Federal Court of Appeal | Cour d'appel fédérale

Date: 20250117

Docket: A-104-23

Citation: 2025 FCA 12

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

BNSF RAILWAY COMPANY

Appellant

and

GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, CANADIAN NATIONAL RAILWAY COMPANY, AND CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Vancouver, British Columbia, on December 12, 2023.

Judgment delivered at Ottawa, Ontario, on January 17, 2025.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

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

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] BNSF Railway Company (BNSF) operates a railway. As part of its operations, it owns a parcel of land near Burnaby, British Columbia, upon which a vehicular bridge, a line of railway track and related railway facilities are constructed. The bridge crosses the BNSF railway tracks.

[2] The Greater Vancouver Sewerage and Drainage District (District) is responsible for constructing, maintaining, operating and administering the District's major sewerage and drainage facilities. The District owns and operates an overhead sewage wastewater pipe attached to BNSF's bridge. Like the bridge, the pipe crosses the BNSF railway tracks; therefore, the pipe qualifies as a "utility crossing" for purposes of section 100 of the *Canada Transportation Act*, S.C. 1996, c. 10.

[3] On application, the Canadian Transportation Agency (Agency) may make an order authorizing the construction of a suitable utility crossing if the parties are unable to negotiate an agreement for its construction: *Canada Transportation Act*, s. 101(3). If the parties reach an agreement and file it with the Agency, the agreement is treated as an order of the Agency: *Canada Transportation Act*, ss. 101(1), (2).

[4] In 2021, the District applied to the Agency for authorization to construct and maintain an overhead sewage wastewater pipe to replace the existing one on BNSF's bridge. The District proposed the new pipe be attached to a new utility truss bridge, itself attached to the abutments on the west side of BNSF's bridge. It also explained that the District had already replaced the sewage wastewater pipe to the north and south of BNSF's property, but had been unable to reach an agreement with BNSF regarding the work to replace the portion of the sewage pipe on BNSF's bridge.

[5] In response to the application, BNSF asserted that the Agency had no authority to consider the District's application. In particular, BNSF said that, in 1959, the District and

BNSF's predecessor entered into an agreement under which the predecessor granted the District permission to "attach, maintain and operate" a 12-inch sanitary sewer pipe on the bridge. BNSF asserted the District's proposed work was "maintenance" as contemplated by the 1959 agreement and that agreement therefore applied.

[6] In reply, the District expressed surprise at BNSF's position and asserted the 1959 agreement did not apply. It pointed to several differences between the existing pipe and the proposed new one. In the District's view, the proposed work did not constitute "maintenance" or "repair" of the existing pipe.

[7] The Agency agreed with the District. It concluded the 1959 agreement related to placing and maintaining the existing pipe, including future repairs, but characterized the new pipe as a "reconstruction". As the agreement did not contemplate such reconstruction, it did not apply and the Agency had jurisdiction to decide the application. The Agency found the proposed new sewage pipe to be a suitable utility crossing and authorized the District to construct and maintain it at the District's cost: Decision No. 14-R-2023 (Decision).

[8] BNSF appeals that Decision. It takes no issue with the Agency's finding that the proposed overhead sewer pipe is a suitable utility crossing. However, BNSF maintains that the 1959 agreement governs, the Agency has no jurisdiction, and the Agency erred in concluding otherwise.

I. This Court Has Jurisdiction to Decide the Appeal

[9] An appeal of an Agency decision to this Court is available with leave, but only on a question of law or jurisdiction: *Canada Transportation Act*, s. 41(1). On April 6, 2023, this Court granted BNSF leave to appeal. Nonetheless, when hearing the appeal, we must be satisfied the appeal engages a question of law or jurisdiction; if it does not, we must dismiss it: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at para. 56.

[10] The District says contractual interpretation is a question of mixed fact and law and BNSF has not established an extricable question of law. In contrast, BNSF asserts the Agency made an extricable error of law because it did not apply the proper principles of contractual interpretation. The District says, regardless, the Agency's decision is correct: the 1959 agreement does not authorize the proposed work.

[11] While contractual interpretation is generally a question of mixed fact and law, the failure to apply the correct legal principles is an extricable error of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 53 [*Sattva*]; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 42 [*Ledcor*].

