

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20100319

**Dockets: A-508-08
A-506-08
A-561-08**

Citation: 2010 FCA 80

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
DAWSON J.A.**

BETWEEN:

A-508-08

THE TOWN OF BENGOUGH

Appellant

and

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

A-506-08

THE TOWN OF BENGOUGH

Appellant

and

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

A-561-08

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

**THE CANADIAN TRANSPORTATION AGENCY and
THE TOWN OF BENGOUGH**

Respondents

Heard at Regina, Saskatchewan, on February 18, 2010.

Judgment delivered at Ottawa, Ontario, on March 19, 2010.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

NADON J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal and cross-appeal

[1] The proceedings in Files A-508-08, A-506-08 and A-561-08 result from an application by the Town of Bengough (the appellant) under section 146.3 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act).

[2] By this application, the appellant sought a preliminary determination of the net salvage value (NSV) of a railway line located in the province of Saskatchewan and known as the Radville Subdivision (the line).

[3] The Canadian Transportation Agency (Agency) issued an interim decision (Decision No. LET-R-74-2008) and a final decision (Decision No. 378-R-2008). The appellant attacks both decisions and the Canadian Pacific Railway Company (CPR) attacks only the final decision.

[4] The appellant alleges errors committed by the Agency in determining the NSV of the line. More specifically, this Court is called upon to decide whether the Agency should have taken into account in determining the NSV the following costs which the appellant says are associated with the dismantling and restoration of the line:

- a) the costs of complying with municipal by-laws in force in some of the municipalities through which the line runs and which require that certain measures of demolition and restoration be undertaken with respect to the lines on which railway operations have been discontinued; and
- b) certain payments which section 146.1 of the Act requires a railway company to make after it discontinues operating a grain-dependent branchline listed in Schedule 1 of the Act.

[5] In a cross-appeal, the CPR raises three grounds of attack on the Agency's final decision. In its view, the Agency

- a) should have concluded that the appellant had abandoned its application when it informed the Agency that it did not wish the Agency to retain the services of an independent land appraiser;
- b) did not have the authority under section 146.3 of the Act to proceed with the application for a determination of a NSV and make said determination which excluded the value of the land which was a component of the line; and

- c) violated the CPR's right to procedural fairness and natural justice when it failed to seek the CPR's input with regards to the amendments made to the appellant's application and the issuance of the final decision.

The relevant legislation

[6] Sections 27, 28, 29, 140 to 144, 144.1, 145, 146, 146.01, 146.02 and 146.1 to 146.5 of the Act are relevant to the determination of the appeal and cross-appeal. I reproduce them in Appendix A attached to these reasons.

[7] The Rural Municipality of Laurier No. 38 (By-Law No. 2, 2001), Bengough No. 40 (By-Law No. 189.98), Weyburn No. 67 (By-Law No. 9-2000), The Gap No. 39 (By-Law 02/02) and the Town of Bengough (By-Law No. 7/98), through which the line runs, have enacted by-laws each containing the following provision:

3. Within a period of not more than 12 months next following the discontinuance of operation of the railway line, the owner(s) shall effect and complete in a proper, timely and workmanlike manner each and every one of the following:

...

(e) restore any excavation, pit, embankment, mound or similar structure or feature which is not naturally occurring along the discontinued railway line to an elevation compatible with abutting properties, and consistent with the natural drainage of water along the abutting properties;

[Emphasis added]

The facts

[8] It is not necessary to review the facts in detail. A short summary will suffice to grasp the issues at stake and understand the reasons for judgment.

[9] The Radville Subdivision is designated in Schedule I of the Act as a grain-dependant branchline. CPR has not carried traffic on the line since 2000. On July 28, 2005, it listed the Radville Subdivision on its Three-Year Plan as a railway line it intended to discontinue operating pursuant to section 141 of the Act. On January 10, 2007, CPR published a “Notice of Discontinuance of Railway Line” in respect of the line in issue pursuant to subsection 143(1) of the Act.

[10] Since no agreement was reached with an interested person within the required time, CPR offered to transfer all of its interests in the line to governments on September 20, 2007, as stipulated in section 145 of the Act. The appellant had until November 19, 2007 to accept CPR’s offer. On November 9, 2007, the appellant filed an application with the Agency pursuant to section 146.3 of the Act for an advance determination of the NSV of CPR’S interest in the line to be used for any purpose.

[11] After a few requests for time extensions, the appellant filed its submissions on January 4, 2008 containing its rationale for the calculation of the NSV of the railway line and proposing a NSV of -\$2,377,889 or \$1. It requested that the Agency factor into its NSV determination certain by-laws

enacted by several of the municipalities through which the line runs. These by-laws require the owner of a railway line which is no longer being operated to obtain from the municipality a demolition permit within a specified time following the discontinuance of railway operations and to give an undertaking that it will perform some of the work required by the by-laws to be performed. The appellant also requested that the Agency build into its determination of the NSV the statutory payment obligations imposed by section 146.1 of the Act.

[12] On January 23, 2008, CPR filed its answer to the NSV submission of the appellant. It estimated the NSV at \$5,870,808. It also commented on the applicability of the municipal by-laws and section 146.1 of the Act.

The Agency's Interim Decision (LET-R-74-2008)

[13] On April 30, 2008, the Agency rendered its Interim Decision. It began its analysis by reviewing the provisions governing the discontinuance of a line (see paragraphs 6-8), defining the NSV (*ibid.* paragraph 9) and explaining the process for arriving at a NSV (*ibid.* paragraphs 10-18). The Agency defined the NSV as “the market value of an asset less the costs associated with its disposal” (*ibid.* paragraph 9). It further explained that “these costs can include, but are not limited to, sales commissions, excavation, disposal and environmental remediation” and that the “net salvage value is the realizable value of the assets ... less the costs associated with their disposal to be used for any purpose” (*ibid.*).

[14] The Agency then proceeded to the actual valuation of the assets. It looked first at the quantity and quality of the track assets (*ibid.* paragraphs 19-21) before determining their precise value (*ibid.* paragraphs 22-43). It also assessed the gross salvage value of the track assets (*ibid.* paragraphs 44-49) and the cost of their removal and salvage (*ibid.* paragraph 50) in order to come to a final NSV for the track assets (*ibid.* paragraph 51). The Agency estimated the NSV of the track materials on the line at \$2,888,351.

