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Court File No. A-198-18

**FEDERAL COURT OF APPEAL**

BETWEEN:

CITY OF OTTAWA

Appellant

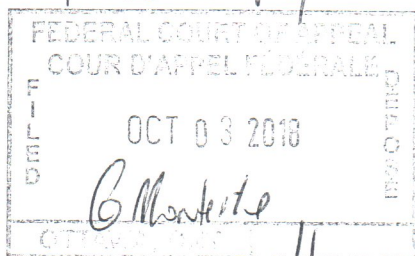
– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

**MEMORANDUM OF FACT AND LAW  
OF THE APPELLANT,  
CITY OF OTTAWA**

*File Copy*



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## PART I – FACTS

### A. OVERVIEW

1. The Canadian Transportation Agency (the “Agency”), in an unprecedented series of decisions, initiated an inquiry into whether the Appellant, the City of Ottawa (the “City”), had discontinued a railway line. The Agency subsequently found that the City had discontinued a railway line according to a novel theory of “constructive discontinuance”. The Agency then imposed undefined and undefinable maintenance obligations on the City, unless the City initiated and completed a statutory discontinuance process pursuant to the *Canada Transportation Act* (the “Act”).<sup>1</sup>

2. The City submits that:

- (a) The Agency had no authority to initiate this inquiry;
- (b) There is no such thing as “constructive discontinuance” of a railway line in the Act;
- (c) The Agency had no authority to impose maintenance obligations with respect to a federal railway line. Maintenance orders are within the exclusive power of the Minister of Transport under the *Railway Safety Act* (the “Railway Act”);<sup>2</sup>
- (d) Even if the Agency had such authority, its final order under appeal is unintelligible; and
- (e) The Agency arrived at its decisions without providing the City with a fair opportunity to put its position before the Agency.

3. The decisions under appeal impose significant, wasteful, and impracticable requirements on the City without any statutory foundation for those obligations. In short, the Agency assumed authority it did not have to render an unreasonable decision, all in breach of its duty of fairness to the City.

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<sup>1</sup> S.C. 1996, c. 10 [“Act”].

<sup>2</sup> R.S.C. 1985, c. 32 [“Railway Act”].



## **B. SUMMARY OF THE FACTUAL BACKGROUND BEFORE THE AGENCY**

### **1) A View from 30,000 Feet**

4. As part of its long-term plan for light rail service, the City acquired a railway line: the Ottawa River Line (“ORL”). A small section of the ORL was recently temporarily dismantled as part of the construction of the light rail transit expansion in Ottawa. This was to accommodate the new west side entrance to Bayview Station for the Confederation Line. The City plans to realign the dismantled track in connection with its broader transportation plans and the City’s Certificate of Fitness.

5. At the urging of a member of the public, the Agency initiated an inquiry into whether the City had “discontinued” the ORL. The Agency’s decisions flowing from this inquiry are the subject of this appeal.

### **2) Purchase and Operation of the ORL**

6. The City is a federally regulated railway company. In 2005, the City purchased certain rail lines from Canadian Pacific Railway Company, including the railway line now known as the ORL.<sup>3</sup> The ORL is a short 1.5 km line that includes a section running over the 137-year-old Prince of Wales bridge (“Bridge”) spanning the Ottawa River between Ottawa and Gatineau.

7. The City acquired the ORL as part of its long-term plans for light rail service.<sup>4</sup> Since the City purchased the ORL, it has been inactive. The City has been managing and protecting the ORL rail infrastructure, including the Bridge, by performing regular engineering inspections and basic maintenance activities commensurate with an inactive rail line under the regulatory oversight of Transport Canada pursuant to the Railway Act.<sup>5</sup> The ORL is an inactive line, and it is maintained as such.

8. In the event the City receives a request from another railway company for running rights on the ORL, the City will consider the request. As part of that process, it will inspect the Bridge to ensure safety for the third-party’s proposed operations. If remedial or other work is required,

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<sup>3</sup> Agreement of Purchase and Sale, January 31, 2005 [“Purchase Agreement”], Appeal Book [“AB”], Vol. I, Tab 5H, pp. 128-153.

<sup>4</sup> Letter correspondence from the City to the Agency, June 28, 2017 [“June 28, 2017 City Letter”], AB, Vol. II, Tab 26, pp. 420-427.

<sup>5</sup> June 28, 2017 City Letter, *supra*, AB, Vol. II, Tab 26, pp. 420-427.



the City will consider initiating the process for the required work. The scope of work required would depend on several factors, including operating technology standards and related requirements of the third-party rail operator. The timing for any remedial or other work would also depend on many factors, including the requirements of the third-party operator, the procurement process, and required regulatory approvals and stakeholder consultations. The cost of the work would vary depending on the future intended use and the availability of various resources.<sup>6</sup> The City would seek to negotiate an appropriate cost-sharing agreement for any necessary remedial or other work in connection with the possible granting of third-party running rights.<sup>7</sup>

### **3) The City's Light Rail Transit System**

9. The City is heavily engaged in developing its rail transit system. Like all major capital projects, this is planned and budgeted for years in advance.<sup>8</sup>

10. The City intends to extend rail transit service across the Bridge to Gatineau at a future date as part of a future link in its transit network. This is set out in the City's Transportation Master Plan.<sup>9</sup> Although no date has been set for the construction or opening of that service, the City has been taking active steps in furtherance of its plans, including entering into a Memorandum of Understanding with the City of Gatineau.<sup>10</sup>

11. The City's current Three-Year Plan, as required by section 141 of the Act, provides that the City intends to retain the ORL.<sup>11</sup> Further the City has consistently confirmed and reaffirmed its intention to retain the ORL for continued rail service. The City has no present intention and

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<sup>6</sup> Letter correspondence from the City to the Agency, October 4, 2017 ["October 4, 2017 City Letter"], AB, Vol. II, Tab 29, pp. 438-441.

<sup>7</sup> Email correspondence from the City to the Agency, February 17, 2017 ["February 17, 2017 City Email"], AB, Vol. II, Tab 21, pp. 389-392.

<sup>8</sup> City Light Rail Report to Transit Commission and Council, September 1, 2015 ["City Light Rail Report"], AB, Vol. I, Tab 5C, pp. 51-81; City Light Rail Conceptual Route Planning Study, April 14, 2000 ["City Light Rail Study"], AB, Vol. I, Tab 5D, pp. 82-91; Interprovincial Transit Strategy, January 2013, AB, Vol. I, Tab 5J, pp. 162-250.