[12] I agree with BNSF that the Agency failed to consider and apply the proper principles when it interpreted the 1959 agreement. Thus, I am satisfied the appeal raises an extricable question of law.

[13] However, I also agree with the District that applying the correct principles leads to the same result: the 1959 agreement does not apply to the proposed work. Accordingly, I would dismiss the appeal.

[14] Before I explain why I have come to these conclusions, a brief description about the parties to this appeal may be helpful.

II. Parties to the Appeal

[15] Canadian National Railway Company (CN) and BNSF are parties to a running rights and joint track usage agreement under which CN operates on the BNSF tracks.

[16] In its application to the Agency, the District also sought authorization to underground certain overhead communication lines that would otherwise interfere with the proposed construction of the utility truss bridge for the new sewage pipe. The District expressed uncertainty about whether BNSF or CN owned those lines, and said CN had asserted that the District needed a work access permit to complete the work.

[17] The Decision authorized the undergrounding of the communication lines as a "related work" to the utility crossing: *Canada Transportation Act*, s. 101(3). Although named as a party, CN did not participate in the appeal, and the authorization to underground the communication lines is not before us.

[18] The Agency has a right to be heard on an appeal of an Agency decision, but like CN, the Agency did not participate in this appeal: *Canada Transportation Act*, s. 41(4).

III. Standard of Review

[19] Statutory appeals require a reviewing court to apply the appellate standard of review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37. The standard of review for questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

IV. The 1959 Agreement and the Agency Decision

[20] The Agency made the Decision based on written submissions, including the District's application, BNSF's answer and the District's reply, and documents the District and BNSF provided to the Agency. The 1959 agreement was among BNSF's documents. (As nothing turns on the fact that BNSF was not the original signatory to the 1959 agreement, I proceed as if it were.)

[21] The 1959 agreement, excluding the exhibit, is a single page. It is appropriate here to set out the provisions I consider most relevant to this appeal:

> WITNESSETH:
>
> > [BNSF] … does hereby grant to the [District], license and permission to attach, maintain and operate a 12-inch sanitary sewer pipe to [BNSF's] Bridge No. 79.2, 1 mile north of New Westminster, British Columbia, to be located as shown colored red

on the print hereto attached, marked Exhibit “A”, and made a part hereof.

The [District], in consideration of such license and permission hereby covenants and promises as follows:

1. The [District] shall place and maintain said facility entirely at its own sole cost and expense…

2. The [District] hereby agrees to reimburse [BNSF] for any and all extra labor and material required on account of the present construction of said facility or future repairs thereof, or extra labor and material required in any reconstruction or repairing of said bridge by reason of the existence of said facility, and which would not have been incurred had not said facility been attached to said bridge.

…

4. [BNSF] shall be under no obligation to maintain a permanent support for said facility; and in the event of the destruction of said bridge from any cause whatsoever, this agreement shall ipso facto cease and terminate.

…

6. Either of the parties hereto may terminate this license and permission at any time upon giving the other party thirty (30) days written notice of its intention to do so.

7. The [District] hereby assumes all risk of and liability for any and all injuries to or death of persons or damage to or loss of property in any manner caused by the location and maintenance of said facility, or by the falling thereof, whether due in whole or in part to the negligence of [BNSF] or otherwise, and shall and will reimburse, indemnify and save harmless [BNSF] for and from any loss on account thereof. The [District] further agrees to appear and defend in the name of [BNSF] any suits or actions at law brought against [BNSF] on account of any such personal injuries, death or damage to property, and to pay and satisfy any final judgment that may be rendered against [BNSF] in any such suit or action. The liability assumed by the [District] herein shall not be affected or diminished by the fact, if it be a fact, that any such suit or action brought against [BNSF] may arise in whole or in part out of the negligence of [BNSF], its officers, agents, servants or employes [*sic*], or be contributed to in whole or in part by such negligence.

[22] While acknowledging the 1959 agreement "refers to future repairs", the Agency characterized the 1959 agreement as "relat[ing] to placing and maintaining the pipe", but as "not contemplat[ing] the reconstruction of the crossing": Decision at para. 21. The Agency said that, as a result, it had to evaluate whether the proposed work qualified as maintenance under the agreement.