[15] After having valued the track assets, the Agency proceeded to consider other factors which could have an impact on the NSV. It first looked at the by-laws enacted by various municipal governments in Saskatchewan to see whether the costs they envisaged should be included in the determination of the NSV (*ibid.* paragraphs 52-77). It will be recalled that these by-laws, among other things, “require a railway company, as a consequence of line discontinuance and within a specified time, to remove track materials, bury ballast and to level and seed the right of ways to a level that is equivalent to the adjacent property” (*ibid.* paragraph 53).

[16] The Agency noted that the municipal government may compel compliance with the by-laws when there has been no application for a permit to demolish the railway line. It then has “sole discretion” to identify the buildings, signals and related railway structures that are to be removed (*ibid.* paragraph 62). The Agency acknowledged that the question of the impact of these by-laws on the NSV was previously considered in Decision No. 445-R-2000 by another panel. The Agency observed that the “degree and nature of any form of site reclamation is contingent, first and foremost, on the planned use of the site” (*ibid.* paragraph 64). It found that the municipal

governments “recognized this in granting themselves powers in these by-laws only at such time as there is a discontinuance of the operation of a railway line” (*ibid.*).

[17] The Agency was of the view that it is only when a railway company failed to reach an agreement to sell, lease or otherwise transfer a railway line, and filed a notice of discontinuance pursuant to subsection 146(1) of the Act, that it may, as owner of the discontinued railways, be subject to all applicable reclamation by-laws (*ibid.* paragraphs 65-66). It concluded that, when there is a sale, lease or transfer to a third party under subsection 146(2), it is the party to whom the line is sold, leased or otherwise transferred that “assumes those obligations and must take such continuing obligations into account” (*ibid.* paragraph 67).

[18] The Agency thus concluded that, in the present case, “what would be transferred ... is a railway line that has not been discontinued” (*ibid.* paragraph 58). The appellant would have sole authority over the planned use of the railway.

[19] The Agency asked whether it should include in the NSV the costs associated with the removal of railway bridges. It concluded that these costs have never been included in the past Agency NSV determinations pursuant to section 145 of the Act and, therefore, that they should not be included in the present case either.

[20] The next element considered by the Agency is the costs associated with special environmental remediation. The Agency concluded that “there is no significant contamination requiring remediation on the line” (*ibid.* paragraph 82). This finding is not being appealed.

[21] The Agency then turned its mind to the statutory compensation envisaged by section 146.1 of the Act. It found that sections 146 and 146.1 of the Act prescribe certain railway obligations that only arise post-discontinuance of the railway line. It was of the view that, according to subsection 146(2), the operating obligations of a railway company under the Act cease simply upon closing of the transfer agreement (*ibid.* paragraph 89). For the Agency, section 146.1 makes it clear that the payments therein mentioned are due “following the railway company providing a notice (of discontinuance) under subsection 146(1)” (*ibid.* paragraph 90). According to the Agency, “no discontinuance notice is required if the asset/line are successfully transferred through the process set out under the CTA ... and the per mile payment does not arise” (*ibid.* paragraph 91).

[22] The last question that the Agency turned its mind to is the value of the land. It explained that where the parties do not agree on the value of the land, the “normal Agency practice is to have a qualified independent land appraiser contracted by the Agency conduct an impartial assessment of the parties differing land valuations” (*ibid.* paragraph 100). It estimated necessary to have an assessment and was prepared to undertake this impartial evaluation” (*ibid.* paragraph 101).

[23] In conclusion, the Agency determined the interim NSV, excluding the value of the land, to be \$2,929,303. The Agency gave the appellant fourteen (14) days to advise it if it wished to proceed

with the independent land appraisal after which it would render its final decision. It also ruled that “any times set out in section 146.3 of the CTA ... are not initiated by this interim ruling and will only apply as of the date of issuance of the final decision” (*ibid.* paragraph 105).

The Agency’s final decision (No. 378-R-2008)

[24] By letter dated May 12, 2008, the appellant requested and was granted an extension to May 28, 2008 to make its decision regarding the independent land appraiser. On May 27, 2008, it advised the Agency that “it believed that through further discussions a fair land value may be set between the parties involved and, therefore it did not wish to proceed with the offer of a land appraisal of the railway line” (see the final decision at page 2).

[25] As the appellant was the applicant in the proceedings commenced under section 146.3 of the Act, the Agency ruled that the appellant had the right to advise it that it did not wish to proceed with the land assessment. Consequently, the Agency invoked the power, pursuant to subsection 27(4) of the Act, to permit an amendment to the appellant’s section 146.3 application. It then treated the appellant’s application as one for a NSV of the line excluding an assessment of the land value.

[26] Finally, being of the view that no new relevant facts or circumstances had arisen since the interim decision, the Agency confirmed its interim decision and fixed the NSV of the line at \$2,928,303.

Analysis of the Agency's decisions and the parties' submissions

[27] The cross-appeal raises issues that are different from the appeal. I will treat the two proceedings separately. I shall dispose of the appeal first.

The appeal

a) The standard of review of the Agency's decision

[28] In its memorandum of fact and law, the appellant submitted that the following questions were questions of law and that the standard of correctness applies to the determination that the Agency made of them:

- a) the proper interpretation of municipal by-laws with respect to the reclamation obligations they impose;
- b) the legal effect of such municipal by-laws;
- c) the proper interpretation of "NSV to be used for any purpose" as that term is used in Division V of Part III of the Act;

- d) whether a government which acquires a railway line pursuant to section 145 of the Act assumes the railway company's previous obligations in respect of operating the railway line;
- e) whether what is transferred to a government which accepts an offer pursuant to section 145 of the Act is a railway line that has not been discontinued; and
- f) the proper identification of the issue raised by the appellant in relation to the statutory payment obligation under section 146.1 of the Act.

