Federal Court of Appeal  Cour d'appel fédérale

Date: 20180406

Docket: A-165-16

Citation: 2018 FCA 69

CORAM: **RENNIE J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

ATTORNEY GENERAL OF CANADA,
CANADIAN TRANSPORTATION AGENCY,
HER MAJESTY THE QUEEN IN RIGHT OF
ALBERTA, AS REPRESENTED BY THE
MINISTER OF TRANSPORTATION, and
THE CITY OF CALGARY

Respondents

Heard at Calgary, Alberta, on January 16, 2018.

Judgment delivered at Ottawa, Ontario, on April 6, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] The Canadian Pacific Railway Company appeals Decision No. 397-R-2015 (the 2015 Decision) of the Canadian Transportation Agency under section 41 of the *Canada*

Transportation Act, S.C. 1996, c. 10. In this decision, the Agency authorized Alberta Transportation's application for the reconstruction of an existing grade separation between a railway line owned by CP and a provincial highway and the construction of a new at-grade crossing. It apportioned costs of construction and of maintenance of these works between CP and Alberta Transportation.

[2] A detailed review of the facts is required in order to understand the issues in this appeal and their disposition.

II. Background

[3] Three kilometers south of Midnapore, Alberta on Highway 22X, a bridge crosses over Canadian Pacific Railway tracks. The bridge has two eastbound lanes and two westbound lanes. It has been there since 1957.

[4] In June 2012, Alberta Transportation submitted an application to the Agency under subsection 101(3) of the *Transportation Act* for an order authorizing a new crossing. Approval was sought for construction of a new overhead bridge crossing the single CP track. It also made a reference to the Agency under section 16 of the *Railway Safety Act*, R.S.C. 1985 (4th Supp.), c. 32 for the apportionment of the costs between CP and Alberta Transportation.

[5] Alberta Transportation presented the project as having two distinct phases. Phase 1 would expand the existing three lane bridge to six lanes by twinning the bridge. This would be done by building a new bridge, adjacent to the existing bridge, with the result that there would be three

eastbound and three westbound lanes. Phase 2 contemplated future expansion of the bridge to accommodate the South West Calgary Ring Road (SWCRR). The SWCRR is of critical importance to Alberta Transportation and the City of Calgary in the management of future traffic in and around Calgary.

[6] The SWCRR would cross the lands of the Tsuut'ina. Until agreement was reached with the Tsuut'ina, the SWCRR could not proceed. Negotiations between Alberta Transportation and the Tsuut'ina Nation were proceeding contemporaneous to the proceedings before the Agency.

[7] CP submitted that the project was a "new route" and, as such, CP should bear no responsibility for any of the costs under Agency guidelines. In response, Alberta Transportation withdrew Phase 2, and limited its application for approval and apportionment of Phase 1 only. CP maintained its position that the Phase 1 project was also a "new route".

[8] In the result, the specific project before the Agency for which approval was sought in 2012 involved the construction of the three through-lane westbound structure with a provision for a future facility lane, and some deck work on the existing structure to make it a three through-lane eastbound structure.

[9] In March 2013, the Agency released its decision (the 2013 Decision).

[10] The Agency found that Phase 1 constituted a reconstruction of an existing grade separation on an existing route. The "new route" argument was rejected, although no reasons

were given. The argument that it was part of the SWCRR was not addressed. It fell to the wayside with the withdrawal of Phase 2.

[11] In submissions to the Agency, Alberta Transportation contended that six lanes met "present day needs", a term used by the Agency in the exercise of its specialised role. Present day needs refers to the capacity required to accommodate the volume of traffic at the crossing upon completion of the project.

[12] The average annual daily traffic (AADT) at the crossing in 2012 was 26,000, which, according to the Alberta Infrastructure's Highway Geometric Design Guide (the Alberta Transportation Guide to projecting future highway needs) warranted a four-lane bridge. After acknowledging the time required to reconstruct the existing grade separation, the Agency was "satisfied that the 2012 vehicular traffic volume [was] sufficiently close" to 31,000 – the threshold for a six-lane section – for six lanes to be considered part of the work required to meet present day needs (2013 Decision at paras. 26–28). The Agency authorized reconstruction on the basis that six lanes (three in each direction) were needed to meet present day needs of 26,000 AADT.

[13] It apportioned costs (save for the costs of a future facility lane, which was found not to form part of the basic grade separation) between Alberta and CP at 85% and 15%, respectively (2013 Decision at paras. 30, 49, 59–60). This is the usual apportionment applied by the Agency when proposed construction is characterized as reconstruction of an existing grade separation as opposed to new construction.

[14] CP did not appeal the 2013 Decision.

[15] On November 27, 2013 the province and the Tsuut'ina Nation reached an agreement for the construction of portions of the SWCRR on their traditional lands.

