

Federal Court



Cour fédérale

Date: 20111020

Docket: T-1104-10

Citation: 2011 FC 1201

Toronto, Ontario, October 20, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**CANADIAN NATIONAL RAILWAY
COMPANY**

Applicant

and

**ATTORNEY GENERAL OF CANADA, PEACE
RIVER COAL INC., AND CANADIAN
INDUSTRIAL TRANSPORTATION
ASSOCIATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is requesting an Order in the nature of *certiorari*, quashing and setting aside an Order-in-Council 2010-0749 issued by the Governor-in-Council June 10, 2010. That Order-in-Council rescinded Canadian Transportation Agency Decision No. 392-R-2008 dated July 18, 2008, in which the Agency found that it had no jurisdiction to change the terms of a contract between the

Applicant Canadian National Railway Company and the Respondent Peace River Coal Inc. For the reasons that follow, I find that the Application is allowed with costs.

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[2] For convenience, these Reasons have been divided as follows:

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“Confidential Contract”?

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THE PARTIES

[3] The Applicant Canadian National Railway Company (CN) is a railway company subject to federal jurisdiction, which offers integrated transportation services in Canada.

[4] The Respondent Peace River Coal Inc. (PRC) is a British Columbia corporation carrying on business in that province, including the operation of a coal loading facility in Trend, British Columbia.

[5] The Respondent Canadian Industrial Transportation Association (CITA-ACTI) is a trade association representing the interests of shippers such as PRC in Canada. It is the party that petitioned the Governor-in-Council, resulting in the Order-in-Council at issue here.

[6] The Respondent Attorney General of Canada represents the interests of the Governor-in-Council in these proceedings.

[7] Not a party to these proceedings is the Canadian Transportation Agency (Agency) which is an administrative tribunal created by the *Canada Transportation Act*, SC 1996, c 10. It is mandated by that *Act*, among other things, to make decisions respecting the transportation of goods in Canada.

THE EVIDENCE

[8] CN provided in evidence the affidavit of Jean Patenaude, Assistant General Counsel in the Legal Department of CN, together with several exhibits. He was cross-examined by Counsel for PRC, where three further exhibits were provided.

[9] PRC provided in evidence the affidavit of David Richard Evans, the person in charge of Strategic Initiatives for Transportation & Logistics for PRC. He was cross-examined by Counsel for CN, where eight exhibits were provided.

THE CONTRACT

[10] Effective as of the 1st day of January 2008, the Applicant CN and the Respondent PRC entered into a contract entitled “*CN Confidential Transportation Agreement No. 662673-AA*”. That contract was to remain in effect until the 30th day of June 2010. The contract provided that CN was to ship coal from PRC’s facilities in Trend, B.C. to Ridley, B.C. The contract stated that it is to be a confidential contract. In particular, clause 6 states:

6. *CONFIDENTIALITY*

This Contract is confidential and shall not be disclosed to any third party except to the extent that it may be required by law, regulatory authority, or as may be consented to by the Parties.

[11] The contract contains *inter alia* the following provisions:

2. *TRANSPORTATION CHARGES*

A. *This Contract is for the transportation of the commodity or commodities (“commodity”) described in Schedule 1 – “Commodity and Transportation Particulars”.*

4. *INCORPORATION BY REFERENCE*

This Contract incorporates by reference all tariffs, rules and regulations which are applicable to the transportation of the commodity except to the extent that such tariffs, rules and

regulations are in conflict with this Contract. In the event of any conflict, the terms and conditions of this Contract shall govern.

[12] Schedule 1 of the contract sets out specific rates per car, subject to certain terms, including:

Note(s) - . . .

*- Rates herein are subject to Fuel Surcharge Tariff
CN 7402 series, supplements thereto or reissues
thereof*

- . . .

[13] Schedule 2 of the Contract contains further provisions, including:

8. Fuel Surcharge

*CN fuel surcharge tariff 7402 will apply for the duration of
this contract.*

[14] No party has raised a challenge that this contract is a “confidential contract” within the meaning of the *Canada Transportation Act*, the provisions of which will be reviewed shortly. The evidence shows that the “Fuel Surcharge” as expressed in Tariff 7402 was considered to be a component of the “rate” charged by CN. I repeat paragraph 17 of the Patenaude affidavit:

17. However, the fuel surcharge remained, and still is, a component of the total rate that is charged for the said transportation. Part of the fuel costs is factored in the Base Rate and the remaining portion is recovered through the fuel surcharge.

[15] The evidence is clear that each of CN and PRC understood that, during the lifetime of the contract, CN could unilaterally vary the Fuel Surcharge set out in Tariff 7402. PRC expected, of course, that it would go down. In paragraph 7 of his affidavit, Evans says:

7. The existence of the following clause []ensured that PRC was not able to predict with certainty the services and conditions under which the service will be provided or be confident that the terms of the contract would remain unchanged until the expiration of the contract...

[16] In answer to question 156 put to him in cross-examination, Evans stated that PRC expected that the fuel surcharge, which he referred to as a rate, would go down:

156. Q. Indeed. And also in clause 8 you confirmed again that CN fuel surcharge tariff 7402 would apply for the duration of the contract.

A. Right, and supplements thereto or issues thereof. We would not attempt to lock 7402 at the rate it was at because 7402 was declining and they expected it to decline significantly in the future as CN recovered more of its prices from others as they had done in all of their other – we expected it to go down.

[17] Patenaude, in cross-examination in answer to questions 39 to 42 (where Counsel referred to rates and charges), acknowledged that CN understood that CN could increase or lower the fuel surcharge rates:

39. Q. Now, in paragraph 10 of your Affidavit you indicate that:

“The availability of contracts has transformed CN’s business with shippers”. And you say, “CN and its clients are now

able to predict with certainty the services and the conditions under which service will be provided”.