<sup>9</sup> Email correspondence from the City to the Agency, July 27, 2016, AB, Vol. II, Tab 6, p. 310.

<sup>10</sup> Memorandum of Understanding, May 26, 2017 ["City MOU"], AB, Vol. II, Tab 26B, pp. 430-433.

<sup>11</sup> City Three-Year Plan 2016-2018, AB, Vol. II, Tab 6A, pp. 311-314.

has not decided to discontinue its ownership and/or planned use of the ORL. It has never taken any steps to permanently discontinue operating or otherwise abandon the ORL.<sup>12</sup>

#### **4) The City Dismantles a Small Section of the ORL**

12. In September 2015, as part of its current light rail expansion project, the City dismantled a small section of the ORL. This was necessary to accommodate the new west side entrance to Bayview Station, one of the stations for the City's new light rail Confederation Line. The City plans to realign the dismantled ORL track by making modifications to segments of the track alignment to effectively address the presence of Bayview Station and to restore the ORL alignment. The City has prepared preliminary plans for this work.<sup>13</sup>

13. The City has not yet developed detailed engineering designs and related work and equipment requirements for the realignment. These details will be developed as the City's conceptual plans are further developed, and as the City receives input from all interested persons, including other potential third-party railway operators. Any physical work will require careful coordination and attention to the in-service operations of the existing light rail infrastructure at Bayview Station, and consideration of industry developments in rail infrastructure assets, systems, and related technological advancements.<sup>14</sup>

#### **5) Brief Overview of the Legislative Framework**

14. A more detailed description of the statutory framework is set out in paragraphs 48 to 58. In brief, the Act addresses commercial and economic-related disputes and obligations of railway carriers and suppliers, ranging from issuing certificates of fitness to qualified entities who seek to operate a federal railway line, to addressing disputes relating to rates, tariffs and services.<sup>15</sup>

15. Central to this appeal is Division V of the Act, which sets out a statutory process by which a railway owner may transfer and discontinue operation of a railway line. A Division V discontinuance process is triggered by the owner's intention to discontinue the line, not by the

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<sup>12</sup> June 28, 2017 City Letter, *supra*, AB, Vol. II, Tab 26, pp. 420-427.

<sup>13</sup> Email correspondence from the City to the Agency, July 28, 2016, AB, Vol. II, Tab 7, pp. 317-318; Preliminary Drawing O-Train Extension from Ottawa to Gatineau, April 4, 2013, AB, Vol. II, Tab 7A, p. 319.

<sup>14</sup> February 17, 2017 City Email, *supra*, AB, Vol. II, Tab 21, pp. 389-392.

<sup>15</sup> Act, ss. 90-92(1), 120.1(1), 121(2), 127.1(1).



railway being inactive for a period of time. It also identifies specific circumstances where a party may complain or apply to the Agency in connection with a statutory discontinuance process.

16. In contrast, the Railway Act governs maintenance, safety, and the day-to-day operation of federal railways. Disputes with respect to railway line maintenance and safety are within the purview of the Minister of Transport.

## 6) The “Moose Plan”

17. Joseph Potvin, the President of Mobility Ottawa-Outaouais: Systems and Enterprises Inc. (“Moose”), has approached the City on multiple occasions since around 2011 regarding his conceptual plans to develop a commuter rail passenger service in the Ottawa Region (“Moose Plan”). Mr. Potvin has made numerous requests for City information and data, and has asked the City to make certain commitments in support of the further development of the Moose Plan.<sup>16</sup> There was no evidence before the Agency that Moose holds a valid Certificate of Fitness under the Act to operate a federal railway line.

18. In 2011, years before the decisions under appeal, Mr. Potvin complained to the Agency that the City was not maintaining the ORL and Bridge, and alleged that the City had committed an “incremental breach of legal obligations” amounting to “constructive discontinuance”.<sup>17</sup> In a 2012 decision, the Agency found that although the ORL was inactive, the City had not discontinued operations within the meaning of the Act. The Agency (correctly) held that the discontinuance provisions in the Act do not provide the Agency with the authority to oversee a railway company’s maintenance and safety practices to see whether there has been a *de facto* discontinuance. It held it had neither the jurisdiction nor the expertise to determine whether a railway line complies with the requirements of the Railway Act.<sup>18</sup>

19. The City included the ORL in its Three-Year Plan for 2012-2015.<sup>19</sup> The City has never taken any steps to discontinue the ORL.

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<sup>16</sup> Submission from Moose to the City Transportation Committee, November 15, 2013 [“Moose Committee Submission”], AB, Vol. I, Tab 5E, pp. 92-100.

<sup>17</sup> Letter correspondence from Moose to the Agency, August 15, 2016 [“August 15, 2016 Moose Letter”], AB, Vol. II, Tab 9A, p. 341.

<sup>18</sup> Agency Decision No. 210-R-2012, June 6, 2012 [“2012 Agency Decision”], AB, Vol. II, Tab 30, pp. 442-445.

<sup>19</sup> City Three-Year Plan 2012-2015, AB, Vol. II, Tab 9E, pp. 354-356.



## 7) The Agency Launches a “Show Cause” Investigation

20. In 2016, Mr. Potvin approached the Agency with information regarding the ORL and the construction of Bayview Station.<sup>20</sup> He again alleged that certain acts by the City amounted to “constructive discontinuance” of the ORL.<sup>21</sup> Based on Mr. Potvin’s information that the City had dismantled a small section of the ORL, the Agency made inquiries of the City regarding the Bayview Station construction.