[16] On March 24, 2015, Alberta submitted another application under subsection 101(3) of the *Transportation Act*. It sought an order authorizing and apportioning the costs of a revised and expanded Phase 2 of the project. Phase 2, characterized by Alberta as a "reconstruct[ion of] the existing overhead bridge to carry the Southwest Calgary Ring Road over the existing CPR track", had become viable due to the agreement with the First Nation which allowed for the construction of the SWCRR.

[17] The 2015 application proposed major revisions to the previously approved Phase 1 project. Instead of only completing some deck work on the existing bridge to make it an entirely three-lane eastbound bridge, the revised Phase 2, sometimes described as "the 2015 Work" in the record, involved the demolition of the existing bridge, the construction of an entirely new eastbound bridge and the construction of the separate, westbound bridge that was approved in the 2013 Decision. Together they would accommodate seven lanes of through-lane traffic over the CP track instead of six.

[18] The revised Phase 2 would also include adding two ramp lanes onto the westbound bridge that was approved in 2013, adding two ramp lanes and a provision for a future facility

lane onto the new eastbound bridge, a provision for a future second CPR track, two future light rail transit (LRT) tracks and a future municipal two-lane roadway.

[19] In the fall of 2015, CP learned Alberta secured federal infrastructure funding for the SWCRR, and asked the Agency to suspend its decision until it had received related documents in response to applications made under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 and the *Access to Information Act*, R.S.C. 1985, c. A-1. CP contended that the documents had a material bearing on the issues of who would benefit from the project, the scope of the project and the cost allocation.

[20] The Agency refused to adjourn (2015 Decision at para. 45) and on December 24, 2015, issued its decision. It is the Agency's 2015 Decision that is the subject of this appeal.

III. Canadian Transportation Agency Decision No. 397-R-2015

[21] The Agency made five main determinations.

[22] The Agency denied CP's request to defer rendering its decision pending CP's pursuit of additional documents relevant to the 2015 application. The Agency held that to postpone would be unfair to Alberta which was "entitled to a timely decision", and contrary to section 29 of the *Transportation Act* which requires the Agency to render decisions within 120 days. However, and important to the disposition of this appeal, the Agency left the door open to CP to apply under section 32 of the *Transportation Act*. This section provides for a review of decisions where

there has been “a change in the facts or circumstances pertaining to the decision” (2015 Decision at paras. 39–45).

[23] Secondly, it found that the westbound structure as described in the 2015 application was essentially the same as the one already authorized by the 2013 Decision. Therefore, with respect to the westbound structure, the 2015 Decision only addressed the addition of two outside ramp lanes (2015 Decision at paras. 28–31) which had not been included in the 2013 Decision (2015 Decision at paras. 28, 31, 34).

[24] Thirdly, the Agency rejected CP’s argument that Alberta’s proposed changes in Phase 2 constituted new construction of a new route. In its view, the proposed demolition and reconstruction of the existing bridge, which would change it to an entirely eastbound, four through-lane structure, and the proposed construction of two new outside ramp lanes on the westbound structure that was authorized in the 2013 Decision, constituted a reconstruction of the existing grade separation. This reconstruction functioned to update the existing route, Highway 22X, to meet the increase in vehicular traffic (2015 Decision at paras. 60–68).

[25] Fourthly, the Agency authorized the proposed reconstruction (that is, the demolition of the existing bridge and construction of a new eastbound bridge) to accommodate the fourth through-lane. This construction would bring the total number of through-lanes to seven, which the Agency found was “required for present day needs upon completion of the grade separation construction” (2015 Decision at paras. 86–87, 90, 94). Further, the two outside ramp lanes were

required to make the westbound structure that was approved in the 2013 Decision functional (2015 Decision at para. 67).

[26] Finally, the Agency apportioned 85% of the reconstruction and construction of the new at-grade crossing to Alberta and 15% to CP, the same proportion applied to the Phase 1 project in 2013. Contemplating future developments, the Agency also ordered that any other works constituted additional facilities, the cost of which, and the cost of any change in the width or length of either structure to accommodate those additional facilities, would be paid by the party requesting them (2015 Decision at paras. 97–102).

IV. Issues on appeal

[27] CP does not contest the authorization of any of the work. Rather, CP contests the Agency's apportionment of costs, arguing that it has no obligation to pay any costs in excess of the 2013 Decision. CP seeks an order quashing the apportionment determination and that its apportionment be reduced to zero percent or, in the alternative, an order remitting the application to the Agency for redetermination with the direction that a portion of the costs be apportioned to the City of Calgary and the federal grant funding Alberta received be applied before apportioning costs.

[28] CP advances three challenges to the decision.

[29] CP argues first that the Agency erred in rendering the 2015 Decision in a manner that conflicted with the 2013 Decision. This ground of appeal focuses on the alleged discrepancies between the Agency's 2013 and 2015 decisions as to the AADT and present day needs.

