

Date: 20030603

Docket: A-374-01

Citation: 2003 FCA 243

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

RÉAL FAFARD AND JACQUES BORDUAS,

Appellants

and

**CANADIAN NATIONAL RAILWAY COMPANY,
TOWN OF SAINT-BASILE-LE-GRAND, AND
TRANSPORT CANADA,**

Respondents

IN THE MATTER OF an application by Réal Fafard and Jacques Borduas pursuant to section 103 of the *Canada Transportation Act*, S.C. 1996, c. 10, to construct and maintain a private level crossing across the Canadian National Railway Company right-of-way at mileage 58.84 of the St-Hyacinthe Subdivision, in the town of Saint-Basile-le-Grand, in the province of Quebec.

Hearing held at Montréal, Quebec, on April 1, 2003.

Judgment delivered at Ottawa, Ontario, on June 3, 2003.

**REASONS FOR JUDGMENT BY:
CONCURRED IN BY:
CONCURRING REASONS BY:**

**LÉTOURNEAU J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] By Decision No. 18-R-2001 dated January 12, 2001, the Canadian Transportation

Agency (Agency) authorized a private crossing under section 103 of the *Canada Transportation*

Act, S.C. 1996, c. 10 (Act) to allow trucks to cross a Canadian National railway line and to enable the applicants to access one of their properties adjoining the track. However, the request to apportion the costs of constructing and maintaining the crossing under section 16 of the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.) was denied. The Agency ordered the applicants to bear the full cost, including the cost of a safety system, which is incidental but essential for the existence and use of the crossing. The applicants are challenging that part of the decision and are asking the Court to recognize that section 16 applies in the circumstances and to order the Agency to determine the proportion of the liability for the costs of installing a protection system at the crossing that was granted to them.

[2] Sections 101, 102 and 103 of the Act and section 16 of the *Railway Safety Act* read as follows:

101. (1) An agreement, or an amendment to an agreement, relating to the construction, maintenance or apportionment of the costs of a road crossing or a utility crossing may be filed with the Agency.

(2) When the agreement or amendment is filed, it becomes an order of the Agency authorizing the parties to construct or maintain the crossing, or apportioning the costs, as provided in the agreement.

(3) If a person is unsuccessful in negotiating an agreement or amendment mentioned in subsection (1), the Agency may, on application, authorize the construction of a suitable road crossing, utility crossing or related work, or specifying who shall maintain the crossing.

101. (1) Toute entente, ou toute modification apportée à celle-ci, concernant la construction, l'entretien ou la répartition des coûts d'un franchissement routier ou par desserte peut être déposée auprès de l'Office.

(2) L'entente ou la modification ainsi déposée est assimilée à un arrêté de l'Office qui autorise la construction ou l'entretien du franchissement, ou qui répartit les coûts afférents, conformément au document déposé.

(3) L'Office peut, sur demande de la personne qui ne réussit pas à conclure l'entente ou une modification, autoriser la construction d'un franchissement convenable ou de tout ouvrage qui y est lié, ou désigner le responsable de l'entretien du franchissement.

(4) Section 16 of the *Railway Safety Act* applies if a person is unsuccessful in negotiating an agreement relating to the apportionment of the costs of constructing or maintaining the road crossing or utility crossing.

(5) This section does not apply in any circumstances where section 102 or 103 applies.

Private Crossings

102. If an owner's land is divided as a result of the construction of a railway line, the railway company shall, at the owner's request, construct a suitable crossing for the owner's enjoyment of the land.

103. (1) If a railway company and an owner of land adjoining the company's railway do not agree on the construction of a crossing across the railway, the Agency, on the application of the owner, may order the company to construct a suitable crossing if the Agency considers it necessary for the owner's enjoyment of the land.

(2) The Agency may include in its order terms and conditions governing the construction and maintenance of the crossing.

(3) The owner of the land shall pay the costs of constructing and maintaining the crossing.

16. (1) Where the proposing party in respect of a proposed railway work and each other person who stands to benefit from the completion of the work cannot agree on the apportionment between them of the liability to meet the construction, alteration, operational or maintenance costs in respect of that work, the proposing party or any of those persons may, if no right of recourse is available under the *Railway Act* or the *Railway Relocation and Crossing Act*, refer the matter to the Agency for a

(4) L'article 16 de la *Loi sur la sécurité ferroviaire* s'applique s'il n'y a pas d'entente quant à la répartition des coûts de la construction ou de l'entretien du franchissement.

