Federal Court of Appeal | Cour d'appel fédérale

Date: 20251231

Dockets: A-207-23
A-65-24

Citation: 2025 FCA 234

CORAM: **RENNIE J.A.**
BIRINGER J.A.
PAMEL J.A.

Docket: A-207-23

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

and

CANADIAN PACIFIC RAILWAY COMPANY

Intervener

Docket: A-65-24

AND BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

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Heard at Toronto, Ontario, on January 23, 2025.

Judgment delivered at Ottawa, Ontario, on December 31, 2025.

REASONS FOR JUDGMENT BY:	PAMEL J.A.
CONCURRED IN BY:	RENNIE J.A. BIRINGER J.A.

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REASONS FOR JUDGMENT

PAMEL J.A.

[1] Canadian National Railway Company (CN Rail or the company) appeals two decisions of the Canadian Transportation Agency (Agency) dismissing the company's requests under section 32 of the *Canada Transportation Act*, S.C. 1996, c. 10 (CTA) to vary its Volume-Related Composite Price Index (VRCPI) and Maximum Revenue Entitlement (MRE) for the 2021/2022 and 2022/2023 crop years (relevant crop years).

[2] For the reasons that follow, I would dismiss the appeals without costs.

I. Background

[3] For more than 25 years, Parliament has regulated the pricing for rail transportation of grain from points in western Canada for export (western grain) by capping the total revenue that a prescribed railway company (railway company or companies) may earn for the movement thereof in each crop year. Crop years for western grain in Canada run the twelve-month period from August 1 to July 31 of the following year; CN Rail is one of two prescribed railway companies in Canada.

[4] Under the MRE regime prescribed under the CTA, railway companies have relative freedom to set freight rates charged to shippers and grain producers for the movement of western grain based on market conditions, so long as the railway company's total revenue during a crop year for the movement of western grain does not exceed its MRE for that crop year. If it does, pursuant to subsection 150(2) of the CTA and corresponding regulations, the railway company must pay all excess revenue and any penalty that may be specified in the regulations to the Western Grains Research Foundation (Foundation).

[5] The formula used by the Agency in the determination of a railway company's MRE, prescribed in subsection 151(1) of the CTA (MRE determination formula), includes a number of factors, one of which is the VRCPI, a numerical multiplier which acts as an inflation index determined by the Agency using forecasted price variations based on forecasting models, expert data, detailed railway company submissions of historical costing information specific to them,

forecasting indices and economic analyses and projections that look at macro trends in the economy more globally.

[6] Although the data used by the Agency in the determination of a railway company's VRCPI includes, amongst other information, actual pricing data from the railway companies, the VRCPI is not a cost-based determination. Rather it uses a predictive methodology to capture forecasted price variations in the cost of railway inputs, i.e., expected variations due to inflation in the cost of labour, fuel, services, materials and other capital items to be used by the railway company for the purpose of transporting western grain during the upcoming crop year. The record suggests the methodology used to determine a railway company's VRCPI is less a matter of a statutory direction or formulae, but rather of how the Agency determined to implement the CTA. Although Parliament defined the MRE regime, it left it largely to the Agency to set out the mechanics of implementation. The purpose of the VRCPI is to ensure that the transportation of western grain remains economically viable and that railway companies are not absorbing inflationary costs without compensation due to an artificially low MRE revenue cap. As recognized by this Court in *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at para. 6, "[w]hile the VRCPI is not the only factor affecting a railway's MRE, it is a significant factor."

[7] Pursuant to subsection 151(5) of the CTA, the Agency is tasked with determining a railway company's VRCPI for each crop year on or before April 30 of the previous crop year, i.e., at least three months prior to the start of the crop year to which the VRCPI relates, enabling western grain stakeholders—including railway companies, shippers and producers—to plan their

operations and account for freight rate increases or decreases in advance of the upcoming crop year based upon the anticipated MRE for each railway company. According to the Agency, this brings a level of certainty and predictability across the western grain market. Subsection 151(5) also provides that a railway company's MRE for each crop year is to be determined by the Agency on or before December 31 of the following crop year, i.e., up to five months after the end of the crop year to which the MRE relates so as to account for the amount of western grain actually transported as well as the average distance travelled during that period, both being factors, along with the VRCPI, of the MRE determination formula in relation to a given crop year.

[8] As such, the statutory scheme of the MRE regime provides that a railway company will only receive confirmation of its allowable MRE, or MRE space, up to twenty months after the determination of the VRCPI for the relevant crop year; a lot may happen within twenty months in relation to the impact inflation has on the cost of railway inputs during the crop year. Accordingly, the Agency's methodology for the determination of a railway company's VRCPI for a given crop year has two components: the first is a percentage increase or decrease reflecting the prospective year over year forecasted inflationary changes in the cost of railway inputs for the upcoming crop year (forecast projection) and the second being a retrospective adjustment to the previous year's forecast—either up or down—meant to capture any over or under forecasting by the Agency of the previous year's VRCPI, incorporating updated forecasts for the upcoming crop year based upon updated data of the railway companies' actual cost of railway inputs for the previous crop year (forecasting variance). The result of combining the prospective inflationary expectations of the forecast projection with the retrospective adjustment of the forecasting

variance is applied by the Agency, as a percentage, to the VRCPI of the previous year to arrive at the numerical multiplier or inflation adjustment for the VRCPI for the upcoming crop year.

[9] The Agency's determinations with respect to the company's VRCPI and MRE with respect to the relevant crop years may be summarized as follows:

- April 2021 – the Agency determined CN Rail's 2021/2022 VRCPI for the crop year set to begin on August 1, 2021 to be 1.4505, an increase of 0.50% over the previous year. This increase was the combination of an increase of 1.06% in the forecast projection component for the 2021/2022 crop year coupled with a decrease of 0.56% in the forecasting variance component to previous year's forecast (2021/2022 VRCPI Determination).

- The 2021/2022 crop year begins August 1, 2021, and runs to July 31, 2022.

- March 15, 2022 – the Agency adjusts the 2021/2022 VRCPI to 1.4572 to account for the increase in the costs incurred by CN Rail to obtain and maintain hopper cars, pursuant to subsection 151(6) of the CTA.

- April 2022 – the Agency determined CN Rail's 2022/2023 VRCPI for the crop year set to begin on August 1, 2022, to be 1.6319, an increase of 11.99 % over the previous year. This increase was the combination of an increase of 4.55% in the forecast projection component for the 2022/2023 crop year coupled with an increase of 7.44% in the forecasting variance component to the previous year's forecast (2022/2023 VRCPI Determination).

- The 2022/2023 crop year begins August 1, 2022, and runs to July 31, 2023.

- December 2022 – the Agency determined CN Rail's 2021/2022 MRE (for the 2021/2022 crop year) to be $589,140,501 (2021/2022 MRE Determination). The 2021/2022 MRE Determination was made using a VRCPI of 1.4572, i.e., it did not take into consideration the forecasting variance of 7.44% made in April 2022. As CN Rail's actual western grain revenue for the 2021/2022 crop year was $592,208,589, the Agency also ordered CN Rail to pay $3,221,492 in excess revenue and penalties to the Foundation.