[23] The Agency then referred to two earlier Agency decisions that distinguished between "maintenance" and "reconstruction". One described maintenance as "those ongoing works necessary to keep a facility in good repair and in an as-constructed condition", and described reconstruction as "building again to a higher standard, qualitative change, modification, improvements and/or alterations that add to the value or improve the original design of the structure": Decision at para. 22, citing Decision No. 105-R-2004 at para. 35. In the second, the Agency concluded that work performed to replace insulated rail joints constituted maintenance, and not construction or reconstruction, because "the capacity or design of the crossing" had not changed: Decision No. 476-R-2000.

[24] Returning to the District's application, the Agency described the proposed sewage pipe as "replacing" the old one: see Decision at paras. 8, 19, 24. It noted several differences between the two: the new one will have a different diameter (24 inches, rather than 12) and greater capacity; be made from a different material; be housed in a steel casing; be built to higher standards; and ensure greater protection beneath the utility truss bridge. The Agency concluded that the work "clearly qualifies as a reconstruction", and not maintenance: Decision at para. 24. Since the 1959

agreement did not contemplate reconstruction, the Agency concluded it did not apply. Accordingly, the Agency found it had jurisdiction to decide the matter.

V. The Agency Made an Error of Law

[25] When interpreting a contract, "[t]he overriding concern is to determine 'the intent of the parties and the scope of their understanding'": *Sattva* at para. 47, citing *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at para. 27 and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 64-65.

[26] To do so, one "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47. The surrounding circumstances are those "facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting" based on "objective evidence of the background facts at the time of the execution of the contract": *Sattva* at paras. 58, 60, citing *King v. Operating Engineers Training*, 2011 MBCA 80 at paras. 66, 70; see also *S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4 at para. 30.

[27] However, contractual interpretation must always be grounded in the contract's text, not the surrounding circumstances: *Sattva* at para. 57; see also *ING Bank N.V. v. Canpotex Shipping Services Limited*, 2017 FCA 47 at paras. 105-106, leave to appeal to SCC refused, 37553 (21 September 2017). The text predominates.

[28] BNSF asserts the Agency failed to apply the proper principles in interpreting the 1959 agreement.

[29] I agree.

[30] The Decision is not lengthy—the Agency's analysis of the interpretation and application of the 1959 agreement spans less than two pages. While reasons need not be lengthy, and need not address every argument, nowhere does the Agency analyze the text of the 1959 agreement with a view to determining what the parties intended. Rather, in interpreting the terms "maintain" and "repair" in the agreement, it relied on Agency decisions that did not concern contractual interpretation.

[31] The District says that, in interpreting the 1959 agreement, the Agency did not suggest it was compelled to follow its previous decisions. That may be true, but it is evident the Agency based its interpretation on those decisions.

[32] The District also says the Agency's reasons must be read in light of the submissions the parties made. I agree, but those submissions also did not address the principles of contractual interpretation.

[33] In its application to the Agency, the District did not raise the 1959 agreement. It explained why in its reply: when the District was attempting to negotiate an agreement with BNSF, BNSF never suggested that the 1959 agreement governed.

[34] In its answer to the application, however, BNSF made its position clear: the 1959 agreement governs. Nonetheless, while referring to the common law rules of contractual interpretation, BNSF failed to explain what they were or how they informed the interpretation of the agreement. The closest BNSF came was to submit the parties must have contemplated the need for a new pipe might arise, as indicated by the contrast in the 1959 agreement between "future repair" and "present construction". That said, the real focus of BNSF's written submissions was on the meaning of "maintain" and "repair" for which it cited dictionary meanings and jurisprudence.

[35] In reply, the District submitted that the decisions BNSF cited did not support BNSF's position. In its view, Agency decisions distinguishing between "maintaining" and "reconstructing" were relevant. Moreover, the District submitted the words "maintain" and "repair" in the 1959 agreement "refer to the specific 12-inch sanitary sewer pipe (i.e., the facility) on the [bridge]" and that the "better interpretation is that the 1959 [a]greement only authorizes work in relation to a 12-inch sewer pipe as specified" in the agreement.

[36] None of the submissions addressed the entire agreement. Yet that is what is required to determine what the parties to the agreement intended.

VI. Analysis

[37] We have the benefit of the 1959 agreement and the parties' submissions to the Agency in the record before us. Therefore, on this appeal, we are in the same position as the Agency and may interpret the 1959 agreement by applying the correct principles of contractual interpretation.

