

**Date: 20080529**

**Docket: A-355-07**

**Citation: 2008 FCA 199**

**CORAM: DESJARDINS J.A.  
NOËL J.A.  
BLAIS J.A.**

**BETWEEN:**

**CANADIAN NATIONAL RAILWAY COMPANY, and  
CANADIAN PACIFIC RAILWAY COMPANY**

**Appellants**

**and**

**CANADIAN TRANSPORTATION AGENCY**

**Respondent**

Heard at Montréal, Quebec, on April 10, 2008.

Judgment delivered at Ottawa, Ontario, on May 29, 2008.

**REASONS FOR JUDGMENT BY:**

**NOËL J.A.**

**CONCURRED IN BY:**

**DESJARDINS J.A.**

**CONCURRING REASONS BY:**

**BLAIS J.A.**

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**REASONS FOR JUDGMENT**

**NOËL J.A.**

[1] This is an appeal by the Canadian National Railway Company (“CN”) and the Canadian Pacific Railway Company (“CP”) (the “appellants”) from a decision of the Canadian Transportation Agency (the “Agency”) whereby it dismissed the appellants’ preliminary objection to the hearing and disposition of an application filed by the Southern Ontario Locomotive Restoration Society (“SOLRS”), pursuant to subsections 144(3.1) and (6) of the *Canada Transportation Act*, S.C. 1996, c. 10 ( the “CTA”).

[2] The issue turns on whether the six month limitation set out in subsection 144(4) of the CTA for the completion of the negotiations which a railway company must undertake prior to discontinuing the operation of a railway line can be extended by the parties to the negotiations or by the Agency. The appellants contend that the limit is strict and that the Agency exceeded its jurisdiction in allowing the application to proceed despite the fact that it was filed after six months had expired.

[3] Before setting out the relevant facts, it is useful to outline the statutory scheme.

### **STATUTORY SCHEME**

[4] Division V of the CTA – sections 140 to 146.1 – sets out the statutory process by which a railway company may transfer and discontinue the operation of a railway line (the “discontinuance scheme”). Subsection 142(1) of the CTA makes it clear that Division V is binding on a railway company:

**142.** (1) A railway company shall comply with the steps described in this Division before discontinuing operating a railway line.

**142.** (1) La compagnie de chemin de fer qui entend cesser d’exploiter une ligne suit les étapes prescrites par la présente section.

[5] Pursuant to the discontinuance scheme, a railway company must first advertise the availability of the railway line or any operating interest that it has in the line which it intends to abandon :

**143.** (1) The railway company shall advertise the availability of the railway line, or any operating interest

**143.** (1) La compagnie fait connaître le fait que le droit de propriété ou d’exploitation sur la ligne peut être

that the company has in it, for sale, lease or other transfer for continued operation and its intention to discontinue operating the line if it is not transferred.

#### Content of advertisement

(2) The advertisement must include a description of the railway line and how it or the operating interest is to be transferred, whether by sale, lease or otherwise, and an outline of the steps that must be taken before the operation of the line may be discontinued, including

(a) a statement that the advertisement is directed to persons interested in buying, leasing or otherwise acquiring the railway line, or the railway company's operating interest in it, for the purpose of continuing railway operations; and

(b) the date by which interested persons must make their interest known in writing to the company, but that date must be at least sixty days after the first publication of the advertisement.

#### Disclosure of agreement with public passenger service provider

(3) The advertisement must also disclose the existence of any agreement between the railway company and a public passenger service provider in respect of the operation of a passenger rail service on the railway line.

transféré en vue de la continuation de l'exploitation et, à défaut de transfert, son intention de cesser l'exploitation.

#### Contenu

(2) L'annonce comporte la description de la ligne et les modalités du transfert, notamment par vente ou cession, du droit de propriété ou d'exploitation de celle-ci, et énonce les étapes préalables à la cessation, la mention qu'elle vise quiconque est intéressé à acquérir, notamment par achat ou prise à bail, les droits de propriété ou d'exploitation de la compagnie en vue de poursuivre l'exploitation de la ligne, ainsi que le délai, d'au moins soixante jours suivant sa première publication, donné aux intéressés pour manifester, par écrit, leur intention.

#### Existence d'une entente

(3) L'annonce doit aussi mentionner toute entente conclue entre la compagnie et une société de transport publique sur l'exploitation d'un service passagers sur une ligne de la compagnie.