[29] I do not disagree that the interpretation of a municipal by-law may involve a question of law. However, this is not what the Agency did in the present instance. It simply took the by-laws as they are and applied them to the facts of the case. The conclusion that results from that exercise is one of mixed fact and law.

[30] In any event, at the hearing, counsel for the appellant agreed that the applicable standard of review was reasonableness. The decision of the Supreme Court of Canada in *Council of Canadians with disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650 as well as the decisions of this Court in *Canadian Pacific Railway Co. v. Canada (Canadian Transportation Agency)*, [2009] 2 F.C.R. 253 and *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*, 2008 FCA 363 establish that the Agency is entitled to the deferential standard of reasonableness with respect to

questions of law such as those relating to the interpretation of the Act, questions of fact, discretion and policy and questions of mixed fact and law.

[31] The issue in *Canadian National Railway Co. v. Municipality of Greenstone and Canadian Transportation Agency*, 2008 FCA 395 pertained, as in the present case, to the discontinuance of a railway line. At paragraph 46 of that decision, this Court wrote:

[46] I agree with the respondent that deference should be given to the Agency's decision on the interpretation of subsection 142(2). The discontinuance process found in Division V of the Act raises an issue within the expertise of the Agency. It is one with which the Agency has familiarity. The Agency was entrusted with the monitoring of the process to ensure implementation of the government's policy and the legislative intention. It is in performing that function that the Agency was called upon to interpret its own statute. It is an interpretation closely connected to its functions.

b) Whether the Agency erred in not taking into account in its determination of the NSV of the line the statutory payment obligation found in section 146.1 of the Act

[32] Counsel for the appellant submitted that the Agency erred in not concluding that the line had been discontinued, thereby triggering the payment obligations found in section 146.1. She grounded her submission on the common definition of "salvage" which she associated with the notion of dismantling. As the application was for a determination of the net salvage value, she saw in the concepts of NSV and "salvage" Parliament's intention that a railway company pays to the municipalities the compensation fixed by section 146.1.

[33] With respect, Parliament's intention is clearly expressed in section 146.1 and subsection 146(1). Section 146.1 only applies if a notice of discontinuance was provided under subsection 146(1). However, such a notice can only be given "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" (emphasis added). No notice of discontinuance has been or could be given pursuant to subsection 146(1) since the process had not reached the stage where "an agreement is not entered into" through that process.

[34] This is the conclusion reached by the Agency. That conclusion is not only reasonable but also legally correct. Otherwise, to include the costs mentioned in section 146.1 in the NSV would have the effect of compelling a railway company to pay these costs regardless of whether or not an agreement was reached under the sections 143 to 145 process and even though a municipality which acquired a railway line would not be liable to pay these costs later on. A substantial "windfall" would result for the municipalities. This was clearly not the intention of Parliament.

c) Whether the Agency erred in not taking into account in its determination of the NSV of the line the costs of complying with municipal by-laws in force in some of the municipalities through which the line runs

[35] The appellant contends that, by refusing to apply the municipal by-laws, the Agency has departed from its previous jurisprudence in that, in assessing the NSV of the line, it failed to consider that the sale to governments is a sale for any purpose, not specifically for continued operations: see for example Decision No. 530-R-1998 – *St. Lawrence & Hudson Railway Company*

Limited at page 5; Decision No. 542-R-2000 – *Canadian National Railway Company’s Cudworth Subdivision*, at page 20.

[36] It relies for its contention on the following excerpts at paragraphs 63 and 64 of the interim decision:

[63] Another panel of the Agency, in Decision No. 445-R-2000, has previously considered the question of the impact of municipal reclamation by-laws on the net salvage value of a railway line.

[64] In its re-examination of this issue in the present case, and to consider this from a different perspective from that set out in Decision No. 445-R-2000, the Agency observes that the degree and nature of any form of site reclamation is contingent, first and foremost, on the planned use of the site. The Agency considers that municipal governments recognized this in granting themselves powers in these by-laws only at such time as there is a discontinuance of the operation of a railway line.

[Emphasis added]

[37] I understand that the underlined statements may carry some ambiguity. However, it has to be kept in mind that the Agency made them in the context of the appellant’s submission and demand that the municipal by-laws apply and be applied.

[38] In my view, the Agency is simply saying that the municipal by-laws on which the claims are made make their exigibility contingent on the planned use of the site. In other words, as the Agency pointed out and as it appears on the face of the by-laws, the municipalities themselves have made the application of their by-laws conditional on the actual discontinuance of a railway line.

[39] Notwithstanding the fact that there is in this case, under the Act, no discontinuance of the line, the appellant asks us to interpret the municipal by-laws in a way which creates a constructive or deemed discontinuance of the line although in reality there is none. To accede to the appellant's submission, we would have to judicially create a legal fiction, that is to say, as Beetz J. wrote in *The Queen v. Verrette*, [1978] 2 S.C.R. 838, at page 845, create a rule which "implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is".

[40] In view of the clear language of the Act and the by-laws as regards discontinuance and the obligations resulting from it, and in the absence of a compelling justification for judicially creating a legal fiction, this Court would be acting beyond the law and its jurisdiction if it were to create it.

[41] It is obvious from a reading of the Agency's decision that it was worried by the sheer number of these by-laws, the breadth of their scope and the wide discretion conferred upon the municipalities. Its preoccupation was that all the costly reclamations under these by-laws would systematically bring the NSV of the line to nothing or less, as in this instance and others, a negative amount of \$2,408,191.00: see also for example Decision No. 545-R-1999 – *Canadian National Railway Company's Arborfield Subdivision* where a negative NSV was arrived at by the municipality as well as Decision No. 445-R-2000, precited.