[30] CP secondly contends that the Agency made three errors of law in its consideration of subsection 16(4) of the *Railway Safety Act*. By rendering a decision that did not consider the extent to which the City of Calgary would benefit from Phase 2, CP says that the Agency erred in law in not conducting the analysis mandated by subsection 16(4). That subsection requires "the Agency [consider] … the relative benefits that each person who has, or who might have, referred the matter stands to gain from the work". CP asserts that the Agency also erred in finding that CP stood to benefit from the provision of a second track when there was no evidence to that effect. The third error in the subsection 16(4) analysis arose from the failure to consider Alberta's true costs in light of the infrastructure funding.

[31] CP's third ground of appeal is that the Agency, in refusing its request for an adjournment and in proceeding in the absence of the requested documents, breached its right to procedural fairness.

A. Standard of Review

[32] I turn first to the question of the standard of review.

[33] Although this is a statutory appeal, administrative law principles apply (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 38, [2015] 2 S.C.R. 3), and the parties

are correct in identifying reasonableness as the applicable standard of review for the first and second grounds of appeal (*Canadian National Railway v. Viterra Inc.*, 2017 FCA 6 at paras. 35–38, 410 D.L.R. (4th) 128; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650). I do not agree, however, that reasonableness applies to the question of whether the Agency breached CP's right to procedural fairness.

[34] Procedural fairness is a matter for the reviewing court to determine and, in so doing, "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'" (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502 (*Khela*)). The use of the word "continues" is instructive. *Khela* did not change what Evans J.A. previously characterized as "[t]he black-letter rule" that allegations of procedural fairness are reviewed on a standard of correctness (*Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 34, 72 Admin. L.R. (5th) 1).

[35] What "correctness" means in the context of procedural fairness is a question which I will address shortly.

[36] Judgments of this Court subsequent to *Khela* have confirmed that the standard of review with respect to procedural fairness matters is correctness (see e.g. *Wsáneć School Board v. British Columbia*, 2017 FCA 210 at paras. 22–23; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146 at para. 19; *Therrien v. Canada (Attorney General)*, 2017 FCA 14 at para. 2, 24 Admin. L.R. (6th) 46; *Miakanda-Batsika v. Bell Canada*, 2016 FCA 278 at para. 14; *El-Helou v. Canada (Courts Administration Service)*, 2016 FCA 273 at para. 43; *Arsenault v. Canada*

(Attorney General), 2016 FCA 179 at para. 11, 11 Admin L.R. (6th) 187; *Henri v. Canada (Attorney General)*, 2016 FCA 38 at para. 16, 480 N.R. 365; *Abi-Mansour v. Canada (Deputy Minister of Foreign Affairs and International Trade)*, 2015 FCA 135 at para. 6, 474 N.R. 193).

[37] There is commentary in some decisions of this Court that the law on this question is unsettled. Closer examination, however, reveals that this is not the case.

[38] In *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59, 70 Admin L.R. (5th) 1 (*Maritime Broadcasting*) decided before *Khela*, a reasonableness standard was expressed, but only in dissent. *Re:Sound* is, on occasion, incorrectly relied on for assertion of the reasonableness standard. There, a correctness standard was applied, albeit with an emphasis on the discretion administrative decision makers have in making procedural choices. *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, 465 N.R. 152 (*Forest Ethics*), also relied on as support for the reasonableness standard, was decided seven months after *Khela.* It does not mention *Khela*. The comments of the majority in *Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras. 11–14, 52 Imm. L.R. (4th) 1 (*Vavilov*) on this issue are, as Gleason J.A. pointed out in her dissenting reasons (at para. 92), *obiter*. *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 99 Admin. L.R. (5th) 1 (*Bergeron*), although decided subsequent to *Khela*, relies on *Forest Ethics* and the dissent in *Maritime Broadcasting*.

[39] The argument advanced before this Court is that procedural fairness is assessed on a correctness basis with considerable deference to the tribunal's procedural choices. As long as the

procedural choices are reasonable, the correctness standard is met. The assertion, which is not infrequently heard, is circular and in my view, confuses two separate parts in the analysis of an alleged breach of procedural fairness.

[40] I return to the core principles of procedural fairness. It is understood that the answer to what fairness requires in any particular circumstance is highly variable and contextual (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682, 69 D.L.R. (4th) 489). The content or degree of fairness required is informed by the five, non-exhaustive contextual factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 837–841, 174 D.L.R. (4th) 193 (*Baker*) (see also *Mavi v. Canada (Attorney General)*, 2011 SCC 30 at para. 42, [2011] 2 S.C.R. 504 (*Mavi*)). Of those factors, the fifth, the degree of deference accorded to the decision maker, is relevant here.