- April 2023 – the Agency determined CN Rail's 2023/2024 VRCPI for the crop year set to begin on August 1, 2023, to be 1.8295, an increase of 12.11% over the previous year. This increase was the combination of a decrease of 0.08% in the forecast projection component for the 2023/2024 crop year coupled with an increase of 12.19% in the forecasting variance component to the previous year's forecast (2023/2024 VRCPI Determination).

- December 2023 – the Agency determined CN Rail's 2022/2023 MRE (for the 2022/2023 crop year) to be $1,076,064,100 (2022/2023 MRE Determination). The 2022/2023 MRE Determination was made using a VRCPI of 1.6319, i.e., it did not take into consideration the forecasting variance of 12.19% made in April 2023. As CN Rail's actual western grain revenue for the 2022/2023 crop year was $1,079,522,039, the Agency also ordered CN Rail to pay $3,630,836 in excess revenue and penalties to the Foundation.

[10] As noted, a significant increase in CN Rail's cost of railway inputs took place during the relevant crop years as a result of a considerable spike in inflation, in particular, according to CN Rail, for steel, fabricated metals and petroleum-related products as a result of what the company refers to as the "unpredictable, once-in-a-century events" of the COVID-19 pandemic and the conflict in Ukraine. To put matters into perspective, the record shows that between the 2010/2011 and 2021/2022 crop years, the retrospective adjustment made by way of the forecasting variance component to CN Rail's annual VRCPI ranged between a decrease of 4.10% and an increase of 3.60%. However, for the relevant crop years, that component represented an increase of 7.44% and 12.19% respectively. According to CN Rail, the degree of what the company called the Agency's "forecasting errors in the economic sense" with respect to the relevant crop years was unprecedented—as evidenced by the magnitude of the forecasting variance components—and led to seriously undervalued MRE determinations for those years corresponding to lost MRE space for the company of about $175 million over that period. CN Rail asserts that the company was left to unfairly absorb significant losses during the relevant crop years on account of the remarkable and unexpected rise in its cost of railway inputs coupled with an artificially low MRE which limited the freight rates the company was able to charge its shippers for the carriage of western grain during that period.

[11] As noted, the forecasting variance component of the VRCPI determined for any crop year is not given retroactive effect. Rather, there is a one-year lag in the adjustment to the previous year's VRCPI; the adjustment to the VRCPI is made prospectively, with the forecasting variance component taken into account in the determination of the VRCPI for the following crop year, thus allowing, in the Agency's view, for any necessary adjustment at that time.

[12] Section 32 of the CTA (section 32) allows an interested party to apply to the Agency to, *inter alia*, review, rescind or vary any of its previous decisions. Section 32 states:

Powers of Agency	**Attributions de l'Office**
Review of decisions and orders	*Révision, annulation ou modification de décisions*
32 The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.	**32** L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.
(Emphasis added.)	(Je souligne.)

[13] The sole condition prescribed by Parliament for the exercise by the Agency of its discretion under section 32 is that there be, in the opinion of the Agency, "a change in the facts or circumstances pertaining to the decision" (which I will refer to going forward simply as a "cifoc") since the decision in question. The Agency has also issued a comprehensive *Interpretation Note* which CN Rail does not challenge, in which it sets out the following test for the exercise of its power under section 32, which states in part:

> There is a basic legal principle in favour of the finality of court and tribunal decisions. This principle is in the interests of parties to a proceeding who have legitimate expectations that a decision, once rendered, is final. Accordingly, there are very limited circumstances where the Agency can reopen its final decisions and orders.
>
> […]

> The Agency has adopted a comprehensive statement of the test to be applied in section 32 applications. It is as follows:
>
> In dealing with an application for review, the Agency must first determine whether there has been a change in facts or circumstances pertaining to the decision. If no such change exists, the decision stands. If, however, the Agency finds that there has been a change in facts or circumstances since the issuance of the decision, it must then determine whether such a change is sufficient to warrant a review, rescission or variance of the decision.
>
> […]
>
> (Emphasis added.)

[14] Thus, to succeed on an application for review or reconsideration under section 32 (a "section 32 request"), the applicant must convince the Agency of the existence of a cifoc pertaining to the decision since its issuance and, secondly, that such a change is sufficient to warrant a review, rescission or variance of that decision (sufficiency threshold).

[15] In January 2023, CN Rail applied to the Agency under section 32 to, *inter alia*, reconsider its previous determinations regarding the railway company's 2021/2022 VRCPI Determination and 2021/2022 MRE Determination so that, according the CN Rail, they properly reflected the circumstances which necessitated the unprecedented forecasting variances, as well as for reimbursement of payments it was ordered to make to the Foundation in respect to that crop year. On April 25, 2023, the Agency issued Determination No. R-2023-88 (First Agency Decision) in which it denied CN Rail's request. In May 2023, CN Rail similarly applied to the Agency under section 32, this time to, *inter alia*, reconsider its previous determination of the company's 2022/2023 VRCPI Determination which would eventually inform the 2022/2023 MRE Determination in December 2023. On October 27, 2023, the Agency issued Determination

No. R-2023-215 (Second Agency Decision) in which it again denied CN Rail's request (collectively, the Agency Decisions).

[16] The essence of CN Rail's section 32 requests was that the underlying circumstances which led to the unprecedented forecasting variances for the relevant crop years were so extraordinary and unexpected as to constitute a cifoc under section 32. In addition, CN Rail also argued that the magnitude of the forecasting variances and the extent of the losses it purportedly suffered during the relevant crop years as a result thereof were not only new facts and circumstances in their own right, but also went to satisfying the sufficiency threshold of the test for the exercise of the Agency's section 32 powers as set out in the *Interpretation Note*.

[17] Given that the 2021/2022 crop year had ended and the 2022/2023 crop year was well underway by the time CN Rail made its section 32 requests for those years, the company also requested for the Agency to recognize its purported losses for those years and allow it to seek compensation through the MRE process going forward, pursuant to the Agency's remedial powers under section 27 of the CTA. The mechanism CN Rail was proposing was for the Agency, in essence, to adopt a system of credits by granting the company additional MRE space in future crop years, above and beyond what would normally be determined by the company's MRE determinations for those crop years, to compensate for any revenue that may have been lost during the relevant crop years (remedial credit system). In addition, CN Rail argued that although the Agency has in the past taken the position that positive and negative forecasting variances tend to offset each other over time, the magnitude of the discrepancy and financial

losses during the relevant crop years could not balance out over time, thus warranting the relief being sought by company.

