Federal Court of Appeal | Cour d'appel fédérale

Date: 20210720

Docket: A-267-18

Citation: 2021 FCA 147

CORAM: **NADON J.A.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

HUDSON BAY RAILWAY COMPANY

Appellant

and

MARK ROSNER

Respondent

Heard by online video conference hosted by the Registry

on April 27, 2021.

Judgment delivered at Ottawa, Ontario, on July, 20, 2021.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RENNIE J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] This is an appeal by Hudson Bay Railway Company (HBR) of a decision of the Canadian Transportation Agency (the Agency), dated June 13, 2018 (CONF-11-2018) (the Decision) holding that HBR breached its level of services obligations pursuant to subsection 113(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act) in failing to repair a railway line between

Gillam and Churchill, Manitoba (the line) that had sustained extensive damage from a flood. The Agency's decision came as a result of a complaint filed by an individual, Mark Rosner (the respondent or Mr. Rosner), in October 2017.

[2] HBR argues that the Agency committed three errors of law in arriving at its decision. First, the Agency misconstrued the provisions in the Act as requiring it to either repair the line or discontinue it. Second, the Agency ignored HBR's financial incapacity in assessing the length of the reasonable pause in HBR's level of services obligations. Third, the Agency's order was incapable of being complied with and unclear. For the reasons that follow, I would allow the appeal and set aside the Agency's decision.

II. Background

[3] HBR is a federally regulated railway company. It is the result of an amalgamation between the Churchill Terminal Company (aka OmniTRAX Canada) and the Hudson Bay Railway Company. HBR operates multiple railway lines in Manitoba and has held a certificate of fitness issued by the Agency since 1997.

[4] In May 2017, a flood caused extensive damage to the railway line operated by HBR between Gillam and Churchill, Manitoba. This is the only railway link to the town of Churchill. Consequently, the residents of Churchill and the surrounding areas rely heavily on the railway for the delivery of food supplies, building materials, and basic household items.

[5] On June 9, 2017, HBR declared *force majeure* following a preliminary damage assessment prepared by AECOM, an engineering firm, and announced that operation on the line would be suspended indefinitely.

[6] On August 18, 2017, AECOM released a report after having conducted a more comprehensive assessment of the railway line. The report estimated the cost of essential repairs to be $43.5 million. It also outlined a sixty-day repair plan to begin September 2017, noting that such a plan would be ambitious given the remote location of the repair sites and the limited time remaining in the construction season.

[7] On October 27, 2017, Mr. Rosner, on behalf of the Manitoba NDP caucus, filed an application with the Agency alleging that HBR's suspension of service constituted a breach of its level of services obligations under the Act.

[8] In its answer to Mr. Rosner, dated November 20, 2017, HBR stated that it was unable to resume services on the line due to the enormous cost of repairing damage resulting from a "once-in-200-year" flood. HBR claimed that it lacked the financial means, and stated that it would file financial information on a confidential basis with the Agency to this effect. HBR also noted that it had begun discussions with the Federal Government in order to obtain the necessary funds for the repairs.

[9] The railway line was repaired in October 2018, and has been operational since then.

III. Decision under review

[10] The Agency rendered its decision on June 13, 2018. In its analysis, it first noted that railway companies have a public duty to provide service on the lines they own or operate (Decision at para. 56). It then explained that, under the Act's transfer and discontinuance provisions, a railway company that no longer wishes to operate a line can be relieved of its service obligation. However, this obligation remains in effect until the line has been transferred or discontinued (Decision at paras. 57-58).

[11] The Agency relied on its previous decision in *Univar Canada Ltd. v. Canadian Pacific Railway Company (CP)*, CONF-4-2017 [CTA *Univar*] for the proposition that, while *force majeure* can justify a reasonable pause, a railway company can only be permanently relieved of its service obligations by following the transfer and discontinuance process (Decision at para. 60). It rejected HBR's argument that a railway company can be permanently exempted from its level of services obligation in light of its financial situation without following this process (Decision at para. 61).