[41] We know from *Baker* that the deference paid to a tribunal's choice of procedure is *one* factor which assists in calibrating the degree of procedural fairness required. It assists, but it does not control. The deference that may be shown to tribunals to make procedural choices does not mean that the ultimate question of whether the proceedings were, on a whole, fair is assessed on a reasonableness standard. This argument equates the contextual factors which are directed to determining *the content* of fairness (e.g., the sufficiency of a written versus an oral hearing) with the ultimate question – *whether* the party knew the case they had to meet, had an opportunity to respond and had an impartial decision maker consider their case fully and fairly. To contend that the standard of review is correctness with an element of deference thus marries two discrete questions.

[42] Paragraph 89 of *Khela* is, at times, cited for the proposition that reasonableness should apply to procedural fairness:

> [89] Section 27(3) authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

[43] But *Khela* must be read in light of the statutory scheme under consideration by the Court. Subsection 27(3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, authorized the Commissioner of Corrections to withhold documents which would otherwise be relevant and pertinent to the fairness of the proceedings where there were "*reasonable* grounds to believe" (emphasis added) that disclosing information would threaten the safety or security of the institution or its residents. Consistent with *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, the focus of the Court's consideration was the effect of the statutory language in framing the content of the duty of procedural fairness. It was not directed to the question of the standard of review.

[44] The suggestion that procedural fairness is reviewed on a correctness standard with some deference is both confusing and unhelpful. It is confusing because the standard of review is applied to consideration of outcomes, and, as a doctrine, is not applied to the procedure by which

they are reached. This is neither a new, nor startling observation. The point was made by Binnie J. in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539:

> [102] The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

[45] In *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27 at paras. 20–21, 241 N.S.R. (2d) 300, Cromwell J. (then at the Nova Scotia Court of Appeal) observed, to the same effect, that deference is owed to the decision maker's choice of procedure in determining the content of the duty of fairness but none is owed in determining whether the decision-maker fulfilled that duty. Again, this reasoning recognizes that references to deference in the context of procedural fairness arise not in considering the standard of review, but in considering the fifth factor from *Baker*, informing the content of the duty of fairness.

[46] Procedural fairness has been described as "a cornerstone of modern Canadian administrative law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 79, [2008] 1 S.C.R. 190 (*Dunsmuir*)) and whether that duty has been fulfilled has, for decades, been treated as a legal question for the Court to answer (*Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 (*Nicholson*); *Knight* at 682; *Baker* at 837–841; *Mavi* at para. 42). Deference is but one criterion amongst many that informs the *content* of fairness, but it is irrelevant in answering the question as to *whether* fairness has been met. *Dunsmuir* itself is an authority for the point.

[47] It is useful to recall that in *Dunsmuir* there were two issues before the Court. The first concerned the adjudicator's decision as to whether provincial legislation permitted an inquiry into the employer's reason for dismissing an employee with notice or pay in lieu of notice. It was in relation to this issue that the Court considered the standard of review and determined that it should be reasonableness. But there was a second issue in *Dunsmuir*, long lost in the decade long debate precipitated by that decision. This orphaned issue concerned the nature of procedural fairness to be given to a public office holder when dismissed. The analysis of the procedural fairness question was considered discretely, hermetically sealed from the discussion of the standard of review. The standard of review played no role in answering the second question.

[48] The point is made more clearly if reference is made to the measures of reasonableness articulated in *Dunsmuir* – justification, transparency and intelligibility. Those criteria allow a reviewing court to test the reasonableness of a decision and whether it falls "within a range of reasonable outcomes". They are devices by which a reviewing court conducts substantive review. As tools, they are of no avail in assessing whether the duty of fairness has been met. The reasonableness of a decision is of no consequence if it was reached in a procedurally unfair manner.

[49] I note, parenthetically, the observation of Binnie J. in *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12 at para. 102, [2009] 1 S.C.R. 339 (*Khosa*), that *Dunsmuir* says procedural fairness issues are determined on a correctness basis. As was observed in *Maritime Broadcasting*, at paragraph 79, this comment was made in passing and is *obiter*. There has also been academic commentary that this statement is in error, and that nothing in *Dunsmuir*

merges the standard of review of decisions into procedural fairness (Edward Clark, "*Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of Baker*" (2018) 31 Can. J. Admin. L. & Prac. 1 at 8–9; The Hon. Simon Ruel, "*What is the Standard of Review to Be Applied to Issues of Procedural Fairness?*" (2016) 29 Can. J. Admin. L. & Prac. 259 at 268 (The Hon. Simon Ruel)). Nonetheless, the substance of the point, as opposed to its provenance, is consistent with the observation in *Khela* that correctness in the context of procedural fairness simply means a court must be satisfied that the right to procedural fairness has been met. Nor do I understand Binnie J. to be departing from the distinction he drew in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, between substantive and procedural review.

[50] This is why the Ontario Court of Appeal has recognized that "no standard of review analysis is necessary" in assessing procedural fairness (*Brooks v. Ontario Racing Commission*, 2017 ONCA 833 at para. 5). This conclusion is consistent with the observation that issues of procedural fairness have not been entangled in standard of review analysis (The Hon. John M. Evans, "View from the Top: Administrative Law in the Supreme Court of Canada 2016–2017" in Donald J.M. Brown & the Hon. John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2017) at 2017VT–14).

