Federal Court of Appeal  Cour d'appel fédérale

**Date: 20180808**

**Docket: A-184-17**

**Citation: 2018 FCA 148**

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

**BETWEEN:**

**CANADIAN NATIONAL RAILWAY COMPANY**

**Applicant**

**and**

**ROBERT SCOTT**

**Respondent**

**and**

**CANADIAN TRANSPORTATION AGENCY**

**Intervener**

Heard at Winnipeg, Manitoba, on April 10, 2018.

Judgment delivered at Ottawa, Ontario, on August 8, 2018.

REASONS FOR JUDGMENT BY: NADON J.A.

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

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**REASONS FOR JUDGMENT**

**NADON J.A.**

## I. Introduction

[1] Before us is the applicant Canadian National Railway Company (CN)'s challenge of decision LET-R-21-2017 (Case No. 16-05647) dated May 29, 2017 whereby the Canadian Transport Agency (the Agency) determined, pursuant to section 95.1 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the CTA), that the noise levels caused by CN's railway operations on the Redditt Subdivision, west of its Transcona Rail Yard, in the city of Winnipeg, were not reasonable.

[2] For the reasons that follow, I would dismiss CN's application for judicial review.

## II. Facts

[3] On November 29, 2016, the respondent, Robert Scott, and other residents of the Mission Gardens neighbourhood in Winnipeg, Manitoba, filed an application with the Agency in regard to noise and vibration resulting from CN's railway operations on the aforementioned Redditt Subdivision. In their application, Mr. Scott and others complained that they had been adversely affected by noise and vibration resulting from a change in CN's rail operations, *i.e.* the marshalling and staging of trains outside of its Transcona Rail Yard, from Plessis Road to Bournais Drive. By their complaint, Mr. Scott and others requested an order from the Agency directing CN to return the marshalling and staging of its trains to within the Transcona Rail Yard, east of the Plessis Road underpass.

[4] In response to this complaint, CN took the position that it met the requirements of section 95.1 of the CTA and that the noise and vibration resulting from its operations were reasonable.

[5] In order to resolve the complaint, the Agency had to determine whether CN had met its obligations under the CTA not to cause noise that was unreasonable. In making that determination, the Agency proceeded under an analytical framework which required it to first determine whether CN's railway operations had caused noise and/or vibration which constituted a substantial interference with the ordinary comfort or convenience of living, according to the standards of the average person, and, if so, whether the noise and vibration levels were reasonable.

[6] By its decision, the Agency concluded that CN had caused noise and/or vibration, constituting a substantial interference. The Agency further concluded that the noise and/or vibration levels resulting from CN's operations were unreasonable and that, consequently, CN was not meeting its obligations under section 95.1 of the CTA.

[7] On June 12, 2017, CN filed an application for judicial review of the Agency's decision. This led the Agency, on June 30, 2017, to seek leave of this Court to intervene, which motion was granted on July 28, 2017 by Trudel J.A. More particularly, the Agency was granted leave to file a motion to strike CN's judicial review application on the grounds that this Court did not have jurisdiction to hear and determine judicial review applications resulting from decisions made by the Agency. Trudel J.A. also allowed the Agency, in the event that its motion to strike was not successful, to file a Memorandum of Fact and Law of no more than ten (10) pages,

pertaining to the following issues: (1) the appropriate standard of review; and (2) the Agency's process and the record, and in particular the technical and specialized elements considered in noise and vibration complaints.

[8] On September 1, 2017, Boivin J.A. dismissed the Agency's motion to strike. In his view, the issue raised by the motion to strike was one that should be determined by the panel hearing and determining the merits of CN's judicial review application.

[9] On September 22, 2017, Boivin J.A. granted the Agency an extension of time to file its Memorandum of Fact and Law and allowed the Agency to address the further question of whether CN's application for judicial review fell within the Court's jurisdiction pursuant to paragraph 28(1)(*k*) and subsection 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In making this order, Boivin J.A. allowed CN to respond to the Agency's Memorandum of Fact of Law by filing a supplemental Memorandum of Fact and Law of no more than five (5) pages.