[6] Section 144 of the CTA then sets out the requirements for negotiating the sale, lease or transfer of an interest in a railway line with a third person. In particular subsection 144(3) of the

CTA requires that the railway company and the interested person negotiate in good faith and subsection 144(4) of the CTA provides that the railway company and an interested person have six months to reach an agreement. The six month period runs from the final date stated in the railway company's advertisement inviting persons to make their interests known. Pursuant to subsection 144(3.1) of the CTA, a party to a negotiation may ask the Agency to determine the net salvage value of the railway line:

**144.** (1) The railway company shall disclose the process it intends to follow for receiving and evaluating offers to each interested person who makes their interest known in accordance with the advertisement.

(2) [Repealed, 2007, c. 19, s. 37]

Negotiation in good faith

(3) The railway company shall negotiate with an interested person in good faith and in accordance with the process it discloses and the interested person shall negotiate with the company in good faith.

Net salvage value

(3.1) The Agency may, on application by a party to a negotiation, determine the net salvage value of the railway line and may, if it is of the opinion that the railway company has removed any of the infrastructure associated with the line in order to reduce traffic on the line, deduct from the net salvage value the amount that the Agency determines is the cost of replacing the removed infrastructure. The party who made the application shall reimburse the Agency its costs associated with the application.

**144.** (1) La compagnie est tenue de communiquer la procédure d'examen et d'acceptation des offres à l'intéressé qui a manifesté son intention conformément à l'annonce.

(2) [Abrogé, 2007, ch. 19, art. 37]

Négociation

(3) Elle est tenue de négocier de bonne foi avec l'intéressé conformément à cette procédure et ce dernier est tenu de négocier de bonne foi avec elle.

Valeur nette de récupération

(3.1) L'Office peut, à la demande d'une partie à la négociation, déterminer la valeur nette de récupération de la ligne et, s'il est d'avis que la compagnie de chemin de fer a retiré une partie de l'infrastructure se rapportant à la ligne en vue de réduire le trafic, déduire de cette valeur la somme qu'il estime équivalente au coût de remplacement de l'infrastructure retirée. Le demandeur est tenu de rembourser à l'Office les frais afférents à la demande.

Time limit for agreement

(4) The railway company has six months to reach an agreement after the final date stated in the advertisement for persons to make their interest known.

Délai

(4) La compagnie dispose, pour conclure une entente, d'un délai de six mois à compter de l'expiration du délai prévu par l'annonce.

[My emphasis]

[7] Pursuant to subsections 144(6) and (7) of the CTA, parties may complain to the Agency that the other party is not negotiating in good faith. Where an interested person is found to have negotiated in bad faith, the Agency may free the railway company from its obligation to negotiate. Where the railway company is found to be in bad faith the Agency may order the conclusion of an agreement on terms which it specifies, including the consideration to be paid:

**144.** (6) If, on complaint in writing by the interested person, the Agency finds that the railway company is not negotiating in good faith and the Agency considers that a sale, lease or other transfer of the railway line, or the company's operating interest in the line, to the interested person for continued operation would be commercially fair and reasonable to the parties, the Agency may order the railway company to enter into an agreement with the interested person to effect the transfer and with respect to operating arrangements for the interchange of traffic, subject to the terms and conditions, including consideration, specified by the Agency.

**144.** (6) Saisi d'une plainte écrite formulée par l'intéressé, l'Office peut, s'il conclut que la compagnie ne négocie pas de bonne foi et que le transfert à l'intéressé, notamment par vente ou bail, des droits de propriété ou d'exploitation sur la ligne en vue de la continuation de son exploitation serait commercialement équitable et raisonnable pour les parties, ordonner à la compagnie de conclure avec l'intéressé une entente pour effectuer ce transfert et prévoyant les modalités d'exploitation relativement à l'interconnexion du trafic, selon les modalités qu'il précise, notamment la remise d'une contrepartie.

**144.** (7) If, on complaint in writing by the railway company, the Agency finds that the interested person is not negotiating in good faith, the Agency may order that the railway company is no longer required to negotiate with the person.

**144.** (7) Saisi d'une plainte écrite formulée par la compagnie, l'Office peut décider que la compagnie n'est plus tenue de négocier avec l'intéressé s'il conclut que celui-ci ne négocie pas de bonne foi.

[8] If no agreement has been reached with an interested party within six months, then subsection 144(5) of the CTA provides that the railway company may choose to continue operating the line. Alternatively, subsection 145(1) of the CTA requires the railway company to make an offer to governments and urban transit authorities on whose territory the line is located to sell the line for its net salvage value:

**144.** (5) If an agreement is not reached within the six months, the railway company may decide to continue operating the railway line, in which case it is not required to comply with section 145, but shall amend its plan to reflect its decision.