[51] Other appellate courts have also, appropriately, questioned the role, if any, of the standard of review analysis in assessing procedural fairness. They have, in the end, used correctness to express the measure of whether the duty to provide procedural fairness has been met (*Boeing Canada Operations Ltd. v. Winnipeg (City) Assessor*, 2017 MBCA 83 at paras. 31–

36, 23 Admin. L.R. (6th) 87; *Eagle's Nest Youth Ranch Inc. v. Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at paras. 21, 26–29, 476 Sask. R. 18 (*Eagle's Nest*); *Spinks v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at paras. 23, 27, 46 Alta. L.R. (5th) 84 (*Spinks*).

[52] In *Khela*, the Supreme Court did not subsume or collapse a discrete doctrine of administrative law, the law of procedural fairness, into the standard of review applicable to substantive review. To do so it would have had to depart from its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (*Suresh*), where it applied a deferential standard of review to the substance of the Minister's decision and found it to be reasonable, but nonetheless set the decision aside on the basis that the underlying statutory mechanisms by which the decision was reached were procedurally unfair. It would also have entailed a departure from its ruling in *Moreau-Bérubé v. Nouveau-Brunswick*, 2002 SCC 11 at para. 74, [2002] 1 S.C.R. 249, where the Court explicitly stated that an evaluation of procedural fairness "requires no assessment of the appropriate standard of judicial review".

[53] In the same vein, the Court in *Khela* is very clear about the demarcation between the principles that govern substantive as opposed to procedural review (at paras. 79–80), in holding that reasonableness has no relevance to the question whether the duty of procedural fairness has been met:

> [79] Third, the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

> [80] It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.

[54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at para. 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

[55] Attempting to shoehorn the question of procedural fairness into a standard of review analysis is also, at the end of the day, an unprofitable exercise. Procedural review and substantive review serve different objectives in administrative law. While there is overlap, the former focuses on the nature of the rights involved and the consequences for affected parties, while the latter focuses on the relationship between the court and the administrative decision maker. Further, certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. As *Suresh* demonstrates, the distinction between substantive and procedural review and the ability of a court to tailor remedies appropriate to each is a useful tool in the judicial toolbox, and, in my view, there are no compelling reasons why it should be jettisoned.

[56] No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice – was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

[57] I now circle back to the facts of this case.

B. Did the Agency err in law by rendering the 2015 Decision in a manner that conflicts with the 2013 Decision?

[58] The essence of CP's argument is that there was not a sufficient change in the projected AADT between the 2013 Decision and the 2015 Decision to warrant a change in the amount of work required to meet present day needs regarding vehicular traffic. In particular, CP alleges that since the Agency ruled in the 2013 Decision that six lanes was sufficient to meet the 31,000–50,000 AADT category of Alberta's Highway Geometric Design Guide, it was inconsistent to rule, as it did in the 2015 Decision, that seven lanes were required to meet the same 31,000–50,000 AADT category. CP submits this inconsistency constitutes an error of law and, on that basis, the works authorized in the 2015 Decision, including the construction of the second lane, should be classified as additional facilities, and not as part of the basic grade separation required to meet the present day needs.

[59] As Alberta notes, the present day needs did change. In arguing that the present day needs in both 2013 and in 2015 fell in the 31,000–50,000 AADT category, CP mischaracterizes the present day needs. Rather, in 2013 the AADT was 26,000; in 2015 it was 37,600. That the Agency found, in 2013, that 26,000 was "sufficiently close" to 31,000 to warrant six lanes does not mean that the Agency made a finding that the AADT in 2013 was in fact 31,000, not 26,000.

[60] The Agency found that six lanes were required to meet the present day needs of 26,000 AADT in 2012 (2013 Decision at paras. 26–28). In 2015, it found that the traffic would increase to 37,600 – above the Design Guide threshold for six lanes – by the time Phase 2 finished and that seven lanes was required to meet the change in the present day needs (2015 Decision at paras. 86–90, 94).

[61] These determinations are factual findings with which it is not open to the Court to interfere. An appeal to this Court may only be made on a question of law or jurisdiction; *Transportation Act*, s. 41. Regardless, reading the reasons as a whole together with the outcome, and considering the fact that the present day needs did in fact change and that the next category – "over 50,000" – warranted eight lanes, the increase to 37,600 places the determination of seven lanes within the range of reasonable outcomes.

[62] Once the nuances of the Agency's AADT findings are clarified, it is clear there is no conflict between the two decisions. This ground of appeal therefore fails.

C. Did the Agency err in law by failing to conduct a proper analysis as mandated by section 16(4) of the Railway Safety Act?

[63] As noted, CP submits the Agency made three legal errors in its analysis of subsection 16(4).