[18] In the end, the Agency determined that a forecasting variance does not equate to a cifoc in the context of the MRE regime within the meaning of section 32 warranting the exercise of its discretionary powers and therefore declined to vary its earlier decisions as requested by CN Rail. In arriving at its decision, the Agency asserted that a forecast is a prediction of future price changes and that consistently accurate forecasts of any pricing element are rare. In fact, not only are forecasting variances to be expected by design, discrepancies of similar magnitude could occur again in the future, to the benefit or detriment of the railway companies or shippers in any given year, considering such factors as the volatility of petroleum pricing, climate change and unexpected world events such as pandemics, wars and other geopolitical tensions. As such, asserted the Agency, the fact that the forecasts used in the determination of the VRCPI for a given crop year were ultimately different from actual price data of the cost of railway inputs the company experienced during the relevant crop year on account of extraneous events does not equate to a cifoc pursuant to section 32 in the context of the MRE regime (see paragraph 21 of the First Agency Decision and paragraph 31 of the Second Agency Decision).

[19] The Agency recognized that section 32 may be appropriate to vary VRCPI determinations for other reasons, for example to correct inputting or calculation errors by the Agency or in response to a change in its methodology. However, forecasting variances are not errors and given the legislative framework for the MRE regime, the policy concerns regarding stability, predictability and the principle of finality, as well as the fact that its methodology

already provides a mechanism to address forecasting variances in a railway company's annual VRCPI by taking such variances into account in the VRCPI and ultimately the MRE determinations for the following crop year—thus allowing railway companies to benefit from increased MRE space during the following crop year beyond the expected year over year forecast projection—the Agency found that it was both "unnecessary and inappropriate" to use section 32 to vary the VRCPI on account of forecasting variances.

[20] In the Second Agency Decision, in particular, the Agency stressed that, as noted by CN Rail in its submissions, the MRE regime alters the normal market forces that affect the shipment of western grain. For that reason, according to the Agency, there are broader policy considerations requiring it, in the exercise of its regulatory mandate, to be cautious in exercising its discretionary authority under section 32. Updating the forecasting in the VRCPI within a given crop year, in the opinion of the Agency, reduces predictability in the industry and could undermine the fairness of the MRE regime for all stakeholders. The Agency commented that reduction in predictability in forecasting could result in difficulties for railway companies in monitoring their MRE to avoid paying out penalties to the Foundation, as well as for grain companies and producers in budgeting their rail freight costs when they set the pricing for the sale of grains to international customers. According to the Agency, if it were to accept CN Rail's arguments, the annual VRCPI determination—designed to be a final decision to provide all stakeholders in the movement of western grain some level of certainty and stability, and a common basis for planning for the upcoming crop year—would devolve into a series of in-season interim decisions modified through applications by stakeholders under section 32 over the course of the crop year to which it applies.

[21] Leave having been granted pursuant to section 41 of the CTA, CN Rail now appeals the First Agency Decision (appeal docket A-207-23) and the Second Agency Decision (appeal docket A-65-24). Although CN Rail seeks a series of relief in its notices of appeal, during the hearing before us the company clarified that what it was ultimately seeking was for the Agency Decisions to be set aside and remitted back to the Agency for redetermination based on this Court's reasons in relation to the application of section 32.

II. Preliminary matters

[22] I have set out the relevant provisions of the CTA in the appendix to these reasons.

[23] Although in its written submissions CN Rail raised the prospect of the Agency's determinations of its VRCPI for the relevant crop years being inconsistent with the provisions of section 112 of the CTA which requires rates or conditions of service established by the Agency under Division IV to be "commercially fair and reasonable to all parties," the company advised during the hearing that it was no longer pursuing that argument.

[24] In addition, Canadian Pacific Railway Company (now known as Canadian Pacific Kansas City)—the other prescribed railway company in Canada under the MRE regime and a competitor to CN Rail—has intervened in both appeals seeking to ensure that it receives equal treatment under the MRE regime; it requests that in the event this Court were to order the Agency to reconsider its decisions in response to CN Rail's section 32 requests and vary the company's

VRCPI and MRE for the relevant crop years, that the Agency also do so for Canadian Pacific Railway Company in accordance with the reasons given by this Court.

III. Discussion

A. *Formulation of the issues*

[25] Although CN Rail initially framed its section 32 submissions to the Agency by characterizing the forecasting variances both as new facts and circumstances in their own right as well as "forecasting errors" that needed to be corrected, before us there was no real dispute between the parties that forecasting variances are to be expected; I agree. In fact they are an integral part of the Agency's predictive methodology in determining a railway company's VRCPI, as the forecasting of inflationary variances in the cost of railway inputs embedded in the VRCPI three months prior to the relevant crop year is a prospective process of informed speculation, a reasoned judgment that uses existing knowledge and data to make a prediction about future inflation, while the determination of the actual increase or decrease in the cost of railway inputs eventually experienced by railway companies during that crop year is one of retrospective certainty. As reflected in the Agency Decisions, forecasting variances are a natural byproduct of the MRE regime with the accuracy of its inflationary forecasts being invariably subject, in essence, to the vagaries of domestic and international events—for example global health crises and political conflicts, supply management policies of petroleum exporting countries, global warming affecting commodity prices, the setting of a country's fiscal and

monetary policies and interest rates, as well as tariffs and trade wars, just to name a few—which occur after the initial determination of a railway company's VRCPI is made.

[26] There also does not seem to be any dispute that global events—in this case, as highlighted by CN Rail, the COVID-19 pandemic and the conflict in Ukraine in 2022—contributed to a considerable disruption in global supply chains and significant increases in world fuel prices and material costs which resulted in CN Rail's cost of railway inputs during relevant crop years being remarkably higher than the inflationary forecasting of the Agency would have suggested.

[27] I should also mention that this appeal does not challenge the Agency's VRCPI and MRE determinations for the relevant crop years as made at the time, nor is it about whether the Agency improperly constrained its interpretation of section 32 to exclude all VRCPI and MRE determinations from the reconsideration process under that section. Both parties acknowledge that quite apart from mandatory adjustments to a railway company's VRCPI prescribed in paragraph 151(4)(c) of the CTA to reflect the cost of purchasing and maintaining hopper cars, section 32 has been applied to reconsider past Agency VRCPI and MRE determinations to address specific substantive costs components; examples given include, as mentioned earlier, where there have been clerical errors (see Decision No. 374-R-2015 dated December 2, 2015), calculation errors (see Determination R-2019-221 and Decision 374-R-2015) or following a subsequent change in Agency methodology or policy which impacted the treatment of key railway inputs (see Determination No. R-2022-16 / Determination No. R-2022-104 and Decision No. 529-R-2009 / Decision No. 628-R-2008).

