Federal Court of Appeal | Cour d'appel fédérale

Date: 20170112

Dockets: A-396-15
A-398-15

Citation: 2017 FCA 6

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

Docket: A-396-15

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

VITERRA INC. and CANADIAN TRANSPORTATION AGENCY

Respondents

Docket: A-398-15

AND BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

RICHARDSON INTERNATIONAL LIMITED and CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Vancouver, British Columbia, on April 21, 2016.

Judgment delivered at Ottawa, Ontario, on January 12, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

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

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] The Canadian National Railway Company (CN or the appellant) appeals from preliminary and final decisions made by the Canadian Transportation Agency (the Agency) on December 18, 2014 and May 20, 2015 wherein the Agency held, pursuant to sections 113 to 115 of the *Canada Transportation Act*, S.C. 1996, c. 10 (*CTA*), that the appellant had failed to meet its level of service obligation to the respondents Viterra Inc. (Viterra) and Richardson International Limited (Richardson) (collectively the respondents) and accordingly ordered remedial measures.

[2] For the reasons that follow, I would allow the appeals.

II. Facts

[3] The 2013 grain crop was the largest crop in Canadian history with 75.8 million metric tonnes of grain being harvested. Unable to fully respond to the resulting surge in demand for freight service by Canadian grain shippers, CN implemented a car rationing methodology based on each shipper's use of CN's grain transportation services during the post-harvest peak period of the 2012-2013 crop year and assigned to each shipper a percentage of its available rail car supply.

[4] In early October, 2013, CN communicated to Canadian grain shippers, and in particular to the respondents, the share of rail car supply that would be assigned to each of them

(Percentage Shares). During the period covered by the respondents' complaints (i.e. a 39 week period beginning in October, 2013 for Viterra and a 25 week period beginning in January, 2014 for Richardson), the number of rail cars CN provided to the respondents fell short of their Percentage Shares calculated under its rationing methodology.

[5] In addition to the record grain crop, the prairies experienced extreme winter conditions during the 2013-2014 winter. As a result, CN had to adapt its *modus operandi* to ensure the safe handling and operation of trains (e.g. operate shorter trains at lower speeds) thus reducing its grain moving capacity.

[6] In early May, 2014, following the issuance on May 2, 2014 by the Agency of an interim order in an unrelated proceeding involving Louis Dreyfus Commodities Canada Ltd. (Letter Decision No. 2014-05-02) (Dreyfus interim order), CN notified the respondents that it would further reduce their allocation of rail cars by a certain number of cars every third week for the duration of the Dreyfus interim order.

[7] In its proceedings before the Agency, commenced on April 14, 2014, Dreyfus alleged that CN had breached its level of service obligation at four of its elevator facilities in Saskatchewan and Alberta during the 2013-2014 crop year. Dreyfus argued that CN had failed to provide it with the number of cars to which it was entitled pursuant to a confidential contract entered into between the parties.

[8] After issuance of the Agency's Dreyfus interim order, both Viterra and Richardson unsuccessfully sought intervener status in those proceedings. In dismissing Viterra and Richardson's motion to intervene, the Agency indicated that if the respondents were not satisfied with the level of service received from CN, they should file separate level of service complaints under the *CTA*.

[9] On October 3, 2014, the Agency issued its final decision concerning Dreyfus' complaint, concluding that that CN had not met its level of service obligation under sections 113 to 115 of the *CTA* (Letter Decision No. 2014-10-03) (Dreyfus final order). More particularly, because the parties had entered into a confidential contract pursuant to subsection 113(4) of the *CTA*, the Agency found that it was not open to it by reason of subsection 116(2) to conduct an investigation into the reasonableness of the services offered by CN. Rather, the Agency indicated that it was bound to give effect to the terms agreed to by the parties. Thus, failure by CN to deliver to Dreyfus the number of cars which it had agreed to deliver was fatal to its case.

[10] CN was granted leave to appeal the Dreyfus final order to this Court. On September 16, 2016 in *Canadian National Railway Company v. Louis Dreyfus Commodities Canada Ltd. and Canadian Transportation Agency*, 2016 FCA 232, [2016] F.C.J. No. 1018 (*Louis Dreyfus Commodities*), our Court dismissed CN's appeal. I will return to this decision later in these reasons.

[11] On June 12 and 20, 2014, Richardson and Viterra filed their respective complaints with the Agency, alleging that CN had not complied with its level of service obligation under sections 113 to 115 of the *CTA*. More particularly, the respondents made the following allegations:

1. That CN had failed to provide them with their Percentage Shares over an extended period of time; and

2. That CN had, in an arbitrary and discriminatory manner, further reduced the rail cars to which they were entitled in order to satisfy its obligation arising from the Dreyfus interim order.

III. The Agency's Decisions

A. Agency's Preliminary Decisions

[12] On December 18, 2014, the Agency rendered preliminary decisions with respect to the level of service complaints made by Viterra and Richardson. The Agency was of the view that although rationing could not be relied on routinely to smooth out the seasonality of the demand for Canadian grain shipping, the record 2013 crop was an extraordinary circumstance justifying the need for rationing.

[13] The Agency scrutinized CN's service provision using the three-step "Evaluation Approach" that it had earlier enunciated in its Dreyfus final order (paragraphs 36 to 75) as its approach to all level of service applications filed pursuant to sections 113 to 115. The Evaluation Approach requires the Agency to consider three questions: (1) Is the shipper's request for service reasonable? (2) Did the railway company fulfill the request? (3) If not, are there reasons to

justify the failure to meet the request? If there are reasons to justify the service failure, then the railway company has not breached its obligations. If no reasonable justification is found, the railway company will be in breach and the evaluation will proceed to remedy.