[10] On October 23, 2017, CN filed its Reply to the Agency's submissions on the jurisdiction issue.

## III. CN's position on the application

[11] In brief, CN takes the position that this Court has jurisdiction to hear its judicial review application as the application raises questions of fact only, arguing *inter alia* that in the circumstances of this case, it has no right of appeal to this Court and that no other available remedy exists for it to assert its rights again the Agency's decision.

[12] On the merits of the Agency's decision, CN argues that the decision is unreasonable in that the Agency misapprehended the strength of the record as a whole and that it applied the *Railway Noise Measurement and Reporting Methodology* (the Methodology) in an improper and unreasonable manner.

## IV. Respondent's position

[13] By letter dated October 4, 2017, counsel for the respondent advised the Court that they had been instructed not to file written submissions on the judicial review application, adding, however, that the respondent was in agreement with the submissions made by the Agency in its Memorandum of Fact and Law.

## V. Agency's position

[14] The Agency points out that pursuant to the Court's Order of July 28, 2017, it was granted leave to intervene so as to make submissions regarding the applicable standard of review and its process and the record, in particular the technical and specialized elements considered in noise and vibration complaints. The Agency also points out that by a second Order dated September 22, 2017, the Court allowed it to file submissions concerning the question of whether CN's application fell within the ambit of this Court's jurisdiction with regard to judicial review applications made pursuant to paragraph 28(1)(*k*) and subsection 28(2) of the *Federal Courts Act*.

[15] The Agency takes the position that its decision is either subject to an appeal to this Court on a question of law or jurisdiction pursuant to subsection 41(1) of the CTA or subject to a Petition to the Governor in Council pursuant to section 40 of the CTA. Consequently, because both of these remedies are appeal mechanisms within the meaning of section 18.5 of the *Federal Courts Act*, the Agency says that this Court cannot entertain CN's judicial review application.

## VI. Analysis

[16] As I am of the view that this Court is without jurisdiction to hear and determine CN's application, I need not address CN's arguments on the merits of the decision nor the Agency's submissions regarding the standard of review and its process and the record.

[17] To begin with, I should set out the legislation relevant to our determination of CN's judicial review application.

| ***Federal Courts Act*** | ***Loi sur les Cours fédérales*** |
|---|---|
| **18.1 (1)** An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | **18.1 (1)** Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |
| … | […] |
| **18.5** Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, | **18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou |

commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

…

[…]

**28 (1)** The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

**28 (1)** La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

…

[…]

(*k*) the Canadian Transportation Agency established by the *Canada Transportation Act*;

*k*) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

…

[…]

**28 (2)** Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

**28 (2)** Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

***Canadian Transportation Act***

***Loi sur les Transports au Canada***

**31** The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

**31** La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

**40** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested

**40** Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie

| | |
|---|---|
| person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties. | ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties. |
| **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. |
| [My emphasis] | [Mon soulignement] |

[18] Although it is correct to say, as CN does, that this Court, pursuant to paragraph 28(1)(k) of the *Federal Courts Act*, has jurisdiction to hear and determine judicial review applications made in respect of decisions rendered by the Agency, the issue now before us arises because of the wording of section 18.5 which provides that decisions of boards, commissions or tribunals are not subject to judicial review whenever an Act of Parliament provides that such decisions may be appealed to, *inter alia*, the Federal Court of Appeal or the Governor in Council.

[19] Relying on section 18.5 which, by reason of subsection 28(2), applies to judicial review applications brought before this Court under subsection 28(1), the Agency says that this Court cannot entertain CN's judicial review application because section 40 and subsection 41(1) of the CTA provide for appeals to this Court, on questions of law or jurisdiction, and to the Governor in Council on any matter, including questions of law, of jurisdiction and of fact. Consequently, the Agency asks us to dismiss CN's judicial review application.