[28] The Agency argues that CN Rail is looking to get into its regulatory wheelhouse through the back door of a section 32 request. No issue was taken before us by the Agency with the proposition that facts or circumstances which cause forecasting variance are "changes" or "new" in the literal or textual sense, in that they would necessarily have taken place after the initial VRCPI determination was made. However, what the Agency essentially decided was that future facts and changes in circumstances which cause forecasting variances do not equate, for the reasons given by the Agency, to a cifoc pertaining to VRCPI determinations because forecasting variances are both expected and integral to the predictive methodology developed by the Agency for the determination of a railway company's VRCPI, and by extension a railway company's MRE. According to the Agency, the decision to exclude from the operation of section 32 new facts and circumstances of this nature and to refuse to modify the Agency's predictive methodology with the incorporation of CN Rail's proposed remedial credit system to essentially account for forecasting variances in the crop year to which they relate rather than in the subsequent year is a factually suffused and policy-imbued decision as it relates to Parliament's decision regarding the regulation of the movement of western grain, and goes to the very heart of the development of that Agency's predictive methodology for the determination of a railway company's VRCPI. As such, the Agency submits, it is precisely a "thing" that Parliament forbids this Court to take on (*Teksavvy Solutions Inc. v. Bell Canada*, 2024 FCA 121 (*Teksavvy*), at para. 17, leave to appeal to SCC refused, no. 41486 (March 27, 2025); *Halton (Regional Municipality) v. Canada (Transportation* Agency), 2024 FCA 122 (*Halton*) at para. 8).

[29] Also, although the Agency concedes that the context of the dispute between the parties may contain questions of law—for example whether it correctly interpreted section 32 and

applied the MRE provisions cited in the Agency Decisions—the Agency says that is not the question being raised by CN Rail. What CN Rail is disputing, according to the Agency, are the policy reasons given by the Agency for declining to exercise its jurisdiction under section 32 on the grounds that, in its opinion, facts and circumstances which cause forecasting variances are not to be treated as a cifoc for the purposes of that provision. The Agency says that those policy reasons are within its "wide discretionary authority over how to exercise its mandate" (*Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 at para. 58, Abella, Moldaver and Karakatsanis JJ., dissenting), and thus outside the ambit of subsection 41(1) of the CTA.

[30] CN Rail asserts that it is not challenging the Agency's methodology in the determination of a railway company's VRCPI and frames the issue in a much narrower way by focusing entirely on the words: "a change in the facts or circumstances" within section 32. The company argues that the Agency gave section 32 an overly constrained interpretation and that proper statutory interpretation dictates that the scope of section 32 is broad and applies to all decisions of the Agency including those pertaining to VRCPI forecasting variances. CN Rail essentially asserts that the cifoc is not the existence of the forecasting variances themselves but rather what the company identifies as the exceptional and unpredictable events and circumstances which form the root cause of those forecasting variances. In any event, argues CN Rail, even if forecasting variances are an integral part of the VRCPI methodology, never has there been a discrepancy in forecasting variances of the magnitude seen during the relevant crop years. Either way, CN Rail argues that the determination of what constitutes a cifoc under section 32 is a question of statutory interpretation and thus a matter of law, or at least an extricable question of law within a matter of mixed fact and law, to be reviewed on a correctness standard.

[31] Quite apart from the main issue in this matter, CN Rail also raises what it frames as issues of procedural fairness, *to wit*, that, first, the Agency failed to give proper reasons or engage with CN Rail's arguments and, second, that notwithstanding that the company takes no issue with the importance of the principle of finality in the Agency's decision-making process, the Agency nonetheless failed to provide the company the opportunity to address the Agency's concerns regarding predictability and finality before raising them for the first time in the Second Agency Decision as support for its reasons for determining that forecasting variances do not lend themselves to being cifoc in the context of VRCPI determinations.

B. *Analysis*

[32] Subsection 41(1) of the CTA provides that this Court may hear an appeal from the Agency, on leave, on a question of law or a question of jurisdiction. Although leave has been granted, there is no question that "the subsection 41(1) issue remains live during the appeal and the Court must dismiss any appeal over which it does not have jurisdiction" (*Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 (*Emerson*) at para. 56); in short, "courts can act only within the limits of the law set by the legislator" (*Emerson* at para. 9).

[33] For the most part, a question of jurisdiction—although it may include issues of procedural fairness—is really a question of statutory interpretation, in other words a question of law (*Emerson* at paras. 14–15 and 19). In addition, this Court has determined that a question of law includes extricable questions of law/legal standards or legal principle that arise from

questions of mixed fact and law and issues of procedural fairness (*Halton* at para. 6; *Emerson* at paras. 25–26; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*) at para. 36). As was set out by this Court in *Emerson*, Parliament's intention behind subsection 41(1) of the CTA is that factually suffused and policy-imbued decisions other than issues of procedural fairness are not to be appealed to this Court. (*Emerson* at paras. 13 and 19).

[34] In addition, this Court has held that "[e]xtricable questions of law/legal standards are best regarded as questions of law of the sort intended by Parliament to be reviewed by this Court under subsection 41(1)" (*Emerson* at para. 26). Unlike the MRE determination formula, the CTA does not provide a statutory definition for what constitutes a cifoc for the purposes of triggering the Agency's discretionary power to reconsider a prior decision under section 32. However, section 32 does provide qualifying words, in that the manner in which that determination is made is left to "the opinion of the Agency."

[35] Here, I think the Agency puts the cart before the horse. Before we can consider the appropriateness of the Agency's exercise of discretion in declining to vary its earlier VRCPI and MRE determinations, we must determine the scope of that discretion. That is a question of law as it involves the statutory interpretation of section 32. As such, the narrow issue in this appeal is whether the Agency committed a reversable error of law or jurisdiction—as required under subsection 41(1) of the CTA—in having determined that, within the context of the MRE regime, forecasting variances in VRCPI and MRE determinations did not equate to a cifoc pursuant to section 32 (see the First Agency Decision at paragraphs 21 and 22, and the Second Agency Decision at paragraphs 31 and 32).

[36] I also, however, disagree with what amounts to blinders put on by CN Rail in its statutory interpretation of section 32, and find that the company's efforts fall short and remain unconvincing.

[37] In fairness, CN Rail correctly sets out that the modern approach to statutory interpretation requires section 32 to be read in its entire context, in its grammatical and ordinary sense harmoniously with the scheme and the objects of the CTA, and the intention of Parliament. However, in considering the text of section 32, CN Rail argues that the "text is broad enough to include new or unpredictable events under the rubric of 'new facts'". I do not hear the Agency challenging that proposition. CN Rail also argues that the words of section 32 suggest that it applies to all Agency decisions and orders, which would include those relating to the VRCPI and MRE determinations. Again, there is no dispute here; the record includes section 32 variances to VRCPI and MRE determinations.

[38] As mentioned, CN Rail focuses its statutory interpretation on the words "a change in the facts or circumstances" found in section 32. However, what is strikingly missing from the company's legal analysis, both in its written representations and in its oral submissions before us, is any mention of the inconvenient truth of the qualifying words "in the opinion of the Agency," or how those qualifying words would go to inform the determination of not only what constitutes a cifoc but also how those words would inform any discretion of the Agency to consider forecasting variances as not equating to a cifoc in this context. The words "in the opinion of the Agency", "change in the facts or circumstances" and "pertaining to the decision" must be read together. The manner in which CN Rail frames the debate neutralizes what is clearly

Parliament's intention to give the Agency discretion in the determination of what constitutes a cifoc for the purposes of section 32. If those qualifying words were not intended to inform the manner in which the determination of what constitutes a cifoc was to be undertaken by the Agency, Parliament would not have included them in section 32.

