

Court File No.: A-198-18

FEDERAL COURT OF APPEAL

BETWEEN:

CITY OF OTTAWA

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

COUR D'APPEL FÉDÉRALE FEDERAL COURT OF APPEAL	
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MEMORANDUM OF FACT AND LAW OF THE RESPONDENT,
CANADIAN TRANSPORTATION AGENCY

(Pursuant to Rule 346(2) *Federal Courts Rules*)

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INTRODUCTION

1. In Determination No. R-2018-23,¹ the Canadian Transportation Agency ("Agency") found that the City of Ottawa ("City") has discontinued the operation of a portion of its Ottawa River Line (the "ORL") without complying with the mandatory discontinuance process set out in Division V of the *Canada Transportation Act* ("CTA"),² and ordered the City to either:

1. Take the steps necessary to restore the ORL, including the Prince of Wales Bridge ("POW Bridge" or the "Bridge"), to a point where it could be made operable within 12 months of an Agency order pursuant to Division IV of the CTA; or,

¹ Determination No. R-2018-23, dated February 16, 2018, Appeal Book, Volume I, Tab 4 at para 2 at 17 [*Final Decision*].

² SC 1996, c. 10 [CTA].

2. Initiate and complete the discontinuance process established in Division V of the CTA.
2. The provisions of Division V of the CTA are intended to promote the continued operation of existing railway lines – whose construction was often publically subsidized, and whose present or future use can have critical economic and social impacts -- whenever possible. Railway lines are limited resources with a public function and are therefore to be protected and preserved. Once removed, they are unlikely to return.
3. Having an operating interest in a railway line implies certain obligations. If a railway company wishes to be relieved of its obligations respecting a particular line, it may transfer or discontinue operation of the line and has no further obligations in that regard.
4. If, however, Division V of the CTA can be interpreted as permitting a railway company to state that its intention is to continue to operate a railway line but otherwise render that railway line inoperable, than the discontinuance process set out in Division V of the CTA is without purpose.

PART I – STATEMENT OF FACTS

A. The City carrying on business as Capital Railway

5. The City carrying on business as Capital Railway as per its Certificate of Fitness and subsequent variances, is a federally-regulated railway company operating the O-Train in Ottawa, Ontario. The City's operation of a railway in the provinces of Ontario and Quebec is within the legislative authority of Parliament.³
6. In 2005, the City purchased the Canadian Pacific Railway Company ("CP") corridor from the Quebec shore of the POW Bridge to Leitrim Road, Ottawa. These railway lines include what is

³ Decision No. 210-R-2012, dated June 6, 2012, Appeal Book, Volume II, Tab 30 at para 7 at 442 [2012 Decision].

currently known as the ORL, which stems from the Quebec shore across the length of the Bridge to Ellwood Subdivision in Ottawa.⁴

7. On June 6, 2012, the Agency rendered Decision No. 210-R-2012 subsequent to a complaint filed by Mobility Ottawa-Outaouais: Systems & Enterprises Inc. ("MOOSE") pursuant to Part III, Division V of the CTA. In that decision, the Agency considered: 1) whether the City, when it purchased the Bridge, acquired the ORL for continued operation; and 2) whether the City had discontinued operation of the ORL.⁵
8. The Agency found that the purchased railway lines, including the ORL and its bridge, were acquired by the City for continued operation in accordance with subsection 141(3) of the CTA. The Agency also found that, for the purposes of the CTA, the City had not discontinued operating the railway line.⁶
9. As explained in the 2012 Decision, the City, contrary to section 141 of the CTA, had failed to indicate in its three-year plan whether it intended to continue to operate or discontinue operation of the railway line. After explaining that until the railway line has been transferred or discontinued, the City would continue to have obligations under the CTA in respect of its operation, the Agency ordered the City to comply with section 141 of the CTA and include the ORL in its three-year plan.⁷
10. The City's Three-Year Plan 2016-2018, dated December 31, 2015 indicates that the City intends

⁴ Agreement of Purchase and Sale of Railway for Continued Railway Operations, dated January 31, 2005, Appeal Book, Volume I, Tab 5H at 128-153.

⁵ 2012 Decision, *supra* note 3 at para 3 at 442.

⁶ *Ibid* at paras 4, 24 at 442-443.

