Put differently, Transnet is concerned that if these Acts are repealed the agreement would no longer be legally binding and the rights accorded to the State, for example to uplift the whole or portion of the railway line would become unenforceable. The SALRC submits that such a conclusion can only be drawn if it is shown that these agreements were not merely validated, but incorporated into these statutes. This distinction is of utmost importance because, as Chief Justice Lamer of the Canadian Supreme Court points out in his minority decision in *British Columbia (Attorney-General) v Canada (Attorney-General) An Act respecting the Vancouver Island Railway (Re)*,[2] the validity of contracts simply approved cannot be challenged for lack of authority, lack of privity and other reasons which might render the contract void and incorporated contracts have an additional feature of being assimilated to statutes.[3] The *British Columbia* case concerned the question whether the provisions of an agreement (the Dunsmuir Agreement) which appeared in the schedule to the Dominion Act were given statutory force by that Act, such that the provisions of the Dunsmuir Agreement were in fact the provisions of the Act itself. Section 2 of the Dominion Act provided the following in respect of the Dunsmuir Agreement:

> "2. The agreement, a copy of which, with specification, is hereto appended as a schedule, for the construction, equipment, maintenance and working of a continuous line of railway of a uniform gauge of four feet, eight and one-half inches, from Esquimalt to Nanaimo in Vancouver Island, British Columbia, and also for the construction, equipment, maintenance and working of a telegraph line along the line of the said railway, is hereby approved and ratified, and the Governor in Council is authorized to carry out the provisions thereof according to their purport"."

2.8 Iaccobucci J, writing for the majority in the above case, provides guidelines that can be used to establish whether an agreement scheduled to an Act forms part of the Act or not. Relying on the decision of the Supreme Court in *Ottawa Electric Railway Co. v. Corporation of the City of Ottawa*, [1945] S.C.R 105[4] Iaccobucci J stated that a

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3 Id at 17.

4 Section 1 of the Act at issue in this case provided that: "The agreement set out in the Schedule to this Act... is ratified and confirmed, and the parties thereto are hereby empowered and authorized to carry out their respective obligations and to exercise their respective privileges thereunder". Two of the judges held that "the agreement, while being 'ratified and confirmed' by section 1, was not made part of Act. The object of that

statutory ratification and confirmation of an agreement standing alone is generally insufficient reason to conclude that such an agreement constitutes a part of the statute itself. Furthermore, the judge quoted with approval a dictum from *Winnipeg v Winnipeg Electric Railway Co*, [1921] 2 W.W. R 282 (Man. C.A) where the judge said that "in order to make an agreement scheduled to an Act a part of the Act itself it is not sufficient to find words in the statute merely confirming and validating the agreement; you must find words from which the intention can be inferred".[5] Iacobucci J added that all tools of statutory interpretation can be called in aid to determine whether incorporation is intended. The judge, in the light of authority referred to above, came to the conclusion that section 2 of the Dominion Act did not bestow statutory force upon the Dunsmuir Agreement.[6]

2.9 The requirement referred to in the *British Columbia* case above that an Act must contain words from which the intention to incorporate an agreement into a statute was invoked by the same court in *Fleitmann v. The King* 52 S.C.R 15. Section 1 of the Statutes of British Columbia, 1912 read:

> "The agreement, a copy of which forms the schedule to this Act, made between His Majesty the King, represented by the Honourable the Premier of British Columbia and the Canadian Pacific Railway Company, the British Columbia Southern Railway Company and the Columbia and Western Railway Company is hereby ratified and confirmed and declared to be legally binding, according to the tenor thereof, upon the parties thereto; and the said parties to the said agreement are hereby authorized and empowered to do whatever is necessary to give full effect to the said agreement, the provisions of which are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act"."[7]

2.10 The court in this case held that the underlined words, read literally, seem to give statutory force to the statements in the agreement.[8] It is for this reason that in this case the court refused to interpret the agreement as a document separate from the statute. According to the court, such an approach would deprive the words of the Act of some

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section is to give the agreement validity and to state that "the parties thereto are hereby empowered and authorized to carry out the respective privileges thereunder". Be it noticed that the authorization is to carry out the obligations and the privileges thereunder and, therefore, those of the agreement. No power or authorization is added to the agreement itself." Id at 78.

5 Id at 79.

6 At 81.

7 At p 25 of the *Fleitmann v. The King* judgment. (Our emphasis).

8 At p 27 of the decision above.

part of their literal effect.

2.11 The following guidelines can be distilled from the decisions referred to above:

- A statement in a statute confirming or ratifying an agreement appended in the schedule is insufficient to conclude that such an agreement constitutes a part of the statute;
- the statute itself must contain words from which the intention to incorporate the agreement into legislation can be inferred; and
- when determining whether the legislature intended to give statutory force to the agreement, one must look at the provisions of the Act and not in the clauses of the agreement.

2.12 Applying this criteria to the Railway Construction Acts under discussion, the SALRC has come to the conclusion that there is nothing in section 4 of the Railway Construction Act 57 of 1961; section 4 of the Second Railway Construction Act 58 of 1963; section 4 of the Railway Construction Act 5 of 1965; and section 4 of the Railway Construction Act 17 of 1966 from which an inference to incorporate these agreements into these Acts can be drawn. In fact, the provisions of section 4 contained in these Acts are similar to section 2 of the Dominion Act referred to in paragraph 2.6 above. The SALRC is of the view that the repeal of these Railway Construction Acts would not affect the rights and duties of parties to the agreements appended in the Schedules to these Acts because these agreements were not incorporated into these statutes.