At paragraph 11 you indicate that CN’s customers know what rates and charges will be for a certain period of time. I believe I’m being fair, Mr. Patenaude, to say that’s something that’s repeated in your Affidavit, in particular paragraphs 48 and 49, the notion that customers will know the rates and charges and what they will be for a certain period of time. In the contract between CN and Peace River Coal, was CN able to change its tariffs during the term of the contract?

A. You are referring to the ancillary charge tariffs?

40. Q. Yes

A. Yes.

41. Q. And they could change them by increasing the rates and ancillary charge tariffs?

A. Increasing or lowering in some instances, yes.

42. Q. And they could change the terms and conditions contained in those ancillary charge tariffs?

A. They could, yes.

[18] Therefore, it can reasonably be concluded with respect to the contract that:

- it was a “confidential contract” as contemplated by the *Canada Transportation Act*;
- that the fuel surcharge as expressed in Tariff 7402 was part of the “rate” charged to the shipper as contemplated by that *Act*;

- that CN had, during the term of the contract, the unilateral power to raise or lower the fuel surcharge;
- the contract did not provide any mechanism for PRC to challenge any change to the fuel surcharge made by CN.

THE TARIFFS

[19] The contract refers to a tariff, Tariff 7402. There have been previous tariffs and subsequent tariffs, including Tariff 7403; one does not necessarily replace the other.

[20] The tariffs, as stated in the Patenaude affidavit quoted earlier, are a surcharge reflecting variable fuel costs added to the base rate charged by CN to shippers for hauling their freight.

[21] The contract at issue was effective January 1, 2008. On February 21, 2008, CN sent a letter to its customers advising that effective April 1, 2008 it would be introducing a new tariff, Tariff 7403 which, among other things, provided for a reduced fuel surcharge. That letter stated, among other things:

“• Contractual agreements currently subject to fuel surcharge 7402 will remain in effect until those agreements expire, at which time we expect 7403 to be applied.”

[22] CN sent a notice respecting the new tariff to its customers stating, *inter alia*:

NOTICE: Effective April 1, 2008, CN is implementing a new mileage-based fuel surcharge option called CN 7403. This will offer customers a re-based CN 7402 fuel surcharge.

- *CN will offer customers a new fuel surcharge option re-based from \$1.25 HDF to \$2.30 HDF effective April 1, 2008. This option will be available to customers upon expiration of existing agreements. All public prices will be converted to CN 7403 on April 1, 2008.*
- ...
- *Confidential contract linehaul rate publications subject to the current fuel surcharges remain in effect until those arrangements expire.*

PRC APPLICATION TO THE AGENCY

[23] On April 22, 2008, PRC filed an Application with the Canadian Transportation Agency requesting an Order requiring CN to establish what it described as a reasonable fuel surcharge to apply to the carriage of PRC's coal by CN. The Application stated, in part:

APPLICATION

Peace River Coal Inc. ("PRC") hereby applies, pursuant to sections 26, 37 and 120.1 of the Canada Transportation Act, S.C. 1996, c. 10 as amended (the "Act") for an order establishing reasonable fuel surcharge charges as described in this application to apply to the carriage of PRC's coal by Canadian National Railway Company ("CN").

...

CN's Fuel Surcharge to PRC

25. *The fuel surcharge that CN currently charges PRC on the movement of PRC's coal traffic is the [fuel surcharge imposed by CN Tariff 7402.][...]*

26. *Upon learning of CN's implementation of its new "competitive" fuel surcharge, a representative of PRC met with CN and requested that CN's new surcharge Tariff 7403 apply to PRC's traffic as of April 1, 2008. CN rejected PRC's request for the new more "competitive" fuel surcharge tariff. [...]The application of the contents of CN Tariff 7403 to PRC's coal traffic would result in a charge to PRC of \$126.56 per round trip from the rail loadout to Ridley Terminals, a reduction of [...] per car from the fuel surcharge that CN is currently charging PRC per round trip [...]*

...

29. *By this complaint, PRC seeks an order from the Agency establishing a reasonable fuel surcharge to apply to PRC's traffic. In order to accomplish this, and consistent with CN's representations, PRC requests the Agency to require CN to vary its charges [...] to reflect the charges and associated terms and conditions specified in CN Tariff 7403.*

...

Relief Requested

39. *As a result of the above, PRC requests that the Agency issue an order establishing reasonable fuel surcharge charges to apply to the carriage of PRC's coal by CN. Specifically, PRC requests the Agency to order CN to vary [...] [its Tariff 7402] to reflect the charges and associated terms and conditions that are contained currently in CN Tariff 7403, for a period of one year.*

[24] CN in response brought a motion before the Agency to dismiss the application. The motion was based on two grounds; (1) that there was an exclusion by reason of section 120.1(7) of the *Canada Transportation Act*, and (2) that the contract was a confidential contract and could not be amended by the Agency. The Notice of Motion stated, in part:

NOTICE OF MOTION

(Pursuant to Rule 32 of the Canadian Transportation Agency (the Agency) General Rules)

Canadian National Railway Company (CN) hereby applies, pursuant to Rule 32 of the Agency's General Rules, for an order dismissing the Application of Peace River Coal Inc. (PRC) on the basis that Section 120.1 of the Canada Transportation Act (CTA) does not apply to transportation rates nor to matters included in a Confidential Contracts between a shipper and a railway company.

...