[39] In considering the context of section 32, CN Rail argues that the provision is situated in Part I of the CTA ("Administration") and under the section dealing with the "Powers of the Agency" as opposed to the section dealing with "Review and Appeal" in which section 41 is situated. The company argues that since section 32 is included among the Agency's general powers as opposed to being in the more restrictive section relating to appeal which only allows for opportunities to challenge errors in an Agency decision, it follows that the reconsideration power was intended to be general in scope, thus supporting the company's textual analysis. Again, I fail to follow CN Rail's reasoning. Sections 32 and 41 deal with completely distinct situations; section 41 allows a stakeholder to challenge an Agency decision, with limited scope as to the nature of the challenge. Section 32 on the other hand does not involve a challenge to an Agency decision, but rather the discretionary power of the Agency to reconsider its own previous decisions, upon application, where in its opinion, the facts and circumstances so warrant.

[40] In considering the purpose of section 32, CN Rail argues that the provision lines up well with Canada's National Transportation Policy objectives set out in section 5 of the CTA as "an important safety-valve to allow the Agency to fulfil its mandate in setting regulated rates, given that its determinations may regulate matters for years to come." I do not necessarily disagree with such a proposition but fail to understand how it assists in interpreting the extent of the

Agency's discretionary powers under section 32, or how the proposition supports the textual and contextual analysis posited by the company.

[41] In my view, the Agency's reconsideration power under section 32 is wide and extensive and constitutes "an expeditious manner to correct an error or to meet changed circumstances" (*Amoco Canada Petroleum Ltd. et al. and Canadian Pacific Ltd*, [1974] CTC 300 at 306, 321). Section 32, properly interpreted, allows for the exercise of discretion by the Agency in the determination of what constitutes a cifoc pertaining to the decision in question, constrained only by the limits imposed by the CTA, with the finality of the Agency's decision generally being upheld. As such, I do not consider that section 32 places any express limits on what may be taken into consideration by the Agency in determining the circumstances in which new facts or circumstances equate to a cifoc. When interpreting the CTA, the "the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate." (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 98). The Agency draws upon its regulatory experience, its knowledge of the industry and its expertise in the transportation sector when interpreting legislation within its mandate (*Emerson* at para. 73). As such, the Agency exercises it authority under section 32 when it is deemed suitable, proper and fitting to do so in the Agency's opinion, having regard to relevant legislative constraints and the broader context of the decision under review. These are the various aspects of the Agency's Decisions which acknowledged the forecasting variances but also explained why it was unnecessary and inappropriate, under the circumstances, to consider such variances as amounting to a cifoc withing the meaning of section 32.

[42] CN Rail claims that there is “no statutory reason” not to apply section 32 to the VRCPI determinations when the nature of the cifoc relates to forecasting variances, and that the MRE regime makes no distinction between decisions based on a forecasting variance and any other VRCPI determination that fall within the scope of section 32. It seems to me that the reason why the distinction is not made in the CTA is because Parliament left the question of what constitutes a cifoc pertaining to the decision in the hands of the Agency, to be determined “in the Agency’s opinion” on the basis of its regulatory experience and policy appreciation, and subject to any legislative constraints.

[43] I understand CN Rail’s argument that in applying its powers under section 32 in relation to VRCPI and MRE determinations, the Agency improperly distinguishes between those decisions which contain clerical errors or are subject to methodology changes on the one hand, and those which involve a cifoc causing forecasting variances on the other. However, it seems to me that the validity of the distinction comes down to the integrity of the results. The nature of a cifoc regarding VRCPI determinations involving clerical errors or changes in methodology is such that if the VRCPI is not varied or corrected once they are discovered, the integrity of the VRCPI determination itself would be in jeopardy. That is not the case for a cifoc which leads to forecasting variances; in fact, the reverse it true.

[44] In oral submissions, CN Rail stressed what was tantamount to a Black Swan theory, that the nature of the COVID-19 pandemic and the conflict in Ukraine was so extraordinary and unexpected, so exceptional and unpredictable, akin to a *force majeure*, that those events could not have been foreseen—unlike, for example, a new collective agreement which was expected to

increase labour costs—thus meeting the threshold of what constitutes a cifoc for the purposes of section 32 even where those facts and circumstances affected forecast variances. I cannot agree with CN Rail. First, COVID-19 was not new at the time the 2022/2023 VRCPI determination was made in April 2022, and even less so in April 2023; COVID-19 was declared a pandemic about 2 years prior. I also cannot agree that the escalation of the conflict in Ukraine was so extraordinary and unpredictable at that time as to support CN Rail's argument; Russia's occupation of the Crimean Peninsula dated back to 2014, and the escalation into a full-scale invasion in February 2022 was preceded by a significant massing of Russian armed forces about a year earlier. It is important to keep in mind the nature of the decision to which the cifoc pertains.

[45] To be fair to CN Rail, what may have been extraordinary and unexpected is the magnitude of the disruption caused by the continuation of the COVID-19 pandemic and the escalation of the conflict in Ukraine, however the company eventually, after questioning by the Court, took the position that magnitude did not inform the notion of what constituted a cifoc, but rather went to inform the second aspect of the section 32 test being the sufficiency threshold. That said, even if I was to consider magnitude of the impact and the disproportionate economic consequences of those events as also informing the notion of what constitutes a cifoc for the purposes of a section 32 request based upon forecasting variances, this would have the effect of conflating the two-part test established by the Agency for section 32 requests—with which as stated CN Rail takes no issue—and introduce an element of subjectivity in the statutory analysis and determination of what constitutes a cifoc, rendering it unworkable.

[46] CN Rail points to the fact that it did not challenge the forecasting variances over the last 10 crop years and argues that it will not be every time that there are forecasting variances that a section 32 reconsideration will be necessary, rather only when those variances are of a significant magnitude, in line the Agency's sufficiency threshold. Apart from conflating the elements of the two-part test established by the Agency regarding section 32 requests, CN Rail has not provided any guidance as to the level of magnitude needed to trigger the application of section 32 or even any basis for why future events resulting in a decrease in the forecasting variance component of 4.10% or increase of 3.60% would not reach the required threshold while those which result in an increase of 7.44% would. What constitutes a cifoc under a legal test in this context requires a principled basis for when the Rubicon has been crossed and cannot come down to a subjective determination as a simple question of degree.

[47] In addition, I cannot accept the arguments of CN Rail because they are founded on a false premise, *to wit*, that the MRE regime is based upon accounting for a railway company's costs of railway inputs and that the scheme of the CTA is meant to ensure to the extent possible that freight rates are reflective of the actual costs of those inputs. CN Rail accepts what it says is an imperfect system in terms of real time capture of the cost of railway inputs by the MRE determination but argues that the system is not presently equipped to afford railway companies the inflation rate they are entitled to get. My reading of the CTA would have me disagree. What the MRE regime and the VRCPI are based upon for a particular crop year is forecasted variances in the cost of railway inputs, not actual costs for that year.