[14] In applying this Evaluation Approach to Viterra and Richardson's complaints, the Agency found that the respondents' rail car entitlements under CN's rationing methodology constituted reasonable requests. The Agency underlined the fact that although the rationing methodology was not a guarantee of a specific number of cars, each shipper was entitled to receive, in a non-arbitrary and non-discriminatory manner, the number of cars that their market share represented. Because of the degree of specificity of the Percentage Shares allocated to each shipper, and because of CN's failure to advise shippers of the rationing methodology's intended flexibility, the Agency rejected CN's arguments that the Percentage Shares were only meant to be guidelines.

[15] As the respondents' request for service had not been met, the Agency proceeded to evaluate possible justifications for the service failure and found none. Despite the fact that there was no contractual commitment on CN's part to abide by the Percentage Shares, the Agency found that the respondents were entitled to their Percentage Shares as these constituted benchmarks of a reasonable level of service under sections 113 to 115 of the *CTA*.

[16] With respect to the impact of the Dreyfus interim order, the Agency held that it "cannot determine the magnitude of the impact of [this Order] without any substantiating evidence or detailed analysis as to whether CN had allocated these cars 'off the top' of the total car supply

and not from individual shippers' allocations on a rotating and disproportionate basis…" (paragraph 112 of the preliminary decision in Viterra and paragraph 107 of the preliminary decision in Richardson). In the Agency's view, railway companies were to be given some flexibility to deal with unexpected situations provided that such flexibility did not result in a given shipper receiving fewer cars than its market share over a specified period. The number of cars could be reduced, but the shortfall had to be fairly redistributed amongst shippers in the rationing pool.

[17] This led the Agency to find that "CN arbitrarily decided that [the respondents] would be subject to a fixed car reduction irrespective of what [their] fair share of the reduction actually ought to have been under a market share-based rationing methodology" (paragraph 134 of the preliminary decision in Viterra and paragraph 129 of the preliminary decision in Richardson) and that this was sufficient to constitute a breach of CN's level of service obligation.

[18] Accordingly, the Agency concluded, pursuant to its three step Evaluation Approach, that:

1. The respondents' demand that their Percentage Shares be respected was a reasonable service request;

2. CN had not fulfilled this request; and

3. CN had not provided reasons justifying the identified service failure.

Thus the Agency ordered CN to deliver to the respondents the number of cars representing their market share and to implement a detailed communication protocol.

B. Agency's Final Decisions

[19] On May 20, 2015, the Agency rendered its final decisions with respect to the level of service complaints made by Viterra and Richardson. The Agency reviewed the "show cause" submissions and fixed the actual cumulative shortfall at a certain number of rail cars. It ordered CN to repay the shortfall in a specific and detailed manner.

[20] On August 10, 2015, upon CN's motion, leave to appeal the Agency's preliminary and final decisions was granted by this Court in accordance with subsection 41(1) of the *CTA*.

IV. Issues

[21] The appeal raises the following four questions:

1. What is the applicable standard of review?
2. Did the Agency lack jurisdiction to determine the respondents' complaints?
3. Did the Agency exceed its jurisdiction in deciding the respondents' complaints?
4. Did the Agency err in concluding that CN breached its statutory level of service obligation?

V. Parties' Submissions

[22] Although, as will appear shortly from these reasons, I conclude that I need only address the first and fourth issues to determine these appeals, it will be useful to set out the parties' respective submissions on the four issues as they are helpful in understanding the Agency's decisions. They also provide a fuller context to the fourth issue in regard to which I conclude that

the Agency erred in determining that CN breached its level of service obligation under sections 113 to 115 of the *CTA*.

A. CN's Submissions

[23] CN submits that the Agency lacked jurisdiction to determine the respondents' complaints which were not, in its view, level of service complaints. As an administrative body, the Agency only has the powers statutorily delegated to it. The Agency has the power to adjudicate level of service complaints pursuant to section 116 of the *CTA*, but it does not have the power to enforce a rationing methodology developed by a railway company.

[24] In addition, CN contends that the Agency exceeded its jurisdiction by prescribing how all railway companies must design and implement car rationing. In this respect, CN argues that the Agency breached its duty of procedural fairness in deciding an issue that was outside the scope of the pleadings. More particularly, CN takes issue with the Agency describing how rationing should be conducted (paragraphs 189 to 192 of the Agency's preliminary decision in Viterra and paragraphs 184 to 188 of the Agency's preliminary decision in Richardson), noting that the respondents had not challenged its rationing methodology.

[25] Further, CN asserts that the Agency, whose powers are complaint specific and not systemic, converted the adjudication of the complaints into an improper systemic review. In CN's view, the Agency was not mandated to "broadly legislate how all railway companies must move their traffic or conduct their operations".

[26] CN also argues that the Agency erred in finding that CN breached its level of service obligation under the *CTA* in that it confused CN's rationing methodology with its statutory obligation. CN reiterates its need for flexibility in order to react to unexpected contingencies and that it should not be bound by strict adherence to a mathematical formula. According to CN, it was wrong for the Agency to determine that it had to justify any departure from the rationing methodology which, in its view, was a mere guideline. In CN's opinion, the incorrect conclusion that it breached its statutory obligation was influenced by the Agency's Evaluation Approach which it applied in rendering its preliminary decisions. In CN's view, this approach places too high of a burden on railway companies.

[27] Finally, CN submits that the Agency did not have the power to order specific performance of the rationing methodology or to order "off the top" car allocations. While it considers that the former does not fall within the Agency's statutory powers, CN affirms that the latter would inevitably result in breaches of CN's level of service obligation to other grain shippers.