⁷ *Ibid* at paras 34, 37-38, 41 at 444.

to continue to operate all of its railway lines, including the ORL.⁸

B. The Agency's "Show Cause" Decision (Decision No. LET-R-27-2017)

11. On July 25, 2016 and August 15, 2016, the Agency received information from MOOSE indicating that the City had dismantled a section of the ORL and that it was constructing a permanent structure on the railway right-of-way that would create an obstruction and prevent future railway operations over the Bridge.⁹
12. On February 17, 2017, City staff confirmed that a portion of the ORL had been removed and is now permanently obstructed by Bayview Station in its current alignment.¹⁰
13. City staff also confirmed that any realignment of the ORL may involve, *inter alia*, the acquisition of land through commercial negotiation or through expropriation proceedings, the design of a practical track configuration and alignment, the reconstruction of the Parkway grade separation, and the elaboration of operational consideration to ensure that the traffic of the Trillium Line and ORL are accommodated. Further, no funding was available or allocated and no date had been set for the realignment of the railway line.¹¹
14. In light of this information, the Agency issued Decision No. LET-R-27-2017. In that decision, the Agency reiterated that a railway company has obligations under the CTA in respect of the operation of a railway line, and that if it wishes to be relieved of those statutory obligations, it must comply with all of steps of the mandatory process set out in Division V.¹²

⁸ Capital Railway Three-Year Plan 2016-2018, Appeal Book, Volume II, Tab 6A at 311-314.

⁹ Decision No. LET-R-27-2017, June 7, 2017, Appeal Book, Volume I, Tab 2 at 11 [*Show Cause Decision*].

¹⁰ City's Response to the Agency's Information Request, dated February 17, 2017, Appeal Book, Volume II, Tab 21 at 389 [*City's February 2017 Response*].

¹¹ *Ibid* at 390.

¹² *Show Cause Decision*, *supra* note 9 at 11.

15. The Agency determined that "it appears that the City has effectively discontinued a portion of a railway line without complying with the mandatory discontinuance process set out in Division V".¹³ The Agency ordered the City to show cause why the Agency should not find that the City had effectively discontinued operation of a portion of the ORL without complying with the mandatory discontinuance process. It required the City to address the operability of the ORL, including over the Bridge, as well as the City's plans for the ORL.¹⁴

C. The Agency's Preliminary Decision (Decision No. LET-R-58-2017)

16. On June 28, 2017, the City submitted its response to the Agency's Show Cause Decision. The City indicated that it had no intention of discontinuing operations on the railway line and provided "preliminary plans for the eventual realignment" of the ORL at Bayview. No timeframes whatsoever were provided.¹⁵

17. On August 14, 2017, the Agency sought clarification from the City on the time it anticipated would be required to carry out the realignment of the ORL and restoration of the Bridge to its proper operable condition, should an application be granted pursuant to Division IV of the CTA.¹⁶

18. On September 8, 2017, the City provided its preliminary estimates that it would take approximately two years to complete the ORL realignment and three years to undertake the Bridge restoration. The City added that "...it is not providing any assurances, representations or commitments of any kind regarding its ability to meet, or accommodate, these timelines in

¹³ *Ibid* at 13.

¹⁴ *Ibid*.

¹⁵ City's Show Cause Response, dated June 28, 2017, Appeal Book, Volume II, Tab 26 at 424, 427.

¹⁶ Agency's correspondence to the City, dated August 14, 2017, Appeal Book, Volume II, Tab 27 at 435.

the future...". Regardless, it indicated that expedited timelines could be explored where warranted and properly supported.¹⁷

19. On September 20, 2017, the Agency issued Decision No. LET-R-58-2017, in which it stated that it was of the preliminary view that the time periods the City had provided were not reasonable. Again, the Agency reiterated that until the mandatory discontinuance process is triggered, a railway company continues to have obligations regarding the operation of the railway line. The Agency directed the City to confirm how quickly it could bring the ORL and its Bridge into operable condition if the Agency were to grant running rights to another railway company.¹⁸

20. The City declined to provide the expedited timelines requested by the Agency, stating that "[i]t would be imprudent and irresponsible for the City to provide highly speculative, heavily qualified response ... knowing that the Agency intends to then adopt and impose regulatory standards on the basis of speculative information". The City reiterated the many obstacles and challenges it would face in realigning the ORL.¹⁹

D. The Agency's Final Decision (Determination No. R-2018-23)

21. On February 16, 2018, the Agency issued Determination No. R-2018-23, in which it found that the City had discontinued the operation of a portion of the ORL without complying with the mandatory discontinuance process set out in Division V of the CTA.²⁰ It ordered the City to

¹⁷ City's additional response to Show Cause, dated September 8, 2017, Appeal Book, Volume II, Tab 28 at 436-437.

¹⁸ Decision No. LET-R-58-2017 dated September 20, 2017, Appeal Book, Volume I, Tab 3 at 16 [*Preliminary Decision*].

¹⁹ City's response to the Agency's Request for further information, dated October 4, 2017, Appeal Book, Volume II, Tab 29 at 439.