[48] That said, while section 32 allows for some flexibility around the finality of decisions, it must be applied in a manner consistent with the legislative scheme; the Agency must none the less exercise its discretion under section 32 in a manner consistent with the CTA. Here, it has.

[49] The Agency argues that, contrary to CN Rail's assertion, the introduction of *ex post facto* adjustments to the VRCPI's methodology of treating forecasting variances is in essence a challenge to its predictive methodology in the determination of a railway company's VRCPI and that CN Rail is seeking to recast inherent forecasting variances which are integral to that methodology by framing their underlying causes as changes in facts or circumstances within the meaning of section 32, something which is at odds with the legislative scheme and would undermine the carefully calibrated system that was adopted by Parliament and the Agency. Although the Agency accepts that section 32 must be applied in conjunction with the broader statutory context and purpose of the CTA, including its MRE regime, respecting the limits and intentions of that statute, it argues that the predictive methodology used by the Agency is a product of a historical process based on a series of decisions it has issued in line with industrywide consultations since 2000 and informed by methodology used prior to the enactment of the MRE regime, something which, argues the Agency, is strictly within its bailiwick.

[50] I agree with the Agency that a variation of the VRCPI methodology, as CN Rail is seeking to do by way of section 32—to account for forecasting variances in the year they are experienced rather than the following year so as to obtain the needed MRE space to absorb the actual cost of railway inputs experienced during that crop year—is fundamentally at odds with how the MRE regime was designed by Parliament. It seems to me that subject only to the

legislatively prescribed in-year adjustments for the cost of hopper cars as well as changes to correct data entry errors or *ex post facto* methodology changes in the calculation of the VRCPI so as to maintain the integrity of the decision, the MRE regime is meant to be a closed loop, allowing all stakeholders to plan for expected freight costs. It is not meant to be a real time monitoring and assessment of the viability of the movement of western grain by rail.

[51] Whether the shippers and grain companies are getting a great deal given actual increases in the costs of railway inputs or whether the railway companies are enjoying elevated profit margins on account of actual decreases in the cost of railway inputs due either to inflation reduction or productivity gains through technological advancements, are issues which go into the planning for the following crop year. As mentioned, any such adjustments —which ultimately go to assuring western grain transportation viability—are subject to a one-year lag. What CN Rail seeks is inconsistent with the essence of the MRE determination formula and the Agency's predictive methodology in the determination of a railway company's VRCPI. The VRCPI is not a cost index designed to reflect actual costs of railway inputs. Rather, it is an inflation index, grounded upon an initial cost estimate for moving western grain calculated in 2000, being the base year for the MRE regime, and then applies yearly inflation adjustments to these base year costs, whether or not these costs are actually incurred by the railway companies in the upcoming crop year. The matter was articulated succinctly by the Alberta Court of Appeal in *Jackson v. Canadian National Railway*, 2013 ABCA 440 at para. 10:

> [10] The VRCPI ("F" in the above formula) is essentially an inflation index set by the Agency. <u>It is important to observe that the formula does not contemplate the Agency embarking upon an examination of actual costs for any component of service</u>. Rather, an inflation allowance is applied to certain historical costs, which

> essentially yields the benefit of operating efficiencies to the railway companies. It follows that the railways bore the risk if costs exceeded the projected inflation.
>
> (Emphasis added.)

[52] According to the Agency, the system promotes efficiency within the operations of railway companies allowing them to benefit from productivity gains such as the use of high-performance hopper cars and various other technological improvements which have allowed railway companies to optimize their operations thus reducing and sometimes eliminating some of the costs that are embedded in the VRCPI. It is for that reason, argues the Agency, that any financial loss that may have been incurred by CN Rail during the relevant crop years is not equivalent to the loss of MRE space for those crop years. As such, any purported loss of MRE space is better understood as CN Rail having missed an opportunity to make more money on freight rates, rather than the company having actually experienced financial losses.

[53] In any event, the same principle was set out by the Agency in Decision No. 8-R-2013, at paragraph 24:

> [24] The CTA does not provide for a general mechanism to adjust the base costs which means that the [VRCPI] is designed such that any productivity gains that CN and CP may have made by improving their operations overtime (sic) cannot be reflected in the [VRCPI]. It also means that the Agency's power to make cost adjustments pursuant to paragraph 151(4)(c) of the CTA is an exception to the principle that the initial cost base embedded in the [VRCPI] must remain constant over time. Consequently, the Agency must only adjust the cost base to the extent expressly permitted under paragraph 151(4)(c) of the CTA.

[54] The VRCPI is based on a forecast of future inflation and not adjusted for the actual cost of railway inputs in the particular crop year. I accept, as pointed out by CN Rail, that actual cost of railway inputs are provided by railway companies to the Agency for the purposes of determining the VRCPI for the following crop year, but such is done for the Agency to update its forecasts, and does not convert, as CN Rail concedes, the predictive methodology of the Agency which measures cost variances to one based on the company's actual costs (see First Agency Decision at paragraph 12). I cannot see how the mechanism postulated by CN Rail can be undertaken without a formal adjustment to the VRCPI. CN Rail accepts that for any extra MRE space to be allocated as part of the company's future MRE determinations, that there would have to be a formal variance to, for example, the 2022/2023 VRCPI to be used as part of the MRE determination formula for the 2022/2023 MRE determination to reflect the extra MRE space provided when the forecasting variance of 12.19% is factored in. Any adjustment to the VRCPI would have a ripple effect going forward.

[55] Even if CN Rail were to amend the relief that it seeks before this Court so that the company not seek a redetermination of its VRCPI or the MRE for the relevant crop years, but only recognition by the Agency that it suffered losses during those years which should be compensated by additional MRE space in future MRE determinations under the remedial credit system it is proposing, such would create a domino effect and require a modification of the Agency's methodology regarding a railway company's VRCPI determination for the years affected, by removing the forecasting variance component so as to avoid double counting. In addition, such a remedial method for the determination of a railway company's MRE would be inconsistent with the MRE determination formula prescribed in the CTA. I must say that

resorting to the Agency's remedial powers under section 27 in order to obtain the result that the CN Rail is seeking does not bode well for the company's statutory interpretation argument. Accepting CN Rail's proposal would also imply that Section 32, together with Section 27, is incorporated within the MRE regime alongside subsection 151(5) of the CTA, rather than constituting remedial relief.

[56] In any event, there is no evidence that the manner in which the Agency determines a railway company's VRCPI causes those companies to suffer unrecoverable losses as claimed by CN Rail, nor is there evidence that the Agency's order for CN Rail to pay penalties to the Foundation constitutes a real loss to the company that cannot be recouped in subsequent years under the prevailing system. The VRCPI drives the MRE, and the record does not reflect CN Rail's actual cost of railway inputs during the relevant crop years. According to the Agency, railway companies are supposed to monitor their MRE cap in relation to the VRCPI, and not in relation to actual price variations or the actual cost of railway inputs. As such, the fact that CN Rail charged higher freight rates (possibly on account of the company experiencing higher costs of railway inputs) causing them to exceed their MRE while knowing what the VRCPI determinations were for the relevant crop years is something that falls strictly on CN Rail's shoulders. What CN Rail is seeking is for a way to manage the risk of greater price volatility going forward. That is a policy issue which is not within the scope of the present appeal.

