Date: 20081212

Docket: A-541-07

Citation: 2008 FCA 395

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

MUNICIPALITY OF GREENSTONE
and
CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Montréal, Quebec, on December 4, 2008.

Judgment delivered at Ottawa, Ontario, on December 12, 2008.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DÉCARY J.A.
NOËL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant challenges a decision of the Canadian Transportation Agency (Agency) on the basis of the following six grounds:

a) the Agency denied the appellant a fair and unbiased treatment;

b) the Agency erred in law in failing to recognize that the withdrawal of the expression of interest by the municipality of Greenstone (Municipality) on October 2, 2006 constituted a waiver of the Municipality's right to acquire the railway lines at issue;

c) the Agency erred in law when it failed to conclude that the Municipality was estopped by its conduct from making a complaint to the Agency;

d) the Agency erred in law when it failed to consider the estoppel arguments in its reasons in support of its decision;

e) the Agency erred in law when it determined that once a railway line is mentioned in a railway company's three-year plan pursuant to section 141 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act) as a line that the company intends to discontinue, it cannot thereafter take steps to discontinue only a portion of that line unless it modifies its three-year plan;

f) the Agency erred in law when it found that the advertisement requirement provided at subsection 143(1) of the Act, and the steps to follow, must necessarily include the entire railway line indicated in a railway company's three-year plan as a candidate for discontinuance.

[2] The appellant also alleges that the errors here-above-mentioned in paragraph b) to f) constituted jurisdictional errors. As usual, there is the debate as to the standard of review applicable to the decision of the Agency.

[3] It is useful at this point to reproduce the relevant provisions of the Act applicable at the time:

Review and Appeal	**Révision et appel**
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.
Time for making appeal	Délai
(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.	(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.
Powers of Court	Pouvoirs de la cour
(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.	(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Agency may be heard

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

Plaidoirie de l'Office

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

DIVISION V

TRANSFERRING AND DISCONTINUING THE OPERATION OF RAILWAY LINES

SECTION V

TRANSFERTS ET CESSATION DE L'EXPLOITATION DE LIGNES

Definition of "railway line"

140. (1) In this Division, "railway line" includes a portion of a railway line, but does not include

(*a*) a yard track, siding or spur; or

(*b*) other track auxiliary to a railway line.

Définition de « ligne »

140. (1) Dans la présente section, «ligne » vise la ligne de chemin de fer entière ou un tronçon seulement, mais non une voie de cour de triage, une voie d'évitement ou un épi, ni une autre voie auxiliaire d'une ligne de chemin de fer.

Determination

(2) The Agency may determine as a question of fact what constitutes a yard track, siding, spur or other track auxiliary to a railway line.

Décision

(2) L'Office peut décider, comme question de fait, ce qui constitue une voie de cour de triage, une voie d'évitement ou un épi, ou une autre voie auxiliaire d'une ligne de chemin de fer.

Three-year plan

141. (1) A railway company shall prepare and keep up to date a plan indicating for each of its railway lines whether it intends to continue to operate the line or whether, within the next three years, it intends to take steps to discontinue operating the line.

Plan triennal

141. (1) Chaque compagnie de chemin de fer est tenue d'adopter et de mettre à jour un plan énumérant, pour les trois années suivantes, les lignes qu'elle entend continuer à exploiter et celles dont elle entend cesser l'exploitation.

Public availability of plan

(2) The railway company shall make the plan available for public inspection in offices of the company that it designates for that purpose.

Accès au plan

(2) Le plan peut être consulté à ceux de ses bureaux que la compagnie désigne.

When sale, etc., permitted

(3) A railway company may sell, leave or otherwise transfer its railway lines, or its operating interest in its lines, for continued operation.

Transfert d'une ligne

(3) Une compagnie de chemin de fer peut transférer, notamment par vente ou bail, ses droits de propriété ou d'exploitation sur une ligne en vue de la continuation de l'exploitation.

Continued operation of a portion of a line

(4) A railway company that sells, leases or otherwise transfers a portion of a grain-dependent branch line listed in Schedule I, or its operating interest in such a portion, to a person who intends to operate the portion shall continue to operate the remaining portion for three years, unless the Minister determines that it is not in the public interest for the company to do so.

Obligation en cas de transfert

(4) La compagnie de chemin de fer qui transfère, notamment par vente ou bail, ses droits de propriété ou d'exploitation sur une partie d'un embranchement tributaire du transport du grain mentionné à l'annexe I à une personne qui entend l'exploiter doit continuer d'exploiter la portion restante pendant les trois ans suivant le transfert, sauf si le ministre conclut que cela n'est pas dans l'intérêt public.