[64] To recapitulate, it contends that the Agency erred in finding that CP would benefit due to an increase in rail traffic because this finding was made without any evidence. Indeed, CP says the only evidence on this point was to the opposite – that CP did not foresee an increase in traffic, thus, it was an error of law to make a contrary finding.

[65] Secondly, CP asserts that, since the City of Calgary is a beneficiary, subsection 16(4) required the Agency to apportion some costs to Calgary. It also argues that, once Calgary's future facilities are constructed, Calgary will be partially responsible for the traffic increase at the crossing, a consideration which also required the Agency to apportion costs to Calgary. CP submits the Agency erred in failing to apportion costs on either basis.

[66] Thirdly, CP asserts subsection 16(4) mandates the Agency to take into account federal funding Alberta received before apportioning costs and erred in failing to do so.

[67] Turning to the first ground, I agree with CP that the Agency did not explain why there would be an increase in rail traffic (2015 Decision at para. 91). Indeed, the only evidence on this point was from CP, which said, at two points during the proceedings, that it did not foresee or contemplate a requirement for a second track. There was thus no evidence before the Agency

that there would be an increase in rail traffic and CP may well be correct that it is an error of law to make a finding of fact for which there is no supporting evidence: *R. v. H. (J.M.)*, 2011 SCC 45 at para. 25, [2011] 3 S.C.R. 197.

[68] However, this does not mean that it was unreasonable to apportion costs to CP when it would not benefit from the construction.

[69] In the application before it, the Agency was asked to apportion costs of the reconstruction of an existing grade separation primarily due to road development. As it was an existing grade separation the Agency apportioned costs 85:15 to the road authority and the railway authority, respectively, reflecting the normal position set out in the Agency's publication, *Apportionment of Costs of Grade Separations: A Resource Tool* (the Resource Tool).

[70] Consistent with the Resource Tool, the Agency concluded at paragraph 93 in the 2015 Decision, "[g]iven the history of parties' shared responsibility at this crossing *and that both parties will continue to benefit from the grade separation*, the Agency finds it appropriate that the parties continue to share responsibility at this crossing" (emphasis added).

[71] Thus, even though there was no evidence of an increase in rail traffic arising from the Phase 2 project in particular, the Agency's decision that CP would benefit rested on a second footing – the continued benefit that CP would have from the grade separation.

[72] To conclude on this point, the error of law noted in paragraph 63 above is of no consequence given the existence of a second basis for finding that CP would benefit.

[73] I turn now to CP's next argument, that is, the failure to consider whether Calgary was a party which would benefit within the meaning of subsection 16(4).

[74] The Agency did not discuss whether Calgary qualified as a beneficiary or whether it would be responsible for the future increase in traffic. However, CP did not argue in its submissions to the Agency that Calgary was a beneficiary or had a responsibility such that it should share in the costs (see Appeal Book, Vol. 1, Tab IV(4) for its May 29, 2015 submissions; see Appeal Book Vol. 2, Tab IV(11) in its October 13, 2015 submissions; see Appeal Book, Vol. 2, Tab IV(13) or its final submissions of October 19, 2015). CP only asserted that the Phase 2 bridges were in part required to meet the City of Calgary's needs and that CP did not benefit (see e.g., May 29, 2015 submissions at 4, AB, Vol. 1, Tab IV(4) at 119).

[75] It is apparent that CP had some inclination to believe that Calgary stood to benefit from the 2015 project, although the nature, scope and extent of Calgary's involvement were unknown to CP. This only became clear following the disclosure to CP of the communications between Alberta and Calgary pursuant to its access to information requests.

[76] The Agency's subsection 16(4) analysis has to be assessed in light of the circumstances before it. At that time, Calgary was not a party before the Agency and no party had requested that it be joined. The parties agree that either CP or Alberta could have joined Calgary as a party

to the proceedings. The parties also agree that the Agency could apportion costs to Calgary had it been before the Agency. The failure to factor in Calgary's benefit, in light of the positions of the parties, cannot be said to be an error.

[77] Under the *Transportation Act*, this Court cannot receive further evidence about who is a beneficiary or who has responsibility at the crossing or make factual determinations on this issue. We can only assess decisions of the Agency after it has reviewed the evidence and made determinations, and even then, only if the Agency made an error of law or jurisdiction in doing so. I will not, therefore, consider CP's request that this Court re-allocate the costs. But this does not leave CP without remedy.

[78] The doctrine of exhaustion of remedies mandates that absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted: *Canada Border Services Agency v. C.B. Powell Ltd.*, 2010 FCA 61 at para. 31, [2011] 2 F.C.R. 332; *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 40–42, [2015] 2 S.C.R. 713. Section 32 of the *Transportation Act* is one such remedy. It provides that a party may ask the Agency to review a decision if, since the decision was rendered, "there has been a change in the facts or circumstances pertaining to the decision".