[57] I accept the Agency's assertion that the predictive modeling methodology it uses inherently involves a trade off between accuracy and predictability. It seems to me that when Parliament chose a system which called for the determination of the VRCPI prior to the relevant

crop year with the absence of an *ex post facto* adjustment provision specific to the MRE regime notwithstanding that forecasting variances were expected, it signalled a preference for predictability over accuracy, and in developing its methodology for the determination of VRCPI, the Agency factored in a compensatory scheme to bridge the gap between the two; given the legislative and policy constraints, compensation was effected the following year, hence the Agency's policy determination that it was "unnecessary" to resort to section 32 to bridge the gap inherent in the choice made by Parliament.

[58] I note that the policies that underly the Agency Decisions such as the need for predictability and the legal principle in favour of the finality of those decisions are not in themselves determinative of a section 32 request, but rather factors which the Agency weighs in determining whether to exercise its discretion to review a decision under section 32 (see the Second Agency Decision at para. 22). Accepting CN Rail's interpretation of section 32 would mean that the strategic allowance by the Agency of a one-time adjustment to the VRCPI, although straining predictability, would be transformed into a systemic mechanism for such adjustments whenever a stakeholder determines it is economically advantageous to so seek.

[59] Notwithstanding the very able submissions of CN Rail's counsel, I see no legal error in the Agency's interpretation and application of section 32. Although section 32 requests apply to VRCPI and MRE determinations, here the Agency has determined, in its opinion, that in light of the legislative constraints and the various policy considerations set out in the Agency Decisions, it would not be an appropriate to consider forecasting variances as equating to a cifoc under the circumstances for the purposes of a section 32 request. It was certainly within the discretionary

powers of the Agency to have come to that determination and to have considered that the use of section 32 in this context was both “unnecessary and inappropriate.” As I mentioned, there is no question that a cifoc may bring about a redetermination of VRCPI determinations. However here, the Agency, in the exercise of its discretion, found that such changes which went to create forecasting variances were inconsistent with the legislative scheme and the methodology they developed as part of their implementation of the MRE regime; that determination was certainly within their legislative discretion.

C. *The procedural fairness issue*

[60] As to the issue of whether the Agency violated CN Rail’s rights to procedural fairness the company relied solely upon its written submissions.

[61] Procedural fairness issues are the proper subject matter for a subsection 41(1) appeal. Regarding such issues, the Court should simply evaluate whether the procedures were fair under the test established in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paras. 21–28 (*Halton* at paras. 13 and 45; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 56).

[62] Here, I am unconvinced by CN Rail’s arguments that there was any breach: on the first issue, the Agency’s reasons for its decisions were sufficiently transparent, intelligible and justified. The various legal and policy reasons as to why the Agency declined to exercise its

discretionary authority under section 32 are clearly reflected in the Agency Decisions. As to the second argument, I cannot agree that the Agency breached the company's right to be heard. The Agency did not introduce a new issue in making reference to the need for predictability and principle of finality in the Second Agency Decision but rather was specifically addressing what it saw as the reasonable consequences of an in-year increase to the VRCPI. Given the Agency's role, mandate and experience, it was certainly within the Agency's abilities to come to that conclusion.

D. *Conclusion and the issue of costs*

[63] On the whole, I do not see where the Agency has committed a reviewable error in relation to the Agency Decisions. Under the circumstances, I would dismiss both appeals.

[64] As to costs, generally, an administrative body such as the Agency will neither be entitled to nor be ordered to pay costs, at least when there has been no misconduct on its part. Here the Agency seeks no costs. That said, there remains the outstanding issue of whether the CN Rail is entitled to costs associated with its efforts to seek further documents from the Agency. The Agency argued that its initial refusal to produce documents under Rule 317, forcing CN Rail to seek an order to that effect, stemmed from the fact that it was not clear whether Rule 317 extended to records being sought by the company, hence the Agency's opposition and need for an order to that effect. It was only following clarity from this Court which ordered such disclosure that the Agency worked with CN Rail to produce the required documents. Under the

circumstances, I find that there has been no crossing of the line by the Agency in this case that would warrant an order as to costs being made against it.

[65] As such, I would also not award costs to either of the parties.

[66] The original of these reasons will be placed in file A-207-23 and a copy will be placed in file A-65-24.

"Peter G. Pamel"
J.A.

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

"I agree.
Monica Biringer J.A."

APPENDIX

Canada Transportation Act, SC 1996, c 10

National Transportation Policy	Politique nationale des transports
Declaration	**Déclaration**
5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when	**5** Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :
(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;	**a)** la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;	**b)** la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;
(c) rates and conditions do not constitute an undue obstacle to the	**c)** les prix et modalités ne constituent pas un obstacle abusif au

movement of traffic within Canada or to the export of goods from Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of all persons;

(d.1) the transportation system is accessible without barriers to persons with disabilities; and

(e) governments and the private sector work together for an integrated transportation system.

trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation de tous;

d.1) le système de transport est accessible sans obstacle aux personnes handicapées;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

Relief

27 (1) The Agency may grant the whole or part of an application, or may make any order or grant any further or other relief that the Agency considers appropriate.

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

Réparation

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]

Amendments

(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]

Modification

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

(5) [Abrogé, 2008, ch. 5, art. 1]

Review of decisions and orders

32 The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Révision, annulation ou modification de décisions

32 L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Appeal from Agency

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Rates and Conditions of Service

Commercially fair and reasonable

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Prix et conditions de service

Obligation

112 A rate or condition of service established by the Agency under this Division must be commercially fair and reasonable to all parties.

112 Les prix et conditions visant les services fixés par l'Office au titre de la présente section doivent être commercialement équitables et raisonnables vis-à-vis des parties.

Maximum Grain Revenue Entitlement

Revenu admissible maximal

Ceiling

Plafond

150 (1) A prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1).

150 (1) Le revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole, calculé par l'Office, ne peut excéder son revenu admissible maximal, calculé conformément au paragraphe 151(1), pour cette campagne.

Payment of excess and penalty

Remboursement et pénalité en cas d'excédent

(2) If a prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1), the company shall pay out the excess amount, and any penalty that may be specified in the regulations, in accordance with the regulations.

(2) Si le revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole, calculé par l'Office, excède son revenu admissible maximal, calculé conformément au paragraphe 151(1), pour cette campagne, la compagnie verse l'excédent et toute pénalité réglementaire en conformité avec les règlements.