**144.** (5) À défaut d'entente dans les six mois, elle peut décider de poursuivre l'exploitation de la ligne, auquel cas elle n'est pas tenue de se conformer à l'article 145, mais doit modifier son plan en conséquence.

**145.** (1) The railway company shall offer to transfer all of its interest in the railway line to the governments and urban transit authorities mentioned in this section for not more than its net salvage value to be used for any purpose if

(a) no person makes their interest known to the railway company, or no agreement with an interested person is reached, within the required time; or

**145.** (1) La compagnie de chemin de fer est tenue d'offrir aux gouvernements, administrations de transport de banlieue et administrations municipales de leur transférer tous ses intérêts à leur valeur nette de récupération ou moins si personne ne manifeste d'intérêt ou aucune entente n'est conclue dans le délai prescrit, ou si le transfert n'est pas effectué conformément à l'entente.

(b) an agreement is reached within the required time, but the transfer is not completed in accordance with the agreement.

[My emphasis]

[9] Subsections 145(2) and (3) of the CTA then provide for the sequence of events in the case where such offers to governments are made. Of significance for our purposes is the fact that the obligation to offer the line to governments comes into existence (i.e., “arises” in the English text) when the relevant conditions are met by the operation of the law. I also note the strict time limits – 30 and 60 days depending on the level of government – within which these offers may be accepted (subsection 145(3)) of the CTA:

**145. (2)** After the requirement to make the offer arises, the railway company shall send it simultaneously

(a) to the Minister if the railway line passes through

(i) more than one province or outside Canada,

(ii) land that is or was a reserve, as defined in subsection 2(1) of the *Indian Act*,

(iii) land that is the subject of an agreement entered into by the railway company and the Minister for the settlement of aboriginal land claims, or

(iv) a metropolitan area;

**145. (2)** L’offre est faite simultanément :

a) au ministre si la ligne franchit, selon le cas :

(i) les limites d’une province ou les frontières du Canada,

(ii) une réserve ou une terre ayant déjà été une réserve au sens du paragraphe 2(1) de la *Loi sur les Indiens*,

(iii) une terre faisant l’objet d’un accord, entre la compagnie de chemin de fer et le ministre, ayant pour but le règlement de revendications territoriales autochtones,

(iv) une région métropolitaine;



*(b)* to the minister responsible for transportation matters in the government of each province through which the railway line passes;

*(c)* to the chairperson of every urban transit authority through whose territory the railway line passes; and

*(d)* to the clerk or other senior administrative officer of every municipal or district government through whose territory the railway line passes.

*b)* au ministre chargé des transports dans toute province dont la ligne franchit le territoire;

*c)* au président de toute administration de transport de banlieue dont la ligne franchit le territoire;

*d)* au greffier ou à un premier dirigeant de toute administration municipale dont la ligne franchit le territoire.

**145.** (3) Subject to subsection 146.3(3), after the offer is received

*(a)* by the Minister, the Government of Canada may accept it within thirty days;

*(b)* by a provincial minister, the government of the province may accept it within thirty days, unless the offer is received by the Minister, in which case the government of each province may accept it within an additional thirty days after the end of the period mentioned in paragraph *(a)* if it is not accepted under that paragraph;

*(b.1)* by an urban transit authority, it may accept it within an additional 30 days after the end of the period or periods for acceptance under paragraphs *(a)* and *(b)*, if it is not accepted under

**145.** (3) Sous réserve du paragraphe 146.3(3), les destinataires de l'offre disposent, après sa réception, des délais suivants pour l'accepter :

*a)* trente jours pour le gouvernement fédéral;

*b)* trente jours pour le gouvernement provincial, mais si le gouvernement fédéral n'accepte pas l'offre qui lui est d'abord faite, chaque gouvernement provincial visé dispose de trente jours supplémentaires une fois expiré le délai mentionné à l'alinéa *a)*;

*b.1)* trente jours pour chaque administration de transport de banlieue, une fois expirés les délais mentionnés aux alinéas *a)* et *b)*;

those paragraphs; and

(c) by a municipal or district government, it may accept it within an additional 30 days after the end of the period or periods for acceptance under paragraphs (a), (b) and (b.1), if it is not accepted under those paragraphs.

c) trente jours pour chaque administration municipale, une fois expirés les délais mentionnés aux alinéas a), b) et b.1).

[10] Finally, under section 146 of the CTA, if the prescribed process has been complied with, but no agreement has been reached at any stage, the railway company may discontinue operating the line on providing notice thereof to the Agency:

**146.** (1) If a railway company has complied with the process set out in sections 143 to 145, but an agreement for the sale, lease or other transfer of the railway line or an interest in it is not entered into through that process, the railway company may discontinue operating the line on providing notice of the discontinuance to the Agency. After providing the notice, the railway company has no obligations under this Act in respect of the operation of the railway line and has no obligations with respect to any operations by any public passenger service provider over the railway line.