Inapplicability of section 120.1 CTA

6. *It is CN's submission that section 120.1 of the CTA is not available to PRC for the following reasons:*
 - i) *fuel surcharge is not an ancillary charge but rather is part of the transportation rate and is therefore excluded from the application of the recourse to the Agency by virtue of subsection 120.1(7) CTA;*
 - ii) *the fuel surcharge is part of a Confidential Transportation Agreement between CN and PRC and there are no provisions in the CTA allowing the Agency at amend such agreements cannot be amended by the Agency(sic).*

THE AGENCY'S DECISION

[25] The Agency, following consideration of the submissions of the parties, made a ruling, Decision No. 392-R-2008 dated July 31, 2008, dismissing PRC's application on the second of the two grounds urged by CN in its motion namely, that the contract was beyond the jurisdiction of the Agency. It stated in respect of its analysis and findings:

Analysis and findings

In this case, both parties have agreed that the traffic in question is covered by the terms and conditions of a confidential contract, including fuel surcharges, which are incorporated by reference into the confidential contract between the parties. Although PRC submits that it does not seek to alter any of the terms of the confidential contract, the Agency finds that PRC is in fact seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.

Contracts are entered into willingly and freely by two parties for their mutual benefit. One of the key purposes is to ensure certainty and predictability on matters agreed to for the duration of the contract. The parties are bound by the contract and the Agency has no jurisdiction to change the terms of a contract between parties on application under section 120.1 of the CTA and dismisses the application.

As a result, there is no need for the Agency to consider CN's alternate argument related to whether the fuel surcharge forms part of the transportation rate.

CITA-ACTI PETITION TO THE GOVERNOR IN COUNCIL

[26] PRC did not seek to appeal the Agency's decision to the Federal Court of Appeal or the Governor-in-Council. Instead, six months later, CITA-ACTI, not PRC, submitted a petition to the Governor in Council dated February 3, 2009. The same lawyer that had represented PRC acted for CITA-ACTI. The petition requested a variance of the Decision of the Agency; it stated, in part:

***AND WHEREAS** PRC is a member of the Canadian Industrial Transportation Association / Association Canadienne de Transport Industriel (CITA-ACTI), a shipper association that represents the interests of shippers throughout Canada;*

***AND WHEREAS** the membership of CITA-ACTI is greatly concerned that the Decision has, in fact, rendered the remedy enacted by Parliament in section 120.1 of the Act effectively inoperative;*

***AND WHEREAS** CITA-ACTI considers that it is in the public interest that the ability of the Agency to review the reasonableness of the railway's fuel surcharge tariffs pursuant to section 120.1 of the Act be confirmed and clarified, and has decided to file the within Petition to the Governor in Council for that purpose;*

...

***YOUR PETITIONER THEREFORE HUMBLY PRAYS** that the Governor in Council vary the Decision to require that the Agency*

- (a) determine that CN's old fuel surcharge tariff is an ancillary charge within the meaning of subsection 120.1(7) of the Act, and is one that may be properly considered under section 120.1 of the Act; and*
- (b) determine that the Agency may consider the reasonableness of CN's old fuel surcharge tariff notwithstanding the existence of the confidential transportation contract between the parties that incorporates the old fuel surcharge.*

...

DETAILS OF REQUEST FOR RELIEF

41. *As a result of the matters set out in this Petition, CITA-ACTI humbly prays that the Governor in Council, pursuant to section 40 of the Canada Transportation Act, vary the Decision to require that the Agency*

- (a) determine that CN's old fuel surcharge tariff is an ancillary charge within the meaning of subsection 120.1(7) of the Act, and is one that may be properly considered under section 120.1 of the Act; and*
- (b) determine that the Agency may consider the reasonableness of CN's old fuel surcharge tariff notwithstanding the existence of the confidential transportation contract between the parties that incorporates the old fuel surcharge.*

DECISION OF THE GOVERNOR IN COUNCIL (ORDER IN COUNCIL)

[27] The Governor-in-Council received submissions from CN and PRC, and on June 20, 2010 issued Order-in-Council 2010-0749 rescinding the Agency's decision. Following recitals as to the background, the Order-in-Council stated:

Whereas section 120.1 of the Act is a complaint-based regulatory remedy against unreasonable charges and associated terms and conditions for the movement of traffic or the provision of incidental services imposed by a railway company that is aimed at benefiting all shippers subject to the charges and associated terms and conditions found in the challenged tariff rather than only benefiting the complainant;

Whereas the complaint filed pursuant to section 120.1 of the Act by PRC was for the benefit of all shippers subject to the alleged charge and associated terms and conditions for the movement of traffic or the provisions of an incidental service contained in CN

Tariff No. 7402, a tariff that applies to more than one shipper and that is not a tariff referred to in subsection 165(3) of the Act;

And whereas the Governor in Council is of the opinion that while the existence of a confidential contract between a railway company and a complainant under section 120.1 of the Act, and the terms and conditions of such contract, are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, it has no bearing on the reasonableness of the charge and associated terms and conditions for the movement of traffic or for the provisions of incidental services that are found in a tariff that applies to more than one shipper and is not a tariff referred to in subsection 165(3) of that Act;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to section 40 of the Canada Transportation Act, hereby rescinds Canadian Transportation Agency Decision No. 392-R-2008 of July 31, 2008.

[28] This Order-in-Council is the subject of the present application to this Court.

THE ISSUES

[29] While the ultimate issue is whether this Court should issue an Order in the nature of *certiorari* quashing and setting aside Order-in-Council 2010-0749 and restoring the Agency's Decision No. 392-R-2008, there are a number of issues that may require determination before arriving at that ultimate issue. Those issues are:

1. What was the nature of the Application made by PRC to the Agency?
2. What was the nature of the Decision made by the Agency to dismiss that Application?