(5) Le présent article ne s'applique pas dans les cas où les articles 102 ou 103 s'appliquent.

Passages

102. La compagnie de chemin de fer qui fait passer une ligne à travers la terre d'un propriétaire doit, sur demande de celui-ci, construire un passage convenable qui lui assure la jouissance de sa terre.

103. (1) Si la compagnie de chemin de fer et le propriétaire d'une terre contiguë au chemin de fer ne s'entendent pas sur la construction d'un passage croisant celui-ci, l'Office peut, sur demande du propriétaire, ordonner à la compagnie de construire un passage convenable s'il juge celui-ci nécessaire à la jouissance, par le propriétaire, de sa terre.

(2) L'Office peut assortir l'arrêté de conditions concernant la construction et l'entretien du passage.

(3) Les coûts de la construction et de l'entretien du passage sont à la charge du propriétaire de la terre.

16. (1) Faute de recours prévu sous le régime de la *Loi sur les chemins de fer* ou la *Loi sur le déplacement des lignes de chemin de fer et les croisements de chemin de fer*, le promoteur et tout bénéficiaire des installations ferroviaires une fois terminées peuvent saisir l'Office de leur désaccord sur leurs obligations en ce qui concerne le coût de réalisation des travaux et les frais d'exploitation et d'entretien des installations réalisées.

determination.

(2) A reference to the Agency under subsection (1) shall be made by notice in a form prescribed by the regulations made under subsection (5), and that notice shall be accompanied by such information relating to the proposed railway work as is prescribed by those regulations.

(3) The Agency may, in its discretion, by notice sent to the person referring a matter or to any person who might have referred a matter, require that person to give the Agency, within such period as it specifies in the notice, such further information relating to actual or anticipated construction, alteration, operational and maintenance costs in respect of the railway work, or benefits arising from the completion of the work, as the Agency specifies in the notice.

(4) Where a matter is referred to the Agency under subsection (1), the Agency shall, having regard to any grant made under section 12 or 13 in respect of that matter, the relative benefits that each person who has, or who might have, referred the matter stands to gain from the work, and to any other factor that it considers relevant, determine the proportion of the liability for construction, alteration, operational and maintenance costs to be borne by each person, and that liability shall be apportioned accordingly.

(5) The Agency may, with the approval of the Governor in Council, make regulations
(a) prescribing the form of the notice for a reference under this section; and
(b) prescribing the information to accompany that notice.

(6) In this section, “railway work” includes the relocation of any portion of a public road.

(7) Notwithstanding this section, this Act shall not be deemed to be administered in whole or in part by the

(2) La saisine s’exerce par avis rédigé en la forme déterminée par règlement de l’Office et accompagné des renseignements qui y sont prévus sur les installations ferroviaires en cause.

(3) À son appréciation, l’Office peut, par avis adressé à toute personne qui l’a saisi ou qui aurait pu le faire, obliger celle-ci à produire, dans le délai qu’il y fixe, les renseignements supplémentaires spécifiés dans l’avis et relatifs aux frais de réalisation véritables ou prévus à l’égard de ces travaux, aux frais d’exploitation et d’entretien des installations réalisées ou aux avantages découlant de cette réalisation.

(4) L’Office détermine la quote-part de chacun à l’égard des frais de réalisation, d’exploitation et d’entretien en tenant compte de la subvention accordée, le cas échéant, au titre des articles 12 ou 13, des avantages respectifs que retirerait des installations la personne qui l’a saisi ou qui aurait pu le faire, et de tout point qu’il juge utile. Les obligations à l’égard de ces frais sont réparties conformément à la décision de l’Office.

(5) L’Office peut, par règlement approuvé par le gouverneur en conseil, déterminer la forme des demandes prévues au présent article et préciser les renseignements devant les accompagner.

(6) Le présent article s’applique notamment au déplacement d’une partie d’une route publique.

(7) Malgré l’article 35 de la *Loi de 1987 sur les transports nationaux*, le présent article n’a pas pour effet de

Agency for the purpose of section 35 of the *National Transportation Act*, 1987.

charger l'Office de l'application, en tout ou en partie, de la présente loi.