**146.** (1) Lorsqu'elle s'est conformée au processus établi en vertu des articles 143 à 145, sans qu'une convention de transfert n'en résulte, la compagnie de chemin de fer peut mettre fin à l'exploitation de la ligne pourvu qu'elle en avise l'Office. Par la suite, elle n'a aucune obligation, en vertu de la présente loi, relativement à l'exploitation de la ligne ou à son utilisation par toute société de transport publique.

## RELEVANT FACTS

[11] On April 29, 2005, the appellants indicated their intention to discontinue the operation of a section of railway line in the City of St. Thomas, Province of Ontario – the CASO subdivision

from mile 113.64 to 117.49 (the “CASO subdivision”) – which they co-own. CN assumed in its name and that of CP, the sole conduct of the discontinuance process.

[12] On May 1, 2006, CN published a notice in the Globe and Mail newspaper, pursuant to subsection 143(1) of the CTA, stating the appellants’ intent to sell their ownership and/or their operating interest in the CASO subdivision for continued operation. On May 15, 2006, SOLRS notified the appellants that it was interested in acquiring ownership in the advertised section of the railway line for purpose of operating the line in the course of its tourist train operation.

[13] In accordance with subsection 143(2) of the CTA, the date by which interested persons had to make their interest in acquiring the line known to the appellants was June 30, 2006 (60 days after publication of the notice). It follows that by virtue of subsection 144(4) of the CTA, the appellants had to reach an agreement with SOLRS by December 31, 2006 (six months after June 30, 2006).

[14] Following several months of negotiation, on October 23, 2006, SOLRS delivered an “Offer to Purchase” the CASO subdivision, which the appellants did not accept. SOLRS offered to pay \$100,000 and invited the appellants to claim the balance of the value of the line as a charitable donation. The offer was rejected as the appellants estimated the value of the line to be \$2,100,000, a value which was later confirmed by the Agency’s net salvage value determination.

[15] As the December 31, 2006 deadline approached without any agreement having been reached, CN agreed to continue discussions with SOLRS until January 25, 2007. However, the parties were unable to come to an agreement within this extended period.

[16] On January 25, 2007 (i.e., the last day on which an agreement could be reached based on the extension), SOLRS made an application before the Agency requesting a determination of the net salvage value of the line as well as a declaration by the Agency that the appellants were not negotiating in good faith. By a separate letter bearing the same date, SOLRS advised the Agency that “the six month period referred to in section 144 of the CTA expired today” (Appeal Book, p. 12).

[17] On January 29, 2007, as no agreement transferring the line to SOLRS had been reached, the appellants made an offer to the Government of Ontario and the municipality of St. Thomas (the public bodies) pursuant to subsection 145(1) to sell the line for an amount “not to exceed” its net salvage value (Appeal Book, pp. 18, 21).

[18] By letter dated January 30, 2007, the appellants asked the Agency not to address SOLRS’ application before considering a preliminary objection going to jurisdiction. Specifically, the appellants argued that the Agency lacked jurisdiction to consider SOLRS’ application since it was filed after December 31, 2006, that is after the statutory period set out in subsection 144(4) of the CTA had expired. The next day (i.e., January 31, 2007), SOLRS filed an objection to what it

described as the appellants “premature service” of the offer to sell the line to the public bodies for its net salvage value.

[19] Written submissions were filed by the parties at the invitation of the Agency and on March 30, 2007, the Agency ruled on the preliminary objection. It held that it had the authority to deal with SOLRS’ application despite the fact that it was made after the six month period had expired. The Agency indicated that it would make its net salvage value determination within 120 days and that the aspect of SOLRS’ application relating to bad faith would be kept in abeyance pending this determination.

[20] On June 6, 2007 the appellants were granted leave to appeal this decision under section 41 of the CTA on the following questions:

- i. whether the Agency exceeded its jurisdiction or erred in law when it determined that SOLRS’ application under section 144 of the CTA could be filed after the expiration of the six month period provided for in subsections 144(4) and 145(1) of the CTA [i.e., after December 31, 2006];
- ii. whether the Agency exceeded its jurisdiction or erred in law when it extended the period for negotiations past the time stipulated in the CTA, and directed that the parties would have a further period of 10 business days after the Agency had determined the net salvage value of the line to continue the discussions;
- iii. whether the Agency exceeded its jurisdiction or erred in law when it found that the issuance of the January 29, 2007 offer to public authorities, made by the appellants following the expiration of both the statutory deadline and the extended discussion period was premature;
- iv. whether the Agency exceeded its jurisdiction or erred in law when it established a discontinuance and transfer process that is distinct from the one set out under the CTA.