21. On August 12, 2016, the Agency advised Mr. Potvin that, following its inquiries, no further monitoring nor compliance action would be taken by the Agency against the City regarding the ORL and the construction of Bayview Station.<sup>22</sup> The Agency provided further clarification on October 5, 2016.<sup>23</sup>

22. Despite the Agency’s correspondence, and despite having no standing to launch a complaint or application with the Agency, Mr. Potvin continued to pursue Moose’s assertion that the Agency should issue a decision finding that the City had dismantled the ORL without complying with Division V of the Act, and he imposed arbitrary deadlines for a response from the Agency.<sup>24</sup>

23. On February 7, 2017, the Agency advised Mr. Potvin that Division V of the Act did not provide for a complaint mechanism, and “as such, does not require the Agency to inquire into a matter filed by the public with respect to alleged non-compliance”.<sup>25</sup> Nevertheless, based on Mr. Potvin’s information that the City had dismantled a small section of the ORL, the Agency

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<sup>20</sup> Email correspondence from Moose to the Agency, July 25, 2016, AB, Vol. I, Tab 5, pp. 20-28; letter correspondence from Moose to the Agency, July 25, 2016, AB, Vol. I, Tab 5A, pp. 29-44; letter correspondence from Moose to the Agency, February 3, 2015 [February 3, 2015 Moose Letter], AB, Vol. I, Tab 5B, pp. 45-50; City Light Rail Report, *supra*, AB, Vol. I, Tab 5C, pp. 51-81; City Light Rail Study, *supra*, AB, Vol. I, Tab 5D, pp. 82-91; Moose Committee Submission, *supra*, AB, Vol. I, Tab 5E, pp. 92-100; City Bridge Request for Qualifications, AB, Vol. I, Tab 5F, pp. 101-118; letter correspondence from Moose to the Agency, October 25, 2012, AB, Vol. I, Tab 5G, pp. 119-127; Purchase Agreement, *supra*, AB, Vol. I, Tab 5H, pp. 128-153; Moose Initial Basic Risk Assessment, July 7, 2015, AB, Vol. I, Tab 5I, pp. 154-161; Interprovincial Transit Strategy, January 2013, AB, Vol. I, Tab 5J, pp. 162-250; Moose Concept Study, August 24, 2015, AB, Vol. I, Tab 5K, pp. 251-309.

<sup>21</sup> February 3, 2015 Moose Letter, *supra*, AB, Vol. I, Tab 5B, p. 45.

<sup>22</sup> Letter correspondence from the Agency to Moose, August 12, 2016, AB, Vol. II, Tab 8, pp. 320-321.

<sup>23</sup> Letter correspondence from the Agency to Moose, October 5, 2016, AB, Vol. II, Tab 13, p. 372.

<sup>24</sup> August 15, 2016 Moose Letter, *supra*, AB, Vol. II, Tab 9A, pp. 324-327; letter correspondence from Moose to the Agency, August 24, 2016, AB, Vol. II, Tab 10A, pp. 360-362; letter correspondence from Moose to the Agency, September 16, 2016, AB, Vol. II, Tab 11, p. 367; letter correspondence from Moose to the Agency, September 23, 2016, AB, Vol. II, Tab 12A, pp. 370-371.

<sup>25</sup> Letter correspondence from the Agency to Moose, February 7, 2017, AB, Vol. II, Tab 16, p. 378.

embarked on an inquiry to gather information regarding the Bayview Station construction.<sup>26</sup> Moose also continued to contact the Agency as a self-designated “complainant” under the Act.<sup>27</sup>

24. On June 7, 2017, the Agency sent Decision No. LET-R-27-2017 (the “Show Cause Decision”) to the City. The Agency framed the “Issue” as follows:

Has the City contravened Division V of the CTA by effectively discontinuing the operation of the ORL without complying with the mandatory discontinuance process set out in Division V of the CTA?<sup>28</sup>

25. The Agency went on to conclude that, “...it appears that the City has effectively discontinued a portion of the railway line without complying with the mandatory discontinuance process set out in Division V”. It ordered the City to: “...show cause, by June 28, 2017, why the Agency should not find that the City had breached its obligations pursuant to Division V of CTA”. It demanded that the City address “...its plans for the line’s ongoing maintenance and eventual use”.<sup>29</sup>

26. In response to the Show Cause Decision, the City requested clarification regarding the Agency’s process. The Agency simply responded that it would “provide any further direction on procedure as required.”<sup>30</sup> The City subsequently provided a response on June 28, 2017.<sup>31</sup>

27. On August 14, 2017, the Agency sought clarification about the time the City anticipated it would require to carry out the realignment of the ORL and to restore the Bridge.<sup>32</sup>

28. On September 8, 2017 the City responded. The City provided some high level time estimates based on a number of assumptions and pre-conditions.<sup>33</sup>

29. On September 20, 2017, the Agency issued Decision No. LET-R-58-2017 (“Preliminary Decision”). It held: “The Agency is of the preliminary view that the time periods the City has provided for making the ORL and POW Bridge operational do not satisfy the minimum

<sup>26</sup> Letter correspondence from the Agency to the City, February 6, 2017, AB, Vol. II, Tab 15, pp. 376-377.

<sup>27</sup> Email correspondence from Moose to the Agency, March 9, 2017, AB, Vol. II, Tab 23, pp. 403-407.

<sup>28</sup> Agency Decision LET-R-27-2017, June 7, 2017 [“Show Cause Decision”], AB, Vol. I, Tab 2, p. 12.

<sup>29</sup> Show Cause Decision, *supra* AB, Vol. I, Tab 2, p. 13.

<sup>30</sup> Letter correspondence from the City to the Agency, June 9, 2017, AB, Vol. II, Tab 24, pp. 417-418; email correspondence from the Agency to the City, June 15, 2017 [“June 15, 2017 Agency Email”], AB, Vol. II, Tab 25, p. 419.

<sup>31</sup> June 28, 2017 City Letter, *supra* AB, Vol. II, Tab 26, pp. 420-427.

<sup>32</sup> Email correspondence from the Agency to the City, August 14, 2017, AB, Vol. II, Tab 27, p. 435.

<sup>33</sup> Letter correspondence from the City to the Agency, September 8, 2017, AB, Vol. II, Tab 28, pp. 436-437.



compliance requirements...The Agency directs the City to confirm how quickly this could be done, if running rights were to be granted by the Agency". It did not state what the minimum compliance requirements were,<sup>34</sup> notwithstanding that the Act does not prescribe any minimum requirements or standards.

30. On October 4, 2017, the City provided a written response.<sup>35</sup>

31. The Agency issued Decision No. LET-R-2018-23 on February 16, 2018 ("Final Decision"). It found that the City, "...has effectively discontinued the operation of a portion of its ORL without complying with the mandatory discontinuance process set out in Part III, Division V of the CTA". It ordered the City to either: 1) Take the steps necessary to restore the ORL, including 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 ("Option 1"); or 2) Initiate and complete the discontinuance process established in Division V of the CTA ("Option 2").<sup>36</sup>

32. The Final Decision lacks critical parameters and does not particularize what rail infrastructure work or financial considerations would be required to comply with Option 1.

33. Further, the Final Decision does not indicate what timeline would have satisfied the Agency's "minimum compliance requirements", as stated in the Preliminary Decision. The Agency never gave notice to the City that it was considering an order requiring the City to undertake remedial work within a prescribed time period.