3. What was the nature of the Petition made by CITA-ACTI to the Governor-in-Council?
4. What was the nature of the Decision made by the Order-in-Council?
5. Did the Governor-in-Council act within the scope of the powers given to it under section 40 of the *Canada Transportation Act* in making the Order-in-Council, or does section 41 of that *Act* remove that power in respect of the issue put to it?
6. What is the standard of review to be applied by the Court in reviewing the Order-in-Council?
7. In applying the appropriate standard of review, is the Order-in-Council correct or reasonable having regard to the provisions of section 120.1 of the *Canada Transportation Act*?
8. In applying the appropriate standard of review, is the Order-in-Council correct or reasonable having regard to the fact that the contract between PRC and CN is a “Confidential Contract”?

SCHEME OF THE CANADA TRANSPORTATION ACT

[30] It is appropriate to review some of the provisions of the *Canada Transportation Act*, SC 1996, c 10. That *Act* was enacted in 1996 and contains several revisions, including section 120.1, which came to be included in the *Act* in 2008, that is, after the contract between PRC and CN came into effect.

[31] Section 5 of the *Act* sets out basic policy provisions, including, in sub-sections (a) and (b), that there shall be competition and that there shall be regulation and strategic public intervention with respect to Canada's national transportation system.

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(b) 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 and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

[32] The Canadian Transportation Agency (Agency) is established by section 7 of the *Act* and is empowered by section 37 of the *Act* to hear and determine a complaint as to matters administered by the Agency. Sections 7 and 37 provide:

7. (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

7. (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition of Agency

Composition

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act.

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

Chairperson and Vice-Chairperson

Président et vice-président

(3) The Governor in Council shall designate one of the members appointed under paragraph (2)(a) to be the Chairperson of the Agency and one of the other members appointed under that paragraph to be the Vice-Chairperson of the Agency.

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

...

...

37. The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

37. L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

[33] Section 40 of the Act gives broad power to the Governor-in-Council at the petition of almost anyone to vary or rescind a decision of the Agency:

40. The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made inter partes or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

40. Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

[34] Section 41(1) of the Act gives a specific right of appeal, with leave, from a decision of the Agency to the Federal Court of Appeal “*on a question of law or a question of jurisdiction*”, provided that leave to appeal is sought within one month:

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l’Office est susceptible d’appel devant la Cour d’appel fédérale sur une question de droit ou de compétence, avec l’autorisation de la cour sur demande présentée dans le mois suivant la date de l’acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l’Office et audition de ceux d’entre eux qui comparaissent et désirent être entendus.

[35] Sections 117, and following, of the Act are directed to tariffs. Care must be taken in looking at the terms used in these sections, including “tariff”, “rate”, and “charges”; none of which terms are specifically defined in the Act. Section 117 prohibits a railway company from charging a “rate” in respect of movement of traffic unless it has been issued and published in the manner set out:

117. (1) Subject to section 126, a railway company shall not charge a rate in respect of the movement of traffic or passengers unless the rate is set out in a tariff that has been

117. (1) Sous réserve de l’article 126, une compagnie de chemin de fer ne peut exiger un prix pour le transport de marchandises ou de passagers que s’il est

issued and published in accordance with this Division and is in effect.

indiqué dans un tarif en vigueur qui a été établi et publié conformément à la présente section.

Renseignements tarifaires

Tariff to include prescribed information

(2) Le tarif comporte les renseignements que l'Office peut exiger par règlement.

(2) The tariff must include any information that the Agency may prescribe by regulation.

Publication des tarifs

Publication of tariff

(3) La compagnie de chemin de fer fait publier et soit affiche le tarif, soit permet au public de le consulter à ses bureaux.

(3) The railway company shall publish and either publicly display the tariff or make it available for public inspection at its offices.

Exemplaire du tarif

Copy of tariff on payment of fee

(4) Elle fournit un exemplaire de tout ou partie de son tarif sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

(4) The railway company shall provide a copy of the tariff, or any portion of it, to any person who requests it and pays a fee not exceeding the cost of making the copy.

Conservation

Record of tariff

(5) Elle conserve le tarif en archive pour une période minimale de trois ans après son annulation.

(5) The railway company shall keep a record of the tariff for at least three years after its cancellation.

[36] Section 119 contemplates that the rates may be changed, provided that a new tariff which supersedes the old, is published:

119. (1) A railway company that proposes to increase a rate in a tariff for the movement of traffic shall publish a notice of the increase at least 30 days before its effective date.

119. (1) La compagnie de chemin de fer qui a l'intention de hausser les prix d'un tarif de transport publie la modification au moins trente jours avant la date de sa prise d'effet.

Effect of freight tariff

Prise d'effet des tarifs

(2) If a railway company issues and publishes a tariff of rates for the movement of traffic in accordance with this Division and Division VI,

(2) Une fois le tarif établi et publié conformément à la présente section et à la section VI :

(a) the rates are the lawful rates of the railway company and, subject to subsection (1), they take effect on the date stated in the tariff;

a) les prix mentionnés sont les prix licites de la compagnie et, sous réserve du paragraphe (1), prennent effet à la date indiquée dans le tarif;

(b) the tariff supersedes any preceding tariff or any portion of it in so far as any rate in the tariff is varied; and

b) le tarif remplace tout ou partie des tarifs antérieurs dans la mesure où il comporte une modification du prix;

(c) a railway company that owns or operates a railway line in respect of which the tariff is issued shall charge the rates in the tariff until

c) chaque compagnie propriétaire ou exploitante d'une ligne de chemin de fer visée par le tarif doit exiger les prix mentionnés jusqu'à la cessation d'effet

they expire or until the tariff is superseded by a new tariff.

de ceux-ci, ou jusqu'au remplacement du tarif, au titre de la présente loi.