B. Respondents' Submissions

[28] The respondents first emphasize that CN failed to raise the question of the Agency's jurisdiction before the Agency itself. Consequently, they ask this Court to decline to consider the jurisdictional arguments made by CN. In any event, the respondents contend that their complaints fell squarely within the Agency's mandate as they constituted true level of service complaints even if they were based on a request that CN's rationing methodology be respected.

In their view, the Agency did not enforce something other than the obligation imposed upon CN by the *CTA*.

[29] In answer to CN's argument that the Agency had exceeded its jurisdiction by converting the complaints into a systemic review, the respondents say that the Agency merely enunciated general principles relating to rationing methodologies. In their view, the Agency provided guidance rather than mandatory requirements. Further, the respondents say that notwithstanding CN's suggestion that the rationing methodology was not at issue before the Agency, there could be no doubt that the rationing methodology was the central focus of their complaints.

[30] With respect to the Agency's Evaluation Approach, the respondents say, contrary to CN's submission, that it does not impose an absolute obligation on railway companies. In their view, the Evaluation Approach was consistent with previous case law, i.e. that the service request must be reasonable. Moreover, the respondents emphasize that CN had received specific notice that the Agency would follow this approach well before the hearing.

[31] Finally, turning to the Agency's remedial jurisdiction, the respondents argue that the Agency's remedial powers under subsection 116(4) of the *CTA* are broad and include ordering "off the top" car allocations.

C. Agency's Submissions

[32] The Agency submits that it has standing to be heard on an appeal of its own decisions pursuant to subsection 41(4) of the *CTA* and says that it has broad and discretionary powers

under the *CTA* to make orders where it finds that a railway company does not fulfil its level of service obligation. It asserts that it developed the Evaluation Approach according to its mandate so as to refine its approach to matters that come within its jurisdiction.

VI. Analysis

A. What is the applicable standard of review?

[33] CN's appeals from the Agency's preliminary and final decisions are before this Court pursuant to subsection 41(1) of the *CTA* which provides as follows:

Appeal from Agency	**Appel**
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.	**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.

[34] Although these are statutory appeals, the applicable standard of review is the one enunciated by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In effect, in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, the Supreme Court held that statutory appeals of decisions of specialized administrative

tribunals were to be reviewed on the basis of administrative law principles. More particularly, at paragraph 38 of its reasons, the Supreme Court held as follows:

> Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal.
>
> [emphasis added]

[35] While CN did not address the standard of review, the respondents and the Agency argued that except for the procedural fairness issue raised by CN, the Agency's decisions were to be reviewed upon the reasonableness standard. Indeed, to the extent that a statutory appeal turns on the interpretation of a tribunal's home statute, as is the case here, a standard of reasonableness presumption applies (see *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paragraph 73 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 30).

[36] Considering that the Agency is a specialized administrative body with technical expertise, the Supreme Court and this Court have held that the Agency was entitled to a deferential standard of review for matters falling within the scope of its expertise and mandate (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paragraph 100; *Canadian National Railway Company v. Richardson International Limited*, 2015 FCA 180, 476 N.R. 83 at paragraphs 25-31; *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R 264 at paragraphs 28-30).

[37] More particularly, regarding the issue of the Agency's characterization of a level of service complaint, this Court held in *Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270, 454 N.R. 125 (at paragraphs 3-5) that the applicable standard of review was that of reasonableness.

[38] Given that the questions raised by these appeals relate to the Agency's interpretation of its home statute and clearly fall within the scope of its expertise and given that the parties do not challenge the existing jurisprudence, it is my view that the applicable standard of review must be that of reasonableness. Although I agree with the respondents and the Agency that the correctness standard applies to questions of procedural fairness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paragraph 79), I need not say anything further on this as it is not necessary for me to address the procedural fairness argument raised by CN in order to dispose of the appeal.

[39] I now turn to the merits of the appeals. Because of my view that the Agency made a reviewable error in concluding that CN breached its statutory level of service obligation, I need not address issues 2 and 3 which pertain to the Agency's jurisdiction.

B. Did the Agency err in concluding that CN had breached its statutory level of service obligation?

[40] I begin by setting out the relevant provisions of law:

Accommodation for traffic

113 (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,

(*a*) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;

(*b*) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;

(*c*) without delay, and with due care and diligence, receive, carry and deliver the traffic;

(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and

(*e*) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

…

Confidential contract between company and shipper

(4) A shipper and a railway company may, by means of a confidential contract or other written agreement,

Acheminement du trafic

113 (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :

a) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;

b) fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;

c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;

d) fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;

e) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.

[…]

Contrat confidentiel

(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur

agree on the manner in which the obligations under this section are to be fulfilled by the company.

les moyens à prendre par la compagnie pour s’acquitter de ses obligations.

Facilities for traffic

114 (1) A railway company shall, according to its powers, afford to all persons and other companies all adequate and suitable accommodation for receiving, carrying and delivering traffic on and from its railway, for the transfer of traffic between its railway and other railways and for the return of rolling stock.

Installations de transport

114 (1) Chaque compagnie de chemin de fer doit, dans le cadre de ses attributions, fournir aux personnes et compagnies les aménagements convenables pour la réception, le transport et la livraison de marchandises sur son chemin de fer et en provenance de celui-ci, pour le transfert des marchandises entre son chemin de fer et d’autres chemins de fer ainsi que pour le renvoi du matériel roulant.

…

[…]

Adequate and suitable accommodation

115 For the purposes of subsection 113(1) or 114(1), adequate and suitable accommodation includes reasonable facilities

(*a*) for the junction of private sidings or private spurs with a railway owned or operated by a company referred to in that subsection; and

(*b*) for receiving, carrying and delivering traffic on and from private sidings or private spurs and placing cars and moving them on and from those private sidings or private spurs.