[20] In my opinion, the position put forward by the Agency is well-founded. Before explaining my reasons for that view, I will set out the arguments advanced by CN in support of the contrary view.

[21] CN begins its arguments by pointing out that three decisions of this Court have dealt with the issue now before us, namely *Leroux v. Transcanada Pipelines Ltd.* 198 N.R. 316, [1996] F.C.J. No. 622 [*Leroux*], *Cathay International Television Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission*, [1987] F.C.J. No. 350, 80 N.R. 117 [*Cathay*]; and *Rich Colour Prints Ltd. v. Deputy Minister of National Revenue (Customs and excise)*,[1984] 2 F.C. 246, [1984] F.C.J. No. 96 at paragraph 7 [*Rich Colour*]. CN says that *Leroux* and *Cathay* offer an expansive view of section 18.5 while *Rich Colour* offers a more restrictive approach.

[22] CN submits that we should follow *Rich Colour* because it provides the only acceptable interpretation of section 18.5 and that *Leroux* and *Cathay* misread section 18.5 and, in the result, render the provision unconstitutional. CN further says that as its application for judicial review

raises questions of fact only, there is no appeal possible to this Court pursuant to subsection 41(1) of the CTA.

[23] CN also argues that section 40 is not an appeal mechanism because it grants the Governor in Council discretion to vary or rescind decisions of the Agency. Although CN does not dispute the fact that the Governor in Council may intervene in matters of fact, it says that the Governor in Council is "a body that is ill-suited to receiving petitions to engage in the type of detail-laden and specific evidentiary examination that is called for during the judicial review process where questions of fact relating to decibel levels are at issue" (CN's Memorandum of Fact and Law, at paragraph 34).

[24] In other words, CN's view is that the type of case now before us is not the type of case which would be of interest to the Governor in Council, contrary to disputes pertaining to policy as evidenced in the matter dealt with by the Supreme Court of Canada in *Canadian National Railway vs. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 [*Canadian Railway SCC*], to which I will return shortly.

[25] CN also says that in terms of time and money, it does not make much sense to bring the present matter to the Governor in Council as, in the end, any decision rendered by the Governor in Council, whether to refuse to hear the petition or to decide it against CN, would likely lead to a judicial review application brought before the Federal Court and the possibility of an appeal from the Federal Court's decision to this Court.

[26] CN also says that Parliament cannot remove the Court's judicial review powers by granting oversight of factual questions to the Governor in Council in lieu of review by a Court, adding that by giving effect to the Agency's position, this Court would be immunizing "…factual conclusions reached by the Agency in its adjudicative capacity from review by the judiciary." (CN's Reply, at paragraph 9).

[27] CN further argues that the constitutional implications arising from section 18.5 were not argued or addressed in *Leroux* and that the rule of law requires that it be allowed to challenge factual findings or conclusions of fact made by the Agency before a Court of law.

[28] CN refers to this Court's decision in *Cathay* making the point that, contrary to what the applicant had attempted to do in that case, the present matter is not an instance where it is attempting, through artful pleadings or arguments, to disguise a question of law or jurisdiction into a factual question. CN also says that there is no authority to support the view that the Agency or any other administrative body can be exempted from the Courts' supervisory role.

[29] Thus, in the end, CN says that since the appeal provided under subsection 41(1) of the CTA is the only appeal provided by an Act of Parliament, hence questions of fact, like those raised in the present matter, can be judicially reviewed by this Court under subsection 28(1) of the *Federal Courts Act*.

[30] In my view, CN's arguments cannot succeed.