[37] Section 120.1 of the *Act* was introduced in a Bill before Parliament in October 2007 and was given Royal Assent on February 28, 2008, which is after the contract at issue here came into effect. It provides that where a tariff applies to more than one shipper, one of them may apply to the Agency to order “new charges or associated terms and conditions”. That order is effective for only one year. Subsection (7) is of importance in this case, since it states that section 120.1 does *not* apply to “*rates for the movement of traffic*”:

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

Period of validity

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance.

Validité

(2) L'ordonnance précise la période de validité de ces

frais ou conditions, qui ne peut excéder un an.

Factors to be considered

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(a) the objective of the charges or associated terms and conditions;

(b) the industry practice in setting the charges or associated terms and conditions;

(c) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

(d) any other factor that the Agency considers relevant.

Commercially fair and reasonable

(4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

Facteurs à prendre en compte

(3) Pour décider si les frais ou conditions sont déraisonnables, l'Office tient compte des facteurs suivants :

a) le but dans lequel les frais ou conditions sont imposés;

(b) les pratiques suivies par l'industrie pour leur fixation;

c) dans le cas d'une plainte relative à des services connexes, l'existence d'une solution de rechange efficace, bien adaptée et concurrentielle;

d) tout autre facteur que l'Office estime pertinent.

Obligations

(4) Les frais ou conditions fixés par l'Office doivent être commercialement équitables et raisonnables tant pour les expéditeurs qui y sont assujettis que pour la compagnie de chemin de fer qui a établi le tarif les prévoyant.

Duty to vary tariff

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

No variation

(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

Clarification

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

Modification du tarif

(5) La compagnie de chemin de fer modifie le tarif en conséquence dès le prononcé de l'ordonnance par l'Office.

Pas de modification

(6) La compagnie de chemin de fer ne peut modifier son tarif à l'égard des frais et conditions fixés par l'Office avant l'expiration de la période de validité précisée au titre du paragraphe (2).

Précision

(7) Il est entendu que le présent article ne s'applique pas aux prix relatifs au transport

[38] Section 126 of the *Act* was introduced in a predecessor statute in 1987. Subsection 126(1) provides that the parties may enter into a “confidential contract”:

126. (1) *A railway company may enter into a contract with a shipper that*

126. (1) *Les compagnies de chemin de fer peuvent conclure avec les expéditeurs*

the parties agree to keep confidential respecting

un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne :

(a) the rates to be charged by the company to the shipper;

a) les prix exigés de l'expéditeur par la compagnie;

(b) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;

(b) les baisses de prix, ou allocations afférentes à ceux-ci, indiquées dans les tarifs établis et publiés conformément à la présente section;

(c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;

c) les rabais sur les prix, ou allocations afférentes à ceux-ci, établis dans les tarifs ou dans les contrats confidentiels, qui ont antérieurement été exigés licitement;

(d) any conditions relating to the traffic to be moved by the company; and

d) les conditions relatives au transport à effectuer par la compagnie;

(e) the manner in which the company shall fulfill its service obligations under section 113.

e) les moyens pris par la compagnie pour s'acquitter de ses obligations en application de l'article 113.

No investigation or arbitration of confidential contracts.

Arbitrage

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

(2) Toute demande d'arbitrage au titre de l'article 161 est subordonnée à l'assentiment de toutes les parties au contrat confidentiel.

[39] Section 161, and following, of the *Act* provide that certain matters can be settled by a “final offer” arbitration process; in particular, a shipper who is dissatisfied with rates charged or to be charged may invoke that process. Subsection 161(1) provides:

161. (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

161. (1) L'expéditeur insatisfait des prix appliqués ou proposés par un transporteur pour le transport de marchandises ou des conditions imposées à cet égard peut, lorsque le transporteur et lui ne sont pas en mesure de régler eux-mêmes la question, la soumettre par écrit à l'Office pour arbitrage soit par un arbitre seul soit, si le transporteur et lui y consentent, par une formation de trois arbitres.

[40] However, in returning to subsection 126(2) of the *Act*, no party to a “confidential contract” may, without consent of all parties, submit any matter governed by the contract to final offer arbitration. Thus, once a contract is signed the opportunity to submit a matter to final offer arbitration ceases:

126. (2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

126. (2) Toute demande d'arbitrage au titre de l'article 161 est subordonnée à l'assentiment de toutes les parties au contrat confidentiel.

[41] Section 116 of the *Act* requires the Agency, on receiving a complaint that a railway company is not fulfilling any of its service obligations, to conduct an investigation and determine if the complaint is warranted. If the parties have entered into a “confidential contract” setting out the manner in which the service obligations are to be performed, the terms of that contract are binding on the Agency. Subsections 116(1)(2) and (3) state:

116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

Confidential contract binding on Agency

(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

116. (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

Contrat confidentiel

(2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

*Competitive line rate
provisions binding on Agency*

(3) If a shipper and a company agree under subsection 136(4) on the manner in which the service obligations are to be fulfilled by the local carrier, the terms of the agreement are binding on the Agency in making its determination.

Obligation de l'Office

(3) Lorsque, en application du paragraphe 136(4), un expéditeur et une compagnie s'entendent sur les moyens à prendre par le transporteur local pour s'acquitter de ses obligations prévues par les articles 113 et 114, les modalités de l'accord lient l'Office dans sa décision.