Installations convenables

115 Pour l’application des paragraphes 113(1) ou 114(1), des installations convenables comprennent des installations :

a) pour le raccordement de voies latérales ou d’épis privés avec un chemin de fer possédé ou exploité par une compagnie visée à ces paragraphes;

b) pour la réception, le transport et la livraison de marchandises sur des voies latérales ou épis privés, ou en provenance de ceux-ci, ainsi que le placement de wagons et leur traction dans un sens ou dans un autre sur ces voies ou épis.

Complaint and investigation concerning company's obligations	**Plaintes et enquêtes**
116 (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall (*a*) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and (*b*) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.	**116** (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.
Confidential contract binding on Agency	**Contrat confidentiel**
(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.	(2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

[41] With respect to the approach to be taken in regard to sections 113 to 115 of the *CTA*, it is not disputed that the Supreme Court's decision in *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway*, [1959] S.C.R. 271, 17 D.L.R. (2d) 449 (*Patchett*), remains the leading authority on the matter. The essence of the Supreme Court's decision in *Patchett* can be found at paragraphs 5, 6, 105 and 111 of that decision where the three members of the majority wrote as follows:

> 5. Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That

> duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed (Rand J.).
>
> 6. The examples of these extreme situations furnish guidance for the solution of partial cessations of work associated with labour controversy. The duty being one of reasonableness how each situation is to be met depends upon its total circumstances. The carrier must, in all respects, take reasonable steps to maintain its public function; and its liability to any person damaged by such a cessation or refusal of services must be determined by what the railway, in the light of its knowledge of the facts, as, in other words, they reasonably appear to it, has effectively done or can effectively do to meet and resolve the situation. In weighing the relevant considerations, time may be a controlling factor (Rand J.).
>
> …
>
> 105. I am in agreement with the views expressed by Coady and Sheppard JJ.A. in the Court below and by my brother Rand that the statutory duty imposed upon the respondent is not an absolute duty but is only a relative one to provide service so far as it is reasonably possible to do so (Abbot J., citation omitted).
>
> …
>
> 111. …It is also my opinion that the railway's statutory obligation under s. 203(1) (*c*) is not an absolute but a relative one, as defined in the reasons of my brother Rand (Judson J.).
>
> [emphasis added]

[42] In *Canadian National Railway v. Northgate Terminals Ltd.*, 2010 FCA 147, [2011] 4 F.C.R. 228, Sharlow J.A., writing for a majority of this Court, sets out her understanding of the *Patchett* principle in the following terms at paragraphs 34 and 35 of the reasons:

> [34] *Patchett* is generally recognized as the leading case on the determination of the adequacy of the service provided by a railway company. CN argues that *Patchett* established three principles of law that were not applied properly, or at all, by the Agency. CN asserts that the three principles are: (1) a railway company is not bound to furnish cars at all times sufficient to meet all demands, (2) the obligation to give transportation is subject to reasonable charges, and (3) on the duty of a railway company to furnish services there is a correlative obligation on the customer to furnish reasonable means of access.
>
> [35] *Patchett* stands for the general proposition that the duty of a railway company to fulfil its service obligations is "permeated with reasonableness in all aspects of what is undertaken" (except in relation to its special responsibility as an insurer of goods, which is not in issue in this case). As I read *Patchett*, the three propositions to which CN refers in its argument are not free-standing principles of law. They are guidelines that must inform any determination by the Agency of a service complaint, but they do not necessarily compel a particular outcome. That is because the determination of a service complaint requires the Agency to balance the interests of the railway company with those of the complainant in the context of the particular facts of the case.
>
> [emphasis added]

[43] Thus, whether a railway company has provided or failed to provide adequate and suitable accommodation in respect of the traffic offered to it for carriage will depend on an assessment of all the relevant circumstances. The measure of that assessment is reasonableness. Consequently, in conducting the inquiry which paragraph 116(1)(*a*) of the *CTA* requires it to perform, the Agency must make its determination in light of all of the surrounding circumstances, keeping in mind that the railway company's obligations are not absolute.

[44] I now return to the Agency's preliminary decisions of December 18, 2014 as a more detailed review thereof is necessary to determine the appeals.

[45] On the basis of its Evaluation Approach, the Agency started by asking itself whether the respondents' request for their Percentage Shares was a reasonable one. First, the Agency agreed

"that the 2013-2014 crop year presented a set of extraordinary circumstances that would justify the temporary need for a rationing methodology" (paragraph 54 of the preliminary decision in Viterra and paragraph 55 of the preliminary decision in Richardson).

[46] Second, the Agency stated that since the complaints made by the respondents were based exclusively on their car entitlement under CN's rationing methodology, it would consider whether the respondents' request for their Percentage Shares constituted a reasonable car request.

[47] Third, after stating its view regarding the use of a rationing methodology by a railway company and what criteria such methodology should meet, the Agency made the point that since the respondents were not challenging "the validity of CN's decision to use a market share-based rationing methodology," (paragraph 58 of the preliminary decision in Viterra and paragraph 59 of the preliminary decision in Richardson), it would determine the merits of the respondents' complaints by determining what level of service they were entitled to in light of their Percentage Shares under CN's rationing methodology.

[48] Fourth, the Agency then dealt with CN's argument that its rationing methodology was not a binding commitment, but rather a guideline, i.e. a target that it would attempt to meet. The Agency's answer to CN's argument was that if CN intended its rationing methodology to be merely a guideline, it ought to have been more specific in its dealings with the respondents, noting that the Percentage Shares had been expressed "not…in approximates, but with a degree of specificity to the first decimal place" (paragraph 60 of the preliminary decision in Viterra and paragraph 61 of the preliminary decision in Richardson).