[31] I will first address the cases referred to by CN. In *Rich Colour*, the Court had before it a motion to extend the time in which to file a section 28 judicial review application challenging a decision of the Tariff Board (now the Copyright Board of Canada) on the grounds that it had made an error of law. After referring to section 48 of the *Customs Act*, R.S.C. 1970, c. C.42, which provided for a right of appeal, on leave of this Court, on questions of law and to section 29 of the *Federal Court Act*, R.S.C. 1970 (2nd supp. c. 10) (now section 18.5 of the *Federal Courts Act*) Pratte J.A., writing for the Court, said at paragraph 7 of the Court's brief, oral reasons:

> In our opinion, section 29 clearly says that a decision which, under an Act of Parliament, may be appealed to an authority mentioned in the section cannot, to the extent that it may be so appealed, be the subject of a section 28 application. It follows that if the right of appeal is not limited, the decision may not be reviewed under section 28; if the right of appeal is limited, for instance to a question of jurisdiction, the decision may be reviewed under section 28 on grounds that cannot be raised in the appeal. Contrary to what was argued by counsel for the applicant, the last words of section 29 are not rendered superfluous by this interpretation. These words are necessary in order to preserve the jurisdiction of the Court when an Act of Parliament provides that a decision of a federal board may not only be appealed to one of the authorities mentioned in section 29 but may also be reviewed by the Federal Court; in such a case, the decision may be reviewed by the Court but only "to the extent and in the manner provided for in that Act."
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> [My emphasis]

[32] Thus, in the Court's view, to the extent that a decision can be appealed to the authorities referred to in section 29 (now section 18.5 of the *Federal Courts Act*) no judicial review application can be brought before the Federal Court or the Federal Court of Appeal. The Court added that if, however, the right of appeal was limited, the decision could be challenged by way of judicial review on grounds which could not be raised in the appeal.

[33] Before the Court in *Cathay* was a motion to quash an application made pursuant to section 28 of the *Federal Court Act* (now section 28(1) of the *Federal Courts Act*) which attempted to set aside a decision of the Canadian Radio-television and Telecommunications Commission (CRTC) on the grounds that the Court was without jurisdiction to hear and determine the matter.

[34] Section 26(1) of the *Broadcasting Act*, R.S.C. 1970, c. B-11, like subsection 40(1) of the CTA, provided that an Appeal lied to this Court, upon leave, on a question of law or jurisdiction. The Court allowed the motion to quash. In so concluding, Stone J.A., for the Court, made the following remarks at paragraph 20 of his reasons:

> (20) I come, finally, to what I regard as the pivotal question in this dispute. By subsection 26(1) of the *Broadcasting Act*, rights of appeal are restricted to "a question of law or a question of jurisdiction". Parliament, by adopting this language, appears to have intended that relief against a decision or order of the Respondent is to be available to the extent and in the manner provided in that subsection and that otherwise, as is stated in section 25 of that statute, the decision or order is to be "final and conclusive". No amount of artful drafting can convert a question that is appealable under the *Broadcasting Act* to one that is reviewable under section 28 of the *Federal Court Act*. In my view, the complaints asserted in paragraph (c) of the section 28 application raise questions of law or of jurisdiction and, hence, cannot be made the subject of a section 28 application.
>
> [My emphasis]

[35] In *Leroux*, the Court also had to determine a motion to quash a judicial review application, this time brought against the National Energy Board. I should mention that pursuant to subsection 22(1) of the *National Energy Board Act*, R.S.C. 1985 c. N-7, decisions of the Board were subject to a right of appeal, on leave of this Court, on questions of law and jurisdiction.

[36] In the face of section 29 of the *Federal Court Act* (now section 18.5 of the *Federal Courts Act*) the applicants in *Leroux* argued that they should be allowed to pursue their judicial review application because they were raising, *inter alia*, errors of facts and failures to follow the rules of natural justice. The Court granted the motion to quash and explained its rationale for doing so as follows:

> [3] The applicants say that their application for judicial review should be allowed to continue notwithstanding this provision since errors of fact and failures to follow the rules of natural justice may not be included in the expression "question of law or of jurisdiction" found in section 22 of the *National Energy Board Act*. We do not agree. In our view, this case is indistinguishable from this Court's decision in *Cathay International Television Inc. v. Canadian Radio-Television and Telecommunications Commission*. That case reviewed some of the earlier decisions of this Court, particularly *Aly Abdel Hafez Aly v. Minister of Manpower & Immigration* but found that the better view was that "no amount of artful drafting can convert a question that is appealable under the *Broadcasting Act* to one that is reviewable under section 28 of the *Federal Court Act*". The same may be said of section 22 of the *National Energy Board Act*. To the extent that section 18.1 of the present *Federal Court Act* allows a review of questions of fact or breaches of the principles of natural justice those matters are questions of law or jurisdiction within the meaning of section 22 of the *National Energy Board Act*. The decision in *Aly*, *supra*, should no longer be viewed as good law.
>
> [My emphasis]

[37] Contrary to CN's submissions, I do not agree that *Rich Colour*, *Cathay* and *Leroux* stand for different propositions. In my view, all three decisions stand for the proposition that judicial review may lie under section 28 when the grounds put forward in the application cannot be the subject of an appeal to any of the authorities referred to in section 18.5. The question before the Court in *Rich Colour*, *Cathay* and *Leroux* was whether there was a ground of judicial review which could not be dealt with by the appeal mechanism provided in the governing statutes. In all three decisions, the Court held that the grounds raised in the judicial review applications clearly fell within the appeal process available to the applicants. However, to the extent that *Leroux* can

be read for the proposition that all questions of fact constitute questions of law or jurisdiction under the governing statutes, and thus never subject to judicial review either section 28(1) of the *Federal Courts Act*, *Leroux* is wrong and should not be followed because its pronouncement is not in accord with our decisions in *Cathay* and *Rich Colour*.

[38] In the present matter, I am satisfied that the grounds raised by CN in its judicial review application are grounds which could either be appealed to this Court, pursuant to subsection 41(1) of the CTA, or put before the Governor in Council by way of a petition brought pursuant to section 40 of the CTA. In my opinion, both the appeal under subsection 41(1) and the petition under section 40 of the CTA constitute appeals within the meaning of section 18.5 of the *Federal Courts Act*.

[39] One of the arguments put forward by the Agency in support of its view that we cannot hear and determine CN's application, is that the application does not, in effect, raise questions of fact but rather questions of law. Although we need not come to a view regarding this argument because, in the end, both questions of fact and of law could either be brought before this Court or before the Governor in Council, a few comments regarding CN's application and its Memorandum of Fact and Law will put in perspective the Agency's argument.

[40] First, a reading of CN's application gives rise to the impression that what is being raised by CN's application are questions of law. In making that assertion, I have in mind the following paragraphs of CN's application.

- At paragraph 3 a), CN says that the Agency made factual findings "…without regard for the material before it…".

- At paragraph 6 a) CN says that the Agency determined "…an ambient noise level despite a complete absence of evidence pertaining to background sound levels."

- At paragraph 6 b) CN says that "[t]he Agency determined an operational noise level despite a complete absence of evidence pertaining to the volume of sound created by the relevant rail operations."

- At paragraph 7, CN says that "[t]here was no evidence to support this conclusion" i.e. to determine a sound differential of 12 dBA, adding that "the Agency cannot create evidence to substantiate s. 95.3 complaints." [Emphasis in the original]

- At paragraph 8, CN says that in unreasonably applying its own assessment methodology, the Agency speculated "…as to both the ambient noise and operational sound level…".

[41] Turning to CN's Memorandum of Fact and Law, I wish to point to the following paragraphs thereof:

- At paragraph 46, CN states that "[t]here is, effectively, no evidentiary justification in the decision for the Agency's use of 55 dBA as the ambient noise for Mission Gardens."

- At paragraph 50, CN asserts that "…it is sufficient for the purpose of this judicial review application to state that there was insufficient evidence presented by Scott on the core points articulated above."