[12] The Agency acknowledged that financial considerations may play a role in the length of the reasonable pause in a company's service obligations following a *force majeure* event. It gives the example of a situation where repair costs are disproportionate, the transfer and discontinuance process has been initiated, and the process can be completed within a relatively short time. Under such circumstances, the reasonable pause can extend to the end of that process (Decision at para. 62).

[13] At paragraphs 64-65 of its Decision, the Agency indicated that the question of breach turned on the length of the reasonable pause, citing general principles set out in CTA *Univar*. At paragraph 68, it found that HBR had been in breach of its level of services obligations starting in November 2017:

> The record before the Agency - and notably, the AECOM Report which HBR itself commissioned - indicates that had HBR taken all reasonable steps to repair the line after the force majeure event, the railway line could have been returned to operations for the "safe passage of light loaded trains" in November 2017. While AECOM qualified its estimate as "ambitious", it is noted that the report itself was completed three months after the flood occurred and that to this day, HBR has done nothing to restore the damaged infrastructure.

[14] With respect to remedy, the Agency ordered HBR to initiate the repair of the railway line by July 3, 2018, and to complete the repairs and resume operations as expeditiously as possible (Decision at para. 73). It also ordered HBR to produce monthly progress reports starting August 1, 2018.

[15] HBR was granted leave to appeal the Decision to this Court on August 27, 2018, pursuant to subsection 41(1) of the Act. It filed its Notice of Appeal on August 30, 2018.

[16] While the Agency is not a named party to this appeal, it has exercised its statutory right to be heard on appeals of its decisions pursuant to subsection 41(4) of the Act.

IV. Issues

[17] In my view, the central issues in this appeal can be stated as follows:

A. Did the Agency err in holding that a railway company cannot be indefinitely exempted from its service obligations under the Act without following the transfer and discontinuance process?

B. Did the Agency err in failing to consider HBR's financial situation in determining the length of the reasonable pause period that the company was entitled to?

V. Analysis

[18] While HBR's appeal was initiated before the Supreme Court rendered its landmark decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], there was no dispute between the parties that the standard of review should be determined pursuant to the analytical framework set out in that decision. Pursuant to *Vavilov*, there is a blanket presumption of reasonableness review. This presumption is rebutted where there exists a statutory mechanism providing that parties can appeal an administrative decision to a Court. When hearing such an appeal, a Court is to apply appellate standards of review to the administrative decision (*Vavilov* at paras. 36-37). This means that a Court must review questions of law under the standard of correctness, and apply the standard of palpable and overriding error to questions of fact and questions of mixed fact and law (where the legal principle is not readily extricable) (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 S.C.R. 235 [*Housen*]).

[19] HBR's appeal was brought under subsection 41(1) of the Act, which provides for an appeal from the Agency on a question of law or a question of jurisdiction. It is clear, then, that the *Housen* standards apply.

[20] In my view, the central issues concern whether the Agency erred in law. The Supreme Court in *Housen*, albeit writing in the context of negligence law, described an error of law as including the application of an incorrect legal standard, a failure to consider a required element of a legal test, or the mischaracterization of the standard (*Housen* at paras. 36-37).

[21] The question of whether a railway company can be indefinitely exempted from its level of services obligations under the Act without following the transfer and discontinuance process concerns the proper characterization of the legal standard used in determining the scope of a railway company's obligations under Part III, Division IV of the Act. The question of whether the Agency erred in failing to consider HBR's financial situation concerns whether the Agency failed to consider a required element of the legal test to determine the duration of the reasonable pause period. Both of these questions, being highly legal in nature, are subject to the correctness standard.