A. *The Interpretation of the 1959 Agreement*

(1) Surrounding Circumstances

[38] BNSF argues the background to the 1959 agreement as "detailed in the [District's] Application" confirms that it "was intended by the parties to give operational effect to a municipal sewer system"; and, as between the parties, the District would be "responsible for the construction, placement/location, operation, maintenance and future repair", which BNSF says "is precisely what is contemplated" by the proposed work: BNSF's Memorandum of Fact and Law at para. 59. It also submits the parties intended a perpetual relationship: BNSF's Memorandum of Fact and Law at para. 58.

[39] In my view, this submission goes too far.

[40] The District's application says nothing about the background to the 1959 agreement. This is not surprising given the District's claim it was unaware that BNSF thought the 1959 agreement applied. The application only describes what the existing pipe built decades ago does, why it needs replacement, and the proposed project to replace it with a new pipe with many new features.

[41] BNSF posits that its version of the background to, and purpose of, the agreement tells us what the agreement means. However, neither party put any objective evidence of that background or purpose before the Agency.

[42] The 1959 agreement does not contain any recitals describing the background facts leading up to or at its formation. Nor does it contain any provisions describing the purpose of the agreement. While such provisions are not required, one must be cautious about drawing conclusions regarding the parties' intentions based on a statement of purpose not otherwise grounded in the agreement or other admissible evidence.

[43] To illustrate the point, the information in the record equally supports the District's view of the agreement. Adapting BNSF's position, the agreement "was intended to give operational effect to a municipal sewer system *by permitting the District to place a specific sanitary sewer pipe in a specific location on BNSF's bridge*"; and, as between the parties, the District would be "responsible for the construction, placement/location, operation, maintenance and future repair *of that specific pipe*".

[44] While objective evidence of the background facts might have been helpful, we can interpret the agreement without it. Even if we had the benefit of such evidence, we must start with the agreement's text because it predominates.

(2) The Text of the 1959 Agreement

(a) *The licence*

[45] Although the 1959 agreement has no title, its text refers to it as "this license" and "this license and permission"; the agreement refers to the parties as "Licensor" (*i.e.*, BNSF) and "Licensee" (*i.e.*, the District) throughout. In my view, these words tell us what the agreement is

really about: BNSF's grant of a license and permission (collectively, licence) to the District, including the terms on which BNSF was prepared to grant it.

[46] The background to the agreement, as far as can be gleaned from the record, supports that characterization. The District's objects include the construction, maintenance, operation and administration of its major sewerage and drainage facilities, including those that service Burnaby and Coquitlam: Decision at para. 6; *Greater Vancouver Sewerage and Drainage District Act*, S.B.C. 1956, c. 59, s. 6(1). To fulfil those objects, the District needed permission to encroach on BNSF's property to construct an overhead sanitary sewer pipe. There is no evidence—and it would be remarkable if there were—that BNSF asked or wanted the District to build the pipe on its property. Rather, we must presume that, to fulfil its statutory duties, the District needed, and so sought permission, to encroach on BNSF's property and BNSF was prepared to grant it, albeit on the terms of the 1959 agreement.

[47] The provision granting the licence permits the District "to attach, maintain and operate a 12-inch sanitary sewer pipe to [a particular BNSF bridge]…to be located as shown" on a page attached to the 1959 agreement. In the context of the grant of a licence to encroach on property, the specificity of the language delineating the licence is meaningful.

[48] Here, absent any suggestion to the contrary, we must presume the language chosen by the parties reflects precisely the interference with BNSF's property the District needed to complete the work it proposed to undertake and which BNSF was prepared to permit. Viewed in that light, the description of each element of the licence grant in the 1959 agreement is significant: what the

District is permitted to do, the size and nature of the pipe, and the pipe's location on a particular bridge.

[49] The 1959 agreement does not use the expression "*a* facility" or "*a* sanitary sewer pipe". As noted above, the agreement contains no recitals or express statements of purpose. BNSF has not identified any part of the text favouring its proposition that the agreement should be interpreted in a manner consistent with BNSF's description of the purpose and intent of the parties, as described in paragraph 38 above.

[50] In my view, the text of the licence-granting provision strongly suggests that the parties intended the 1959 agreement to apply only to the particular sanitary sewer pipe described in that provision: the 12-inch sewer pipe. However, the interpretation exercise does not end there.