Compliance with steps for discontinuance

142. (1) A railway company shall comply with the steps described in this Division before discontinuing operating a railway line.

Étapes à suivre

142. (1) La compagnie de chemin de fer qui entend cesser d'exploiter une ligne suit les étapes prescrites par la présente section.

Limitation

(2) A railway company shall not take steps to discontinue operating a railway line before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months.

Réserve

(2) Elle ne peut cesser d'exploiter une ligne que si son intention de ce faire a figuré au plan pendant au moins douze mois.

Community-based groups

(3) Subsection (2) does not apply and a railway company shall without delay take the steps described in section 143 if

(*a*) the federal government, a provincial, municipal or district government or a community-based group endorsed in writing by such a government has written to the company to express an interest in acquiring all or a portion of a grain-

Groupes communautaires

(3) Si le gouvernement fédéral, un gouvernement provincial, une administration municipale ou un groupe communautaire appuyé par écrit par un tel gouvernement ou une telle administration a informé par écrit une compagnie de chemin de fer qu'il serait intéressé à acquérir, en vue d'en continuer l'exploitation, tout ou partie d'un embranchement tributaire du transport du grain mentionné à l'annexe I et

dependent branch line that is listed in Schedule I for the purpose of continuing to operate that line or portion of a line; and

(*b*) that line or portion of a line is indicated on the company's plan as being a line or a portion of a line that the company intends to take steps to discontinue operating.

figurant dans le plan de la compagnie à titre de ligne dont elle a l'intention de cesser, en tout ou en partie, l'exploitation, le paragraphe (2) ne s'applique pas et la compagnie doit sans délai suivre les étapes visées à l'article 143.

Advertisement of availability of railway line for continued rail operations

143. (1) The railway company shall advertise the availability of the railway line, or any operating interest that the company has in it, for sale, lease or other transfer for continued operation and its intention to discontinue operating the line if it is not transferred.

Publicité

143. (1) La compagnie fait connaître le fait que le droit de propriété ou d'exploitation sur la ligne peut être transféré en vue de la continuation de l'exploitation et, à défaut de transfert, son intention de cesser l'exploitation.

Content of advertisement

(2) The advertisement must include a description of the railway line and how it or the operating interest is to be transferred, whether by sale, lease or otherwise, and an outline of the steps that must be taken before the operation of the line may be discontinued, including

(*a*) a statement that the advertisement is directed to persons interested in buying, leasing or otherwise acquiring the railway line, or the railway company's operating interest in it, for the purpose of continuing railway operations; and

(*b*) the date by which interested persons must make their interest known in writing to the company, but that date must be at least sixty days after the first publication of the advertisement.

Contenu

(2) L'annonce comporte la description de la ligne et les modalités du transfert, notamment par vente ou cession, du droit de propriété ou d'exploitation de celle-ci, et énonce les étapes préalables à la cessation, la mention qu'elle vise quiconque est intéressé à acquérir, notamment par achat ou prise à bail, les droits de propriété ou d'exploitation de la compagnie en vue de poursuivre l'exploitation de la ligne, ainsi que le délai, d'au moins soixante jours suivant sa première publication, donné aux intéressés pour manifester, par écrit, leur intention.

Agreement with VIA Rail

(3) The advertisement must also disclose the existence of any agreement between the

VIA Rail

(3) L'annonce doit aussi mentionner toute entente conclue entre la compagnie et VIA

railway company and VIA Rail Canada Inc. in respect of the operation of a rail passenger service on the railway line if VIA Rail advises the railway company that it agrees to the transfer of the company's rights and obligations under the agreement to any person to whom the line, or the company's operating interest in it, is transferred..

Rail Canada Inc. sur l'exploitation d'un service passager sur une ligne de la compagnie si VIA Rail notifie à celle-ci son consentement à la cession des droits et obligations de la compagnie au cessionnaire éventuel du droit de propriété ou d'exploitation sur la ligne.

Disclosure of process

144. (1) The railway company shall disclose the process it intends to follow for receiving and evaluating offers to each interested person who makes their interest known in accordance with the advertisement.

Communication

144. (1) La compagnie est tenue de communiquer la procédure d'examen et d'acceptation des offres à l'intéressé qui a manifesté son intention conformément à l'annonce.