[42] Thus, before a “confidential contract” is entered into, a shipper such as PRC may submit the proposed terms to “final offer” arbitration, but not after the contract is signed. Further, “service obligations” may be submitted to “final offer” arbitration, but only to the extent that those obligations are not set out in the contract. It was not suggested by any party that “service obligations” include “rates”.

ISSUE # 1 What was the nature of the Application made by PRC to the Agency?

[43] The Application has been reviewed earlier in these Reasons. In brief, PRC was applying to the Agency:

...for an order establishing reasonable fuel surcharge charges...to apply to the carriage of PRC's coal by (CN).

[44] Thus, PRC wanted, in effect, to have the contract between it and CN varied, and the way to do that was to have the Agency review the fuel surcharge Tariff 7402. PRC, of course, hoped that the variance would result in a lower fuel surcharge.

[45] The Agency was, in the Court's opinion, entirely correct when it concluded in its analysis and findings:

...Although PRC submits that it does not seek to alter any of the terms of the confidential contract, the Agency finds that PRC is in fact seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.

ISSUE #2 **What was the nature of the Decision made by the Agency to dismiss that Application?**

[46] The Agency was moved by CN to dismiss the application on either or both of two grounds:

- i) *fuel surcharge is not an ancillary charge but rather is part of the transportation rate and is therefore excluded from the application of the recourse to the Agency by virtue of subsection 120.1(7) CTA;*
- ii) *the fuel surcharge is part of a Confidential Transportation Agreement between CN and PRC and there are no provisions in the CTA allowing the Agency to amend such agreements cannot be amended by the Agency (sic).*

[47] The Agency found in CN's favour by dismissing the Application on the second of these two grounds; namely, that it had no jurisdiction to amend the contract. It found that it was not necessary to consider the first of these grounds; that is, whether a fuel surcharge is an ancillary charge or part of the transportation rate. It wrote:

Contracts are entered into willingly and freely by two parties for their mutual benefit. One of the key purposes is to ensure certainty and predictability on matters agreed to for the duration of the contract. The parties are bound by the contract and the Agency has no jurisdiction to change the terms of a contract between parties on

application under section 120.1 of the CTA and dismisses the application.

As a result, there is no need for the Agency to consider CN's alternate argument related to whether the fuel surcharge forms part of the transportation rate.

[48] Thus, the Agency found that it lacked jurisdiction to consider the PRC Application since it was being asked to consider and amend a contract.

ISSUE #3 **What was the nature of the Petition made by CITA-ACTI to the Governor-in-Council?**

[49] CITA-ACTI submitted a Petition to the Governor-in-Council respecting the Agency's Decision to decline to hear the Application six months after the Decision was made. It did so under the provisions of section 40 of the *Canada Transportation Act*.

[50] Under section 41 of that *Act*, only PRC, as a party to the proceedings before the Agency, could have sought leave to appeal to the Federal Court of Appeal. It would have had to do so within one (1) month from the Agency's decision. Leave would have to have been given. The issues would be restricted to questions of law or jurisdiction.

[51] The specific relief sought by CITA-ACTI from the Governor-in-Council was to require that the Agency:

- (a) *determine that CN's old fuel surcharge tariff is an ancillary charge within the meaning of subsection 120.1(7) of the Act, and is one that may be properly considered under section 120.1 of the Act; and*

- (b) *determine that the Agency may consider the reasonableness of CN's old fuel surcharge tariff notwithstanding the existence of the confidential transportation contract between the parties that incorporates the old fuel surcharge.*

[52] There is a shift in ground between the CITA-ACTI Petition and the Application made by PRC to the Agency. CITA-ACTI, particularly in (b) above, simply wanted the Agency to review the fuel surcharge tariff, notwithstanding a contract. PRC wanted the Agency to amend the contract so as to incorporate the rate that the Agency was asked to find was “reasonable”.

[53] Thus, CITA-ACTI was asking the Governor-in-Council, under section 40 of the *Canada Transportation Act*, to ignore PRC's request that the Agency vary the contract and to simply ask the Agency to review the Tariff for “reasonableness” without regard to the contract.

ISSUE #4 **What was the nature of the Decision made by the Order-in-Council?**

[54] The substance of the Order-in-Council has been set out earlier in these Reasons; however, for convenience, I repeat it:

Whereas section 120.1 of the Act is a complaint-based regulatory remedy against unreasonable charges and associated terms and conditions for the movement of traffic or the provision of incidental services imposed by a railway company that is aimed at benefiting all shippers subject to the charges and associated terms and conditions found in the challenged tariff rather than only benefiting the complainant;

Whereas the complaint filed pursuant to section 120.1 of the Act by PRC was for the benefit of all shippers subject to the alleged charge and associated terms and conditions for the movement of traffic or the provisions of an incidental service contained in CN

Tariff No. 7402, a tariff that applies to more than one shipper and that is not a tariff referred to in subsection 165(3) of the Act;

And whereas the Governor in Council is of the opinion that while the existence of a confidential contract between a railway company and a complainant under section 120.1 of the Act, and the terms and conditions of such contract, are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, it has no bearing on the reasonableness of the charge and associated terms and conditions for the movement of traffic or for the provisions of incidental services that are found in a tariff that applies to more than one shipper and is not a tariff referred to in subsection 165(3) of that Act;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to section 40 of the Canada Transportation Act, hereby rescinds Canadian Transportation Agency Decision No. 392-R-2008 of July 31, 2008.

[55] What the Governor-in-Council has done, in effect, is to say to the Agency that it is to go ahead and determine the reasonableness of the Tariff notwithstanding the existence of a contract between PRC and CN. It has said that since the Tariff applies to more than one shipper, the review of the Tariff will be of benefit to all of them and not just PRC. The Order-in-Council expressly *does not* direct that the Agency require that PRC and CN amend their contract to reflect the amended Tariff. That, presumably, is left for another day and perhaps another forum.