(b) *"Said facility"*

[51] The provision immediately following the licence-granting provision requires the District "to place and maintain said facility" at its own cost and expense. In my view, the expression "said facility" reinforces the particularized subject and limited scope of the licence and the agreement. Specifically, "said" is a shorthand way of capturing all of the specific details of the facility that is the subject of the licence: a sanitary sewer pipe of a particular size that is placed in a particular location on a particular bridge. Subsequently, the 1959 agreement repeatedly refers to "said facility", which is entirely consistent with an intention to capture the same details in those other provisions.

(c) *"Maintain", "repair", "construct" and "reconstruct"*

[52] In the 1959 agreement, the District promises to "maintain" the "said facility" and to reimburse BNSF for extra labour and material "required on account of the present construction of said facility or *future repairs* thereof" (emphasis added). The District also assumes all risk of, and liability for, injuries or damage to or loss of property in any manner caused by the "location *and maintenance* of said facility" (emphasis added).

[53] BNSF relies on these provisions for its position that the 1959 agreement governs the proposed work. It says "there is no difficulty in giving the terms 'maintain' and 'repair' a broad and elastic meaning sufficient from time to time for the reasonable needs of the District": BNSF's Memorandum of Fact and Law at para. 88. It elaborates, "the law has ascribed much broader definitions to [those words] in a variety of circumstances, in contrast to the narrow definitions applied by the Agency": BNSF's Memorandum of Fact and Law at para. 66.

[54] That may be so. However, BNSF does not explain why its jurisprudence is any more relevant to the interpretation of the agreement than Agency decisions interpreting those same terms. Given the task at hand, I view BNSF's jurisprudence and the Agency decisions as equally relevant, but not particularly useful.

[55] There can be no dispute that a particular word may have more than one meaning. That said, the question is not whether the words can have the meaning BNSF advances. I accept that they can. Rather, the question we face is what the parties to the 1959 agreement meant—

intended—by the words they used when they entered into the agreement. In my view, BNSF's submissions gloss over the principle that the interpretation exercise must start with the text of the agreement.

[56] The 1959 agreement uses each of "maintain", "maintenance", "construction", "reconstruction" and "repair". For example, it uses the expression "present construction…or future repairs" and "reconstruction or repairing" within a single clause.

[57] No doubt each of the terms "maintain", "reconstruct" and "repair" may have a meaning that encompasses the other two—a meaning that can be broad and all-encompassing. In certain contexts, any one of them may be interpreted as including all three concepts. However, each term also has a narrower meaning, one that does not overlap with the meaning of the other terms.

[58] In my view, the parties to the 1959 agreement must have understood that. Nonetheless, they chose to use each of those terms in the agreement. Absent any evidence to the contrary, I conclude that the parties did so to reflect their intentions—the parties chose, and used, the terms they did with those different (independent) meanings in mind. Thus, in the 1959 agreement they each mean different things; one does not encompass the other.

[59] The expression "reconstruction or repairing" illustrates this point, particularly given the parallelism with the expression "present construction…or future repairs". To give each term meaning, the parties must have intended each to have its own distinct meaning, one that does not include the other. In other words, the parties intended each term to be construed narrowly. Under

this narrow view, “repair” would mean restoring something that has been damaged, fixing, mending, patching and perhaps renovating, while “reconstruction” would mean building again after destruction or significant damage, akin to construction: Oxford English Dictionary, BNSF’s Memorandum of Fact and Law at paras. 64-65.

[60] The 1959 agreement requires the District to reimburse BNSF for extra labour and material costs related to the “*present* construction” of, or “future repairs” to, “*said facility*” (emphasis added). Present construction can only refer to the initial construction of the sanitary sewer pipe. Given that “repair” does not encompass “reconstruction”, the limitation on the reimbursement obligation also suggests the parties intended the agreement to apply only to the existing sanitary sewer pipe, including following future repairs, but neither a reconstruction following significant damage nor a complete replacement and relocation.

[61] The terms “maintain” and “maintenance” also appear in the 1959 agreement. The agreement grants the District a licence to “maintain and operate a 12-inch sanitary sewer pipe”. The District agrees to “place and maintain [the] said facility” and to assume all risk and liability caused by the “location and maintenance of said facility”. BNSF has no obligation to “maintain a permanent support” for that facility.