[22] Before turning to the merits of the dispute, there is the preliminary question of mootness that needs to be addressed. The respondent submits that the appeal is moot due to the fact that HBR ultimately complied with the Agency's order and repaired the line by October 31, 2018. As such, the "live controversy that prompted the complaint to the Agency and the Agency's decision has long since disappeared…" (Respondent's Memorandum of Fact and Law at para. 28). HBR disputes this assertion on the basis that since it has been found by the Agency to be in breach of its level of services obligations under the Act since November 2017, the company may still be ordered by the Agency to pay compensation under paragraph 116(4)(*c.*1) or found liable for damages under subsection 116(5) of the Act for the period between November 2017 and August

31, 2018. In HBR's submission, the potential for a liability finding remains as there is no limitations period set out in the Act.

[23] I agree with HBR that the dispute is not moot. As Mr. Rosner has correctly noted, mootness applies when a decision will not resolve a controversy that might affect the rights of the parties (*Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 at p. 353, 57 D.L.R. (4th) 231). However, the order sought by HBR from this Court would resolve a controversy, namely that of whether HBR should continue to be exposed to claims for compensation under the abovementioned provisions in the Act. Moreover, if the Agency's decision is set aside, HBR's legal exposure in relation to its failure to repair the line would cease, thereby affecting its legal rights with regard to potential claimants. For these reasons, I am satisfied that the dispute is not moot.

A. *Did the Agency err in holding that a railway company cannot be indefinitely exempted from its service obligations under the Act without following the transfer and discontinuance process?*

[24] HBR submits that the Agency set up a false binary in its interpretation of subsection 113(1) of the Act. That is, a railroad company can only be compliant with this provision by providing service despite being affected by *force majeure* events (subject to a short "reasonable pause") or, alternatively, by resorting to the discontinuance provisions in Part III, Division V of the Act (Appellant's Memorandum of Fact and Law at para. 41). This interpretation, in HBR's view, is contrary to the Supreme Court's ruling in *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271, 17 D.L.R. (2d) 449 [*Patchett*], which limits the scope of the level of services obligation to what is within the railway company's power.

[25] Moreover, HBR submits that this limitation arises as a matter of interpretation of subsection 113(1) and is not dependent on the company engaging the transfer and discontinuance provisions of the Act (Appellant's Memorandum of Fact and Law at para. 48). HBR says that the Agency wrongly assumed a duty to discontinue where it is difficult to foresee when a "reasonable pause" period will end following a *force majeure* event. In HBR's submission, the Agency failed to consider the possibility that, under the Act, a railroad company can be relieved from its level of services obligation due to financial considerations without a fixed or predetermined deadline for the commencement or completion of repairs (Appellant's Memorandum of Fact and Law at para. 58).

[26] Subsection 113(1) appears in Part III, Division IV of the Act and sets out the obligation of federally regulated railway companies to provide an adequate level of service:

Canada Transportation Act (S.C. 1996, c. 10)	**Loi sur les transports au Canada (L.C. 1996, ch. 10)**
113 (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,	**113 (1)** Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :
(*a*) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;	*a*) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;

(*b*) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;	*b*) fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;
(*c*) without delay, and with due care and diligence, receive, carry and deliver the traffic;	*c*) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;
(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and	*d*) fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;
(*e*) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.	*e*) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.

[27] The Agency, while not taking a position on the outcome of the dispute in its submissions to this Court, submits that the level of services provisions in the Act should be read harmoniously with the part of the Act on discontinuance. It notes that railway companies are given extensive power to perform public services. As such, they are subject to statutory obligations regarding service provision and the transfer and cessation of lines.

[28] The provisions on transfer and discontinuance can be found in Part III, Division V of the Act (relevant provisions of Division V are set out in Annex 1). Under subsection 146(1), a railway company ceases to have any obligations under the Act upon competing the steps outlined in sections 143-145. As noted by the Agency in its submissions, these provisions set out a

prescribed and orderly process reflecting the intention that railway lines be used for the public good rather than abandoned (Agency's Memorandum of Law and Fact at para. 28).

[29] The Agency submits that when a level of services complaint is made in the context of a railway line having indefinitely ceased operations, it is appropriate to consider the effect of this cessation on the disuse of railway lines without making them available to interested parties for continued operation or to the government at the net salvage value (Agency's Memorandum of Fact and Law at para. 32).