²⁰ *Final Decision*, *supra* note 1 at para 2 at 17.

either:

1. Take the steps necessary to restore the ORL, including the POW Bridge, to a point where it could be made operable within 12 months of an Agency order under to Division IV of the CTA; or,
 2. Initiate and complete the discontinuance process established in Division V of the CTA.²¹
22. On March 16, 2018, the City filed its notice of motion for leave to appeal of Decision No. LET-R-27-2017, Decision No. LET-R-58-2017, and Determination No. R-2018-23, with this Honorable Court.²²
23. Leave to appeal was granted on May 2, 2018.²³

PART II - POINTS IN ISSUE

24. The Agency proposes to address the issues as formulated by the Appellant:
- A. Did the Agency have jurisdiction to make the inquiries leading to the Show Cause Decision, Preliminary Decision and Final Decision?
 - B. Did the Agency exceed its statutory authority by imposing maintenance standards on the City in respect of a railway line, and/or by ordering it to pursue statutory discontinuance?
 - C. Is the Final Decision unreasonable on the basis of being vague, unclear and arbitrary? and
 - D. Did the Agency breach its duty of procedural fairness by failing to notify the City that it was considering an order requiring the City to undertake undefined remedial work within a prescribed time period?

²¹ *Ibid* at para 27 at 19.

²² Notice of Motion for leave to appeal, dated March 16, 2018, Court File No. 18-A-14, online: Federal Court of Appeal <http://apps.fct-cf.gc.ca/pq/IndexingQueries/infp_RE_info_e.php?court_no=18-A-14&select_court=All> at Recorded Entry #1.

²³ Order, dated May 2, 2018, Court File No. 18-A-14, online: Federal Court of Appeal <http://apps.fct-cf.gc.ca/pq/IndexingQueries/infp_RE_info_e.php?court_no=18-A-14&select_court=All> at Recorded Entry #9.

PART III - STATEMENT OF SUBMISSIONS

A. The Agency's Participation in this Appeal

25. While the Agency recognizes the concerns expressed by the Courts when a tribunal appears on an appeal of one of its own decisions, it is submitted that the Agency's participation in this matter is justified and permissible.

26. Pursuant to subsection 40(4) of the CTA, the Agency is entitled to be heard by Counsel or otherwise on the argument of an appeal before this Court. This establishes Parliament's intention that the Agency, an expert tribunal, would participate in appeals from its decisions.

27. The Supreme Court of Canada has recognized that a tribunal's participation in an appeal from one of its decisions raises two fundamental issues: the importance of having a fully informed adjudication of the issues before the court, and the importance of maintaining tribunal impartiality.²⁴ In this case, a weighing of the factors identified by the Supreme Court in determining what role a tribunal should play in an appeal of one of its decisions favours recognizing the Agency's right to respond to the merits of this Appeal.

28. The Agency has been recognized by this Court as an expert tribunal.²⁵ Given its expertise and familiarity with the relevant administrative scheme, the Agency is well-positioned to assist the Court in reaching a just outcome.²⁶

29. Given that there is otherwise no respondent in this Appeal, this Court will benefit from having submissions from the Agency.²⁷

²⁴ *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 at para 48 [*Ontario (Energy Board)*].

²⁵ *Canadian National Railway Company v Richardson International Limited*, 2015 FCA 180 at para 28.

²⁶ *Ontario (Energy Board)*, *supra* note 24 at para 53.

²⁷ *Ibid* at para 59.

30. While the proceeding before the Agency initiated pursuant to information received from a private company, it was not *per se* an individual conflict between two adversarial parties. MOOSE was not seeking an individual remedy. Rather, MOOSE sought to engage the Agency's regulatory powers to bring a halt to certain actions taken by the City alleged to be in violation of the CTA. In this context, it is the Agency's regulatory role which is primarily engaged, and therefore concerns about impartiality are not as significant.²⁸

31. While acknowledging the need to avoid "bootstrapping" and the need to let the Agency's decision speak for itself, the Agency submits that its participation in this Appeal is appropriate. It is the Agency's intention to simply highlight what is apparent on the face of the record and respond to the arguments raised by the City. It is submitted that this approach is permissible and is consistent with the Supreme Court of Canada's statement on the issue.²⁹

B. Standard of Review

32. The Agency submits that all of the issues raised in this Appeal, with the exception of the question of procedural fairness, are reviewable on a standard of reasonableness.

33. The courts have generally reviewed decisions of the Agency – an administrative body with specialized expertise – on a deferential standard.³⁰

34. The deferential standard is presumed to apply when the Agency is interpreting its own statute or statutes closely connected to the Agency's functions with which the Agency will have a

²⁸ *Ibid.*

²⁹ *Ibid* at para 70.

³⁰ *Canadian National Railway Company v Viterro Inc.*, 2017 FCA 6 at para 34. See also *Canadian National Railway Company v Canadian Transportation Agency*, 2013 FCA 270 at para 3, citing *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 at para 100.

particular familiarity.³¹ The Agency therefore agrees with the City that the Agency is entitled to a presumption of reasonableness when interpreting the CTA.