## PART II – POINTS IN ISSUE

34. Section 41(1) of the Act provides the City with the right to appeal the Show Cause Decision, Preliminary Decision, and Final Decision: "An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction..."<sup>37</sup>

35. There are four issues:

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<sup>34</sup> Agency Decision No. LET-R-58-2017, September 20, 2017, AB, Vol. I, Tab 3, pp. 15-16.

<sup>35</sup> October 4, 2017 City Letter, *supra*, AB, Vol. II, Tab 29, pp. 438-441.

<sup>36</sup> Agency Decision No. LET-R-2018-23, February 16, 2018 ["Final Decision"], AB, Vol. I, Tab 4, pp. 17-19.

<sup>37</sup> Act, s. 41(1).



(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?

### PART III – LAW AND SUBMISSIONS

#### A. THE STANDARD OF REVIEW OF THE AGENCY’S DECISIONS

##### 1) Standard of Review: Generally

36. The Federal Court of Appeal has held that although these are statutory appeals, the applicable standard of review is set out in *Dunsmuir v. New Brunswick*.<sup>38</sup>

37. There are only two standards of review of administrative decisions – correctness and reasonableness. There is a well-established presumption that where an administrative body interprets its home statute, the reasonableness standard applies. However, the correctness standard applies to issues of procedural fairness,<sup>39</sup> true questions of jurisdiction and issues of competing jurisdiction between tribunals.<sup>40</sup>

38. Courts have the last word on jurisdiction: “...a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator”.<sup>41</sup> Nevertheless, recent Supreme Court jurisprudence has narrowly defined “true” questions of *vires*. A true question of jurisdiction is “confined to instances where the decision maker must determine whether it has the

<sup>38</sup> *Canadian National Railway v. Viterro Inc.*, 2017 FCA 6 at para. 34 [*Viterro*].

<sup>39</sup> *Dunsmuir v. New Brunswick*, Common List of Authorities [“CLA”] Vol. 3, Tab 18 at paras. 45 and 50 [*Dunsmuir*].

<sup>40</sup> *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paras. 27-28 [*CHRC*].

<sup>41</sup> *Dunsmuir*, *supra* at paras. 30 and 36.

authority to enter into the inquiry before it".<sup>42</sup> The court drew a distinction between the scope of a decision-maker's authority (which is subject to a reasonableness standard) and whether the decision-maker had the authority to enter into its inquiry in the first place (which is subject to a correctness standard).<sup>43</sup>

39. Where there are issues of competing jurisdiction, the Supreme Court has held that where the legislature has conferred jurisdiction to decide an issue to one administrative decision-maker, the question of whether another administrative decision-maker may exercise concurrent or overlapping jurisdiction is to be decided on the correctness standard.<sup>44</sup>

40. Reasonableness is a deferential standard. It recognizes that certain questions may give rise to a number of reasonable conclusions:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.<sup>45</sup>

41. The correctness standard invokes no deference. The court undertakes its own assessment:

The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.<sup>46</sup>

42. The standard of review for a decision of the Agency falling within the scope of its expertise and mandate is reasonableness.<sup>47</sup> However, for true questions of jurisdiction,<sup>48</sup> and for questions of procedural fairness,<sup>49</sup> the standard is correctness. Nevertheless, the decisions under appeal fail even the reasonableness standard.

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<sup>42</sup> *CHRC*, *supra* at para. 31.

<sup>43</sup> *CHRC*, *supra* at paras. 28 and 38.

<sup>44</sup> *Dunsmuir*, *supra* at paras. 58-61.

<sup>45</sup> *Dunsmuir*, *supra* at para. 47.

<sup>46</sup> *Dunsmuir*, *supra* at para. 50.

<sup>47</sup> *Viterra*, *supra* at paras. 35-36.

<sup>48</sup> *Canadian National Railway Company et al. v. Canadian Transportation Agency*, 2008 FCA 199 at paras. 30-31 [CNR].

<sup>49</sup> *Canadian National Railway v. Greenstone*, 2008 FCA 395 at para. 21 [*Greenstone*], and *Viterra*, *supra* at para. 38.



**2) The Agency's Breach of Natural Justice and Errors of Jurisdiction Warrant a Standard of Correctness**

43. The Agency lacked the authority to make the inquiries leading to the Show Cause Decision, Preliminary Decision, and Final Decision. Its decision to embark on this inquiry was incorrect. The Agency was also incorrect in making what is in effect a maintenance order, which it has no power to do. In any event, the Agency's inquiry on this issue and Final Decision also fails to even meet the standard of reasonableness.

44. No deference is owed to the Agency's decisions when a court is determining the fairness of the decision-maker's process or an incorrect assumption of jurisdiction. The Agency has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached that duty. In sum, the decision must be reviewed on the standard of correctness.<sup>50</sup> In reference to the Act, this Court has held there is "no dispute" that the correctness standard applies to questions of fairness.<sup>51</sup>

**3) The Agency's Errors of Statutory Interpretation and Application Warrant a Standard of Reasonableness**

45. The City made errors of law which should be reviewed on a standard of reasonableness.<sup>52</sup>

46. A deferential standard will not insulate the Agency in respect of the Final Decision. The Agency's Final Decision is premised on fundamental and unreasonable errors in its application of Division V of the Act. The Agency erred in its interpretation of Divisions IV and V of the Act by:

- (a) imposing maintenance standards on the City in respect of the ORL;
- (b) ordering the City to pursue statutory discontinuance;
- (c) ordering the City to perform an undefined scope of work;
- (d) requiring the City to be in a permanent state of "12-months to readiness";

<sup>50</sup> *Mission Institution v. Khela*, 2014 SCC 24 at para. 79; *Air Canada v. Greenglass*, 2014 FCA 288 at para. 26.

<sup>51</sup> *Greenstone*, *supra* at para. 21.

<sup>52</sup> *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65 at paras. 21-28 [*CN v. CTA*].

(e) compelling the City to make significant capital expenditures for no current and likely no future value to Ottawa taxpayers; and

(f) shifting the cost of rehabilitating the Bridge entirely to the City, instead of sharing the cost with any entity seeking running rights in the future in connection with the ORL.

47. The Agency's reasoning was flawed. It led to a construction of the Act that fell outside the range of reasonable statutory interpretations. As a result, in the Final Order the Agency imposed obligations on the City which are not provided for in the Act. The Final Decision is unreasonable.