[21] On July 27, 2007 the Agency determined that the net salvage value of the line was \$1,959,951. The Agency never got to deal with the allegation of bad faith as that aspect of SOLRS' application was withdrawn by letter dated September 17, 2007.

### **DECISION OF THE AGENCY**

[22] The Agency notes that ambiguity can arise in its application of subsection 144(4) of the CTA. Specifically, the parties to a negotiation have the right to have the net salvage value of the line determined in the course of the negotiations. The parties are also entitled to remedies in the event that the other party exhibits bad faith. According to the Agency unless provision is made for extending the six month period within which an agreement must be reached, these remedies risk becoming moot and ineffective (Reasons, p. 2, last full para. and p. 3, 1<sup>st</sup> full para.).

[23] The Agency finds that the six month period can be extended for a reasonable time on consent. The Agency refers to the need to balance the railway's interests to shed their uneconomic railway lines within reasonable commercial time frames with those of potential purchasers, including governments (Reasons, p. 3, 3<sup>rd</sup> full para.). The Agency rejects the appellants' proposition of two negotiating periods – the first period being the first six months during which a variety of remedies under the CTA apply and the second period representing the period covered by the time extension that the parties consented to, where no statutory rights exist because section 144 of the CTA does not apply – as incongruous (Reasons, p. 3, 3<sup>rd</sup> full para.).

[24] Consequently, the Agency dismisses the appellants' objection to entertaining the application because it was filed after the six month statutory period and grants the parties a further period "at least of 10 business days" to continue their negotiations after the Agency's eventual determination of the net salvage value (Reasons, p. 3, last para.). In view of the extension, it also holds that the appellants' offer to public bodies, pursuant to section 145 of the CTA, is premature (*idem*).

### **POSITION OF THE PARTIES**

[25] The appellants rely on the recent decision of the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") to support their view as to the applicable standard of review. They emphasize the clearly jurisdictional nature of the issues raised on appeal and invite the Court to apply a standard of correctness. The Agency for its part takes the position that it has particular expertise that is of use in assessing these issues and urges the Court to assess the propriety of its decision on a standard of reasonableness.

[26] Turning to the appeal itself, the appellants submit, applying a standard of correctness, that the Agency did not have the jurisdiction to entertain the applications filed by SOLRS. Subsection 144(4), when read in context, makes it clear that the Agency's role is exhausted upon the expiration of the six month period (Appellants' Memorandum, paras. 56, 57).

[27] While an interested person and a railway company may agree to negotiate beyond that period (Appellants' Memorandum, paras. 64-67; 103 and 104), the time limits imposed under

sections 140 to 146 of the CTA must be respected in order for those provisions to apply. During the six month period, the parties may file a complaint of bad faith or file an application to determine the net salvage value of the line. Upon the expiry of that six month period, if no agreement is reached, the railway company must either resume operation of the line or offer it to the relevant public bodies for sale (Appellants' Memorandum, paras. 64-66). The appellants submit that these are mandatory provisions and that they reflect Parliament's intention that the discontinuance and transfer process be expeditious (Appellants' Memorandum, paras. 60-62).

[28] For its part, the Agency submits that a strict interpretation of the time limit under subsection 144(4) would frustrate the purpose of the legislation, which is, in part, "to promote the takeover of lines by new owners or operators" (Clause by Clause Analysis of Bill C-14) and would unduly impact ongoing negotiations to the detriment of both parties (Respondent's Memorandum, para. 40). Contrary to the appellants' submissions, the Agency argues that Parliament's intent was not to sanction by mandatory foreclosure the failure to reach an agreement within the stipulated deadline. The Agency submits that there will be cases where, even with diligence the railway and interested party, as here, will need more than six months to reach an agreement (Respondent's Memorandum, para. 42).

[29] The Agency repeats that a strict reading of the six month period would on the facts of this case, take away any impact which the remedies that it can grant might have on the negotiations (Respondent's Memorandum, paras. 48-50). Finally, the Agency submits that there is no limitation



on when an application for a determination of net salvage value can be made under subsection 144(3.1) of the CTA (Respondent's Memorandum, para. 51).

## ANALYSIS AND DECISION

### *Standard of review*

[30] The Supreme Court in *Dunsmuir, supra* has simplified the approach in determining the appropriate standard of review by reducing these to two: correctness and reasonableness. Without attenuating a reviewing Court's duty to identify and apply the appropriate standard, the Supreme Court also provided means of facilitating its identification. Amongst other things, the Court said (*Dunsmuir, supra*, para. 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 ed.), 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.