[62] In support of its view that “repair” and “maintain” should be given a broad meaning, one that includes useful or reasonable improvements, BNSF relies on cases that interpret those terms in various contexts, including in the context of railways: *Sevenoaks, Maidstone, and Tunbridge R. Co. v. London, Chatham and Dover R. Co.* (1879), 11 Ch. D. 625 (Eng. C.A.); *Weston v.*

County of Middlesex (1913), 30 O.L.R. 21, 16 D.L.R. 325 (S.C.); *Canadian Pacific R. Co. v. Grand Trunk R. Co.* (1914), 49 S.C.R. 525, 20 D.L.R. 56 [*Grand Trunk*]; *York Condominium Corp. No. 59 v. York Condominium Corp. No. 87* (1983), 42 O.R. (2d) 337, 148 D.L.R. (3d) 660 (C.A.); *Canadian National Railway Company v. Volker Stevin Contracting Ltd.*, 1991 ABCA 287; *Mott v. Leasehold Strata Plan LMS2185 UBC Properties Inc.*, [1998] B.C.J. No. 2730, 84 A.C.W.S. (3d) 588 (S.C.); and *Elahi v. Owners, Strata Plan VR 1023*, 2011 BCSC 1665. These cases, BNSF says, support its interpretation—the District could maintain the existing sewer by keeping it in its existing state or in an improved state, and there is no difficulty interpreting "maintain" as including improvements to meet the reasonable needs of the District: BNSF's Memorandum of Fact and Law at para. 88.

[63] However, while "precedents interpreting similar contractual language may be of some persuasive value…it is the intentions of the particular parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate": *Ledcor* at para. 38. Intention may differ from precedent: *Ledcor* at para. 38.

[64] Moreover, the cases BNSF cites are all distinguishable. Each interprets "maintain" (or "repair") in a manner appropriate to the relevant circumstances and context. That is exactly what we must do here.

[65] I accept that "maintain" has several possible meanings. Indeed, as observed in one of the above cases, it is "a word of varying and doubtful import": *Grand Trunk* at 59.

[66] The Agency offered one meaning: “ongoing works necessary to keep a facility in good repair and in an as-constructed condition”: see Decision at paras. 22, 24. For its part, BNSF also refers to dictionary meanings that include “to continue (something)”, “to care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep”, and “preserve or provided for the preservation of (a building, machine, road, etc.) in good repair”: BNSF’s Memorandum of Fact and Law at paras. 62-63.

[67] Among the meanings that may be attributed to “maintain”, what does the 1959 agreement tell us about the meaning the parties intended when they used it or a variation of it? The way the parties used it is significant and may reveal that the parties did not intend it to have an identical meaning each time it was used. The context informs us of what the parties meant.

[68] Considering the use of “maintain” and “maintenance” in the context of the provisions in which they appear, I do not agree with BNSF that the parties intended the broad meaning it advances insofar as those terms are used in provisions addressing the District’s rights and obligations.

[69] Starting with the provision granting the licence, the District is granted permission “to attach, maintain and operate” the sanitary sewer pipe described. Here, “maintain” can be interpreted as meaning work necessary to keep it operational and in good repair, similar to the Agency’s view. However, I am prepared to accept that BNSF intended to permit the District to make improvements to keep that sanitary sewer pipe operational and in good repair. As noted above, however, the terms of the licence extend only to the specific facility described—a 12-inch

sanitary sewer pipe located in a particular place on BNSF's bridge. BNSF granted a licence to maintain that facility, no other.

[70] Two other provisions in the 1959 agreement concerning the District's obligations also suggest this interpretation of "maintain". The agreement provides that the District "shall place and maintain said facility" at its own cost and expense and assumes all risks of injury, death and loss "caused by the location and maintenance of said facility, or by the falling thereof". Here, the meaning given to "maintain" described in paragraph 69 is equally apt. In my view, the ordinary meaning of "maintenance" typically would be that narrower meaning.

[71] There is one other use of "maintain" in the 1959 agreement. The District agrees that BNSF is "under no obligation to maintain a permanent support for said facility". Here, it is evident that the parties intended to limit BNSF's obligations, suggesting that the parties intended "maintain" to have a broader meaning. The remainder of the provision reinforces that broader interpretation—in the event the bridge is destroyed, the agreement automatically terminates.