## **B. STATUTORY FRAMEWORK**

48. Federal railways are governed by the Act and the Railway Act. Railway owners are the stewards of their own assets, subject to compliance with statutory obligations under the Act and the Railway Act.

49. The Act is directed towards the competitive, economic and efficient use of the federal rail system.<sup>53</sup> It addresses a range of matters including revenue caps imposed on railway companies for grain shipping,<sup>54</sup> the net salvage value of a railway line being negotiated for sale,<sup>55</sup> the arbitration of rates charged to a shipper when the dispute is submitted to the Agency,<sup>56</sup> and shippers' complaints regarding the allocation of rail cars provided by the carrier.<sup>57</sup> There is nothing in the Act which stipulates a mandatory level of usage or activity of a railway line. The Agency is empowered to make orders under the Act.

50. By contrast, the Railway Act is directed towards the safety and security of the public property and the environment in connection with federal railway operations.<sup>58</sup> The Railway Act sets out standards for the operation and maintenance of railway works and equipment. It empowers the Minister of Transport to make orders in respect of improperly maintained railway

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<sup>53</sup> Act, s. 5.

<sup>54</sup> *CN v. CTA*, *supra* at para. 10

<sup>55</sup> *CNR*, *supra* at para. 6.

<sup>56</sup> *Canadian National Railway v. Moffatt*, 2001 FCA 327 at paras. 12-13 [*Moffatt*].

<sup>57</sup> *Viterra*, *supra* at para. 82.

<sup>58</sup> Railway Act, s. 3.



works.<sup>59</sup> It also includes provisions pursuant to which a railway company may request a review and appeal of any order.<sup>60</sup>

51. In the words of the Federal Court of Appeal, with the enactment of the Railway Act, “...the Agency no longer exercises control over the day-to-day operations of railway companies...”.<sup>61</sup>

52. The key provisions of the Act for the purposes of this appeal are set out in Divisions IV and V. Division IV of the Act deals with “Rates, Tariffs and Services”. At section 138, it provides a federally regulated railway company with a statutory right to apply to the Agency for running rights on a railway belonging to another railway company. It empowers the Agency to order the applicant to “pay compensation” to the owner in connection with a grant of running rights.<sup>62</sup> The Agency has described this as an “exception remedy”, in part because it is expropriative in nature. It is only available to an applicant who can establish that the proposal is in the “public interest”.<sup>63</sup> The Federal Court of Appeal agreed, noting that: “Although a statutory power to grant running rights has existed for over eighty years, it has never been exercised”.<sup>64</sup>

53. Division V of the Act deals with “Transferring and Discontinuing the Operation of Railway Lines”. As stated by Noël J.A., “...Division V provides a railway company, which follows the prescribed process, the right to abandon the operation of a railway line.”<sup>65</sup> Section 141(1) of the Act provides:

A railway company shall prepare and keep up to date a plan indicating for each of its railway lines whether it intends to continue to operate the line or whether, within the next three years, it intends to take steps to discontinue operating the line” [emphasis added].<sup>66</sup>

<sup>59</sup> Railway Act, s. 32(1).

<sup>60</sup> Railway Act, ss. 32.1(1), 32.2(1).

<sup>61</sup> *Canadian National Railway v. Brocklehurst*, 2000 CarswellNat 3460 (F.C.A.) at para. 28, [2000] F.C.J. No. 2020 [Brocklehurst].

<sup>62</sup> Act, s. 138.

<sup>63</sup> Agency Decision No. 505-R-2002 dated September 10, 2002, aff’d *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 454 [Ferroequus].

<sup>64</sup> *Ferroequus*, *supra* at para. 1. Although this was a 2003 decision, we are not aware of any subsequent Agency decision granting running rights pursuant to a section 138 application.

<sup>65</sup> *CNR*, *supra* at para. 32.

<sup>66</sup> Act, s. 141(1).

54. It sets out the statutory process by which a railway company “may” transfer and discontinue operation of a line.<sup>67</sup>

55. Division V sets out required steps for discontinuance once engaged by the advertisement mentioned in section 143(1).<sup>68</sup> It has been described as a “complete code”, setting out notice provisions and advertising provisions.<sup>69</sup> Section 142(1) provides: “A railway company shall comply with the steps described in this Division before discontinuing a railway line”.<sup>70</sup>

56. In the words of the Federal Court of Appeal, “The discontinuance process, once engaged by the advertisement mentioned in subsection 143(1), is governed by short, strict and mandatory time-limits within which an agreement between purchaser and a railway company must be reached and the sale and transfer provision completed” [emphasis added].<sup>71</sup>

57. Division V also confers specific rights to complain or make application to the Agency in prescribed circumstances. For example, section 144(6) provides that upon receipt of a complaint by an interested person that the railway company is not negotiating in good faith, and where the Agency considers that a sale, lease or other transfer of the railway line would be commercially reasonable and fair, the Agency may order the company to enter into the agreement, and may fix consideration in connection with the agreement.<sup>72</sup>

58. Notably, the Agency has held that there is nothing in Division V requiring a railway company to comply with the discontinuance provisions where there is already an owner intending to operate the line.<sup>73</sup> In other words, the Division V process is a statutory avenue that a railway operator may choose to pursue if it seeks to be relieved of its obligations under the Act.

#### C. THE AGENCY LACKED JURISDICTION TO LAUNCH AN INQUIRY UNDER DIVISION V

59. The Agency has exceeded its statutory powers in two respects. First, it pursued an inquiry under Division V that it had no statutory authority to pursue. Second, the Final Order is

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<sup>67</sup> *CNR, supra* at para. 4.

<sup>68</sup> *Greenstone, supra* at para. 42.

<sup>69</sup> *Greenstone, supra* at para. 42.

<sup>70</sup> Act, s. 142(1).

<sup>71</sup> *Greenstone, supra* at para. 42.

<sup>72</sup> Act, s. 144(6). See for example *CNR, supra*.

<sup>73</sup> Agency Decision No. 445-R-1997 dated July 11, 1997.



effectively a maintenance order. The Agency has no authority to make such an order. The Act provides for an appeal for both errors of law and jurisdiction. Both of these errors are errors of jurisdiction. They should be reviewed on a correctness standard. Even if these are found to be errors of law, the Agency's interpretation of its powers is not supported by any reasonable reading of the Act.

60. The Agency has no jurisdiction to pursue an inquiry of its own motion under Division V of the Act. It only has specific powers to make orders following a statutorily prescribed complaint or application in the course of a discontinuance process, once that process has been triggered by a section 143(1) advertisement.<sup>74</sup> The decisions must therefore be set aside.