[My emphasis]

[31] In my respectful view the first, second and fourth question raised by the appellants in this appeal (see para. 20) are true questions of jurisdiction or *vires*. The issue underlying each of these questions is whether the Agency could hear and dispose of SOLRS' application given that the six month period provided for in subsection 144(4) of the CTA had expired when the application was

filed. As the reasons make clear, the Agency had to first determine whether Division V gave it authority to rule on SOLRS' application. The Agency found that there was an implicit grant of authority to extend the six month period under Division V and assumed jurisdiction over SOLRS' application on this basis. To the extent that Division V does not allow for an extension, as the appellants contend, the Agency exceeded its jurisdiction in disposing of SOLRS' application and the remedies provided are *ultra vires*. It follows that the Agency had to be correct in concluding that there was an implicit grant of authority to extend the time under Division V (compare *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, at para. 5). I therefore propose to review questions one, two and four according to a standard of correctness. Question 3, if looked upon on its own, is not jurisdictional in the narrow sense. However, there is no need to assess the standard applicable to this question as its disposition is wholly dependent on the other three.

[32] Turning to the substantive issue, Division V provides a railway company, which follows the prescribed process, the right to abandon the operation of a railway line. This process takes place in accordance with a precise time line.

[33] The steps which must take place within this time line are geared towards achieving the continued operation of the line through alternative means. The preferred option is for the railway company to identify on its own a purchaser who will continue the operation of the line (subsection 141(3)). Failing this, the railway must seek out interested buyers who wish to continue operating the line by way of a public notice, and engage in negotiations for the sale of the line to that person.

[34] These negotiations are not open ended. Once a person has expressed an interest, subsection 144(4) of the CTA provides that the railway company “has six months to reach an agreement with the interested person”. This period runs from the last day on which the interested person had to make its interest known according to the public notice.

[35] The Agency can impact on those negotiations in two ways. First, the negotiating parties may ask the Agency to determine the net salvage value of the railway line (subsection 144(3.1)). Second, either party to a negotiation may complain to the Agency that the other party is not negotiating in good faith.

[36] Although, a net salvage value determination can assist in the negotiations, it is not binding on the parties. A finding of bad faith however gives rise to binding remedies. Where a finding of bad faith is made against the interested person, the Agency may relieve the railway company from its obligation to negotiate (subsection 144(7)). Where the railway company is found to be at fault, the Agency may order the conclusion of an agreement on its own terms and set the price at which the line will be sold (subsection 144(6)).

[37] Absent any such intervention, subsection 145(1) of the CTA provides that “if ... no agreement with ... an interested person is reached, within the required time;” (“si [...] aucune entente n’est conclue dans le délai prescrit,”), the railway company must (i.e., “shall”) offer the line for sale to the governments and relevant transit authorities for no more than its net salvage value (subsection 145(1) of the CTA). Alternatively, the railway company may decide at that juncture to

continue to operate the line, a decision which if taken, effectively brings the process governed by Division V to an end (subsection 144(5)).

[38] On the facts of this case, the appellants did not opt to continue to operate the line upon failing to reach an agreement within the six month period. It follows that unless this period was validly extended, the appellants had, at this juncture, the obligation to offer the line for sale to the relevant public bodies at its net salvage value, and these public bodies had a corresponding right to acquire the line at that price.

[39] However, the Agency decided that the six month period was validly extended by the parties on consent and proceeded to further extend it by order, thereby effectively differing any entitlement which the relevant public authorities might have had to acquire the line. The Agency came to this conclusion despite the fact that the requirement for the negotiations to be completed within six months is couched in unambiguous terms.

[40] The Agency in its reasons (p. 2, last para.) recognizes that there is no ambiguity in the words that appear in subsection 144(4) (“... the railway company has six months to reach an agreement ...”). [The same comment could be made with respect to subsections 144(5) (“if an agreement is not reached within six months ...”) and 145(1) (“if ... no agreement ... is reached within the required time;” “dans le délai prescrit” in French text)]. However, the Agency found that ambiguity could arise in the application of this six month time limitation in two situations and found as a result that

authority to extend the statutory period must be read into Division V in order to resolve this ambiguity.

[41] The Agency's reasoning in finding that there was ambiguity in the application of the six month period is set out in the following two paragraphs (Agency's Reasons, pp. 2, 3).