35. The City alleges, however, that the issues pertaining to the Agency's jurisdiction to conduct the inquiry and the Agency's authority to issue the order under appeal are true questions of jurisdiction - one of the exceptional categories identified in *Dunsmuir* that will always attract the standard of correctness.³²

36. Although perhaps framed by the City as true questions of *vires*, they are rather questions that pertain to the scope of the Agency's jurisdiction in applying its home statute.³³ These are, by definition, simple questions of jurisdiction.

37. In fact, the Supreme Court has gone so far as to suggest that true questions of jurisdiction arise so rarely when a tribunal is interpreting its home statute that it may be asked whether "the category of true questions of jurisdiction exists".³⁴ Unless the situation is exceptional, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.³⁵ More recently, the Supreme Court has not only questioned the existence of true questions of *vires*, but also the utility in even attempting to identify them.³⁶

³¹ *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30 [*Alberta Teachers*] citing *Dunsmuir* at para 54; *Smith v Alliance Pipeline*, 2011 SCC 7 at para 28.

³² Appellant's Memorandum of Fact and Law, dated October 3, 2018 at paras 43-44 [*Appellant's factum*].

³³ *Canadian National Railway Company v BNSF Railway Company*, 2018 FCA 135 at para 8 citing *Bell Canada v Canada (Attorney General)*, 2017 FCA 249 at para 9.

³⁴ *Alberta Teachers*, *supra* note 31 at para 34.

³⁵ *Ibid.*

³⁶ *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 35-41.

38. As for the violation of procedural fairness alleged by the City, the issue is whether a fair and just process was followed. No standard of review is applied. The Agency notes this Court's discussion of the issue in *Canadian Pacific*:

A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 21) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.³⁷

C. The Agency's Interpretation of Division V of the CTA

39. The central issue on appeal is the Agency's interpretation of Division V of the CTA, more particularly its finding that until the discontinuance process has been completed, a railway company continues to have obligations regarding the operation of a railway line, which prevent it from rendering the line inoperable, by for example, removing tracks and obstructing the railway line's right-of-way.

40. This interpretation is set out in the Final Decision at paragraph 20, which reads as follows:

The Agency finds that the most reasonable interpretation of the Division V discontinuance requirement, particularly when read in concert with Division IV and the national transportation policy, is that where a railway company does not trigger the discontinuance process, it must intend to operate the line at the present time or at some point in the future, and have the ability to bring a currently inoperable line into operable condition within a reasonable period of time if, for example, the Agency grants running rights to another railway company upon application.³⁸

i) Obligations regarding the Operation of the Railway Line

41. The National Transportation Policy is set out in section 5 of the CTA. It states, amongst other

³⁷ *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*].

³⁸ *Final Decision*, *supra* note 1 at para 20 at 18.

things, that "... competition and market forces ... are the prime agents in providing viable and effective transportation services", and that "...regulation and strategic public intervention are used to achieve economic, safety, security environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces".³⁹

42. Part III, Division II of the CTA establishes the rail licensing regime as the means by which railway companies can construct or operate a railway that falls within the legislative authority of Parliament. It requires railway companies to hold a certificate of fitness, issued by the Agency, to construct or operate a federal railway.⁴⁰

43. Once constructed, a federal railway or a portion of a railway is declared to be a work for the general advantage of Canada by the operation of subsection 88(3) of the CTA. The declaration ceases to have affect with respect to a line of the railway, or a portion of it, only after the discontinuance process under Division V has been completed.⁴¹

44. Thus, while it may be true that railway owners are the "stewards of their own assets",⁴² they are also curators of those assets, assets which are limited in number and have been declared by Parliament to be for the general advantage of Canada. Once a certificate of fitness has been issued, the CTA grants a number of powers and rights to railway companies,⁴³ but also imposes specific obligations.⁴⁴ This "public function" of railway companies has been recognized, for

³⁹ CTA, *supra* note 2, s 5.

⁴⁰ *Ibid*, ss 90-93.

⁴¹ *Ibid*, ss 88(3), 88(4).

⁴² *Appellant's factum*, *supra* note 32 at para 48.

⁴³ CTA, *supra* note 2, s 95.