61. The Agency only has the powers expressly assigned to it under the Act. The Federal Court of Appeal has quoted approvingly from the Agency's predecessors:<sup>75</sup>

The first points that arise relate to the jurisdiction and powers of the Board. It is important that, as occasion occurs, these should be carefully considered and defined in order that they be well understood and, if found advisable, enlarged or diminished by Parliament. To assume jurisdiction which we do not possess and to shirk the exercise that given us, would equally be breaches of duty.<sup>76</sup>

62. This Court has held that the Act does not provide the Agency with a general mandate to administer it. In *Canadian National Railway v. Brocklehurst*, the Agency incorrectly relied on sections 26 and 37 of the Act to administer section 95, which relates to the railway's powers to construct and operate a railway line. This Court disagreed with the Agency's interpretation and held that the Agency must be authorized to act pursuant to a specific section:

[The Act] contains no provision conferring upon the Agency the power duty or function of administering the whole Act. It is indeed noteworthy that neither s. 26 nor s. 37 refer expressly to the very statute in which they are found. The statute, however, contains numerous provisions that confer upon the Agency jurisdiction with respect to the administration of specific parts of the Act. Unless s. 95 is one such provision, the Agency has no jurisdiction with respect to that section.<sup>77</sup>

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<sup>74</sup> Act, Division V.

<sup>75</sup> The Agency was initially known as the Board of Railway Commissioners for Canada, the Board of Transport Commissioners for Canada, the Canadian Transport Commission, and then the National Transportation Agency before continuing under the name of the Agency.

<sup>76</sup> *Brocklehurst*, *supra* at para. 8.

<sup>77</sup> *Brocklehurst*, *supra* at para. 14.



63. This Court's interpretation of the powers afforded to the Agency under section 26 was subsequently reaffirmed *Canadian National Railway v. Moffatt*, where this Court held that the Agency is a creature of statute, and the power it exercises must be found in statutory law. Where the Act provides no specific jurisdiction to act, the Agency has no jurisdiction.<sup>78</sup>

64. In its Final Decision, the Agency incorrectly relies on sections 26 and 142 of the Act as providing it with the authority to investigate and issue the Show Cause Decision, Preliminary Decision and Final Decision. However, the combined effect of sections 26 and 142 of the Act do not provide the Agency with broad authority to investigate a potential violation of the discontinuance provisions of Division V of the Act.

65. Where Parliament intended for the Agency to have enforcement or investigative powers, it expressly provided for those powers on a section-by-section basis in the Act, including sections 117-120 with respect to tariffs and section 138 with respect to running rights.<sup>79</sup> All of the Agency's enforcement and investigative powers in Division V are contingent on a complaint or application being made to the Agency.<sup>80</sup>

66. The Agency had no jurisdiction to pursue an inquiry of its own motion in respect of compliance with the discontinuance provisions in Division V of the Act. Alternatively, the Agency's interpretation of its own powers is not supported by any reasonable reading of the Act.

#### **D. THE AGENCY EXCEEDED ITS JURISDICTION IN THE FINAL DECISION**

67. Even if the Agency had jurisdiction to proceed with the inquiry leading to the three decisions, the Agency had no statutory authority to make a maintenance order. This is a jurisdictional error reviewable on a correctness standard. Alternatively, this is an error of law and the Agency's interpretation of its powers is not supported by any reasonable reading of the Act.

68. Further, based on the principle of *expressio unius est exclusio alterius*, the Act must be interpreted as intentionally excluding discontinuance orders from the Agency's authority.

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<sup>78</sup> *Moffatt*, *supra* at paras. 10 and 25.

<sup>79</sup> Act, ss. 117-120, 138.

<sup>80</sup> Act, Division V.

Granted the City has never had any intention of discontinuing the ORL – nor taken any steps to discontinue the line – it is beyond the Agency’s jurisdiction to force the City to do so.

**1) Maintenance and Safety Practices are not Within the Agency’s Powers**

69. The Agency exceeded its jurisdiction in the Final Decision by imposing maintenance standards of its own creation on the City in respect of the ORL, or by ordering it to pursue statutory discontinuance, which it has no authority to do. Maintenance standards are within the exclusive power of the Minister of Transport (and Transport Canada) under the Railway Act.<sup>81</sup>

70. There is no express statutory obligation under the Act for an owner to operate a line, let alone maintain it in a state of ready use for rail service. Section 95 of the Act provides that a railway company “may” (and not shall) exercise powers including “...do anything else necessary for the construction or operation of the railway”.<sup>82</sup>

**2) The Agency has Recognized it Does not Have Maintenance or Safety Authority**

71. Further, the Agency has no statutory authority to order the City to undertake maintenance on the ORL. The Agency has recognized these limits to its powers in earlier decisions:

“...[I]n the Agency’s opinion, 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*...”<sup>83</sup>

72. The Agency has acknowledged in the Final Decision that the Act does not obligate 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 to limit its maintenance activities on an unused line, to the point where it is rendered temporarily inoperable”.<sup>84</sup>

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<sup>81</sup> Railway Act, s. 32.

<sup>82</sup> Act, s. 95(1)(e).

<sup>83</sup> 2012 Agency Decision, *supra* at para. 39, AB, Vol. II, Tab 30, p. 444.

<sup>84</sup> Final Decision, *supra*, AB, Vol. I, Tab 4, pp. 17-19.



73. Consistent with the objectives of a competitive, economic and efficient transportation system, the Act simply requires a railway company to adopt and publicly file a three-year plan for its lines, and to make this plan available to the public.<sup>85</sup>

### 3) The Principle of *Expressio Unius* Applies to the Act

74. The Agency has no general statutory authority to order a railway company to amend its Three-Year plan to indicate that it intends to take steps to discontinue a line, let alone to compel a company to initiate a statutory discontinuance process. The Act does confer the power to amend its three-year plan in one narrow circumstance. Section 116(4) provides that following a complaint by any person that a railway company is not fulfilling any of its service obligations, if the Agency determines that a company is not complying with its service obligations, the Agency may:

(d) if the service obligation is in respect of a grain-dependent branch line listed in Schedule 1, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps so discontinue operating the line...<sup>86</sup> [emphasis added]

75. This ORL is not a Schedule 1 branch line, and there was no section 116 complaint. It is a maxim of statutory interpretation that where there is a pattern of express references in a statute, the absence of an express reference in a particular provision is presumed to be intentional. Where the statute expressly confers jurisdiction in a particular set of circumstances, the Court may imply that Parliament intended to deprive administrative decision-makers of a general authority.<sup>87</sup>

76. The inclusion of section 116(4) in the Act strongly suggests that it was Parliament's intention to restrict the Agency's ability to order a party to amend its three-year plan to indicate its intention to discontinue a railway line to the narrow circumstances enumerated in that specific provision.