[30] The Agency relies on this Court's decision in *Canadian Pacific Railway Company v. Univar Canada Ltd.,* 2019 FCA 24, 2019 CarswellNat 14681 [FCA *Univar*] wherein we upheld the Agency's decision in CTA *Univar* and expressed the view that a railway company should not be allowed to indirectly circumvent the requirements of the transfer and discontinuance process by unilaterally deciding not to undertake repairs. The Agency adds that "to the extent that the level of services provisions can in themselves be read as allowing for a complete end to rail service based on financial considerations in principle, this would arise in only the most exceptional circumstances and only where the transfer and discontinuance provisions would not be offended" (Agency's Memorandum of Fact and Law at paras. 34-35).

[31] In assessing the merits of the parties' submissions, this Court must be guided by the Supreme Court's holding in *Patchett* that reasonableness permeates an assessment of a breach of service complaint. In that case, the question was whether the railway company breached its level

of services obligations as a result of its employees refusing to cross an illegal picket line. The Court found that there was no such breach:

> Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed.
>
> [*Patchett* at pp. 274-275.]

[32] Having carefully considered this passage from *Patchett*, I cannot help but agree with HBR's submission that reasonableness is an inherent limitation on the scope and effect of the level of services obligations under subsection 113(1), independent of whether transfer or discontinuance is at play. The Supreme Court makes it clear that "financial necessities" can in and of itself impose limits on the scope of a railway company's obligations under that provision. Specifically, a railway company cannot be compelled to bankrupt itself to meet all public demand for its services.

[33] Accordingly, reasonableness may require an indefinite pause on a railway company's level of services obligations if the alternative option means compelling the company to bankrupt

itself. The circumstances faced by HBR serve as a perfect illustration of this principle. Here, the damage to the railway line was caused by a "once-in-200-year flood". The damage was extensive and the cost of repairs exorbitant. As a *force majeure* event, the flood and resulting damage was an improbable event for which no railway company can be reasonably expected to prepare. Moreover, the railway company was in a precarious financial situation with no sign of help on the horizon at the time of the complaint. Given these circumstances, the company was hardly in a position to provide a timeline for repairs. Indeed, any commitment by HBR to funding the repairs, estimated to cost over $43 million, within the ambitious timeframe proposed in the AECOM report would have amounted to a commitment to the company's insolvency. For the Agency to impose such a demand would be to exceed the limits of reasonableness as articulated by the Supreme Court in *Patchett*.

[34] In light of the above remarks, I cannot agree with the Agency's submission that questions about the applicability of the transfer and discontinuance provisions are necessarily engaged once railway operations have ceased indefinitely. While I share the Agency's concerns regarding the negative consequences of indefinite cessation and the possibility of railway companies circumventing their level of services obligations, I am of the view that the transfer and discontinuance provisions in Part III, Division V of the Act apply to situations quite different than the one HBR found itself in. Specifically, Division V applies when a railway company *intends* to discontinue a railway line. This is evident in the numerous references to a railway company's intention. For instance, subsection 141(1) provides that 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" (my emphasis). Subsection 142(2) similarly states that 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" (my emphasis). During oral submissions, the Agency conceded that it had no power to compel a railway company to initiate the discontinuance process.

[35] On account of the length and complexity of the discontinuance process, the decision to initiate it is not one that a railway company would take lightly. In addition to indicating its plan to discontinue a line within the next three years, a railway company must advertise the availability of the line for continued rail operations (subsection 141(1)) and make an offer to transfer its interest in the railway line to governments if there are no interested parties (subsection 145(1)). The process also involves making numerous written disclosures and declarations (*e.g.* subsections 141(3.1), 143(2), 144(1), 144(5.1), 145(1.1), 145(4.1)). It is only at the conclusion of this lengthy and involved process that a railway company can legally discontinue its operation of the line (subsection 146(1)). In short, the discontinuance process is one that a railway company, in the normal course of things, deliberately chooses to embark on.