⁴⁴ *Ibid*, s 138.

example, in relation to common carrier obligations.⁴⁵

45. Part III, Division IV of the CTA sets out railway companies obligations regarding rates and services, and consistent with the National Transportation Policy described above, includes several provisions that are intended to foster competition and user choice. For example, section 138 of the CTA provides that a railway company may apply to the Agency for the right to:

- (a) take possession of, use or occupy any land belonging to any other railway company;
- (b) use the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company; and
- (c) run and operate its trains over and on any portion of the railway of any other railway company.⁴⁶

46. The ability for a railway to apply for the rights described above creates a corroborative obligation on the host railway. Contrary to the Appellant's assertion at paragraph 8 of their Memorandum, the railway does not have full discretion in granting running rights and setting the terms and conditions on its railway line. Absent agreement, the Agency has the authority to grant the rights described above. In that regard, the Agency may make any order and impose any condition on either railway company and may restrict the rights as appear just and reasonable to the Agency, having regard to the public interest.

47. Like Parliament's declaration that a railway or portion of a railway is a work for the general advantage of Canada,⁴⁷ it is the Agency's view that a railway company's obligations in relation to the operation of a railway line continues until the mandatory discontinuation process set out

⁴⁵ *Patchett & Sons Ltd. v Pacific Great Eastern Railway Co.*, [1959] SCR 271 at 275.

⁴⁶ CTA, *supra* note 2, s 138.

⁴⁷ *Ibid*, s 88(3).

in Part III, Division V of the CTA, has been completed. This means that the railway must be kept in a state that permits these obligations to be fulfilled. A railway company cannot dismantle a railway line and continue to operate it.

ii) Mandatory Discontinuance Process

48. Division V of the CTA sets out a process for the discontinuance of federally-regulated railway lines. Section 142 states that "a railway company shall comply with the steps described in this Division before discontinuing operating a railway line". To "operate" a railway, for its part, is defined at section 87 of the CTA and includes "any act necessary for the maintenance of the railway or the operation of a train".⁴⁸ A railway company's obligations in respect of the operation of a railway line or portion of a railway line terminate when it:

- sells, leases or otherwise transfers its railway line, or its operating interest in its line, for continued operation;⁴⁹ or,
- complies with the discontinuance process⁵⁰ and provides notice of the discontinuance⁵¹ to the Agency.

49. Key actions that a railway company must take are as follows:

- indicate on a plan that is kept up to date and made available to the public that it intends to, within the next three years, take steps to discontinue operating the line;
- after indicating its intention in its plan for at least 12 months, advertise its intention to discontinue operation of the line and afford persons interested in continuing to operate the line the opportunity to acquire it;
- if no agreement is reached to transfer the line, offer the line, for not more than its net

⁴⁸ *Ibid*, s 87.

⁴⁹ *Ibid*, ss 141(3), 144.1.

⁵⁰ *Ibid*, ss 143-145.

⁵¹ *Ibid*, s 146.

salvage value, to the federal government, and then to any provincial and municipal governments and urban transit authorities, through whose territory the line passes.⁵²

50. In Decision No. 445-R-1997, the Agency explained that "the provisions of Division V of the CTA are intended to promote the normal business management of railway assets and operations by a railway company, as well as to encourage the continuation of railway services wherever possible through the takeover of railway lines by new operators in situations where the current railway operator does not wish to continue to provide service".⁵³

51. In *Canadian National Railway Company v Greenstone (Municipality)*⁵⁴, the Federal Court of Appeal held that Division V of the CTA is a complete and mandatory statutory code for discontinuance of a railway line:

In any event, Division V of the Act establishes a mandatory process for the discontinuance of railway lines. The appellant is under a clear and positive statutory duty to comply with the obligations therein that are imposed upon it. An interested or potentially interested buyer of the lines, such as the Municipality in the present instance, cannot through consent, its participation or its conduct in the process relieve a railway company of its statutory obligations.⁵⁵

52. Finally, this complete and mandatory process also applies to the discontinuance of part of a railway line, as recognized by the Federal Court of Appeal in *Greenstone*:

The prohibition in subsection 142(2) to start the discontinuance process applies not only when there is discontinuance of a line, but also, as envisaged by the definition of "railway lines", when there is discontinuance of "a portion of a railway line".⁵⁶

53. The choice provided by section 142 of the CTA to a railway company is to either operate or discontinue operation of its lines. The law does not include an option of disassembling the line

⁵² *Ibid*, ss 141(1), 143-145.

⁵³ Decision No. 445-R-1997, dated July 11, 1997.

⁵⁴ 2008 FCA 395 [*Greenstone*].

⁵⁵ *Ibid* at para 56.

⁵⁶ *Ibid* at para 41.

and building a permanent structure in its right-of-way, without completing the discontinuance process.