- At paragraph 57, CN states that "[a]s noted above, Scott led little-to-no evidence on this point and it is unclear why he was given the benefit of the doubt by way of a lower ambient sound level, particularly given the Agency's own description of Mission Gardens."

- At paragraph 59, CN states that "…there was no evidence to suggest that 60 minutes of idling was associated with or representative of the majority of CN's operations in the area."

- At paragraph 64, CN says that "[t]here was no basis in the record for preferring one account of 60 minutes as opposed to another account of multiple instances 'up to 20 minutes'."

- At paragraph 67, CN says that "[u]ltimately, the record is equally consistent with a finding of a mere 2 dBA differential than with a finding of a 12 dBA differential. There is no basis whatsoever for reaching the latter conclusion as opposed to the former. This is not the type of decision where both results were reasonably open to the Agency. With respect, the result bears more in common with a coin flip than with a reasoned adjudication based on the record."

[42] As I have just indicated, we need not determine the issue raised by CN's argument. However, I would say that the nature of the assertions and statements made by CN, both in its application and its Memorandum of Fact and Law, may have been what Hugessen, J.had in mind in *Leroux* when he stated at paragraph 3 of his reasons for the Court that "[t]o the extent that section 18.1 of the present *Federal Court Act* allows a review of questions of fact or breaches of the principles of natural justice those matters are questions of law or jurisdiction within the meaning of section 22 of the *National Energy Board Act*."

[43] In any event, there can be no dispute that questions of law or of jurisdiction arising from the Agency's decision could have been brought before this Court pursuant to subsection 41(1) of the CTA and that that mechanism is an appeal mechanism for the purpose of section 18.5 of the *Federal Courts Act*.

[44] Accepting for present purposes that the issues raised by CN in its application are truly questions of fact, and thus not appealable to this Court under subsection 41(1) of the CTA, I am satisfied that the petition to the Governor in Council, pursuant to section 40 of the CTA, constitutes an appeal mechanism for the purpose of section 18.5 of the *Federal Courts Act*. Thus, CN could have petitioned the Governor in Council in respect of the matters raised in its application. My reasons for this view are the following.

[45] First, I cannot subscribe to CN's submissions that the remedy provided at section 40 of the CTA does not constitute an appeal mechanism for the purpose of section 18.5 of the *Federal Courts Act*. If I understand CN's submissions, it is, *inter alia*, that the word "appeal" found in

section 18.5 is limited to judicial appeals. That cannot be since there are no judicial appeals to either the Governor in Council or the Treasury Board. Restricting the meaning of the word "appeal" to judicial appeals would, in my respectful opinion, deprive the provision of its true meaning, *i.e.* that, to the extent that there is an available and meaningful remedy allowing the aggrieved party to challenge the Agency's decision, judicial review of the decision is not available.

[46] In *Canadian National Railway Company v. Emerson Milling Inc.* 2017 FCA 79, [2017] F.C.J. No. 371, this Court took the view that the remedy found at section 40 was an appeal within the meaning of section 18.5 of the *Federal Courts Act*. Writing for the Court, Stratas J.A. at paragraphs 11, 12 and 13 of the Court's reasons, made the point in the following terms:

> [11] For the purposes of subsection 41(1) of the *Canada Transportation Act* and sections worded like it, what is a "question of law" and what is a "question of jurisdiction"? To interpret these terms, we need to consider their plain meaning, their context within the Act and the purpose of subsection 41(1) and the Act itself: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.
>
> [12] Under the *Canada Transportation Act*, the Agency is continued and empowered as a specialized regulator in the transportation sector. Its decisions are informed by understandings of how the sector operates and other specialized appreciations and policy considerations, such as the National Transportation Policy set out in section 5 of the Act. Indeed, under sections 24 and 43 of the Act, the Governor in Council can issue policy directions concerning any matter that comes within the jurisdiction of the Agency and the Agency must follow them. Appeals are not available for pure questions of fact (see section 31 of the Act). But appeals to the Governor in Council are available under section 40 of the Act; this provides a way to appeal, among other things, factually suffused and policy-imbued decisions of the Agency: *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (*"CN 2014"*).
>
> [13] From these provisions, one can see Parliament's intention behind subsection 41(1): factually suffused and policy-imbued decisions are not to be appealed to this Court. Parliamentary debates also support this: *CN 2014* at para. 46. Such questions can be appealed elsewhere. Instead, only matters turning on questions of law or questions of jurisdiction may be appealed to this Court with leave