Evaluation of offers

(2) If the advertisement has disclosed the existence of an agreement mentioned in subsection 143(3), the railway company shall, in evaluating each offer, consider whether the offeror is willing to assume the company's rights and obligations under the agreement in respect of the railway line.

Examen

(2) Si l'annonce fait état d'une entente visée au paragraphe 143(3), la compagnie doit, dans le cadre de l'examen, considérer si l'éventuel acquéreur entend assumer les droits et obligations découlant de l'entente relativement à la ligne.

Negotiation in good faith

(3) The railway company shall negotiate with an interested person in good faith and in accordance with the process it discloses and the interested person shall negotiate with the company in good faith.

Négociation

(3) Elle est tenue de négocier de bonne foi avec l'intéressé conformément à cette procédure et ce dernier est tenu de négocier de bonne foi avec elle.

Net salvage value

(3.1) The Agency may, on application by a party to a negotiation, determine the net salvage value of the railway line and may, if it is of the opinion that the railway company has removed any of the infrastructure associated with the line in order to reduce traffic on the line, deduct from the net salvage value the amount that the Agency determines is the cost of

Valeur nette de récupération

(3.1) L'Office peut, à la demande d'une partie à la négociation, déterminer la valeur nette de récupération de la ligne et, s'il est d'avis que la compagnie de chemin de fer a retiré une partie de l'infrastructure se rapportant à la ligne en vue de réduire le trafic, déduire de cette valeur la somme qu'il estime équivalente au coût de remplacement de l'infrastructure retirée. Le

replacing the removed infrastructure. The party who made the application shall reimburse the Agency its costs associated with the application.

Time limit for agreement

(4) The railway company has six months to reach an agreement after the final date stated in the advertisement for persons to make their interest known.

Decision to continue operating a railway line

(5) If an agreement is not reached within the six months, the railway company may decide to continue operating the railway line, in which case it is not required to comply with section 145, but shall amend its plan to reflect its decision.

Remedy if bad faith by a railway company

(6) If, on complaint in writing by the interested person, the Agency finds that the railway company is not negotiating in good faith and the Agency considers that a sale, lease or other transfer of the railway line, or the company's operating interest in the line, to the interested person for continued operation would be commercially fair and reasonable to the parties, the Agency may order the railway company to enter into an agreement with the interested person to effect the transfer and with respect to operating arrangements for the interchange of traffic, subject to the terms and conditions, including consideration, specified by the Agency.

Remedy if bad faith by an interested person

(7) If, on complaint in writing by the railway company, the Agency finds that the interested person is not negotiating in good faith, the Agency may order that the

demandeur est tenu de rembourser à l'Office les frais afférents à la demande.

Délai

(4) La compagnie dispose, pour conclure une entente, d'un délai de six mois à compter de l'expiration du délai prévu par l'annonce.

Continuation de l'exploitation

(5) À défaut d'entente dans les six mois, elle peut décider de poursuivre l'exploitation de la ligne, auquel cas elle n'est pas tenue de se conformer à l'article 145, mais doit modifier son plan en conséquence.

Défaut par le chemin de fer de négocier de bonne foi

(6) Saisi d'une plainte écrite formulée par l'intéressé, l'Office peut, s'il conclut que la compagnie ne négocie pas de bonne foi et que le transfert à l'intéressé, notamment par vente ou bail, des droits de propriété ou d'exploitation sur la ligne en vue de la continuation de son exploitation serait commercialement équitable et raisonnable pour les parties, ordonner à la compagnie de conclure avec l'intéressé une entente pour effectuer ce transfert et prévoyant les modalités d'exploitation relativement à l'interconnexion du trafic, selon les modalités qu'il précise, notamment la remise d'une contrepartie.

Défaut par l'intéressé de négocier de bonne foi

(7) Saisi d'une plainte écrite formulée par la compagnie, l'Office peut décider que la compagnie n'est plus tenue de négocier avec l'intéressé s'il conclut que celui-ci ne

railway company is no longer required to negotiate with the person.

négocie pas de bonne foi.

Offer to governments

Offre aux gouvernements et administrations

145. (1) The railway company shall offer to transfer all of its interest in the railway line to the governments mentioned in this section for not more than its net salvage value to be used for any purpose if

(*a*) no person makes their interest known to the railway company, or no agreement with an interested person is reached, within the required time; or

(*b*) an agreement is reached within the required time, but the transfer is not completed in accordance with the agreement.