54. As stated in the Final decision:

This does not mean that the CTA obligates railway companies to keep every line that they own in fully-operable condition at all times. There may well be situations where a railway company decides, for example, to relocate a portion of a line or limit its maintenance activities on an unused line, to the point where the line is rendered temporarily inoperable. It does not follow, however, that lines can be allowed to fall into a state of permanent or long-term inoperability without the discontinuance process having been respected. Such an interpretation would undermine the very purpose and logic of the discontinuance provisions. To comply with the legislative scheme, a railway company must ensure, at minimum, that it is in a position to restore a line that has not been discontinued to operability within a reasonable period of time, in order to meet its obligations under Division IV of the CTA.⁵⁷

55. While the City has not formulated the intention to discontinue operation of the ORL in its three-year plan, it has nonetheless, by its own actions, taken steps to render the line inoperable within the foreseeable future.

D. The Agency did not Exceed its Jurisdiction in the Final Decision, which was both Reasonable and Fair

i) The Agency had the jurisdiction to conduct the inquiry

56. The City relies on the Federal Court of Appeal's decision in *Canadian National Railway Co. v Brocklehurst*⁵⁸ to argue that the Agency lacks the necessary jurisdiction to conduct an inquiry pursuant to Division V.⁵⁹ However, *Brocklehurst* dealt with the Agency's jurisdiction to deal with complaints concerning noise, smoke and vibration resulting from day-to-day railway operations. Contrary to the case at hand, the CTA (at the time) contained no express obligation

⁵⁷ *Final Decision*, *supra* note 1 at para 22 at 18.

⁵⁸ [2001] 2 FC 141 [*Brocklehurst*].

⁵⁹ *Appellant's factum*, *supra* note 32 at paras 60-62.

in that regard.⁶⁰

57. In *Brocklehurst*, the Agency had tried to infer an obligation from the general powers set out in section 95 of the CTA and relied on section 26 of the CTA to exercise its jurisdiction to enforce these obligations.⁶¹ The Federal Court of Appeal found that section 95 was not intended to address the liability of railway companies regarding noise, smoke and vibration in and as such, section 26 of the CTA could not be used by the Agency to exert jurisdiction where no such obligation existed.⁶² The Court found that the only recourse available to complainants was through common law actions of nuisance.⁶³

58. In the case at hand, there are express obligations in the CTA that are alleged to have been infringed:

- a railway company is required to comply with the steps described in Division V before discontinuing operating a railway line;⁶⁴ and
- a railway company is prohibited from taking steps to discontinue operating a railway line before its intention to discontinue operating has been indicated in its three year plan of at least 12 months.⁶⁵

59. Should a railway company take steps to discontinue operating a railway line before complying with the steps described in Division V or before indicating its intention to discontinue operating the railway line, as was determined in the Final Decision, section 26 of the CTA provides that

⁶⁰ In, 2007, the CTA was amended to provide the Agency with the jurisdiction to inquire into complaints regarding noise and vibration. See e.g., CTA, *supra* note 2, ss 95.1-95.4.

⁶¹ *Brocklehurst*, *supra* note 58 at para 19.

⁶² *Ibid* at para 34.

⁶³ *Ibid* at para 37.

⁶⁴ CTA, *supra* note 2, s 142(1).

⁶⁵ *Ibid*, s 142(2).

the Agency has the authority to compel the observance of these specific obligations.

60. Surely, the legislator did not intend for the Agency sit idly by when made aware of a violation of the licensing or discontinuance regime that it is tasked with overseeing. Section 26 provides, in express terms, the Agency's authority to compel observance of obligations set out in any act administered in whole or in part by the Agency, for the purpose of avoiding such a scenario.

61. If section 26 cannot be read as providing express jurisdiction to inquire into information regarding a potential violation of such an obligation that has been brought to its attention by a member of the public or otherwise, then the Agency must have, by necessary implication, the jurisdiction to do so.⁶⁶ To interpret section 142 and section 26 of the CTA otherwise would render the obligations and order granting authority that those provisions contain meaningless.

ii) The Agency had the authority to issue the order

62. The City, for all intents and purposes, discontinued the operation of a portion of the ORL without complying with the discontinuance process set out in Division V of the CTA. Pursuant to section 26 of the CTA, the Agency ordered the City to either restore the ORL to a point where it could be made operable within 12 months of an Agency order under Division IV of the CTA, or to initiate and complete the discontinuance process established in Division V of the CTA.⁶⁷ The two options given to the City are directly related to the obligation and prohibition set out in section 142 of the CTA, and are crafted to ensure compliance with that section.

63. The Agency did not make the order under the authority of section 32 of the *Railway Safety Act*.⁶⁸ That authority belongs to the Minister. The City's maintenance obligations under the

⁶⁶ Guy Régimbald, *Canadian Administrative Law*, 1st ed (Markham: LexisNexis Canada Inc., 2008) at 142-143.

⁶⁷ *Final Decision*, *supra* note 1 at para 27 at 19.

⁶⁸ *Appellant's factum*, *supra* note 32 at para 69.