... For example, if a net salvage value application is filed under subsection 144(3.1) of the CTA and it is filed in month five, does the expiration of the six months automatically dictate that the application be dismissed because its outcome is moot? Similarly, if there is a complaint that the railway company is not bargaining in good faith (subsection 144(3) of the CTA) and if the complaint is filed in month five, does it too become moot upon expiration of the six months? In both cases, if the six month time line is interpreted literally, the filing and determination by the Agency of these complaints would be meaningless as they can have no impact on ongoing negotiations.

These two complaint (or application) provisions (for either a net salvage value determination or a finding of good/bad faith) grant a "right" to proposed purchasers. A rigid interpretation of the six month period would eliminate the "rights" if the application is filed towards the end of the period. Put another way, the strict interpretation and application of a process matter (time periods under subsection 144(4) of the CTA) could eliminate a substantive right to a remedy that Parliament put in the CTA. In order to avoid this elimination, it is reasonable to conclude that there should be flexibility in the six month time period.

[My emphasis]

[42] In light of the concurring reasons by my colleague, Blais J.A., I feel compelled to state the obvious i.e.: that the above passage reflects the *ratio* of the Agency's decision to extend the delay, and that it must accordingly be addressed. Turning first to the reasoning of the Agency as it relates to the right of a negotiating party to make a complaint when the other party is negotiating in bad faith, and to benefit from the remedies provided under the CTA when a finding of bad faith is made, the Agency expresses the view that this right becomes moot and ineffective if the complaint is made late in the process. In so saying, the Agency appears to be of the view that its decision must be

rendered within the six month period failing which it has no effect. The appellants support this restrictive view of the Agency's decision making power. They too suggest that a bad faith allegation must both be made and disposed of within the six month period (Appellants' Memorandum, paras. 77, 78).

[43] If this were the case, I would have little difficulty in accepting that an implicit right to extend the six month period must be read into Division V, in order to allow the Agency to give effect to the remedies provided for by Parliament. However, as counsel for the Agency recognized during the course of the hearing, it is clear that the filing of a bad faith application under section 144 of the CTA, suspends the running of the six month period, with the result that there is, in my respectful view, no need to read in a power to extend this time frame in order to give effect to the will of Parliament.

[44] So long as a complaint is filed within the six month period the Agency is bound to address it and apply the appropriate remedy, if it should find in favour of the complainant. If the breach of the obligation to negotiate in good faith is on the part of the interested person, the railway will be justified to have brought negotiations to an end as of the time when the breach is found to have occurred. Similarly, if the breach is on the part of the railway company, the interested person will have the right to acquire the line at the ordered price with priority as of the time of the breach. The fact that the six month period may have passed when these findings are made has no impact on the authority of the Agency to grant these remedies.

[45] With respect to the right of the negotiating parties to have access to a net salvage value determination in the course of the negotiations, there is no doubt that the parties will not likely have access to this determination if the application is made towards the end of the six month period. However, the parties are aware of the six month period and nothing prevents a party who is interested in obtaining such a determination to apply for it early in the process.

[46] Under subsection 29(1) of the CTA, the Agency must dispose of applications as expeditiously as possible and in any event within 120 days from the date on which the originating documents are filed. In this case, the Agency acknowledged that it had 120 days to make the net salvage value determination although it, in fact, disposed of it within 90 days. Even in cases where the Agency requires the full 120 days, a party could expect to have in hand the Agency's determination well within the six month period if the application was filed during the early stages of the negotiations. It follows that the scheme as it exists does allow for the Agency's net salvage determination to play a role during the course of the statutory negotiation period. I should add that a net salvage value determination, if applied for within the period, can remain of use after the six month period has expired depending on the circumstances (see the discussion at para. 49 below).

[47] There is therefore no basis for the Agency's conclusion that the two substantive rights which it identified will be lost, unless implicit authority to extend the six month period is read into Division V. As this apprehended loss of rights is the only basis on which the Agency found that ambiguity could arise when came time to apply the six month period, it can be safely assumed that

the Agency would have come to a different conclusion in the absence of these misapprehensions, given its conclusion that the six month period is otherwise unambiguous.

[48] Indeed, Division V is a complete code which operates in accordance with a definite time line. It is couched in mandatory terms and the detailed steps which must be followed leave no doubt about when the process begins and when it ends. Amongst those steps is the railway's obligation to offer the line for sale to the relevant public bodies for its net salvage value if no agreement is reached within the six month period (subsection 145(2)). In my view, the corresponding right to acquire the line at its net salvage value which accrues to the relevant public bodies by the operation of subsection 145(1) at that juncture, eliminates the possibility that the parties on consent, or the Agency by order, could extend the six month statutory period. Neither the parties nor the Agency can effectively do away with the right which accrues to public bodies by the operation of the statute.