[72] When used in connection with BNSF's obligations, "maintain" applies to *a* (*i.e.*, any) permanent facility. Insofar as it is used in connection with the District's licence and its covenants to BNSF, "maintain" applies to the "said facility" and thus only to a specific sanitary sewer pipe in a specific location. I do not accept that the parties to the agreement intended the District's covenant "to place and maintain *said* facility" to mean anything other than exactly that (emphasis added).

[73] BNSF appears to want to interpret the 1959 agreement as if the District had promised to maintain a sewer pipe on BNSF's bridge and BNSF had granted the District permission to do so, whatever the size, or the location on the bridge, or the changes required to the bridge (*i.e.*, here, construction of a utility truss bridge). I see no support in the text of the agreement for that interpretation.

(d) *Perpetual agreement*

[74] BNSF describes the 1959 agreement as a perpetual agreement. Specifically, it submits that the parties "contemplated a perpetual relationship" in which "the District took on all of the obligations [with] respect to the maintenance and repair of the sewer pipe, including the inevitable replacement or reconstruction of the pipe": BNSF's Memorandum of Fact and Law at para. 58.

[75] I accept that the 1959 agreement does not have a specified term. However, that alone does not indicate the parties intended the District to have a perpetual licence to place, construct and maintain *any* sewage pipe. The most that can be said is that the parties intended the agreement to continue indefinitely unless otherwise terminated in accordance with its terms. In any event, whatever the term of the agreement, the dispute here is about what that continuing agreement concerns.

[76] I also accept, as BNSF asserts, that the parties to the 1959 agreement must have known, or reasonably ought to have known, that the pipe might (or perhaps would) require a replacement at some future date. However, that knowledge does not necessarily mean the parties intended the

agreement to apply when that need arose. Instead, the fact that the agreement does not address replacement, or indeed reconstruction, of the "said facility" favours the District's (and Agency's) position that the parties did not intend it to apply in those circumstances, but rather intended a new agreement would be negotiated.

B. *The 1959 Agreement Does Not Apply to the Proposed Work*

[77] In my view, properly interpreted, the 1959 agreement does not apply to the District's proposal for a new sewage pipe. To the contrary, nothing in that agreement suggests that the parties intended that it would apply in those circumstances.

[78] I conclude that, unless otherwise terminated, the parties intended the 1959 agreement to apply only to the specific 12-inch sanitary sewage pipe described in the agreement for so long as the District maintained and operated it, as originally constructed or repaired.

[79] The proposed work described in the Decision, read in light of the District's application and the parties' submissions to the Agency, involves far more than what BNSF describes as "reasonable improvements" that may be characterized as maintaining or repairing "said facility". I would characterize the proposed new sewage pipe, there described, as the construction of a new utility crossing that entirely replaces the existing utility crossing while substantially changing and improving it in significant ways.

[80] Importantly, with the exception of its purpose and the need to cross BNSF's railway at BNSF's bridge, the new sewer pipe shares no features with the existing pipe. Yet, under BNSF's

view as described in paragraph 38 above, the purpose of the pipe—to give operational effect to a municipal sewer system that the District is responsible for constructing, locating, maintaining and repairing—should be determinative. I see no basis for that interpretation of the 1959 agreement.

VII. Costs

[81] Both parties seek costs of the appeal, including costs of BNSF's motion for leave to appeal the Decision. The order granting BNSF leave left the costs of the motion to the discretion of the panel assigned to hear the appeal.

VIII. Conclusion

[82] Because the Agency made an error of law in interpreting the 1959 agreement, this Court has jurisdiction to review that interpretation on appeal. I am satisfied that, properly interpreted, the 1959 agreement does not apply to the proposal that was the subject of the District's application to the Agency. Rather, the parties to that agreement intended otherwise. As a result, the Agency had jurisdiction to authorize the proposed work.

[83] Accordingly, I would dismiss the appeal and award the District costs of this appeal and BNSF's motion for leave to appeal the Decision, payable by BNSF.

"K.A. Siobhan Monaghan"
J.A.

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

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-104-23
STYLE OF CAUSE:	BNSF RAILWAY COMPANY v. GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT, CANADIAN NATIONAL RAILWAY COMPANY, AND CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 12, 2023
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	RENNIE J.A. MACTAVISH J.A.
DATED:	JANUARY 17, 2025

APPEARANCES:

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