Railway Safety Act were not at issue before the Agency. Nor did the Agency order that the ORL must be maintained in "a state of ready use for rail service".⁶⁹ The order in question was made in relation to the City's obligations under the CTA regarding operation of the railway line.⁷⁰

64. In Decision No. 210-R-2012, the Agency found that "...the discontinuance provisions do not provide the Agency with the authority to oversee a railway company's maintenance and safety practices to ascertain whether, with respect to a specific railway line, a *de facto* discontinuance has occurred. The Agency has neither the jurisdiction nor the expertise to determine whether a railway line complies with the requirements of the *Railway Safety Act*".⁷¹ That remains true.

65. In the Final Decision, the Agency confirmed that it does not examine a railway company's safety and maintenance practices to determine whether a railway company is compliant with Division V of the CTA, but added that the Agency may conclude that a railway company had failed to respect the discontinuance process if: 1) infrastructure has been removed; 2) physical barriers have been created; or 3) a railway line has been allowed to fall into such a state of disrepair that operation of the railway line would not be possible within a reasonable period of time.⁷² In such instances, the Agency submits that whatever the railway company's stated intent, its actions effectively constitute discontinuance outside the statutory process established for discontinuance.

66. In the present case, the factual context is not one where the City has simply allowed an inactive railway track to fall into a temporary state of disrepair. Rather, the City has taken specific

⁶⁹ *Ibid* at para 70.

⁷⁰ *Final Decision*, *supra* note 1 at para 1 at 17.

⁷¹ *2012 Decision*, *supra* note 3 at para 39 at 444.

⁷² *Final Decision*, *supra* note 1 at para 23 at 18.

actions to render a portion of the ORL inoperable, including removing tracks and constructing a permanent structure in the railway line's right-of-way. Further, any plans for its realignment and return to operability are linked to the uncertain possibility of rail operations at an undefined time in the future.

67. The City further argues that inclusion of 116(4) of the CTA, a provision dealing with orders of the Agency specific to a railway company's level of service obligations, suggests that the Agency has no statutory authority to have made the order under appeal. Arguing that the principle of *Expressio Unius* applies, the City contends that the Agency's ability to order a party to amend its three-year plan is limited to the narrow circumstance enumerated in that subsection.⁷³

68. As discussed in *Dorval v Dorval*,⁷⁴ the jurisprudence clearly indicates that implied exclusion arguments must be weighed with considerable caution:

...[T]he maxim *expressio unius est exclusio alterius* is only an aid to statutory construction. As Laskin C.J. noted in *Jones v. A.G. of New Brunswick*, [1975] 2 S.C.R. 182, "This maxim provides at the most merely a guide to interpretation; it does not pre-ordain conclusions." And its application calls for a considerable measure of caution lest too much be made of it..⁷⁵

69. In the case at hand, the Agency determined that the City failed to comply with express obligations set out in section 142 of the CTA and ordered the City to comply with those obligations pursuant to section 20 of the CTA. The fact that paragraph 116(4)(a) specifies that the Agency may order a railway company to modify its three-year plan in a particular context of a grain-dependent branch line does not imply that the Agency does not have the authority to

⁷³ *Appellant's factum*, *supra* note 32 at paras 74-76.

⁷⁴ 2006 SKCA 21.

⁷⁵ *Ibid* at para 13.

compel observance of section 142 pursuant to section 26 of the CTA.

70. Subsection 116(4) of the CTA lists a series of potential orders that the Agency may make if it determines that a railway company is not fulfilling its service obligations. To interpret the provision in the manner proposed by the City would effectively negate the Agency's ability to ensure compliance with the discontinuance provisions in any other circumstance, or any other obligation for that matter, where the remedy may resemble one of the possible orders enumerated in subsection 116(4) of the CTA.

iii) Reasonableness and Fairness of the Agency's Decision

71. The City argues that the specific requirements imposed by the Final Decision should be overturned on the grounds that they are unreasonable, arbitrary and unclear.⁷⁶

72. First, the City argues that the scope of the work ordered by the Agency, to "take the necessary steps to restore the ORL..." is not defined, arbitrary and unclear "because it depends entirely on the future intended use of the ORL and the timing of that use".⁷⁷ However, it is the City itself that has enumerated the various steps that would be required to return the ORL to a state where it could become operational again,⁷⁸ and according to the City's own future plans, its future intended use has already been determined: "The City intends to extend rail transit service across the Bridge to Gatineau ... as part of a future link in its transit network".⁷⁹ There is no expectation that the line be made operational by the City for any other use.

73. As for its own use, the City argues that it has not yet detailed these plans.⁸⁰ Yet, it is the City's

⁷⁶ *Appellant's factum*, *supra* note 32 at para 84.

⁷⁷ *Ibid* at para 85.