[42] I reproduce section 3 of By-Law No. 189.98 to show the wide scope of application of these by-laws:

3. Within a period of not more than 12 months next following the discontinuance of operation of the railway line, the owner(s) shall effect and complete in a proper, timely and workmanlike manner each and every one of the following:

- (A) remove all buildings, signals, bridges, and related railway structures (including any telegraph, telephone or electric lines) remaining along the discontinued railway line, which were constructed or acquired to accommodate the operation of the railway line at any time prior to its discontinuance of operation, which in the sole discretion of the Rural Municipality of Bengough No. 40 or its designate, render the discontinued railway line unsightly, untidy, or dangerous;
- (B) restore all roadways and passage-ways which constituted level or farm crossings over the railway line prior to its discontinuance of operation;
- (C) remove all rubbish, non-salvageable materials remaining along the discontinued railway line;
- (D) remove from the discontinued railway line all toxic substances, contaminants, and pollutants which may constitute a health or safety risk to persons exposed to the toxic substances, contaminants and pollutants whether or not such persons could only be exposed to such risk by trespassing;
- (E) restore any excavation, pit, embankment, mound or similar structure or feature which is not naturally occurring along the discontinued railway line to an elevation compatible with abutting properties, and consistent with the natural drainage of water along the abutting properties;
- (F) cause the discontinued railway line to be left in a safe condition; and
- (G) unless the abutting property owners consent in writing to the contrary, seed the discontinued railway line with coarse grass immediately after completion of the measures required to be taken in accordance with items 2(A), 2(B), 2(C), 2(D), and 2(E) above, or at such other time deemed suitable by the Rural Municipality of Bengough No. 40 or its designate, and maintain the same.

[Emphasis added]

[43] The nature of the reclamations contained in this by-law reveals that the municipalities are clearly envisaging its application to whoever is the owner of the railway line only at the time the line is dismantled and restoration becomes necessary.

[44] The Agency correctly found that, if an agreement is concluded and a sale or other transfer to a third party occurs, then the railway company ceases to have any obligations in respect of the operation of the railway line and such obligations under the municipal by-laws are assumed by the new owner or the transferee: see paragraphs 67 and 68 of the interim decision.

[45] Again, these findings of the Agency relate to the application of the by-laws. While I agree with the Agency that the by-laws as drafted do not apply to the CPR since there is, in fact or at law, no discontinuance of the line, I believe, however, that this is not the end of the matter.

[46] These by-laws identify some of the work that may become necessary after the dismantling of a railway line. In the present instance, the appellant claimed only the costs referred to in paragraph 3(E) of its by-law which are associated with the levelling of 66% of the rights-of-way. The total cost was estimated at \$535,500 (see appeal book, vol. 1, Tab C-8, at pages 138-139). I should add that in files A-507-08 and A-509-08 involving the Rural Municipality of Souris Valley No. 7, the amount claimed was \$350,000 (see appeal book, vol. 1, Tab C-8, at pages 68-69).

[47] The Agency's expertise was solicited to determine the NSV of the line. Because subsection 145(1) of the Act provides that the offer to the governments is to be made for not more than the NSV of the line to be used "for any purpose", discontinuance and dismantling of the line have to be considered as one of the purposes and, therefore, the costs of that operation factored in the determination of the NSV. I agree with the dissenting opinion in Decision No. 445-R-2000, *ibid.*,

that the “very act of determining a net salvage value is speculative. Costs are contingent upon speculative events”.

[48] That costs are contingent upon speculative events is reflected in the interim decision of the Agency where an assessment is made of the costs of an eventual removal and disposal of track assets (rail, track fastenings, ties, and other track materials), of dismantling bridges, of removing culverts and of environmental remediation, as well as an analysis of the opportunity to award them.

[49] In the present instance, the costs of levelling the rights-of-way were denied on the basis that the by-laws did not apply because there was no discontinuance of the line as required by the by-laws. However, for the purpose of determining the NSV of the line “to be used for any purpose”, an eventual discontinuance and even dismantling of the line are presumed so as to ensure compliance with section 145 of the Act (“NSV to be used for any purpose”) and come to an assessment which is fair to both parties. Obviously, in the quest for fairness, an equitable line short of full compensation has to be drawn somewhere. Parliament’s intent in this respect appears in the partial compensation provided for in section 146.1 of the Act. The expertise of the Agency is helpful in this process and bears heavily on the final determination of the NSV.

[50] Irrespective of the applicability of the municipal by-laws, I believe, however, that the levelling of the rights-of-way is a possible consequence of the presumed discontinuance and dismantling of the line. In my view, the merit of the appellant’s claim should also have been analysed from that perspective.

[51] As it appears from its previous jurisprudence (see for example the *St-Lawrence* Decision No. 530-R-1998, *ibid.*), the Agency possesses the discretion to determine those costs that are relevant to the determination of the NSV. It can refuse to award costs that are unreasonable in light of the facts and the law. However, I do not think that it can disregard claims, which may be relevant as a result of the presumed discontinuance of the line for the purpose of a NSV determination under section 145 of the Act, on the basis that the by-laws advanced in support of the claim are inapplicable as written and, therefore, irrelevant.

[52] With respect, I believe the Agency should have gone further and, as it did for the assessment of the removal of the track, bridges, culverts and environmental remediation, determine whether the costs-claim for the levelling of the rights-of-way was relevant and, if so, determine the amount, if any, that should be taken into account in fixing the NSV of the line.

[53] To put it differently, the NSV under section 145 of the Act has always been determined by looking at the value of the assets based on the supposition that the line will one day be discontinued and even dismantled. The resulting costs of discontinuance and dismantling will be borne by someone at some point in the future and they are a liability on the railway line at the time of assessing its NSV.

d) Conclusion

[54] For these reasons, I would send the matter back to the Agency and ask it to determine:

- a) if the costs claimed in the present instance by the appellant for the levelling of the rights-of-way are relevant to the determination of the NSV pursuant to section 145 of the Act;
- b) if so, whether their award is justified on the facts and circumstances of this case; and
- c) if so, the amount that should be awarded.

The cross-appeal

[55] The Agency inferred from the appellant's letter of May 27, 2008 that the appellant had no intention of abandoning its application as the appellant asserted its belief that a fair land value could be set between the parties involved through further discussions. I cannot say that this inference and the resulting conclusion were unreasonable. Actually, the Agency gave the parties more time to negotiate with each other by stating that its interim decision was not initiating the times set out in section 146.3 of the Act for accepting an offer under section 145.