Items not included in revenue

Exclusion

(3) For the purposes of this section, a prescribed railway company's revenue for the movement of grain in a crop year shall not include

(3) Pour l'application du présent article, sont exclus du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole :

(a) incentives, rebates or any similar reductions paid or allowed by the company;

a) les primes, rabais ou réductions semblables versés ou accordés par la compagnie;

(b) any amount that is earned by the

b) les recettes attribuables aux

company and that the Agency determines is reasonable to characterize as a performance penalty or as being in respect of demurrage or for the storage of railway cars loaded with grain;

amendes pour non-exécution, aux droits de stationnement et aux droits de stockage des wagons chargés de grain que l'Office estime justifié de considérer comme telles;

(c) compensation for running rights;

c) les indemnités pour les droits de circulation;

(d) any amount that is earned by the company at the interswitching rate determined in accordance with section 127.1; or

d) les revenus perçus pour l'interconnexion du trafic dont le prix est fixé en application de l'article 127.1;

(e) any amount that is earned by the company for the movement of grain in containers on flat cars.

e) les revenus tirés du mouvement du grain par conteneurs sur wagons plats.

Impermissible reductions

(4) For the purposes of this section, a prescribed railway company's revenue for the movement of grain in a crop year shall not be reduced by amounts paid or allowed as dispatch by the company for loading or unloading grain before the expiry of the period agreed on for loading or unloading the grain.

Sommes non déduites

(4) Pour l'application du présent article, ne sont pas déduites du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole les sommes versées ou les réductions accordées par elle à titre de primes de célérité pour le chargement ou le déchargement du grain avant la fin du délai convenu.

Reductions from revenue

(5) For the purposes of this section, if the Agency determines that it was reasonable for a prescribed railway company to make a contribution for the development of grain-related facilities to a grain handling undertaking that is not owned by the company, the company's revenue for the movement of grain in a crop year shall be reduced by any amount that the Agency determines constitutes the amortized amount of the contribution by the company in the crop year.

Déductions

(5) Pour l'application du présent article, est déduite du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole la somme qui, selon l'Office, constitue la portion amortie de toute contribution versée par la compagnie, au cours de la campagne, à une entreprise de manutention de grain n'appartenant pas à la compagnie pour l'aménagement d'installations liées au grain si l'Office estime qu'il était

raisonnable de verser cette contribution.

Agency to determine revenue

(6) The Agency shall make the determination of a prescribed railway company's revenues for the movement of grain in a crop year on or before December 31 of the following crop year.

Calcul du revenu des compagnies

(6) L'Office calcule le montant du revenu de chaque compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole au plus tard le 31 décembre de la campagne suivante.

Maximum revenue entitlement

151 (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula

Revenu admissible maximal

151 (1) Le revenu admissible maximal d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole est calculé par l'Office selon la formule suivante :

[A/B + ((C - D) × $0.022)] × E × F

[A/B + ((C - D) × 0,022 $)] × E × F

where

où

A is the company's revenues for the movement of grain in the base year;

A représente le revenu de la compagnie pour le mouvement du grain au cours de l'année de référence;

B is the number of tonnes of grain involved in the company's movement of grain in the base year;

B le nombre de tonnes métriques correspondant aux mouvements de grain effectués par la compagnie au cours de l'année de référence;

C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;

C le nombre de milles correspondant à la longueur moyenne des mouvements de grain effectués par la compagnie au cours de la campagne agricole, tel qu'il est déterminé par l'Agence;

D is the number of miles of the company's average length of haul for the movement of grain in the base year;

D le nombre de milles correspondant à la longueur moyenne des mouvements de grain effectués par la compagnie au cours de l'année de référence;

E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined

E le nombre de tonnes métriques correspondant aux mouvements de grain effectués par la compagnie au

by the Agency; and

F is the volume-related composite price index that applies to the company, as determined by the Agency.

Canadian National Railway Company

(2) For the purposes of subsection (1), in the case of the Canadian National Railway Company,

(a) A is $348,000,000;

(b) B is 12,437,000; and

(c) D is 1,045.

Canadian Pacific Railway Company

(3) For the purposes of subsection (1), in the case of the Canadian Pacific Railway Company,

(a) A is $362,900,000;

(b) B is 13,894,000; and

(c) D is 897.

Volume-related composite price index

(4) The following rules are applicable to a volume-related composite price index:

(a) in the crop year 2016-2017, each prescribed railway company's index is 1.3275;

(b) an index shall be determined in respect of each prescribed railway

cours de la campagne agricole, tel qu'il est déterminé par l'Office;

F l'indice des prix composite afférent au volume applicable à la compagnie, tel qu'il est déterminé par l'Office.

Compagnie des chemins de fer nationaux du Canada

(2) Pour l'application du paragraphe (1), dans le cas de la Compagnie des chemins de fer nationaux du Canada :

a) A est égal à 348 000 000 $;

b) B est égal à 12 437 000;

c) D est égal à 1 045.

Compagnie de chemin de fer Canadien Pacifique

(3) Pour l'application du paragraphe (1), dans le cas de la Compagnie de chemin de fer Canadien Pacifique :

a) A est égal à 362 900 000 $;

b) B est égal à 13 894 000;

c) D est égal à 897.

Indice des prix composite afférent au volume

(4) Les règles ci-après s'appliquent à l'indice des prix composite afférent au volume :

a) l'indice pour chaque compagnie de chemin de fer régie pour la campagne agricole 2016-2017 est égal à 1,3275;

b) l'indice est déterminé pour chaque compagnie de chemin de fer

company; and

(c) the Agency shall make adjustments to each prescribed railway company's index to reflect the costs incurred by the prescribed railway company to obtain hopper cars for the movement of grain and the costs incurred by the prescribed railway company for the maintenance of those hopper cars.

When Agency to make determination

(5) The Agency shall make the determination of a prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year under subsection (1) on or before December 31 of the following crop year and shall make the determination of a prescribed railway company's volume-related composite price index on or before April 30 of the previous crop year.

Making of adjustments

(6) Despite subsection (5), the Agency shall make the adjustments referred to in paragraph (4)(c) at any time that it considers appropriate and determine the date when the adjusted index takes effect.

régie;

c) l'Office ajuste l'indice déterminé pour chaque compagnie de chemin de fer régie afin de tenir compte des coûts supportés par la compagnie en cause pour l'obtention de wagons-trémies en vue du mouvement du grain et pour l'entretien des wagons obtenus.

Délai pour effectuer le calcul

(5) L'Office calcule le montant du revenu admissible maximal pour le mouvement du grain de chaque compagnie de chemin de fer régie au cours d'une campagne agricole au plus tard le 31 décembre de la campagne suivante et calcule, pour chaque compagnie de chemin de fer régie, l'indice des prix composite afférent au volume pour cette campagne au plus tard le 30 avril de la campagne précédente.

Ajustements

(6) Malgré le paragraphe (5), l'Office effectue les ajustements visés à l'alinéa (4)c) lorsqu'il l'estime indiqué, et détermine la date de prise d'effet de l'indice ainsi ajusté.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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