⁷⁸ *City's February 2017 Response*, *supra* note 10 at 390-391.

⁷⁹ *Appellant's factum*, *supra* note 32 at para 10.

⁸⁰ *Ibid* at para 13.

specific actions that have rendered the ORL inoperable. Removing a portion of the line and constructing a permanent structure in its right-of-way without having a detailed plan for its realignment is why the Agency found that the City has discontinued operation of a portion of the ORL. Again, this is not a case where an inactive line has simply fallen into a temporary state of disrepair. The uncertainty regarding the restoration of the line has been created by the actions of the City.

74. Second, the City argues that the "12 month to readiness" timeframe contained in the order is unreasonable.⁸¹ As set out in the Final Decision, the most reasonable interpretation of Division V includes a requirement that a railway have the ability to bring a currently inoperable line into operable condition within a reasonable period of time.⁸² In arriving at what constitutes a reasonable period of time in the circumstances, the Agency considered, on the one hand, "the City's transportation plans and the fact that there have been no applications pursuant to Division IV of the CTA", and on the other hand, "the impact that allowing the line to fall into a state of permanent or long-term inoperability would have on the City's ability to comply with its obligations".⁸³

75. The City had ample opportunity to bring evidence regarding the "process required by the City to plan and carry out significant capital projects".⁸⁴ Regardless, the City is misreading the Agency's Decision. The order contemplates that the "process required by the City to plan and carry out significant capital projects" would have to be factored in by the City in bringing the line back to a condition where it could be operational within 12 months, and not necessarily

⁸¹ *Ibid* at para 86.

⁸² *Final Decision*, *supra* note 1 at para 20 at 18.

⁸³ *Ibid* at para 25 at 18-19.

⁸⁴ *Appellant's factum*, *supra* note 32 at para 86.

within the 12 month timeframe itself.

76. Third, the City argues that the decision is unreasonable as it compels the City to make significant capital expenditures for no current value to Ottawa taxpayers.⁸⁵ Again, much of those expenditures result from the City having removed a portion of the ORL and built a permanent structure in its right-of-way, creating the need for its realignment to remain operational. If the City determines that the cost is too high to continue operation, it has the option of transferring or discontinuing the line. The legislative regime makes no distinction as to whether the railway is owned and operated by a public entity or a private one.
77. Fourth, the City argues that the Final Decision is unreasonable as it has the effect of shifting the cost of rehabilitation of the Bridge entirely to City instead of sharing the costs.⁸⁶ However, nothing would prohibit the City from negotiating the commercial terms of a running rights agreement, from opposing an application under section 138 of the CTA failing such an agreement, or from seeking conditions or compensation. The cost of maintaining the line as operational would certainly remain a factor in any commercial negotiation or application before the Agency.
78. Finally, City's contention that the Agency erred in law by failing to abide by the principles of procedural fairness cannot be supported by the record.⁸⁷ The order issued flows directly from the obligations set out in section 142 of the CTA. The City knew the case to be met and was given every opportunity to respond. This was the very purpose of both the Show Cause and Preliminary Decisions.

⁸⁵ *Ibid* at para 88.

⁸⁶ *Ibid* at para 89.

⁸⁷ *Ibid* at paras 90-98.

E. Costs

79. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.⁸⁸

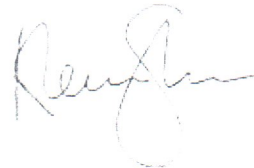
80. The Agency has acted in good faith. It does not seek costs and submits that in the circumstances it should not be ordered to pay costs.

PART IV - ORDER SOUGHT

81. The Agency awaits the disposition of this Honorable Court

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 1st day of November, 2018.



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⁸⁸ *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para 47 citing Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998).

PART V - LIST OF AUTHORITIES

A. Statutes and Regulations

Canada Transportation Act, S.C. 1996, c. 10, ss. 5, 26, 40, 83, 87-88, 90-93, 95, 116(4), 138, 141-146

B. Case Law

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61

Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31

Canadian National Railway Company v BNSF Railway Company, 2018 FCA 135

Canadian National Railway Company v Brocklehurst, [2001] 2 FC 141

Canadian National Railway Company v Canadian Transportation Agency, 2013 FCA 270

Canadian National Railway Company v Greenstone (Municipality), 2008 FCA 395

Canadian National Railway Company v Richardson International Limited, 2015 FCA 180

Canadian National Railway Company v Viterra Inc., 2017 FCA 6

Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69

Dorval v Dorval, 2006 SKCA 21

Lang v British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244

Ontario (Energy Board) v Ontario Power Generation Inc., 2015 SCC 44

Patchett & Sons Ltd. v Pacific Great Eastern Railway Co., [1959] SCR 271

C. Agency Decisions

Decision No. 445-R-1997, dated July 11, 1997