ISSUE # 5 **Did the Governor-in-Council act within the scope of the powers given to it under section 40 of the *Canada Transportation Act* in making the Order-in-Council or does section 41 of that *Act* remove that power in respect of the issue put to it?**

[56] Sections 40 and 41 of the *Canada Transportation Act* are seemingly at odds with one another. Does the specific power given to the Federal Court of Appeal to deal with questions of law or jurisdiction under section 41 remove those issues from the very broad powers of the Governor-in-

Council to vary or rescind any decision of the Agency, or may each forum be engaged even in respect of questions of law and jurisdiction? What a delight for lawyers and lobbyists prowling the halls of Parliament or the backrooms of popular Ottawa restaurants to determine where the most favourable winds may be blowing!

[57] I find for the following reasons that each of the Federal Court of Appeal and the Governor-in-Council is a proper forum for determining questions of law and jurisdiction. Further, the Governor-in-Council is the only forum in which a variance or rescission of a decision of the Agency may be sought on grounds beyond questions of law or jurisdiction.

[58] This question was addressed by the Ontario Court of Appeal in *Re Davisville Investment Co Ltd and City of Toronto et al* (1977), 15 OR (2d) 553 where Lacourciere JA for the majority wrote at paragraphs 7 to 9 and 16 in holding that the Lieutenant-Governor in Council had broad power:

7 Section 94(1) of the Ontario Municipal Board Act reads as follows:

94(1) Upon the petition of any party or person interested, filed with the Clerk of the Executive Council within twenty- eight days after the date of any order or decision of the Board, the Lieutenant Governor in Council may,

(a) confirm, vary or rescind the whole or any part of such order or decision; or

(b) require the Board to hold a new public hearing of the whole or any part of the application to the Board upon which such order or decision of the Board was made,

and the decision of the Board after the public hearing ordered under clause b is not subject to petition under this section.

8 *The 1972 decision of the Ontario Municipal Board could be challenged in two ways: (1) By an appeal following the judicial route of s. 95, on a question of law or jurisdiction, and subject to leave being obtained leading to the Divisional Court, or (2) by a petition, along the political route to the Lieutenant-Governor in Council, pursuant to s. 94.*

9 *The respondent association, after some procedural hesitation, eventually chose the second route. The Lieutenant-Governor in Council, answerable to the Legislature, exercises a discretionary power of control over the Municipal Board, and is not confined to the grounds stated in the petition or limited to the record before the Board. The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of Government applying its perception of the public interest to the facts established before the Board, plus the additional facts before the Council. The Lieutenant-Governor in Council is not concerned with matters of law and jurisdiction which are within the ambit of judicial control. But it can do what Courts will not do, namely, it can substitute its opinion on a matter of public convenience and general policy in the public interest. This is what was done by the Order in Council: if it was done without any error of law, or without defects of a jurisdictional nature, the Divisional Court had no power to interfere and properly dismissed the application before it.*

...

16 *Section 94 of the Ontario Municipal Board Act should not be construed restrictively as if it involved an inferior tribunal to which certain matters have been committed by the Legislature. I prefer to regard the power as one reserved by the legislative to the executive branch of Government acting on broad lines of policy. There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.*

[59] In its recent decision in *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 194, [2011] FCJ No 774, the Federal Court of Appeal acknowledged, in respect of similar legislation to that at issue here, that dual avenues for appeal or review could exist, both to the Court or Governor-in-Council. Sexton JA for the Court wrote at paragraph 26:

26 To begin with, the Governor in Council "has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission" (CSP Foods v. Canada (Canadian Transport Commission), [1979] 1 F.C. 3 at 9-10 (C.A.) [CSP Foods]; see also Re Davisville Investment Co. and City of Toronto (1977), 15 O.R. (2d) 553 at 555-56 (C.A.)). A decision of the CRTC may be reviewed in two ways. It may be appealed directly to this court with leave pursuant to section 64 of the Act, where both factual and legal issues will likely be reviewed on a reasonableness standard (see Telus Communications v. Canada (CRTC), 2010 FCA 191 at paragraphs 33-34). The decision may also be reviewed by the Governor in Council pursuant to section 12. This procedure is very different than the section 64 appeal, and the Governor in Council reviews the CRTC's decision de novo. This Court is therefore reviewing the Order in Council. All aspects of the Order in Council are subject to judicial review.

[60] At paragraph 31, Sexton JA wrote that Parliament has chosen concurrent routes:

[31] ...Rather than giving this Court the exclusive right to review CRTC decisions, Parliament chose to vest concurrent review in the Governor in Council.

[61] Thus, section 41 of the *Canada Transportation Act* does not remove from the Governor-in-Council the power to vary or rescind a decision of the Agency, even in respect of questions of law or jurisdiction.

ISSUE # 6 What is the standard of review to be applied by the Court in reviewing the Order-in-Council?

[62] It is appropriate to begin consideration of this issue by referring to the recent decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and, in particular, to paragraphs 55 to 59 of the Reasons of the majority. In these paragraphs, we are told that even some questions of law may be reviewed on a reasonableness standard, but on true questions of jurisdiction or vires, administrative bodies must be correct. The majority wrote:

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

*The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.*

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

...