[56] As for the alleged breach of procedural fairness, the parties were informed by the Agency, well in advance of the issuing of the final decision, that the interim decision would be made final. The CPR had ample time to request the opportunity to make further submissions regarding the Agency's jurisdiction to proceed to a final decision and the new facts it says occurred between the interim and the final decision. It did not. The Agency cannot be blamed for not satisfying an expectation that the CPR did not convey to it.

[57] At the hearing, counsel for the CPR complained that the final decision of the Agency was not a decision, at least not a happy one, since the application was for a determination of the NSV and the Agency, by not ascertaining the value of the land and excluding its value from the NSV, determined a NSV which is not a NSV. Consequently, he asked this Court to declare either that the appellant had abandoned its application and, therefore, the process was over, or that the application be processed and a valuation of the land made.

[58] According to the parties, the final decision of the Agency left them in a conundrum. However, it appears to me that the Agency proceeded to render a final decision in order to trigger the times set out in subsection 143.3(3) of the Act for accepting the offer and, thereby, complete the process. The process would have been over shortly after the final decision were it not for a stay order issued by this Court on August 8, 2008 which stayed, pending the determination of the appeal of the interim decision, any final determination of the NSV of the line.

[59] I am satisfied that no declaration is needed since the stay order will expire on the date of the issuance of our decision. If we had dismissed the appeal, the times set out in subsection 146.3(3) would have been set in motion. The matter will now go to the Agency for a new determination unless it is settled between the parties.

Conclusion

[60] For these reasons, I would allow the appeals with one set of costs and set aside the part of the Agency's decision which dismisses the appellant's claim for the costs of the levelling of the rights-of-way of the line. I would refer the matter back to the Agency to determine:

- a) if, in the present instance, the above costs are relevant to the determination of the NSV pursuant to section 145 of the Act;
- b) if so, whether their award is justified on the facts and circumstances of this case; and
- c) if so, the amount that should be awarded.

[61] I would dismiss the cross-appeal with costs. However, I would award no costs to or against the Agency. In accordance with the Order of this Court issued on January 20, 2009, a copy of these reasons will be filed in the other appeals as well as in files A-509-08 and A-507-08 involving the

Rural Municipality of Souris Valley No. 7 v. Canadian Pacific Railway in support of the judgments rendered therein.

“Gilles Létourneau”

J.A.

“I agree
M. Nadon J.A.”

“I agree
Eleanor R. Dawson J.A.”

APPENDIX A

27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.

(2) and (3) [Repealed, 2008, c. 5, s. 1]

(4) The Agency may, on terms or otherwise, make or allow any amendments in any proceedings before it.

(5) [Repealed, 2008, c. 5, s. 1]

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

(a) at a future time,

(b) on the happening of any contingency, event or condition specified in the order, or

(c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless

27. (1) L'Office peut acquiescer à tout ou partie d'une demande ou prendre un arrêté, ou, s'il l'estime indiqué, accorder une réparation supplémentaire ou substitutive.

(2) et (3) [Abrogés, 2008, ch. 5, art. 1]

(4) L'Office peut, notamment sous condition, apporter ou autoriser toute modification aux procédures prises devant lui.

(5) [Abrogé, 2008, ch. 5, art. 1]

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou subordonner celle-ci à la survenance d'un événement.

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire

the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

140. (1) In this Division, “railway line” includes a portion of a railway line, but does not include
(a) a yard track, siding or spur; or
(b) other track auxiliary to a railway line.

(2) The Agency may determine as a question of fact what constitutes a yard track, siding, spur or other track auxiliary to a railway line.

141. (1) A railway company shall prepare and keep up to date a plan indicating for each of its railway lines whether it intends to continue to operate the line or whether, within the next three years, it intends to take steps to discontinue operating the line.

(2) The railway company shall make the plan available for public inspection in offices of the company that it designates for that purpose.

(2.1) Whenever the railway company makes a change to the plan, it shall notify the following of the change within 10 days after the change:
(a) the Minister;
(b) the Agency;
(c) the minister responsible for transportation matters in the government of each province through which the railway line passes;

dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l’acte introductif d’instance.

(2) Le gouverneur en conseil peut, par règlement, imposer à l’Office un délai inférieur à cent vingt jours pour rendre une décision à l’égard des catégories d’affaires qu’il indique.

140. (1) Dans la présente section, « ligne » vise la ligne de chemin de fer entière ou un tronçon seulement, mais non une voie de cour de triage, une voie d’évitement ou un épi, ni une autre voie auxiliaire d’une ligne de chemin de fer.

(2) L’Office peut décider, comme question de fait, ce qui constitue une voie de cour de triage, une voie d’évitement ou un épi, ou une autre voie auxiliaire d’une ligne de chemin de fer.

141. (1) Chaque compagnie de chemin de fer est tenue d’adopter et de mettre à jour un plan énumérant, pour les trois années suivantes, les lignes qu’elle entend continuer à exploiter et celles dont elle entend cesser l’exploitation.

(2) Le plan peut être consulté à ceux de ses bureaux que la compagnie désigne.

(2.1) Si elle modifie son plan, la compagnie de chemin de fer en avise, dans les dix jours :
a) le ministre;
b) l’Office;
c) le ministre chargé des transports dans toute province dont la ligne franchit le territoire;
d) le président de toute administration de transport de banlieue dont la ligne franchit le territoire;
e) le greffier ou un premier dirigeant de

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

(e) the clerk or other senior administrative officer of every municipal or district government through which the railway line passes.

(3) Subject to section 144.1, a railway company may sell, lease or otherwise transfer its railway lines, or its operating interest in its lines, for continued operation.

(4) A railway company that sells, leases or otherwise transfers a portion of a grain-dependent branch line listed in Schedule I, or its operating interest in such a portion, to a person who intends to operate the portion shall continue to operate the remaining portion for three years, unless the Minister determines that it is not in the public interest for the company to do so.

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

(2) A railway company shall not take steps to discontinue operating a railway line before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months.

(3) Subsection (2) does not apply and a railway company shall without delay take the steps described in section 143 if

(a) the federal government, a provincial, municipal or district government or a community-based group endorsed in writing by such a government has written to the company to express an interest in acquiring all or a portion of a grain-dependent branch line that is listed in Schedule I for the purpose of continuing to operate that line or portion of a line; and

(b) that line or portion of a line is indicated

toute administration municipale dont la ligne franchit le territoire.