[79] If, however, CP believes it has received information that demonstrates such a change, the proper recourse is to commence a section 32 application. In the circumstances of this case, the availability of this remedy that CP has yet to exhaust means that the administrative process is

ongoing. The Agency cannot be faulted for not deciding in CP's favour when it did not have the evidence that CP obtained from the access to information requests. This case is markedly different from *Rogers Communications Canada Inc. v. Maintenance and Service Employees' Association*, 2017 FCA 127 (*Rogers Communications*). Here, and in contrast to that case, the Agency was aware of CP's efforts to obtain relevant documents and chose to proceed regardless. It pointed to the availability of a section 32 application as a justification for proceeding.

[80] CP's argument that the Agency erred in failing to consider the federal funding falls prey to the same concerns. The Agency did not have information about the funding before it and, understandably, did not make a determination on its relevancy to the apportionment of costs. Alberta agrees that the effect of the federal funding on the cost apportionment exercise is also a new matter that could be addressed under section 32, which again, sets this apart from *Rogers Communications*.

D. Was the Agency's decision procedurally fair?

[81] CP alleges the Agency breached CP's right to procedural fairness in two ways: by denying CP's request to suspend its 2015 Decision pending its pursuit of documents under the freedom of information legislation, and by refusing to order that Alberta produce certain documents relevant to the extent to which Calgary would benefit and to the question of Alberta's actual costs. CP says that failing to take either of these actions precluded CP from presenting its case fairly and fully.

[82] With respect to the production of documents, Alberta offered to provide CP with the information it sought if it made a formal request under the Agency's rules. CP did not accept the offer. Alberta's offer was also conditional on CP identifying specific documents, a condition which CP contends it could not fulfill. At the same time, Alberta opposed CP's request for a delay.

[83] Alberta also submits that, although it was public knowledge in September 2015 that up to $583 million in federal funding had been allotted for the SWCRR project, no formal agreement had been reached and the funding was uncertain at the time of the Agency's decision. Alberta contends that this uncertainty, coupled with the Agency's statutory obligation to render decisions no later than 120 days after receiving the originating documents and the availability of a section 32 application, renders the Agency's decision procedurally fair.

[84] Under paragraph 41(1)(*d*) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (the Agency's *Dispute Proceedings Rules*), the Agency can stay a proceeding where "the Agency considers it just and reasonable to do so". This express statutory provision is akin to that considered in *Khela*, which stated that information could be withheld "when the Commissioner has *'reasonable grounds to believe'* that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation". Because "[t]he Commissioner … is in the best position to determine whether such a risk could in fact materialize", the Supreme Court held that "the Commissioner … is entitled to a margin of deference on this point" (*Khela* at para. 89).

[85] When the Agency made its decision, it was not in dispute that CP was able to present all of the information it had available to it at that time, and no specific document or group of documents relevant to the issues had yet been identified or obtained by CP. Further, the Agency was entitled to take at least some account of its duty under section 29 of the *Transportation Act* to make a decision within 120 days, if possible. At the time of CP's request, it had been five months since the Agency received Alberta's application originating documents.

[86] However, I share CP's concern about the degree of the Agency's reliance on the 120 day obligation. As CP notes, it is a rule more breached than honoured. The 2013 Decision, involving Phase 1, a project of less cost and complexity, was rendered over nine months after Alberta Transportation filed its application. Counsel for CP also directed the Court's attention to over 25 decisions of the Agency, only two of which were rendered within the 120 day limit while only a handful of others were rendered outside of the limit based on an agreement by the parties.

[87] CP draws the inference, which I accept as reasonable, that the Agency moved with uncharacteristic speed in order to ensure that Alberta had the approvals necessary to secure infrastructure funding. It notes that only some of the work authorised by the 2013 Decision had been started, which reinforces the argument that there was no prejudice to Alberta from the delay.

[88] However, these considerations alone do not establish that the Agency breached CP's right to procedural fairness by not delaying in its decision.

[89] I reach this conclusion by reason of the existence of CP's right to make an application under section 32. This is a critical element in the landscape against which the decision to refuse an adjournment needs to be considered. CP's remedies are not spent. The Agency itself in refusing the adjournment recognised that this recourse was available to CP.

[90] I turn now to the Agency's failure to order production of documents. CP did not ask the Agency to order that Alberta produce the information sought. This was in spite of the option available to make such a request under section 24 of the Agency's *Dispute Proceedings Rules* and of Alberta's offer to provide the information sought should CP make such a request. In these circumstances, by failing to ask the Agency to make the order, it can be said that CP waived any right to such an order. A party who has waived a right to procedural fairness cannot subsequently challenge an administrative decision on the basis of a breach of that waived right (*Johnson v. Canada (Attorney General)*, 2011 FCA 76 at para. 25, 414 N.R. 321; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 at para. 48, [2010] 2 F.C.R. 488).