[49] Then, after stating that the respondents were not entitled to a specific number of cars under CN's rationing methodology, the Agency held that they were nonetheless entitled to receive their Percentage Shares as determined by the rationing methodology, adding that "Rationing cannot be applied in an arbitrary or discriminatory way, with no accountability, and a rationing methodology ceases to be consistent with statutory railway company level of service obligations if it is not applied fairly with rigour and consistency" (paragraph 61 of the preliminary decision in Viterra and paragraph 62 of the preliminary decision in Richardson).

[50] As a result, the Agency concluded its analysis under the first step of its Evaluation Approach by saying that the respondents' request that CN provide to them their Percentage Shares was a reasonable request (paragraph 65 of the preliminary decision in Viterra and paragraph 66 of the preliminary decision in Richardson).

[51] The Agency then proceeded to the second step of its Evaluation Approach to determine whether CN had provided to the respondents their Percentage Shares. It found that CN had failed to allocate to the respondents their Percentage Shares. More particularly, the Agency held that CN had not fulfilled Richardson's service request for the period from grain weeks 23 to 47 of the 2013-2014 crop year and that it had not fulfilled Viterra's service request for the period from grain weeks 9 to 47 of the 2013-2014 crop year.

[52] The Agency then proceeded to the third step of its Evaluation Approach so as to determine whether CN's failure to provide the respondents with their Percentage Shares could be justified.

[53] In answer to CN's argument that flexibility was required during the 2013-2014 crop year in order to deal with difficult circumstances, the Agency, although recognizing CN's need for flexibility, held that CN's rationing methodology "already integrates a sufficient degree of flexibility" (paragraph 154 of the preliminary decision in Viterra and paragraph 149 of the preliminary decision in Richardson).

[54] CN argued that it had taken all commercially reasonable steps to move as much grain as possible during the 2013-2014 crop year, for example that it had acquired additional hopper cars and high power locomotives to meet the accrued demand for services, and that it had increased its human resources. However, the Agency observed that CN's efforts had been insufficient to meet the increased demand concluding that "any issues with capacity acquisition have no bearing on a rationing program based on percentage allocations and do not justify its faulty implementation" (paragraph 163 of the preliminary decision in Viterra and paragraph 158 of the preliminary decision in Richardson).

[55] CN further argued that during the 2013-2014 crop year that it had transported record levels of grain. The Agency's response was that the fact that CN had surpassed its previous records was an irrelevant consideration which did not justify its service failure. At paragraph 173 of the preliminary decision in Viterra and paragraph 168 of the preliminary decision in Richardson, the Agency made the following remarks:

> The Agency is of the opinion that, even assuming that CN faced the supply chain challenges that it claims, this does not constitute any justification as to why CN did not provide [the respondents'] share of CN's Average Total Weekly Car Spots, however limited that weekly spotting may have been in weeks when CN faced supply chain challenges.

[56] Finally, CN argued that fulfilling the respondents' requests for their Percentage Shares would have a detrimental effect on other grain shippers which it served. After making the point that the service which a rail company owed to shippers at large did not relieve a railway company from its level of service obligation to a specific individual shipper, the Agency concluded the third step of its Evaluation Approach by stating that it could not agree with CN's argument that its obligations to other shippers constituted a justification for its failure to deliver the Percentage Shares to the respondents.

[57] Then, at paragraphs 185 and 186 of its preliminary decision in Viterra and paragraphs 180 and 181 of its preliminary decision in Richardson, the Agency summarized its determinations as follows:

> In examining whether CN breached its level of service obligations to [the respondents] using its three-step Evaluation Approach, the Agency finds that:
>
> Step 1: With its actual service requirements constrained by car rationing, [the respondents'] service request to receive service at a level that met the historical shipping percentage allocation imposed on it by CN in its car rationing methodology, that is, [redacted] percent of CN's total available car supply, constitutes a reasonable service request. This is reinforced by [the respondents'] need for predictable and reliable service to plan its operations and purchase and sales programs.
>
> Step 2: CN has not fulfilled [the respondents'] service request for grain weeks [9 to 47 in the case of Viterra and 23 to 47 in the case of Richardson] of the 2013-2014 crop year. During grain weeks 40 to 47, CN further breached its level of service obligation to [the respondents] by subjecting [them] to inequitable treatment by reducing the cars available to [them] by an arbitrary number unrelated to its market share.
>
> Step 3: CN did not establish reasons that would justify the service failures identified in Step 2.
>
> The Agency therefore finds that CN has breached its statutory level of service obligations to [the respondents].

[58] In my respectful view, the Agency's preliminary decisions are unreasonable for two reasons. First, the Agency erred in treating CN's rationing methodology as if it constituted a confidential contract pursuant to subsection 113(4) of the *CTA*. Second, because of its error regarding the meaning and scope of the rationing methodology, the Agency did not conduct an investigation into the question of whether or not CN had failed to provide to the respondents adequate and suitable accommodation for their traffic.

[59] The underlying idea behind the Agency's preliminary decisions is that CN must be held to the binding commitment which it made to the respondents when it communicated to them their respective Percentage Shares. Although, to be fair to the Agency, it does not use the words "binding commitment", I can only conclude from the words used by the Agency to express its findings that it was of the view that the respondents were entitled to their Percentage Shares under CN's rationing methodology because CN's rationing methodology constituted a binding commitment to which it was giving effect. In my view, paragraph 62 of the Viterra preliminary decision and paragraph 63 of the Richardson preliminary decision leave no doubt on that point:

> Having calculated and communicated a relatively precise allocation standard for [the respondents], which was derived from historic market share data, CN cannot expect to then be entitled to compromise the integrity of that standard by viewing it as a mere guideline or soft obligation and veer from it unilaterally and without proper notice. CN itself has set the allocation standard that it should have met. If a railway company unilaterally assumes the role of gatekeeper of the car supply, as CN did in this case, it must also accept the stewardship responsibilities that accompany that role.