(3) Sous réserve de l'article 144.1, la compagnie de chemin de fer peut transférer, notamment par vente ou bail, ses droits de propriété ou d'exploitation sur une ligne en vue de la continuation de son exploitation.

(4) La compagnie de chemin de fer qui transfère, notamment par vente ou bail, ses droits de propriété ou d'exploitation sur une partie d'un embranchement tributaire du transport du grain mentionné à l'annexe I à une personne qui entend l'exploiter doit continuer d'exploiter la portion restante pendant les trois ans suivant le transfert, sauf si le ministre conclut que cela n'est pas dans l'intérêt public.

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

(2) Elle ne peut cesser d'exploiter une ligne que si son intention de ce faire a figuré au plan pendant au moins douze mois.

(3) Si le gouvernement fédéral, un gouvernement provincial, une administration municipale ou un groupe communautaire appuyé par écrit par un tel gouvernement ou une telle administration a informé par écrit une compagnie de chemin de fer qu'il serait intéressé à acquérir, en vue d'en continuer l'exploitation, tout ou partie d'un embranchement tributaire du transport du grain mentionné à l'annexe I et figurant dans le plan de la compagnie à titre de ligne dont elle a l'intention de cesser, en tout ou en partie, l'exploitation, le paragraphe (2) ne s'applique pas et la compagnie doit sans délai suivre les étapes visées à l'article 143.

on the company's plan as being a line or a portion of a line that the company intends to take steps to discontinue operating.

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

(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.

(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.

(4) [Repealed, 2007, c. 19, s. 36]

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.

143. (1) La compagnie fait connaître le fait que le droit de propriété ou d'exploitation sur la ligne peut être transféré en vue de la continuation de l'exploitation et, à défaut de transfert, son intention de cesser l'exploitation.

(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.

(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.

(4) [Abrogé, 2007, ch. 19, art. 36]

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

(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.

(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.

(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.

(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.

(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

(2) [Abrogé, 2007, ch. 19, art. 37]

(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.

(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.

(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.

(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.

(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.

operating arrangements for the interchange of traffic, subject to the terms and conditions, including consideration, specified by the Agency.

(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.

144.1 (1) If a railway line, or a railway company's operating interest in a railway line, is sold, leased or otherwise transferred under subsection 141(3) or as the result of an advertisement under subsection 143(1) and, before the day such advertisement was made, an agreement was in force between the railway company and a public passenger service provider in respect of the operation of a passenger rail service on the railway line, the rights and obligations of the railway company under the agreement in respect of the operation of that service on that line vest, as of the day the transfer takes place, in the person or entity to which the railway line, or the operating interest, is transferred, unless the public passenger service provider indicates otherwise before that day.

(2) Whenever a railway company's rights and obligations under an agreement with VIA Rail Canada Inc. are vested in another person or entity by subsection (1), the portion of the railway line to which the agreement relates is hereby declared, as of the day the transfer takes place, to be a work for the general advantage of Canada.

(3) The declaration referred to in subsection (2) ceases to have effect if
(a) VIA Rail Canada Inc. ceases to operate a passenger rail service on the portion of railway line to which the declaration relates; or

(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.

144.1 (1) Si la compagnie de chemin de fer transfère, notamment par vente ou bail, ses droits de propriété ou d'exploitation sur une ligne au titre du paragraphe 141(3) ou d'une annonce faite en vertu du paragraphe 143(1), les droits et obligations découlant de toute entente conclue — avant l'annonce, le cas échéant — avec une société de transport publique sur l'exploitation d'un service passagers sur la ligne sont dévolus au cessionnaire dès le transfert, sauf avis contraire donné par la société avant le transfert.

(2) Si le transfert concerne une partie d'une ligne à laquelle s'applique une entente conclue avec VIA Rail Canada Inc., cette partie de la ligne est déclarée être un ouvrage à l'avantage général du Canada, et ce à compter de la date du transfert.

(3) La déclaration visée au paragraphe (2) cesse d'avoir effet si, selon le cas :
a) VIA Rail Canada Inc. cesse d'exploiter un service passagers sur cette partie de la ligne;
b) la ligne cesse d'être exploitée.

(b) the operation of the railway line is discontinued.

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

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

(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;

(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.

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

(a) by the Minister, the Government of

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.

(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) 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.

(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

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 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.

(4) Once a government or an urban transit authority communicates its written acceptance of the offer to the railway company, the right of any other government or urban transit authority to accept the offer is extinguished, and the railway company must notify the other governments and urban transit authorities of the acceptance.

(5) If a government or an urban transit authority accepts the offer, but cannot agree with the railway company on the net salvage value within 90 days after the acceptance, the Agency may, on the application of the government or urban transit authority or the railway company, determine the net salvage value.

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

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

(4) La communication, par écrit, de l'acceptation à la compagnie éteint le droit des autres destinataires de l'offre; celle-ci leur notifie l'acceptation de l'offre.

(5) Si les parties ne peuvent s'entendre, dans les quatre-vingt-dix jours suivant l'acceptation de l'offre, sur la valeur nette de récupération, l'Office la détermine, sur demande de l'une d'elles.

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

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.

(2) If the railway line, or any interest of the railway company in it, is sold, leased or otherwise transferred by an agreement entered into through the process set out in sections 143 to 145 or otherwise, the railway company that conveyed the railway line has no obligations under this Act in respect of the operation of the railway line as and from the date the sale, lease or other transfer was completed and has no obligations with respect to any operations by any public passenger service provider over the railway line as and from that date.

146.01 (1) If, by reason of the instrument or act by which a railway line or an operating interest in a railway line is transferred through the process set out in sections 143 to 145 or otherwise, the railway line or operating interest in the railway line returns to the railway company that transferred it, the railway company shall, within 60 days after the day on which the return takes place, resume operations of the line or follow the process set out in sections 143 to 145.