(Emphasis added)

[3] After analyzing the record and the submissions by the parties, I am essentially in agreement with the reasons and the conclusions of the Agency. I would simply add the following observations.

[4] Sections 102 and 103 of the Act are found under the heading “Private Crossings” (in French, “*Passages*”) and govern cases involving private crossings, i.e. owners who want to access their private property, as opposed to section 101, which is in the section entitled “Road and Utility Crossings” (in French, “*Franchissement routier et par desserte*”) and which deals with crossings used by the general public: see Application by Money’s Mushrooms Ltd., Decision No. 22-R-2001, January 15, 2001, Canadian Transportation Agency.

[5] In sections 102 and 103, Parliament set out the obligations of both parties, i.e. the railway company and the owner of the land, with respect to private crossings. Section 102 is mandatory, whereas section 103 is permissive, which explains why costs are treated differently. Section 102 covers the detrimental situation where an owner’s land is divided in two by a railway line. The railway company has no choice: it must construct a suitable crossing for the owner of the land who otherwise would be deprived of the enjoyment of a part of his land, and it must bear the costs of doing so. Parliament has imposed this obligation on the company. Section 103 covers

quite a different situation. It deals with the case where an owner of land adjoining a railway line wants a suitable crossing constructed across the track in order to access the property. In that case, there is no automatic right to such a crossing, because often the land is not enclosed and there are other ways to access it. That is precisely the situation here where “there are several crossings in the area in close proximity, some of which are public, and some of which are equipped with automatic protection systems”: see the decision of the Agency, page 6. In addition, the applicants’ trucks use these crossings. The Agency may order the construction of a crossing if the two parties do not agree, but that order can only be made if the crossing is necessary for the owner’s enjoyment of the land. Parliament chose to have the owner of the land pay the full costs of constructing and maintaining the crossing: subsection 103(3).

[6] In addition to the reasons that the Agency properly cited in concluding that section 16 of the *Railway Safety Act* does not apply to an application for a private crossing under section 103 of the Act, including the fact that subsection 101(5) clearly so states, an additional textual argument based on section 101 confirms the Agency’s conclusion. Parliament expressly stated in subsection 4 of section 101 that section 16 of the *Railway Safety Act* applies where the parties, i.e. proposing parties and persons who stand to benefit from public crossings, cannot agree on the apportionment of the costs of the railway work. If Parliament had intended section 16 to apply to applications under sections 102 and 103, which deal with private crossings, it would have said so, as it did in subsection 101(4), which deals with public crossings. In fact, it clearly and specifically said the opposite in subsection 101(5) with respect to private crossings.

[7] Subsection 101(5) of the Act and what it states is clear and readily understood, because the Agency, on an application for a private crossing under section 103, has neither the jurisdiction nor the discretion to apportion the costs of the construction and maintenance of the crossing that has been granted. In fact, absent exceptional circumstances (see Decision No. 93-R-2001, Raymond Leblanc, where the Agency ordered the railway company to rebuild at its own expense the private crossing that it had unlawfully destroyed and ordered that the future costs of maintaining it should be borne by the owner of the adjoining land), Parliament has provided in subsection 103(3) that those costs must be paid by the owner of the adjoining land (in French: “*les coûts [...] sont à la charge*”). Therefore, it is not possible to apply section 16 or to order an apportionment of costs as the applicants would like. In addition, since the land is private property accessible only by the owner, the only person who stands to benefit from the private crossing is the owner of that land. The railway company does not stand to benefit from the private crossing: it is being imposed on the company. There is therefore no reason to apply section 16, which provides for the apportionment of costs among each person who stands to benefit. This is what subsection 101(5) recognizes, in all logic.

[8] The applicants concede that, on an application under section 103 of the Act, the Agency has jurisdiction to require that the private crossing that is granted be subject to safety measures, whose terms and conditions are determined by the Minister of Transport. Subsection 103(2) gives the Agency the power to include in its order terms and conditions governing the construction of the crossing. The scope and exercise of this power includes, inherently and indisputably, the power to ensure that the construction of the crossing it is permitting will be

subject to safety conditions. In fact, the Agency cannot ignore the obligation that is imposed, created and governed by section 5 of the Act. That section declares that it is essential to establish a safe network of transportation services and a national transportation system that meets the highest practicable safety standards: paragraph 5(a). In allowing a person, such as the applicants, to cross a rail line with trucks, the Agency cannot ignore the issue of safety that is raised in such a case. There is no doubt that the Agency is bound to make decisions that do not compromise or thwart the objective of transportation safety set out in its enabling statute.