[60] What the above paragraph from the preliminary decisions shows is that the Agency treated CN's rationing methodology as if it constituted a confidential contract under subsection

113(4) of the *CTA*, i.e. a written agreement pursuant to which the parties have agreed "on the manner in which the obligations under this section are to be fulfilled by the company". Consequently, rather than conducting the inquiry set out at paragraph 116(1)(*a*) of the *CTA*, i.e. an inquiry into whether CN had fulfilled its obligations under sections 113 to 115, the Agency's investigation amounted to ascertaining CN's commitment to the respondents pursuant to its rationing methodology and then giving effect to the terms of that commitment.

[61] There are other paragraphs in the Agency's preliminary decisions which leave no doubt that it viewed CN's rationing methodology as a binding commitment on CN's part to provide specific Percentage Shares to the respondents from which no deviation would be tolerated. In that regard, I have in mind paragraph 163 of the Viterra preliminary decision and paragraph 158 of the Richardson preliminary decision where the Agency dismissed CN's argument that it had taken all commercially reasonable steps to move as much grain as it could during the 2013-2014 crop year. In dismissing CN's argument, the Agency made it clear that because CN had decided to put in place a rationing methodology, it would not make any allowance in favour of CN. Specifically, the Agency said that "any issues with capacity acquisition have no bearing on a rationing program based on percentage allocations and do not justify its faulty implementation".

[62] I also have in mind paragraph 173 of the Viterra preliminary decision and paragraph 168 of the Richardson preliminary decision where the Agency dismissed CN's argument that it had transported record levels of Canadian grain during the 2013-2014 crop year and that it had delivered more cars to the respondents (Richardson and Viterra, in that order, are the shippers which received the most cars during the 2013-2014 crop year) than to any other shipper during

the relevant period. The Agency dismissed CN's argument because it determined that CN's difficulties in regard to the supply chain could not justify its failure to provide to the respondents their Percentage Shares. In other words, the Agency found that CN had bound itself to provide specific Percentage Shares and the Agency would hold it to that promise.

[63] I should also mention paragraph 154 of the Viterra preliminary decision and paragraph 149 of the Richardson preliminary decision where the Agency dismissed CN's argument that it required flexibility, in particular during crop years such as the 2013-2014 crop year, to make adjustments to its car supply so as to meet shifting priorities and changing circumstances. The Agency's answer to CN's submission was a simple one, i.e. that CN's rationing methodology "already integrates a sufficient degree of flexibility". In other words, because CN had committed itself to provide to the respondents their Percentage Shares, the Agency determined that it should not be allowed any flexibility in regard to that commitment.

[64] There can be no doubt, in my view, that CN's rationing methodology does not constitute a confidential contract or other written agreement pursuant to which the parties have agreed, in the words of subsection 113(4), "on the manner on which the obligations under this section are to be fulfilled by the [railway] company". It is worth pointing out that neither the respondents nor the Agency advanced the proposition that CN's rationing methodology constituted a confidential contract or that it should be treated as such.

[65] Where, however, the parties have entered into such an agreement, the test of reasonableness enunciated in *Patchett* will not apply and the investigation which paragraph

116(1)(*a*) of the *CTA* requires the Agency to perform will be restricted by the terms of the written agreement which shall be binding on the Agency. In such circumstances, a railway company will be unable to rely on an argument that it could not reasonably be expected to fulfill the obligations found in the confidential contract. The parties to such a contract will be held to their bargain by the Agency. Consequently, if the railway company fails to fulfil its obligations under the confidential contract, it will be found by the Agency to have breached its obligations under sections 113 to 115. It is on that basis that our Court upheld the Agency's decision in *Louis Dreyfus Commodities* where, at paragraph 26 of its reasons, the Court said:

> The *CTA* contemplates that a shipper and a railway company may enter into an agreement that would set out the manner in which the service obligations of the railway company may be fulfilled. If the parties have entered into such an agreement, the service obligations of the railway company will be determined based on what the railway company agreed to provide, not on whether any particular order is considered to be reasonable.
>
> [emphasis added]

[66] As the parties to these proceedings did not enter into a confidential contract, the *Patchett* principle of reasonableness applied to the Agency's determination as to whether CN had fulfilled its obligations under sections 113 to 115. In carrying out its investigation pursuant to paragraph 116(1)(*a*), the Agency had to determine whether the number of rail cars provided to the respondents by CN during the weeks at issue of the 2013-2014 crop year constituted adequate and suitable accommodation in regard to their traffic. Because of its misunderstanding regarding the meaning and scope of CN's rationing methodology, the Agency failed to perform the proper inquiry.