(2) If a railway line or operating interest in a railway line returns to a railway company that transferred it and the company decides to follow the process set out in sections 143 to 145 in respect of the railway line or operating interest, the company is not subject to subsection 142(2) in respect of the railway line or operating interest and has no obligations under this Act in respect of the operation of the railway line.

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.

(2) En cas de transfert — notamment par vente ou bail — par la compagnie de la ligne ou de droits qu'elle y détient, en vertu d'une convention résultant du processus établi en vertu des articles 143 à 145 ou autrement, la compagnie cessionnaire n'a plus d'obligation en vertu de la présente loi relativement à l'exploitation de la ligne ou à son utilisation par la société de transport publique, et ce à compter de la date de signature de l'acte de transfert.

146.01 (1) Si, au titre de la convention de transfert résultant notamment du processus établi en vertu des articles 143 à 145, la ligne de chemin de fer ou les droits d'exploitation d'une telle ligne font retour à la compagnie qui les avait transférés, celle-ci doit, dans les soixante jours suivant le retour, reprendre l'exploitation de la ligne ou se conformer au processus établi en vertu de ces articles.

(2) Le cas échéant, la compagnie de chemin de fer qui choisit de suivre le processus établi en vertu des articles 143 à 145 n'est pas assujettie au paragraphe 142(2) à l'égard de la ligne ou des droits d'exploitation et elle n'a pas d'obligation en vertu de la présente loi relativement à l'exploitation de la ligne de chemin de fer.

146.02 Despite section 146.01, if a railway line or operating interest in a railway line returns to a railway company referred to in that section and, before the day on which the return takes place, an agreement was in force between the person or entity that owned the railway line or had the operating interest in the railway line immediately before the return and a public passenger service provider as defined in section 87 in respect of the operation of a passenger rail service on that railway line, then, unless the public passenger service provider indicates otherwise before that day, the rights and obligations of the person or entity under the agreement in respect of the operation of that service on that line vest, as of that day, in the railway company and the railway company shall resume operations of the railway line.

146.1 (1) A railway company that discontinues operating a grain-dependent branch line listed in Schedule I, or a portion of one, that is in a municipality or district shall, commencing on the date on which notice was provided under subsection 146(1), make three annual payments to the municipality or district in the amount equal to \$10,000 for each mile of the line or portion in the municipality or district.

(2) If a railway company to which subsection 146.01(1) applies does not resume operations on a grain-dependent branch line listed in Schedule I within the period provided for in that subsection and does not enter into an agreement for the sale, lease or other transfer of that railway line, or applicable interest in that railway line, after following the process set out in sections 143 to 145, the railway company shall, beginning on the day after the last day on which its offer could have been accepted under section 145, make the

146.02 Malgré l'article 146.01, si une ligne de chemin de fer ou les droits d'exploitation d'une ligne font retour à la compagnie de chemin de fer visée à cet article, les droits et obligations découlant, avant le retour, de tout accord auquel sont parties le propriétaire de la ligne ou le détenteur des droits d'exploitation et une société de transport publique, au sens de l'article 87, relativement à l'exploitation d'un service de passagers sur la ligne sont, sauf avis contraire donné par la société avant le retour, dévolus dès le retour à la compagnie de chemin de fer qui est alors tenue de reprendre l'exploitation de la ligne.

146.1 (1) La compagnie de chemin de fer qui cesse d'exploiter un embranchement tributaire du transport du grain mentionné à l'annexe I, ou une partie d'un tel embranchement, passant dans une municipalité fait à celle-ci trois versements annuels à compter de la date où elle avise l'Office en application du paragraphe 146(1). Chaque versement est égal au produit de 10 000 \$ et du nombre de milles de l'embranchement ou de la partie d'embranchement situés dans le territoire de la municipalité.

(2) Si la compagnie à laquelle s'applique le paragraphe 146.01(1) ne reprend pas l'exploitation d'un embranchement tributaire du transport du grain mentionné à l'annexe I dans le délai prévu à ce paragraphe et qu'aucune convention de transfert n'est conclue au titre du processus établi en vertu des articles 143 à 145, la compagnie effectue les versements annuels prévus au paragraphe (1) à compter du

annual payments referred to in subsection (1).

146.2 (1) A railway company shall prepare and keep up to date a list of its sidings and spurs that it plans to dismantle and that are located in metropolitan areas or within the territory served by any urban transit authority, except for sidings and spurs located on a railway right-of-way that will continue to be used for railway operations subsequent to their dismantlement.

(2) The railway company shall publish the list on its Internet site and, whenever it makes a change to the list, it shall notify the following of the change within 10 days after the change:

- (a) the Minister;
- (b) the Agency;
- (c) the minister responsible for transportation matters in the government of the province in which the siding or spur that is the subject of the change is located;
- (d) the chairperson of the urban transit authority in whose territory the siding or spur that is the subject of the change is located; and
- (e) the clerk or other senior administrative officer of the municipal or district government in which the siding or spur that is the subject of the change is located.

(3) A railway company shall not take steps to dismantle a siding or a spur until at least 12 months have elapsed since the siding or spur was added to the list.

(4) Before dismantling a siding or a spur that has been on the list for at least 12 months, a railway company shall send simultaneously to each of the following an offer to transfer all of its interest in the siding or spur for not more than its net salvage value:

- (a) the Minister;
- (b) the minister responsible for

lendemain du dernier jour où l'offre aurait pu être acceptée au titre de l'article 145.

146.2 (1) La compagnie de chemin de fer est tenue d'établir et de mettre à jour la liste des voies d'évitement et des épis à démonter qui sont situés dans les régions métropolitaines, ou sur le territoire desservi par une administration de transport de banlieue, exception faite des voies et des épis situés sur une emprise qui continuera d'être utilisée dans le cadre d'opérations ferroviaires après qu'ils auront été démontés.

(2) La compagnie publie sa liste sur son site Internet. En cas de modification de celle-ci, elle en avise, dans les dix jours :

- a) le ministre;
- b) l'Office;
- c) le ministre chargé des transports dans la province où est situé la voie d'évitement ou l'épi qui est l'objet de la modification;
- d) le président de l'administration de transport de banlieue du territoire où est situé la voie d'évitement ou l'épi qui est l'objet de la modification;
- e) le greffier ou un premier dirigeant de l'administration municipale du territoire où est situé la voie d'évitement ou l'épi qui est l'objet de la modification.