[9] In *Metropolitan Toronto (Municipality) v. Canadian National Railway Co.*, [1998] 4 F.C. 506 (F.C.A.), this Court not only recognized the jurisdiction of the Agency in matters involving safety, but also its significant expertise in this field; accordingly, its decisions are to be reviewed on a standard of reasonableness. At pages 519 and 520, Mr. Justice Strayer, writing for the Court, said:

Here we have an expert tribunal with the cumulative experience of a century acquired by it and its predecessors, with an expert staff, and a regular involvement with problems of railway safety both with respect to those working or travelling by rail and those who by proximity may be endangered by the railway operation. If the CTA concludes, as it obviously has, that keeping trespassers off the railway right of way and tracks both protects the railway and facilitates its operation, it is difficult to see why this is not central to its area of expertise.

This expertise also extends to granting safe public and private crossings and to apportioning the costs as prescribed by the Act.

[10] Lastly, the concept of “suitable crossing” (in French, “*passage convenable*”) in section 102 and subsection 103(1) of the Act, by definition, includes an element of safety. A suitable crossing is a crossing that is adequate and appropriate for the purposes for which it was intended and installed. A private crossing for trucks across rail lines is not adequate or suitable within the meaning of the Act, whose essential objective is transportation safety, if the safety of high-speed trains, their passengers and users of the crossing is jeopardized every time it is used. I agree with the submission of counsel for the Agency: yes, the crossing requested must be suitable for the applicants’ trucks, but it must also be suitable for the trains.

[11] In addition, the interpretation to be given to the terms “suitable crossing” (*passage convenable*) in section 103 of the Act cannot be different from the one that must be given to the same terms in section 102, given that sections 102 and 103 are under the same heading: This principle of interpretation was applied in *S.T.B. Holdings Ltd. v. Her Majesty the Queen*, 2002 FCA 386, pages 13 to 15, leave to appeal to the Supreme Court of Canada denied on March 27, 2003.

[12] The applicants submit that the safety measures constitute railway work and therefore the railway company must necessarily pay part of the costs because it stands to benefit from the work.

[13] First, as I stated above, the safety measures, even if they do constitute railway work, are part of a “suitable private crossing”, and this crossing benefits only the owner of the adjoining private property.

[14] Second, if we were to conclude on these grounds, as the applicants are asking us to do, that the cost of safety measures for a suitable private crossing granted under section 103 can be apportioned under section 16, that would mean that the cost of such measures could also be apportioned in the case of a suitable private crossing that has been agreed to under section 102. This would increase the harm to the owner who, under section 102, sees his land divided in two, and henceforth could be required to pay part of the costs, whereas currently all the costs are borne by the railway company. However, over and above that fact, such an interpretation would thwart Parliament’s intention to establish a distinction with respect to costs and their apportionment between public crossings and private crossings on the one hand and between two types of private crossings on the other hand, i.e. those under section 102 and those under section 103 of the Act.

[15] For these reasons, I would dismiss the appeal without costs, since the only respondent who appeared, the Canadian National Railway Company, did not request them.

“Gilles Létourneau”

J.A.

“I concur.
M. Nadon J.A.”

Certified true translation

Mary Jo Egan, LLB

PELLETIER J.A. (Concurring Reasons)

[16] On April 13, 2000, the appellants filed an application with the Canadian Transportation Agency (the Agency) to construct a private level crossing across a Canadian National Railway Company right of way (the CN). The appellants, who operate a private farm recycling and composting business, wished to obtain access to their land from the provincial highway. Raw material from the business is trucked to the composing site by semi-trailer, representing ten round trips per day. These trucks must currently use a road crossing in the town of St. Basile-le-Grand to access the appellants' lands. The appellants now seek to have a private crossing constructed to avoid having to go through the town of St. Basile-le-Grand.

[17] A level crossing giving access to the appellants' lands and adequately serving their needs already existed, but was closed by CN at the request of Transport Canada because of railway safety concerns. As a result of that closure and believing that the re-opening of the crossing would require the installation of some sort of protection system (the protection system), the appellants joined to their application for a crossing an application for apportionment of the costs of the protection system. The application for a crossing was submitted under section 103 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act), and the application for costs apportionment under section 16 of the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.) (the RSA).