[67] The inquiry which, in my respectful view, should have been conducted by the Agency is the one which it conducted in its Letter Decision Number 2015-06-18 dated June 18, 2015 (Decision 06-18), in the matter of another complaint made by Louis Dreyfus Commodities Canada Ltd. (Dreyfus Commodities). Before examining how the Agency conducted its investigation in that matter, it is of interest to note that the Agency, at paragraphs 64 to 66 of its Decision 06-18, distinguished its approach in that case with the one that it adopted in the present matter. The Agency wrote as follows:

> [64] For the 2013-2014 crop year, the Agency found in the Decisions dated December 18, 2014 related to Richardson International Limited and Viterra Inc. that, in the extraordinary circumstances of the 2013-2014 crop year, rationing was justified. Specifically the Agency stated:
>
> > …given the record 2013 crop in western Canada, an export grain volume that was 50 percent higher than average, and the relatively short notice given to the rail system to react to the resulting transient surge in demand, the Agency agrees with CN that the 2013-2014 crop year presented a set of extraordinary circumstances that would justify the temporary need for a rationing methodology.
>
> [65] However, given the scope of the level of service applications in those two cases, the Agency was only asked to determine if CN breached its level of service obligations by not providing the number of cars in accordance with the rationing methodology it had imposed and communicated to its customers. CN's methodology was based on market share, that is, it provided that the shipper would be allocated a number of cars in accordance with that shipper's historical market share of the general population of hopper cars. Therefore, in those cases, the Agency was able to use the shipper's share and compare it with actual service received to determine if CN had served its customers according to its own car allocation scheme.
>
> [66] In the present case, the Agency does not have the same parameters it had in the RIL and Viterra cases. It must therefore determine if CN had a reasonable justification to meet 83 percent of LDC's request, having regard to the particular circumstances under which the cars were ordered by and delivered to LDC.
>
> [emphasis added]

[68] As it did in the present matter, the Agency applied its three step Evaluation Approach in order to make its determination. With respect to the first step, the Agency concluded that the cars ordered by Dreyfus Commodities during the complaint period constituted a reasonable request for service. It then turned to the second step in regard to which it concluded that CN had not fulfilled Dreyfus Commodities' request for service during the complaint period. The Agency then turned to the third step of its Evaluation Approach to determine whether CN's failure to meet Dreyfus Commodities demand for cars was justified.

[69] The Agency first considered the size of the 2013-2014 crop year, pointing out that it was "significantly larger than recent years" (paragraph 67 of Decision 06-18). In so concluding, it took note of the evidence before it that the 2013-2014 crop year was 50 percent higher than the average crop year.

[70] Second, the Agency considered that CN had made great efforts to acquire additional cars to deal with the increased demand, noting that it had brought into service a considerable number of additional cars. In other words, CN had increased the number of cars available for allocation between its customers so as to respond to a dramatic increase in the demand for its services.

[71] The Agency then noted that during the 2013-2014 crop year, Dreyfus Commodities had ordered substantially more rail cars than in the past two crop years. The Agency also considered the fact that a very severe winter had prevailed on the prairies during the 2013-2014 crop year, noting that the temperature had been below minus 30 degrees in Winnipeg and Saskatoon for a period of almost 30 days. The Agency noted that extreme cold weather forces rail companies to

change their operations, including operating at lower speeds and with shorter train lengths, and increases problems with infrastructure. In particular, during the 2013-2014 winter those operational constraints "were significantly greater, and lasted significantly longer, than average" (paragraph 72 of Decision 06-18).

[72] The Agency also noted that for the 2013-2014 crop year, CN had implemented a rationing methodology based on each shipper's historical use of its grain service during the post-harvest peak period of the 2012-2013 crop year. The Agency also considered the fact that planning had been made difficult for CN during the 2013-2014 crop year because of the magnitude of the crop and the difficult weather conditions.

[73] All of the above considerations led the Agency to conclude the third step of its Evaluation Approach as follows:

> [78] The Agency finds that, on balance, when considered together, the factors constitute a reasonable explanation as to why CN provided only 83 percent of the cars requested by LDC for its Dawson Creek facility during the complaint period. The crop was of extraordinary size and the winter was exceptionally harsh. These two factors were outside the railway company's direct control and were difficult to predict. The first should have been a boon to both the shipper and railway company, and might have been managed better except for the weather, which was a hindrance to both.
>
> [79] For greater clarity, this finding relates to specific service provided to LDC under the exceptional circumstances that prevailed during the complaint period.

[74] Thus, by reason of the factors which it considered relevant in making its Decision 06-18, the Agency concluded that CN had not breached its service obligation to Dreyfus Commodities during the complaint period of the 2013-2014 crop year. The Agency was satisfied,

notwithstanding the fact that CN had only met 83 percent of Dreyfus Commodities' demand for cars, that CN had provided, in the circumstances, adequate and suitable accommodation in respect of Dreyfus Commodities' traffic. It is clear from the Agency's Decision 06-18 that it applied the *Patchett* principle of reasonableness in determining whether CN had fulfilled its level of service obligation. More particularly, on the basis that CN's obligations were not absolute, it gave consideration to those factors and circumstances which, in CN's view, justified its failure to meet Dreyfus Commodities' total demand.

[75] It goes without saying that I do not intend to make any comments with regard to the merits of the Agency's determination in Decision 06-18. However, it is important to point out that in that case, the Agency was dealing with the same crop year and the same rationing methodology which are under consideration in these appeals. There can be no doubt that the Agency's approach in Decision 06-18 is manifestly different from the approach that it took in the present matter.

[76] In my view, the difference in approach can only be attributed to the fact that in its preliminary decisions regarding Viterra and Richardson, the Agency treated CN's rationing methodology as a confidential contract falling within the ambit of subsection 113(4). The Agency's explanation for a different approach is found at paragraphs 65 and 66 of Decision 06-18 which I have reproduced herein at paragraph 67 of these reasons. More particularly, the Agency justified its different approach on the basis that Viterra and Richardson had only sought, through their complaints, an order compelling CN to deliver to them their respective Percentage

Shares. Hence, the nature of the complaints filed by the respondents dictated the approach which the Agency would take in determining whether or not CN had breached its service obligation.