[36] This is not to deny that Division V of the Act may be engaged when a railway company attempts to circumvent the discontinuance regime by unilaterally deciding not to make repairs as was the situation in CTA *Univar*. In that case, Canadian Pacific (CP) refused to repair a damaged bridge based (among other reasons) on the calculation that it would never recover the return on capital investment (CTA *Univar* at paras. 52-53). In contrast to the case at bar, CP did not face a dilemma between meeting its service obligations (by repairing the bridge) and financial ruin.

Despite possessing the wherewithal to undertake the repairs, CP made a decision not to do so strictly based on business considerations. In such a circumstance, it is clear that the railway company's decision amounted to an attempt to circumvent the discontinuance provisions set out in Division V.

[37] The factual scenario in CTA *Univar* should not be confused with a situation where a railway company has expressed, through its communication and behaviour, an intention to continue operating the line once it secures the necessary resources to do so. In other words, a railway company's inability to provide a timeline on repairs should not, in and of itself, be interpreted as an intention to discontinue the railway line or an attempt to circumvent the requirements of Division V of the Act. Such an assumption excludes situations where the railway company is in the process of securing necessary funding and has taken "reasonable steps to maintain its public function" (*Patchett* at p. 275). Where this is the case, Division V is simply not engaged. I therefore fail to see how granting an indefinite pause period inherently threatens the integrity of the discontinuance process.

[38] The key question that arises out of the May 2017 *force majeure* event and HBR's financial circumstances relates to the length of the reasonable pause and, specifically, whether HBR was entitled to an indefinite pause under the circumstances. This is acknowledged by the Agency, in paragraphs 62 and 64 of its Decision, noting that the question of breach turns on the length of the reasonable pause after a *force majeure* event and that financial considerations are relevant to this determination. Where the Agency errs is in requiring the company to initiate the transfer and discontinuance process as a condition precedent to being granted an indefinite pause

in its service obligations. This is a mischaracterization of the applicable legal test. As discussed above, it fails to recognize reasonableness as an inherent limitation on the scope of a railway company's level of services obligations independent of whether the company intends to transfer or discontinue the line. The Supreme Court made it clear in *Patchett* that a railway company's financial situation is a central consideration in determining what the Agency can reasonably require of the company with respect to its level of services obligations.

[39] My finding that the Agency erred in law is in no way intended to minimize the negative consequences of an indefinite cessation. I acknowledge that the town of Churchill was, and remains, highly dependent on HBR's railway line for the delivery of basic goods. The economic hardship caused by the line's cessation is not in dispute. That being said, the law is clear that the Agency's determination of the scope of a railway's statutory duty to provide service, and allegations of breach, must be guided by reasonableness. Accordingly, the Agency must determine the appropriateness of an indefinite pause based on a "reasonable balance between the interests of both parties in the factual context before it" (FCA *Univar* at para. 27) as opposed to whether the railway company has initiated the discontinuance process under Division V. It would be unreasonable to compel a railway company to initiate this process where the company has every intention to continue operating the line but, for practical reasons, cannot provide an accurate timeline for the resumption of services.

[40] For the foregoing reasons, I find that the Agency in its Decision erred in holding that a railway company cannot be indefinitely exempted from its level of services obligations under the Act without following the transfer and discontinuance process.

B. *Did the Agency err in failing to consider HBR's financial situation in determining the length of the reasonable pause period that the company was entitled to?*

[41] Another point of contention between the parties is whether the Agency erred in law by failing to consider HBR's financial circumstances in determining the length of the reasonable pause period.

[42] The Agency acknowledged in its Decision the importance of taking into account a railway company's financial situation in determining the length of a reasonable pause following a *force majeure* event. Nonetheless, the Agency asserts that it "was required to weigh the strength of the arguments and evidence put forth by the Appellant" with respect to the HBR's claims of financial incapacity (Agency's Memorandum of Fact and Law at para. 42). The Agency then submits that, given the claims made by Mr. Rosner questioning HBR's financial incapacity, it was open to the Agency to arrive at its decision (at para. 43).