[18] The Agency granted the crossing sought by the appellants, but specified that the crossing must include a “protection system that complies with the requirements of the *Railway Safety Act*.” The Agency also ordered that the full cost of construction and maintenance be borne by the appellants. The Agency dismissed the application for apportionment of costs of the protection system on the ground that section 16 of the RSA does not apply to works under section 103 of the Act. In fact, the reference to section 16 of the RSA, which is found in section 101 of the Act, only comes into play in the context of a road crossing. In this case, since a road crossing is not involved, section 16 of the RSA does not apply. The appellants, who were disappointed at having to bear the costs of construction and maintenance themselves, were even more disappointed on discovering that the costs of the protection system would exceed \$400,000.

[19] Before this Court, the appellants contended that the protection system was not included in the crossing that the Agency had granted to them. They submit that it is a railway work within the meaning of the RSA and that the costs of constructing and maintaining it may be apportioned under section 16 of the RSA. In the case before us, since section 16 of the RSA applies, it is irrelevant to cite section 101 of the Act, although that section provides expressly that it does not apply in any circumstances where section 102 or 103 applies.

[20] The respondents, CN and the Agency, agree that the appellants should bear all the costs of the construction and maintenance of the crossing, since they asked for the crossing. They note that the Agency has the jurisdiction to order the construction of a *suitable* crossing, and therefore, by implication, to order any measure required to make the crossing safe. Although the

respondents concede that protection standards are within the jurisdiction of the Minister of Transport, they argue that this does not affect the right, even the obligation, of the Agency to specify in its order that the crossing be safe in accordance with the standards established by the Minister. Accordingly, the costs of the protection system are the responsibility of the appellants under the very terms of the order made by the Agency.

[21] The following are the relevant provisions of the *Canada Transportation Act*, *supra*:

100. In this section and section 101,

"utility line" means a wire, cable, pipeline or other like means of enabling the transmission of goods or energy or the provision of services.

"utility crossing" means the part of a utility line that passes over or under a railway line, and includes a structure supporting or protecting that part of the utility line or facilitating the crossing;

"road crossing" means the part of a road that passes across, over or under a railway line, and includes a structure supporting or protecting that part of the road or facilitating the crossing;

101. (1) An agreement, or an amendment to an agreement, relating to the construction, maintenance or apportionment of the costs of a road crossing or a utility crossing may be filed with the Agency.

(2) When the agreement or amendment is filed, it becomes an order of the Agency authorizing the

100. Les définitions qui suivent s'appliquent au présent article et à l'article 101

« desserte » Ligne servant au transport de produits ou d'énergie ou à la fourniture de services, notamment par fil, câble ou canalisation.

« franchissement par desserte » Franchissement par une desserte d'un chemin de fer par passage supérieur ou inférieur, ainsi que tous les éléments structuraux facilitant le franchissement ou nécessaires à la partie visée de la desserte.

« franchissement routier » Franchissement par une route d'un chemin de fer par passage supérieur, inférieur ou à niveau, ainsi que tous les éléments structuraux facilitant le franchissement ou nécessaires à la partie visée de la route.

101. (1) Toute entente, ou toute modification apportée à celle-ci, concernant la construction, l'entretien ou la répartition des coûts d'un franchissement routier ou par desserte peut être déposée auprès de l'Office.

(2) L'entente ou la modification ainsi déposée est assimilée à un arrêté de l'Office qui autorise la construction ou

parties to construct or maintain the crossing, or apportioning the costs, as provided in the agreement.

(3) If a person is unsuccessful in negotiating an agreement or amendment mentioned in subsection (1), the Agency may, on application, authorize the construction of a suitable road crossing, utility crossing or related work, or specifying who shall maintain the crossing.

(4) Section 16 of the Railway Safety Act applies if a person is unsuccessful in negotiating an agreement relating to the apportionment of the costs of constructing or maintaining the road crossing or utility crossing.

(5) This section does not apply in any circumstances where section 102 or 103 applies.

102. If an owner's land is divided as a result of the construction of a railway line, the railway company shall, at the owner's request, construct a suitable crossing for the owner's enjoyment of the land.

103. (1) If a railway company and an owner of land adjoining the company's railway do not agree on the construction of a crossing across the railway, the Agency, on the application of the owner, may order the company to construct a suitable crossing if the Agency considers it necessary for the owner's enjoyment of the land.