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<sup>85</sup> Act, s. 141.

<sup>86</sup> Act, s. 116(4).

<sup>87</sup> R. Sullivan, *Sullivan on Construction of Statutes*, 6<sup>th</sup> ed. (Markham: LexisNexis Canada, 2014) at paras. 8.97-8.99.

#### 4) **The City has Never Formed an Intention to Discontinue the ORL**

77. In the within case, the Agency erred in its interpretation of the Act by implying an obligation into to the Act to maintain a rail line to a certain (and unspecified) standard, failing which it will be “deemed” to be a discontinued railway line, triggering the Division V discontinuance process under the Act. The Agency’s interpretation of a binary choice for railway owners between either using a line or discontinuing it has no support in the Act.

78. The only trigger for the Division V discontinuance process is the railway company’s intention to discontinue a railway line. Once the railway company has formed this intention, Division V of the Act sets out a process by which discontinuance must unfold.

79. Here, the City’s plans and actions demonstrate an unwavering intention to continue operation of the ORL as part of its long-term rail plan. There are numerous railway lines across Canada which become periodically inactive or dormant, with or without fully operable and fully maintained infrastructure in place. The current temporary obstruction of the ORL track should not be “deemed” to be a decision to discontinue the line.

80. The Agency has greatly exceeded its jurisdiction in ordering the City to perform maintenance and repair work on the ORL, and interpreting the Act as conferring upon it the power to find that inadequate maintenance standards are a deemed discontinuance. Additionally, the Agency found “implied” or “constructive” discontinuance had occurred, contrary to the prescribed provisions of Division V of the Act which sets out procedures for express discontinuance.

#### 5) **The Bridge Maintenance is Separate from the ORL Maintenance**

81. The Agency does not have the authority to conclude “constructive” discontinuance has occurred, nor to order the City to complete maintenance or construction work within a specific period of time. However, even if the Agency were empowered to force the City to replace or realign segments of the ORL within a shorter timeframe than planned, there is no nexus between the temporary obstruction of the ORL and the remediation of the Bridge, which is a different part of the ORL.



82. As the Agency has previously determined, it does not have the authority to oversee the City's maintenance and safety practices with respect to the ORL and Bridge.<sup>88</sup>

83. The impetus for the Agency's Show Cause Decision was the construction of Bayview Station and the resulting dismantling of the ORL.<sup>89</sup> The City has not obstructed or dismantled the Bridge and it is a separate and distinct section of the ORL. Accordingly, even if the Agency had jurisdiction to require the City to perform work with respect to the dismantled section of the ORL, the Agency has no authority order the City to perform maintenance work on other sections of the ORL, including the section running over the Bridge.

#### E. THE FINAL DECISION IS UNREASONABLE

84. If the Agency has jurisdiction to make maintenance orders, then the specific requirements imposed by the Final Decision should be overturned on the grounds that they are unreasonable, arbitrary and unclear.<sup>90</sup>

85. First, the scope of work ordered by the Agency to "take the steps necessary to restore the ORL, including the...Bridge...to a point where it could be made operable within 12 months of an Agency order pursuant to Division IV of the [Act]"<sup>91</sup> is not defined. It is vague and unclear. The City has no way of determining what it must do to comply with the Final Decision. The "steps necessary to restore the ORL" depend entirely on the future intended use of the ORL and the timing of this use. In respect of its own future plans, the City has not yet detailed these plans. Will the requirement be for a single or twin track? Light or heavy rail infrastructure? Passenger and/or freight service? Single or double deck passenger cars? Diesel or electric or other form of locomotive power? What are the load requirements? All of these variables and many more, will impact the required scope of work. In respect of any potential third-party request for running rights, again the scope of work will depend on the nature of the third-party request. By way of example, will the unknown rail company seek running rights for Class 1 freight, or twin-track

<sup>88</sup> 2012 Agency Decision, *supra* at para. 39, AB, Vol. II, Tab 30, p. 444.

<sup>89</sup> Show Cause Decision, *supra*, AB, Vol. I, Tab 2, p. 11.

<sup>90</sup> *Thurairajah v. Canada (Minister of Employment & Immigration)*, 1994 CarswellNat 1612 (F.C.A.) at paras. 12 and 18, [1994] F.C.J. No. 322; *Tembec Industries Inc. v. Peddie*, 2005 CarswellOnt 7975 (O.L.R.B.) at paras. 14-17, [2005] O.L.R.B. Rep. 863.

<sup>91</sup> Final Decision, *supra* at para. 27, AB, Vol. I, Tab 4, p. 19.

passenger rail service? It would be premature to speculate on what work could be required to accommodate some future running rights request.

86. Second, the requirement to effectively be in a permanent state of “12-months to readiness” is arbitrary and unreasonable. The timeframe is unsupported by the Act, and was imposed without regard to any evidence about the process required by the City (or any other railway company) to plan and carry out significant capital projects, including provincial and federal environmental assessments, financial capacity, and required procurement processes.

87. Further, the timeframe also renders the order unclear. It is impossible for the City to know whether it is in compliance. How can it be objectively determined at some future date whether the ORL “*could be made operable within 12 months*” without having any certainty about for what intended use it must be “operable” for? Must this state of “12-months to readiness” be maintained in perpetuity?

88. Third, the decision is unreasonable as it compels the City to make significant capital expenditures for no current value whatsoever to Ottawa taxpayers, representing a breathtaking disregard for taxpayer funds. These expenditures may have no future benefit for taxpayers, and do not take into account the City’s existing efforts to develop a well thought-out, open, comprehensive, and collaborative regional transportation mandate to serve Ottawa and the surrounding area.<sup>92</sup> It is disruptive to municipal plans involving both the City and Gatineau. When it comes time for the City to extend rail service, the technology may have changed requiring additional effort and resources to retrofit or reconstruct the infrastructure at that time. Moreover, due to the passage of time, duplicative and/or different refurbishment work may be required.