(3) La compagnie ne peut démonter une voie d'évitement ou un épi que s'il figure sur la liste depuis au moins douze mois.

(4) Avant de démonter une voie d'évitement ou un épi qui figure sur la liste depuis au moins douze mois, la compagnie est tenue d'offrir de transférer tous ses intérêts, à un prix n'excédant pas leur valeur nette de récupération :

- a) au ministre;
- b) au ministre chargé des transports dans la province où la voie d'évitement ou l'épi est situé;
- c) au président de l'administration de

transportation matters in the government of the province in which the siding or spur is located;

(c) the chairperson of the urban transit authority in whose territory the siding or spur is located; and

(d) the clerk or other senior administrative officer of the municipal or district government in which the siding or spur is located.

(5) Subject to subsection 146.3(3), after the offer is received

(a) by the Minister, the Government of Canada may accept it within 30 days;

(b) by the provincial minister, the government of the province may accept it within an additional 30 days after the end of the period mentioned in paragraph (a) if it is not accepted under that paragraph;

(c) by the chairperson of an urban transit authority, that authority may accept it within an additional 30 days after the end of the periods for acceptance under paragraphs (a) and (b), if it is not accepted under those paragraphs; and

(d) by the clerk or other senior administrative officer of a municipal or district government, that government may accept it within an additional 30 days after the end of the periods for acceptance under paragraphs (a), (b) and (c), if it is not accepted under those paragraphs.

(6) Once a government or an urban transit authority communicates its written acceptance of the offer to the railway company, the right of any other government or urban transit authority to accept the offer is extinguished, and the railway company shall notify the other governments and urban transit authorities of the acceptance.

(7) If a government or an urban transit authority accepts the offer, but cannot agree with the railway company on the net salvage value within 90 days after the

transport de banlieue du territoire où la voie d'évitement ou l'épi est situé;

d) au greffier ou à un premier dirigeant de l'administration municipale du territoire où la voie d'évitement ou l'épi est situé.

Cette offre leur est faite simultanément.

(5) 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, une fois expiré le délai mentionné à l'alinéa a);

c) trente jours pour l'administration de transport de banlieue, une fois expirés les délais mentionnés aux alinéas a) et b);

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

(6) La communication, par écrit, de l'acceptation à la compagnie éteint le droit des autres destinataires de l'offre; celle-ci leur notifie l'acceptation de l'offre.

(7) Si les parties ne peuvent s'entendre, dans les quatre-vingt-dix jours suivant l'acceptation de l'offre, sur la valeur nette de récupération, l'Office la détermine, sur demande de l'une d'elles.

(8) Si l'offre n'est pas acceptée, la compagnie peut démonter la voie d'évitement ou l'épi à la condition d'en aviser l'Office.

acceptance, the Agency may, on the application of the government, the urban transit authority or the railway company, determine the net salvage value.

(8) If the offer is not accepted, the railway company may dismantle the siding or spur on providing notice to the Agency.

146.3 (1) A person to whom a railway line is offered under section 145, or to whom a siding or spur is offered under section 146.2, may apply to the Agency for a determination of the net salvage value of the railway line, siding or spur, as the case may be, at any time before the expiry of the period available to the person to accept the offer.

(2) The applicant shall without delay provide a copy of the application to the railway company, and the railway company shall without delay notify every other person to whom the offer was made and whose time to accept the offer has not expired that an application for a determination of the net salvage value was made.

(3) If an application is made under subsection (1), the time available to the applicant to accept the offer expires on the day that is 30 days after the day the Agency notifies the applicant of its determination of the net salvage value and the 30-day period for each other person to accept the offer is calculated on the expiry of the period available to the applicant to accept the offer.

(4) The applicant shall reimburse the Agency's costs associated with the application.

146.4 Sections 146.2 and 146.3 apply, with any modifications that are necessary, to

146.3 (1) Le destinataire de l'offre faite au titre des articles 145 ou 146.2 peut, avant l'expiration du délai imparti pour l'accepter, demander à l'Office de déterminer la valeur nette de récupération de la ligne, de la voie d'évitement ou de l'épi, selon le cas.

(2) Le demandeur envoie, sans délai, copie de sa demande à la compagnie de chemin de fer. Celle-ci en avise immédiatement les autres destinataires de l'offre à l'égard desquels le délai d'acceptation n'est pas expiré.

(3) Le demandeur dispose, après décision de l'Office, d'un délai de trente jours pour accepter l'offre. Les délais — de trente jours — dont disposent respectivement les autres destinataires pour l'accepter commencent à courir à compter de l'expiration du délai applicable au demandeur.

(4) Le demandeur est tenu de rembourser à l'Office les frais afférents à sa demande.

146.4 Les articles 146.2 et 146.3 s'appliquent, avec les adaptations

railway rights-of-way, that are located in metropolitan areas or within the territory served by any urban transit authority and in respect of which the sidings and spurs have been dismantled, that a railway company plans to sell, lease or otherwise transfer.

146.5 Sections 146.2 and 146.3 apply, with any modifications that are necessary, to passenger railway stations in Canada that a railway company plans to sell, lease or otherwise transfer or dismantle.

nécessaires, aux emprises qui sont situées dans les régions métropolitaines ou sur le territoire desservi par une administration de transport de banlieue, sur lesquelles se trouvaient des voies d'évitement ou des épis qui ont été démontés, et que la compagnie de chemin de fer entend transférer, notamment par vente ou bail.

146.5 Les articles 146.2 et 146.3 s'appliquent également, avec les adaptations nécessaires, aux gares de voyageurs situées au Canada que la compagnie de chemin de fer entend transférer, notamment par vente ou bail, ou démonter.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-508-08

STYLE OF CAUSE: THE TOWN OF BENGOUGH v.
CANADIAN PACIFIC RAILWAY COMPANY

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: February 18, 2010

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
DAWSON J.A.

DATED: March 19, 2010

APPEARANCES:

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