(2) The Agency may include in its order terms and conditions governing the construction and maintenance of the crossing.

(3) The owner of the land shall pay the costs of constructing and maintaining the crossing.

l'entretien du franchissement, ou qui répartit les coûts afférents, conformément au document déposé.

(3) L'Office peut, sur demande de la personne qui ne réussit pas à conclure l'entente ou une modification, autoriser la construction d'un franchissement convenable ou de tout ouvrage qui y est lié, ou désigner le responsable de l'entretien du franchissement.

(4) L'article 16 de la Loi sur la sécurité ferroviaire s'applique s'il n'y a pas d'entente quant à la répartition des coûts de la construction ou de l'entretien du franchissement.

(5) Le présent article ne s'applique pas dans les cas où les articles 102 ou 103 s'appliquent.

102. La compagnie de chemin de fer qui fait passer une ligne à travers la terre d'un propriétaire doit, sur demande de celui-ci, construire un passage convenable qui lui assure la jouissance de sa terre.

103. (1) Si la compagnie de chemin de fer et le propriétaire d'une terre contiguë au chemin de fer ne s'entendent pas sur la construction d'un passage croisant celui-ci, l'Office peut, sur demande du propriétaire, ordonner à la compagnie de construire un passage convenable s'il juge celui-ci nécessaire à la jouissance, par le propriétaire, de sa terre.

(2) L'Office peut assortir l'arrêté de conditions concernant la construction et l'entretien du passage.

(3) Les coûts de la construction et de l'entretien du passage sont à la charge du propriétaire de la terre.

7. (1) The Governor in Council may make regulations respecting engineering standards governing the construction or alteration of railway works, and such engineering standards may embrace both physical specifications and performance standards.

(2) The Minister may, by order, require a railway company
(a) to formulate engineering standards governing any matters referred to in subsection (1) that are specified in the order or to revise its engineering standards governing those matters; and
(b) within a period specified in the order, to file the formulated or revised standards with the Minister for approval.

16. (1) The proponent of a railway work, and each beneficiary of the work, may refer the apportionment of liability for the construction, alteration, operational or maintenance costs of the work to the Agency for a determination if they cannot agree on the apportionment and if no recourse is available under Part III of the Canada Transportation Act or the Railway Relocation and Crossing Act. The referral may be made either before or after construction or alteration of the work begins.

(2) A reference to the Agency under subsection (1) shall be made by notice in a form prescribed by the regulations made under subsection (5), and that notice shall be accompanied by such information relating to the proposed railway work as is prescribed by those regulations.

(3) The Agency may, in its discretion, by notice sent to the person referring a matter or to any person who might have referred a matter, require that person to give the Agency, within such period as it specifies in the notice, such further information

7. (1) Le gouverneur en conseil peut, par règlement, régir l'établissement de normes concernant la structure ou le comportement d'installations ferroviaires et applicables à la construction ou à la modification de celles-ci.

(2) Le ministre peut, par arrêté, enjoindre à une compagnie de chemin de fer soit d'établir des normes concernant l'un des domaines visés au paragraphe (1), soit de modifier, d'une façon particulière, de telles normes et d'en déposer, pour approbation, le texte auprès de lui, le tout dans un délai déterminé dans l'arrêté.

16. (1) Faute de recours prévu sous le régime de la partie III de la Loi sur les transports au Canada ou de la Loi sur le déplacement des lignes de chemin de fer et les croisements de chemin de fer, le promoteur et tout bénéficiaire des installations ferroviaires peuvent, avant ou après le début des travaux relatifs à la construction ou à la modification de ces installations, saisir l'Office de leur désaccord sur leurs obligations en ce qui concerne le coût de réalisation des travaux et les frais d'exploitation et d'entretien des installations.

(2) La saisine s'exerce par avis rédigé en la forme déterminée par règlement de l'Office et accompagné des renseignements qui y sont prévus sur les installations ferroviaires en cause.

(3) À son appréciation, l'Office peut, par avis adressé à toute personne qui l'a saisi ou qui aurait pu le faire, obliger celle-ci à produire, dans le délai qu'il y fixe, les renseignements supplémentaires spécifiés dans l'avis et relatifs aux frais de réalisation

relating to actual or anticipated construction, alteration, operational and maintenance costs in respect of the railway work, or benefits arising from the completion of the work, as the Agency specifies in the notice.