> granted on the basis that there is an arguable issue: *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 135, 418 N.R. 198; *Rogers Cable Communications Inc. v. New Brunswick (Transportation)*, 2007 FCA 168, 367 N.R. 78. Given the terms of subsection 41(1), given the fact that a denial of leave is merits based, and given the availability of review under other sections of the Act for other questions, it would be hard to view subsection 41(1) as immunizing Agency decision-making in a problematic way.
>
> [My emphasis]

[47] There can be no doubt that in using the words "appeals to the Governor in Council are available under section 40 of the Act [CTA]", Stratas J.A. did not intend to say that a judicial appeal lied to the Governor in Council. Rather, as I have just indicated, he could only have meant that the remedy found at section 40 was an acceptable alternative remedy open to CN in that case to challenge the Agency's decision.

[48] Second, I agree entirely with the statement found at paragraph 26 of the Agency's Memorandum of Fact and Law where it states:

> Section 18.5 of the *Federal Courts Act* applies because the CTA expressly provides for an appeal to the Federal Court of Appeal and to the Governor-in-Council. There is no authority for the proposition that section 18.5 would not apply if the applicant is not satisfied with the statutory appeal mechanism(s) available to it. Whether the appellate jurisdiction is discretionary, whether the applicant feels the reviewing body is "ill-suited" to deal with the proposed appeal, and whether pursuing the appeal is economical, <u>it is the existence of the right to appeal which forecloses this Court's jurisdiction under section 28</u>.
>
> [My emphasis]

[49] To the extent that the mechanism provided by Parliament at section 40 of the CTA constitutes a meaningful alternate remedy allowing CN to challenge the Agency's decision, then

that remedy prevents CN from instituting judicial review proceedings under section 28 of the *Federal Courts Act*.

[50] Third, I disagree with CN's assertions that by depriving it of its right to judicially review the Agency's decision pursuant to paragraph 28(1)(*k*) of the *Federal Courts Act*, this Court would be, in effect, granting the Agency complete immunity from supervision by the Courts of all factual questions determined by the Agency in its adjudicative capacity. In my view, the Supreme Court of Canada's decision in *Canadian Railway SCC*, provides a complete answer to CN's arguments on this point.

[51] In *Canadian Railway SCC*, after referring to section 40 of the CTA and indicating that the provision continued the Governor in Council's power to vary or rescind any decision or order of the Agency, the Court, under the penship of Rothstein J., formulated the question which it had to determine, at paragraph 2 of the reasons, in the following way:

> The questions at issue in this appeal centre on whether the Governor in Council was empowered to vary or rescind a decision of the Agency on a point of law.

[52] At paragraph 34 of his reasons for the Court, Rothstein J. highlights the fact that CN had argued that section 40 of the CTA did not allow the Governor in Council to determine matters of law or jurisdiction but that its power was confined to questions of fact and policy only. With that view Rothstein J. could not agree, making the point at paragraph 37 of his reasons that section 40 did not, in any way, limit the Governor in Council's authority in determining petitions brought before it.

[53] At paragraphs 43 and following of the Court's Reasons, Rothstein J. dealt with CN's arguments that the legislative history of both section 40 and subsection 41(1) of the CTA militated in favour of limiting the Governor in Council's authority to questions of fact or policy. After stating that the legislative history of the provision was unclear, he made the following statement at paragraph 46 of the reasons:

> In my view, the Hansard evidence does confirm that Parliament intended to prevent questions of fact from being appealed to the Federal Court of Appeal. This does not, without more, demonstrate that the Governor in Council's role was intended to be limited to review of questions of fact or policy alone.