89. Fourth, the Final Decision is unreasonable as it has the effect of shifting the cost of the rehabilitation of the Bridge entirely to the City, instead of more appropriately sharing the cost with any private entity seeking running rights in connection with the ORL. The Agency has justified its decision on the basis that it has considered the potential for a s. 138 application, and specifically, “...the City’s ability to comply with its obligations, were such an application to be

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<sup>92</sup> City MOU, *supra*, AB, Vol. II, Tab 26B, pp. 430-433.



made”.<sup>93</sup> This decision is effectively an anticipatory order under s. 138 in connection with a non-existent running rights request. If and when another railway company were to seek running rights on the ORL (which has never yet occurred), the City and that railway company could negotiate the commercial terms of such an arrangement. Failing agreement, the railway company could apply to the Agency under s. 138 for an “exceptional” running rights order. The City could oppose the application, or alternatively could seek conditions or compensation in connection with any order. In other words, if and when Moose’s plans ever mature to the stage that it becomes a licensed, federal railway company making a running rights request, the effect of the Final Decision could be to effectively confer a financial windfall on this private business by requiring Ottawa taxpayers to finance a significant portion of this private company’s capital costs. It deprives the City of its ability to negotiate a cost sharing agreement.

#### **F. THE AGENCY FAILED TO MEET ITS DUTY OF FAIRNESS**

90. The Agency erred in law by failing to abide by principles of procedural fairness. The Agency incorrectly provided no advance notice to the City that it was contemplating an order requiring it to carry out work within a specified timeframe.<sup>94</sup>

91. Whenever an administrative decision is made which affects the “rights, privileges or interests” of a person, a duty of fairness is owed.<sup>95</sup>

92. If the duty of procedural fairness is breached in the process of decision-making, the decision in question must be set aside.<sup>96</sup>

93. A number of factors will be considered when determining the content and scope of the duty of fairness. These include:

- (a) The nature of the decision being made and the process followed in making it;
- (b) The nature of the statutory scheme and the terms of the statute;

<sup>93</sup> Final Decision, *supra* at para. 25, AB, Vol. I, Tab 4, pp. 18-19.

<sup>94</sup> Guy Régimbald, *Canadian Administrative Law*, 1<sup>st</sup> ed. (Markham: LexisNexis Canada, 2008) at 256.

<sup>95</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, CLA Vol. 3, Tab 3 at para. 20 [*Baker*].

<sup>96</sup> *Cardinal v. Director of Kent Institution*, [1985] S.C.J. No. 78, 1985 CarswellBC 402 (S.C.C.) at para. 23; *Sketchley v. Canada (Attorney General)*, CLA Vol. 3, Tab 36 at paras. 46, 53, and 54.

- (c) The importance of the decision to the individuals affected by the decision;
- (d) The legitimate expectations of the person challenging the decision; and
- (e) The choices of procedure made by the Agency itself.<sup>97</sup>

94. Here, the Final Decision clearly required more than a minimum level of procedural fairness.

95. First, the Supreme Court has held that greater procedural protections will be required when no administrative appeal procedure is provided within the statute.<sup>98</sup> In the case at bar, pursuant to the Act, the finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive. While the Agency may review, rescind or vary any of its decisions or orders, there is no administrative appeal process. The Act only provides for an appeal of a decision of the Agency to this Court, with leave, on a question of law or question of jurisdiction.<sup>99</sup>

96. Second, the more important the decision to those affected and the greater the impact, the more stringent the procedural protections that will be mandated.<sup>100</sup> The financial and political implications of the Final Decision are significant. Compliance with the Final Decision would be a major multi-year capital project for the City, which must be planned and budgeted for years in advance. The Final Decision also affects the City's current Council directions and contracts with respect to transportation studies and projects; for instance, the City has entered into a Memorandum of Understanding with the City of Gatineau regarding a joint planning and coordination group for inter-provincial transportation efforts.<sup>101</sup>

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<sup>97</sup> *Baker, supra* at paras. 23-27.

<sup>98</sup> *Baker, supra* at para. 24; D.J.M. Brown and J. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Canvasback, 1998) at 7-76.

<sup>99</sup> Act, ss. 31, 32, 41.

<sup>100</sup> *Baker, supra* at para. 25.

<sup>101</sup> City MOU, *supra*, AB, Vol. II, Tab 26B, pp. 430-433.



97. The City was entitled, at a bare minimum, to notice about the potential consequences and/or enforcement mechanisms available to the Agency with respect to compliance with section 142 of the Act.<sup>102</sup>

98. On the basis of the foregoing, the Agency made several errors of law and jurisdiction by inquiring into the matter, rendering its decision, and ordering the relief which it ordered.

#### PART IV – ORDERS SOUGHT

99. The City respectfully requests that this Honourable Court:

- (a) set aside the Show Cause Decision, Preliminary Decision, and Final Decision of the Agency as incorrect and/or unreasonable;
- (b) in the alternative, if the only error found is a breach of procedural fairness, send the matter back to the Agency for reconsideration;
- (c) award to the City its costs of this Appeal; and
- (d) provide such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of October, 2018.

  
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<sup>102</sup> Régimbald at 256.

## PART V – LIST OF AUTHORITIES

### Legislation

*Canada Transportation Act*, S.C. 1996, c. 10.

*Railway Safety Act*, R.S.C. 1985, c. 32.

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*Canadian National Railway Company et al. v. Canadian Transportation Agency*, 2008 FCA 199.

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*Mission Institution v. Khela*, 2014 SCC 24.

*Air Canada v. Greenglass*, 2014 FCA 288.

*Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65.

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*Canadian National Railway v. Brocklehurst*, 2000 CarswellNat 3460 (F.C.A.), [2000] F.C.J. No. 2020.

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Brown, D.J.M. and Evans, J., *Judicial Review of Administrative Action in Canada* (loose-leaf) (Canvasback, 1998).

**Agency Decision**

Agency Decision No. 505-R-2002.

Agency Decision No. 445-R-1997.

OTT01: 9003618: v1

Court File No. A-198-18

**FEDERAL COURT OF APPEAL**

BETWEEN:

CITY OF OTTAWA

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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|--------------------------------------------------|-------------|
| FEDERAL COURT OF APPEAL<br>COUR D'APPEL FÉDÉRALE |             |
| FILED                                            | SEP 05 2018 |
| WAYNE SAWTELL                                    |             |
| OTTAWA, ON                                       | 9           |

**APPEAL BOOK**

Volume I of II

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Court File No. A-198-18

**FEDERAL COURT OF APPEAL**

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CANADIAN TRANSPORTATION AGENCY

Respondent

**APPEAL BOOK**

Volume II of II

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