[49] As a practical matter, where no public body is interested in purchasing the line, the parties are free to pursue their negotiations after the six month period and to reach an agreement at the time of their choice. The same applies if the parties agree to continue negotiations, after the notice provided for in subsection 145(2) is given and subject to the right of the relevant public bodies to acquire the line for its net salvage value. The intent of Division V is served by these continued negotiations since the alternative will generally be the discontinuance of the line. However, it is clear that such extended negotiations are no longer be governed by Division V.



[50] I therefore conclude that the Agency acted beyond its jurisdiction when it disposed of SOLRS' application despite the fact that it was filed after the six month period provided for in subsections 144(4) and 145(1) of the CTA had expired. For the same reasons, the Agency was without authority to further extend the six month negotiating period by "at least of 10 business days" after its net salvage value determination was made, and by establishing a discontinuance and transfer process according to time lines which depart from those set out in Division V. Finally, there was no basis in law for the Agency's conclusion that CN's offer to government on January 29, 2007 was premature, since the offer was submitted after the six month period had expired without an agreement being reached, as contemplated by subsection 145(1) of the CTA.

[51] For these reasons I would allow the appeal, set aside the decision of the CTA and remit the matter back to the Agency with instruction that it decline to deal with SOLRS' application for want of jurisdiction.

“Marc Noël”

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J.A

“I concur,  
Alice Desjardins J.A.”

**BLAIS J.A. (Concurring Reasons):**

[52] I have had the benefit of reading the reasons prepared by my colleague Justice Noël.

[53] I agree with the general conclusion of my colleague Justice Noël that the appeal should be allowed and that the decision of the CTA be set aside, as he suggests.

[54] I would like to add some comments regarding the impact of a bad faith application to the running of the six month period provided by section 144 of the CTA.

[55] In this case, the application for bad faith negotiation was filed twenty-five days after the six month period had expired. The allegation of bad faith negotiation against CN was held in abeyance until completion of the net salvage determination. Once the net salvage value was established and made known to the parties, the application for bad faith negotiation was abandoned.

[56] This question of the application for bad faith negotiation was not mentioned in the order granting leave to appeal. In fact, four questions were specifically mentioned and the question of bad faith negotiation was not one of them (see paragraph 20 above).

[57] We should also recognize that this issue was not discussed in detail by the parties before the Agency, but was raised before our Court only as an argument to justify the extension of the time limit, an argument which we have rejected.

[58] The suggestion that an application for bad faith negotiation may suspend the running of the six month period is interesting, but in my view, the possibility of extending or suspending any time limit which is clearly provided in the CTA, deserves to be properly argued by the parties after an in depth analysis and not decided in a vacuum in the absence of a real application, or in the presence of an application that has been abandoned.

[59] Not being a question identified when the leave to appeal was granted and being moot, it would be seen only as *obiter*.

[60] In my view, it is inappropriate to decide the matter and conclude one way or another for future cases without the benefit of a proper factual background.

[61] There are many possible solutions for dealing with a bad faith application filed within the time limit. Some applications could simply be dealt with within the time limit prescribed by the law. In other cases, the existing legislation provides options to respond to such applications and provide remedies. For example a party to the proceeding could seek a stay or pursue an appeal under the CTA, the *Federal Courts Act* or the *Federal Courts Rules*, thus vitiating the need for an automatic suspension of the time limit.

[62] In *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327, [2000] F.C.J. No. 228 (C.A.), Justice Létourneau held:

38 In view of the conclusion that I have reached with respect to Mr. Klinko's claim who was the target of the persecution, this ground of appeal has become moot. I do not think, for two reasons, that it is in the interest of justice that I address the question of so-called derivative claims.

39 First and foremost, any opinion I could express or conclusion I could come to would be *obiter*. I believe it would be inappropriate, when there is another appeal pending on that same issue in which it appears that the issue is material to the case, to condition, dictate or perhaps preempt by way of *obiter* a forthcoming discussion of such a material point. In addition, the matter was not the central focus of the appeal and, therefore, was not fully and satisfactorily canvassed.

[63] I have no hesitation in concluding that it is more appropriate to address the issue of the impact of an application for bad faith negotiation on the time limit imposed by the law, when such an application is made within the time limit and the matter has been "fully and satisfactorily canvassed", to use the words of Justice Létourneau.

[64] I would therefore conclude that the argument that an application for bad faith negotiation justifies *per se* a suspension or an extension of the time limit is premature.

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"Pierre Blais"

J.A

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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**CONCURRED IN BY:** Desjardins J.A.  
**CONCURRING REASONS BY:** Blais J.A.

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