[77] What the respondents sought from the Agency was, in my respectful view, akin to an order enforcing CN's rationing methodology. With respect, such an order could not be made by the Agency pursuant to its powers under subsection 116(1) since the Agency's powers under that subsection are limited to determining whether a railway has provided adequate and suitable accommodation. Investigating and determining whether CN had met its targets under the rationing methodology is not, in my respectful view, within the powers conferred upon the Agency by subsection 116(1). Neither could the Agency make such an order under subsection 116(2) as the rationing methodology did not constitute a confidential contract.

[78] There is no dispute between the parties that the set of extraordinary circumstances surrounding the 2013-2014 crop year justified the need for CN to come up with a rationing methodology. Neither of the respondents disputed, nor could they in my opinion, CN's right to devise a rationing methodology for the 2013-2014 crop year. Although the Agency considered the respondents' complaints as level of service complaints, it did not deal with them on that basis because of the way they were framed by the respondents. Rather than conducting the investigation required of it under paragraph 116(1)(*a*) of the *CTA*, the Agency gave itself the mandate to determine whether the respondents' entitlement under the rationing methodology represented reasonable car requests. In other words, the Agency assumed, without so saying, that CN's rationing methodology and, more particularly the Percentage Shares allocated to the

respondents thereunder, constituted the level of service obligation owed by CN to the respondents. That was clearly an error on the part of the Agency.

[79] Whether the number of cars actually provided by CN to the respondents during the weeks at issue of the 2013-2014 crop year was sufficient to satisfy CN's level of service obligation is the question which the Agency ought to have addressed. However, as I have already indicated, in conducting that exercise, the Agency could not assume or take it for granted that the Percentage Shares resulting from CN's rationing methodology represented the level of service obligation owed by CN to the respondents.

[80] For example, if a railway company adopts a rationing methodology that turns out to be more generous than its statutory level of service obligation, shippers would obviously have no incentive to challenge that methodology. Under that scenario, it would not, however, necessarily follow that the railway company had breached its statutory obligation if it did not meet the targets set out in its rationing methodology. This gives rise to the question of whether the complaints made by the respondents were truly level of service obligation complaints. I have serious doubts that they were, but because of the conclusion which I have arrived at in regard to the Agency's determination that CN had breached its level of service obligation, I need not determine that question.

[81] I wish to add that in enacting its rationing methodology, CN did not and could not substitute that methodology for the level of service obligation which it owed to the respondents. The best that can be said is that, in some circumstances, a rationing methodology may explain or

justify a failure to meet a request for service. However, a rationing methodology, like the one adopted by CN in the present matter, is not a measure of the service which must be provided by a railway company. I would further add that I agree entirely with CN's assertion, found at paragraphs 41 of its memoranda of fact and law in Viterra and Richardson that it "was free to alter or withdraw the rationing methodology as operationally appropriate at any time. Subsections 113 to 115 of the Act do not impose any specific obligations on a railway company in this respect".

[82] Pursuant to sections 113 to 115 of the Act, a railway company is not obliged to provide to shippers a specific percentage of rail cars or a specific number of cars. Thus, CN was under no duty to deliver to the respondents a fixed percentage of cars or a fixed number of cars per week. Its obligation, pursuant to sections 113 to 115, was to provide to the respondents "adequate and suitable" accommodation in regard to their traffic.

[83] Before concluding, I wish to emphasize that in their applications for redress to the Agency, the respondents did not assert that CN had failed to meet its level of service obligation under sections 113 to 115. After stating that their allocation of rail cars since the fall of 2013 had "fallen short" of their requirements, the respondents pointed out that their complaints did not pertain "to the overall inadequacy of CN's service", but rather to the question of whether CN had breached its statutory obligation by failing to provide to them the Percentage Shares of rail cars to which they were entitled pursuant to CN's rationing methodology. As I have already indicated, the framing of the complaints by the respondents led the Agency astray in that it failed to address the only question which it could determine under the *CTA*, i.e. whether, in all of the

circumstances, CN had breached its duty to provide adequate and suitable accommodation in regard to the respondents' traffic.

[84] It is also important to point out that the respondents did not assert nor did they attempt to demonstrate that in failing to provide to them their respective Percentage Shares, CN had failed to meet its level of service obligation. Nor did the respondents assert that if CN had delivered these Percentage Shares it would have met its level of service obligation under the *CTA*.

[85] One last remark needs to be made. Because of the conclusion that I have reached, in regards to the Agency's determination that CN had breached its level of service obligation, we need not determine whether the Agency's Evaluation Approach is, in the words of CN, "a new and incorrect legal framework for determining level of service complaints." That issue will have to wait for another day.

VII. Conclusion

[86] It is therefore my opinion that in concluding that CN had breached its level of service obligation by reason of its failure to provide to the respondents the Percentage Shares allocated to them under CN's rationing methodology, the Agency made unreasonable errors of law which justify intervention on our part. Because the Agency's preliminary decisions cannot stand, the Agency's final decisions must also fall.

[87] I would therefore allow the appeals with costs, I would set aside both the Agency's preliminary and final decisions, and, in the circumstances, I would send the matter back to the

Agency for reconsideration of the respondents' applications in light of these reasons. Finally, I would grant the appellant the cost of its applications for leave to appeal.

"M. Nadon"

J.A.

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

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-396-15 and A-398-15

(APPEAL FROM PRELIMINARY DECISIONS OF THE CANADIAN TRANSPORTATION AGENCY DATED DECEMBER 18, 2014 (CASE NOS. 14-03260 and 14-03127) AND THE FINAL DECISIONS OF THE CANADIAN TRANSPORTATION AGENCY DATED MAY 20, 2015 (CASE NOS. 15-00017 and 15-00015))

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AND DOCKET:	A-398-15
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CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
DATED:	JANUARY 12, 2017

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