[91] Thus, CP has not established that the Agency breached its right to procedural fairness by failing to order production of documents. CP had available to it the necessary mechanisms to ensure that its interests were protected in the proceedings before the Agency. It could have moved under section 24 of the Agency's *Dispute Proceedings Rules* to compel disclosure of the additional documents. It also could have moved to join Calgary as a party. It can also now make an application under section 32 of the *Transportation Act*.

[92] The procedural fairness arguments therefore fail.

[93] This, however, does not conclude the matter.

[94] On September 7, 2016, this Court granted a motion by CP for an order to adduce fresh evidence in this appeal. On the basis of this evidence, CP contends that Alberta Transportation obscured from the Agency the full nature and scope of Calgary's future facilities to be placed under the new bridges. Based on the evidence before this Court, this argument has some merit.

[95] There is no doubt that CP was aware of plans for a future two-lane road and two LRT tracks. What was not disclosed, either to CP or the Agency, was the plan to build a four-lane road, a pedestrian walkway, and the extent of the encroachment onto CP's right of way. These could all have implications for the Agency's analysis under subsection 16(4).

[96] Information received as a result of its freedom of information request indicates that the City and Alberta Transportation may have kept CP, and the Agency, in the dark about their future plans:

> **December 5, 2011, Wayne Krause to Garry Lamb et al.:**
>
> With respect to drawing CPR-01, copy attached, I would recommend that we do not include the future ultimate four lane stage roadway on the drawing. However, the ultimate four lane [option] will still be available by obtaining approval to encroach onto CPR right-of-way.
>
> Since time is of the essence to obtain CPR's approval, it seems to me that presenting CPR with only the two lane option [i.e.,] the two lane option shifted off the CPR right-of-way will receive CP's approval without any hang ups. Who knows if the four lane option will ever be constructed. If it is required sometime in the future, then the City or A.T. will need to negotiate approval to access CPR's right-of-way. …

> **March 28, 2012, Wayne Krause to Garry Lamb and Alan Dixon:**
>
> … From A.T.'s perspective, it would make our negotiations a lot simpler at this stage if we only showed the future two lane stage beyond the CPR right-of-way and indicated that the City may approach CP in the future regarding the four lane option. …
>
> **March 30, 2012, Wayne Krause to Garry Lamb and Alan Dixon:**
>
> Since Doug is aware that the City is looking at a future 4 lane roadway through the east headslope, we should probably be up front and indicate that the long term stage may be a four lane facility.
>
> I know we had decided to only show a possible two lane ultimate stage because the four lane facility would involve negotiating an easement, etc[.] from CPR since two lanes would be on CPR right-of-way. Garry, are you aware if the City would be constructing a two lane or four lane facility in the future initial stage of their roadway facility?
>
> I believe adding the two "future" LRT tracks on the west headslope of the CPR-01 cross-section drawing prior to resubmitting the section to Doug should be ok. If I remember correctly, we decided not to indicate any future roadway facilities that encroached onto CPR right of way since there is always a possibility that it could delay the approval process for the present stage.
>
> (emphasis added)

[97] The drawings provided to CP, and upon which the Agency predicated its decision, did not show the four-lane and pedestrian walkway option (see Drawings STR-02 and STR-03 in Appendix A to Alberta Transportation's 2015 application, AB, Vol. 1, Tab IV(1) at 62–63).

[98] These documents had a material and direct impact on the 2015 Decision and had consequences for CP. CP was deprived of exploring, with the City and Alberta Transportation, the extent to which Calgary stood to benefit from the proposal. The documents bear directly on the analysis required by subsection 16(4).

[99] The record also indicates considerable discussion between Alberta Transportation and the City of Calgary with respect to the extent to which Calgary stood to benefit from the project, and the associated costs. I note parenthetically, that the argument that Calgary's costs were subsumed in Alberta Transportation's because Calgary's works were "additional facilities" for which CP would bear no responsibility obscures CP's main point. CP's point, which is well founded, is that its overall share of project cost could have been less had the extent to which Calgary was to benefit been considered by the Agency.

[100] The Agency invited CP to make an application for reconsideration should new facts come to light. It appears as though such facts have come to light, and that they could have a direct and material bearing on several aspects of the 2015 Decision, including the threshold decision as to whether Phase 2 was a new route. Should it wish to do so, CP is free to make an application under section 32 to the Agency, for reconsideration of the 2015 Decision and any further ground that it may wish to advance.

[101] I would dismiss the appeal. In light of these reasons, I would make no order as to costs.

"Donald J. Rennie"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED DECEMBER 24, 2015, DECISION NO. 397-R-2015 (15-01539)

DOCKET:	A-165-16
STYLE OF CAUSE:	CANADIAN PACIFIC RAILWAY COMPANY v. ATTORNEY GENERAL OF CANADA et al
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 16, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	APRIL 6, 2018

APPEARANCES:

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