[43] While it was open for the Agency in its Decision to question HBR's claims of financial incapacity or the accuracy of the supporting documents, I can find no reference to HBR's financial situation in the Agency's determination of the reasonable pause period. Its reasoning for finding HBR in breach of its service obligations since November 2017 is contained in one short paragraph that makes no mention of the company's financial situation. It reads as follows:

> [68] The record before the Agency - and notably, the AECOM Report which HBR itself commissioned - indicates that had HBR taken all reasonable steps to repair the line after the *force majeure* event, the railway line could have been returned to operations for the "safe passage of light loaded trains" in November 2017. While AECOM qualified its estimate as "ambitious", it is noted that the report itself was

> completed three months after the flood occurred and that to this day, HBR has done nothing to restore the damaged infrastructure.

[44] The AECOM report referenced above assesses the damage that resulted from the flood, puts forward a repair plan, and provides a cost estimate. Whether this repair plan could have actually been carried out within the timeframe proposed in the report depended, however, on HBR's financial situation at the time. As indicated in HBR's November 20, 2017, answer to the Agency, and supported by financial statements provided by the company, HBR did not "have the financial capacity to undertake such extensive repairs" (Answer of HBR filed November 20, 2017, Appeal Book, Tab 6, at p. 061; HBR Financial Statements, Appeal Book, Tab 6(c)).The weighing of evidence that the Agency mentioned in its submission to this Court is conspicuously absent from the Decision. Indeed, there is nothing in the Decision indicating that the Agency actually performed such a weighing exercise.

[45] In my view, this failure to account for HBR's financial situation amounts to an error of law. It is not enough for the Agency to note the importance of considering a railway company's financial situation in determining the duration of a reasonable pause. The Agency must apply the very test it sets out (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39, 144 D.L.R. (4th) 1; FCA *Univar* at para. 64 (per Pelletier, J.A., dissenting)). In basing its findings of breach exclusively on when HBR could have completed the repairs had the company followed the repair plan outlined in the AECOM report, the Agency appears to have operated on the assumption that HBR had the resources to do so. There is no indication in the Decision that the Agency considered the financial information it had in its possession in assessing the scope of HBR's level of services obligations and the allegation of

breach. Had the Agency done so, it may well have come to a different conclusion on what repairs were feasible for HBR to undertake at the time of the complaint.

[46] Accordingly, I find that the Agency erred in law in failing to consider HBR's financial circumstances in determining the length of the reasonable pause period. Given the foregoing findings, I see no need to address HBR's argument that the Agency's order was unclear or incapable of being complied with.

VI. Conclusion

[47] For these reasons, I would allow the appeal, set aside the Agency's decision, and return the matter to the Agency for reconsideration in light of these reasons. I would also allow HBR its costs, both on the appeal and on its motion for leave to appeal.

"M. Nadon"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Marianne Rivoalen J.A."

ANNEX 1

Canada Transportation Act, S.C. 1996, c. 10	**Loi sur les transports au Canada, L.C. 1996, ch. 10**
Three-year plan	**Plan triennal**
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	**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.
…	[…]
Compliance with steps for discontinuance	**Étapes à suivre**
142 (1) A railway company shall comply with the steps described in this Division before discontinuing operating a railway line. The railway company shall publish and keep up to date on its Internet site or the Internet site of an association or other entity representing railway companies a report that sets out the date that it commenced and completed each step.	**142 (1)** La compagnie de chemin de fer qui entend cesser d'exploiter une ligne suit les étapes prescrites par la présente section. Elle publie et tient à jour sur son site Internet ou sur celui d'une association ou autre entité représentant les compagnies de chemin de fer un rapport indiquant la date où elle a commencé et celle où elle a franchi chacune des étapes prescrites par la présente section.
Limitation	**Réserve**
142 (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.	**(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.
…	[…]
Offer to governments	**Offre aux gouvernements et administrations**

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

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.

(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.

…

[…]

Discontinuation

Cessation d'exploitation

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.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RENNIE J.A. RIVOALEN J.A.
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