[54] Then, at paragraph 48 of the Court's reasons, Rothstein J. indicated that he agreed with CN's view that it was unusual for the Governor in Council to determine questions of law and that generally the Governor in Council was mainly interested in issues of policy and fact, adding, however, that "…this does not mean that the Governor in Council has no authority under the statute to do so". In Rothstein J.'s view, the fact that parties may prefer, for practical or strategic considerations, to pursue questions of law before the Federal Court of Appeal pursuant to subsection 41(1), did not mean that section 40 of the CTA prevented the Governor in Council from exercising its power over questions of law.

[55] Then, in the context of determining the standard of review applicable to decisions made by the Governor in Council pursuant to section 40 of the CTA, Rothstein J., at paragraph 51 of the Court's reasons, made the point that in determining petitions under section 40 of the CTA, the Governor in Council was not acting in a legislative capacity and that, as a result, any decision rendered by the Governor in Council was subject to judicial review by the Federal Court. Thus, in Rothstein J.'s view, the Federal Court would be exercising "a supervisory function over the

Governor in Council, a public authority exercising the statutory powers delegated to it under s. 40 of the CTA." (paragraph 52 of the Court's reasons). After referring to the Court's decisions in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paragraph 28; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 30, Rothstein J. further explained the view which he expressed at paragraph 51 of the Court's reasons, by saying, at paragraph 58 the following:

> [58] Although primary administrative jurisdiction over *The Railway Act* was later delegated to the Board of Railway Commissioners (the body that later became the Agency) in order to further efficiency in addressing issues arising under *The Railway Act*, the Governor in Council maintained an oversight role (*The Railway Act*, 1903, S.C. 1903, c. 58; Coyne, at pp. vi-vii). The long history of the Governor in Council's involvement in transportation law and policy indicates that this is an area closely connected to the Governor in Council's review function. Parliament has maintained a robust role for the Governor in Council in this area through s.40, which confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. When reviewing orders or decisions of the Agency in its s. 40 role, the Governor in Council acts in an adjudicative capacity and determines de novo substantive issues that were before the Agency. In this way, Parliament has recognized the Governor in Council's longstanding involvement in this area. As such, the principle that deference will usually result where a tribunal is interpreting statutes closely connected to its function, with which it will have particular familiarity, can be said to apply in this case.
>
> [My emphasis]

[56] It follows from the Supreme Court's decision in *Canadian Railway SCC*, that there is a meaningful acceptable alternate remedy open to CN to challenge factual findings and determinations made by the Agency. It also follows from *Canadian Railway SCC* that decisions made by the Governor in Council under section 40 are adjudicative decisions which are subject to judicial review before the Federal Court whose decisions can be appealed to this Court.

[57] Consequently, contrary to what CN asserts, Parliament did not remove the Courts' judicial review powers by enacting section 40 of the CTA. The remedy open to CN may not be the one that it would have liked to have but the remedy created by Parliament, as I have already indicated, is a meaningful remedy, the effect of which is to prevent this Court from hearing and determining CN's judicial review application brought under section 28 of the *Federal Courts Act*.

## VII. Conclusion

[58] For these reasons, I would dismiss CN's judicial review application with costs.

"M Nadon"

J.A.

"I agree.
Eleanor R. Dawson J.A."

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-184-17 |
| **STYLE OF CAUSE:** | CANADIAN NATIONAL RAILWAY COMPANY v. ROBERT SCOTT AND CANADIAN TRANSPORTATION AGENCY |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | APRIL 10, 2018 |
| **REASONS FOR JUDGMENT BY:** | NADON J.A. |
| **CONCURRED IN BY:** | DAWSON J.A.<br>GLEASON J.A. |
| **DATED:** | AUGUST 8, 2018 |

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