(4) Where a matter is referred to the Agency under subsection (1), the Agency shall, having regard to any grant made under section 12 or 13 in respect of that matter, the relative benefits that each person who has, or who might have, referred the matter stands to gain from the work, and to any other factor that it considers relevant, determine the proportion of the liability for construction, alteration, operational and maintenance costs to be borne by each person, and that liability shall be apportioned accordingly.

(5) The Agency may, with the approval of the Governor in Council, make regulations
 (a) prescribing the form of the notice for a reference under this section; and
 (b) prescribing the information to accompany that notice.

(6) In this section, "railway work" includes the relocation of any portion of a public road.

(7) Notwithstanding this section, this Act is not deemed to be administered in whole or in part by the Agency for the purpose of section 37 of the Canada Transportation Act.

véritables ou prévus à l'égard de ces travaux, aux frais d'exploitation et d'entretien des installations réalisées ou aux avantages découlant de cette réalisation.

(4) L'Office détermine la quote-part de chacun à l'égard des frais de réalisation, d'exploitation e d'entretien en tenant compte de la subvention accordée, le cas échéant, au titre des articles 12 ou 13, des avantages respectifs que retirerait des installations la personne qui l'a saisi ou qui aurait pu le faire, et de tout point qu'il juge utile. Les obligations à l'égard de ces frais sont réparties conformément à la décision de l'Office.

(5) L'Office peut, par règlement approuvé par le gouverneur en conseil, déterminer la forme des demandes prévues au présent article et préciser les renseignements devant les accompagner.

(6) Le présent article s'applique notamment au déplacement d'une partie d'une route publique.

(7) Malgré l'article 37 de la Loi sur les transports au Canada, le présent article n'a pas pour effet de charger l'Office de l'application, en tout ou en partie, de la présente loi.

[23] It is useful to define the issue before us. Subsection 103(3) of the Act states that the owner of the land shall pay the costs of constructing and maintaining the crossing. Accordingly, a first conclusion can be made about the crossing itself, namely that the order made by the Agency does not increase the obligations of owners, since those obligations are already prescribed by the Act. The second conclusion that can be drawn from the fact that subsection 103(3) deals with the

costs of construction, is that the Agency could not include in its order a condition relating to the costs of construction, because Parliament has already dealt with it. Assuming that section 103 deals only with a crossing, it therefore follows that the Agency can only make the appellants liable for the protection costs under subsection 103(3) if that system is an integral part of the crossing.

[24] It is not disputed that the Minister of Transport is responsible for the structural and performance standards of railway works and the standards applicable to the construction of the crossing sought by the appellants. Although these standards are enacted by the Governor in Council, the implementation of the RSA always lies with the Minister of Transport. Whether they are characterized as construction standards or performance standards, it follows that the circumstances in which protection systems must be integrated into the construction of a crossing or a road crossing are included in the standards that must be complied with by anyone constructing a crossing or a road crossing. Given the number of crossings and road crossings, it would be unreasonable to think that protection systems are not included in the standards applicable to these works.

[25] As a result, when the Agency granted the appellants the right to a crossing, the standards in effect required a protection system, given that it was precisely the lack of such a system that had led the Minister of Transport to request that the crossing in question be closed. Therefore, by stating that the crossing had to include a protection system that complied with the requirements of the Minister of Transport, the Agency did not increase the obligations of the builder or the

appellants. The only crossing that the Agency could grant to the appellants was a crossing that conformed to the prevailing standards, and it is precisely the cost of that crossing that subsection 103(3) imposes on the appellants. Apportionment under section 16 of the RSA is therefore not an issue.

[26] In light of this conclusion, it is not necessary to rule on the Agency's jurisdiction to deal with safety issues.

[27] For these reasons, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

Certified true translation

Mary Jo Egan, LLB

FEDERAL COURT OF CANADA
APPEAL DIVISION

SOLICITORS OF RECORD

DOCKET: A-374-01

STYLE OF CAUSE: RÉAL FAFARD and JACQUES BORDUAS v.
CANADIAN NATIONAL RAILWAY COMPANY et
al

PLACE OF HEARING: Montréal

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CONCURRED IN BY: NADON J.A.
CONCURRING REASONS: PELLETIER J.A.

DATED: June 3, 2003

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