59 *Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or vires. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.*

[63] In *Globalive supra*, the Federal Court of Appeal observed that the Governor-in-Council has the power to take into consideration the public interest, and that the standard is that of reasonableness. At paragraph 26, Sexton JA wrote:

26 *To begin with, the Governor in Council "has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission" (CSP Foods v. Canada (Canadian Transport Commission), [1979] 1 F.C. 3 at 9-10 (C.A.) [CSP Foods]; see also Re Davisville Investment Co. and City of Toronto (1977), 15 O.R. (2d) 553 at 555-56 (C.A.)). A decision of the CRTC may be reviewed in two ways. It may be appealed directly to this court with leave pursuant to section 64 of the Act, where both factual and legal issues will likely be reviewed on a reasonableness standard (see *Telus Communications v. Canada**

(CRTC), 2010 FCA 191 at paragraphs 33-34). The decision may also be reviewed by the Governor in Council pursuant to section 12. This procedure is very different than the section 64 appeal, and the Governor in Council reviews the CRTC's decision de novo. This Court is therefore reviewing the Order in Council. All aspects of the Order in Council are subject to judicial review.

[64] In the present case, we must look at the decision of the Governor-in-Council in two ways. First, it “varied” the decision of the Agency so that it was to look only at reasonableness of the tariff without regard to amending the contract between PRC and CN. In that regard, it was within the power given by section 40 to “vary” a decision.

[65] The second question is to consider the Order-in-Council from the point of view as to whether the existence of a contract meant that, in law, the Agency had no jurisdiction over the Application made by CN.

[66] The second question depends upon the characterization of the Application by CN. I have found that the Application is one in which PRC is seeking that the Agency amend the contract with CN. If PRC was simply, for altruistic reasons, to benefit fellow shippers, it could simply have sought a review of the Tariff and the Agency would have had to oblige. If it were simply that, the Governor-in-Council’s decision would have been both correct and reasonable.

[67] I put it to Counsel for the parties at the hearing that there was seemingly no impediment for PRC or any affected shippers to seek a review of the Tariff by the Agency. They agreed. I put it to them that what, if anything, would be the result of the amendment? Was it something for another day and possibly another forum? They agreed. Why, then, do we have this judicial review? CN, and

perhaps the other parties, said that this was the first time many of these issues have arisen and they seek judicial determination. Here we are.

[68] I find that the Governor-in-Council, in deciding matters of pure jurisdiction such as the issue here, must be subject to the correctness standard on review. There is no issue of public policy involved. What is involved is an interpretation of the appropriate provisions of the *Canada Transportation Act* and their applicability to the issues before the Agency. If changes are sought on policy grounds in respect of what the *Act* says in this regard, that is the function of Parliament.

ISSUE #7 **In applying the appropriate standard of review, is the Order-in-Council correct or reasonable in having regard to section 120.1 of the *Canada Transportation Act*?**

[69] I have determined that the applicable standard is that of correctness.

[70] As previously set out, section 120.1, which came into force after the contract at issue was entered into, but before it ended, provides that a tariff which applies to more than one shipper may be reviewed and revised by the Agency at the request of any of those shippers. However, subsection 120.1(7) states that this section does not apply to rates for the movement of traffic.

[71] I have previously found in these Reasons that the tariff at issue here is part of a “rate” charged to the shipper. It is within the exemption provided by subsection 120.1(7); therefore, it is *not* reviewable by the Agency. The Agency was correct in dismissing the Application for lack of jurisdiction. The Governor-in-Council was not correct in rescinding that decision.

ISSUE #8 **In applying the appropriate standard of review, is the Order-in-Council correct or reasonable having regard to the fact that the contract between PRC and CN is a “Confidential Contract”?**

[72] I have found that the standard of review is correctness. There is no dispute that the contract at issue is a “confidential contract” within the meaning of the *Canada Transportation Act*.

[73] This issue turns on characterization of the Application before the Agency. If the Agency is being asked by PRC to vary the contract that it has with CN, as I have so found, then the Agency lacks jurisdiction. Nowhere in the *Act* can there be found any power in the Agency to vary a contract between a shipper and a carrier. What the Agency can do is vary a published tariff which is applicable to more than one shipper. The effect of that variance on an existing contract, however, is not within the power of the Agency to determine.

[74] The *Act* provides that *before* the parties enter into a contract, one of them may require that the proposed terms be submitted to final offer arbitration. However, the *Act* does not provide any mechanism to deal with matters such as rates established by a contract after the contract has been entered into by the parties.

[75] I make no finding as to what effect, if any, a finding of the Agency as to the reasonableness of a tariff might have. I simply find that the Agency has no power to vary the contract entered into by the parties. That is precisely what PRC was seeking in its Application to the Agency. Therefore, the decision of the Governor-in-Council in returning the subject matter of the Application to the Agency is incorrect, the Agency had no jurisdiction to deal with the matter.

CONCLUSION AND COSTS

[76] In conclusion, I have found that the Order-in-Council is a decision to be reviewed on a standard of correctness. That decision was not correct.

[77] I award costs to the successful party, the Applicant CN, at the level of the upper end of Column IV. Fees for two Counsel, one senior and one junior at the hearing, are allowed. I understand from discussions with Counsel at the hearing that the quantum of costs may be agreed upon. Failing that, I will invite the parties to make further submissions to me as to quantum.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. Order-in-Council 2010-0749 is set aside and Canadian Transportation Agency Decision No. 392-R-2008 is restored; and
3. The Applicant is entitled to costs at the upper end of Column IV in accordance with the Reasons.

“Roger T. Hughes”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1104-10

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY COMPANY v.
ATTORNEY GENERAL OF CANADA, PEACE
RIVER COAL INC., and CANADIAN INDUSTRIAL
TRANSPORTATION ASSOCIATION

PLACE OF HEARING: Ottawa, Ontario

DATES OF HEARING: September 28 & 29, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** HUGHES J.

DATED: October 20, 2011

APPEARANCES:

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