145. (1) La compagnie est tenue d'offrir aux gouvernements ou administrations municipales de leur transférer tous ses intérêts à leur valeur nette de récupération ou moins si personne ne manifeste d'intérêt ou aucune entente n'est conclue dans le délai prescrit ou si le transfert n'est pas complété conformément à l'entente.

Which governments receive offer

Précision

(2) After the requirement to make the offer arises, the railway company shall send it simultaneously

(*a*) to the Minister if the railway line passes through
(i) more than one province or outside Canada,
(ii) land that is or was a reserve, as defined in subsection 2(1) of the *Indian Act*, or
(iii) land that is the subject of an agreement entered into by the railway company and the Minister for the settlement of aboriginal land claims

(*b*) to the minister responsible for transportation matters in the government of each province through which the railway line passes through; and

(*c*) to the clerk or other senior administrative officer of each municipal or district government through whose territory the railway line passes.

(2) L'offre doit être faite au ministre si la ligne franchit les limites d'une province ou les frontières du Canada, une réserve ou une terre ayant déjà été une réserve au sens du paragraphe 2(1) de la *Loi sur les Indiens* ou une terre faisant l'objet d'un accord – entre la compagnie et le ministre – ayant pour but le règlement de transport et au greffier, ou à un premier dirigeant, de chaque administration municipale, dont la ligne franchit le territoire. Cette offre est faite simultanément à toutes les personnes en cause.

Time limits for acceptance

(3) After the offer is received

(*a*) by the Minister, the Government of Canada may accept it within thirty days;

(*b*) by a provincial minister, the government of the province may accept it within thirty days, unless the offer is received by the Minister, in which case the government of each province may accept it within an additional thirty days after the end of the period mentioned in paragraph (*a*) if it is not accepted under that paragraph; and

(*c*) by a municipal or district government, it may accept it within an additional thirty days after the end of the period or periods for acceptance under paragraphs (*a*) and (*b*), if it is not accepted under those paragraphs.

Délai d'acceptation

(3) Les gouvernements ou administrations municipales disposent, après sa réception de l'offre par son destinataire, des délais suivants pour l'accepter :

a) trente jours pour le gouvernement fédéral;

b) trente jours pour le gouvernement provincial, mais si le gouvernement fédéral n'accepte pas l'offre qui lui est d'abord faite, chaque gouvernement provincial visé dispose de trente jours supplémentaires une fois expiré le délai mentionné à l'alinéa *a*);

c) trente jours pour chaque administration municipale, une fois expirés les délais mentionnés aux alinéas *a*) ou *b*).

Communication and notice of acceptance

(4) Once a government communicates its written acceptance of the offer to the railway company, the right of any other government to accept the offer is extinguished and the railway company must notify the other governments of the acceptance.

Acceptation

(4) La communication, par écrit, de l'acceptation à la compagnie de chemin de fer éteint le droit des autres intéressés; celle-ci leur notifie aux gouvernements et administrations l'acceptation de l'offre.

Net salvage value

(5) If a government accepts the offer, but cannot agree with the railway company on the net salvage value within ninety days after the acceptance, the Agency may, on the application of the government or the railway company, determine the net salvage value.

Valeur nette de récupération

(5) En cas de désaccord, à l'expiration des quatre-vingt-dix jours suivant l'acceptation de l'offre, sur la valeur nette de récupération, l'Office la détermine, sur demande d'une des parties.

Discontinuation

146. (1) Where a railway company has complied with the process set out in sections 143 to 145, but an agreement for the sale, lease or other transfer of the railway line or an interest therein is not entered into through that process, the railway company may discontinue operating the line on providing notice thereof to the Agency. Thereafter, the railway company has no obligations under this Act in respect of the operation of the railway line and has no obligations with respect to any operations by VIA Rail Canada Inc. over the railway line.

No obligation

(2) If the railway line, or any interest of the railway company therein, is sold, leased or otherwise transferred by an agreement entered into through the process prescribed by sections 143 to 145 or otherwise, the railway company that conveyed the railway line has no obligations under this Act in respect of the operation of the railway line as and from the date the sale, lease or other transfer was completed and has no obligations with respect to any operations by VIA Rail Canada Inc. over the railway line as and from that date.

Compensation

146.1 (1) A railway company that discontinues operating a grain-dependent branch line listed in Schedule I, or a portion of one, that is in a municipality or district shall, commencing on the date on which notice was provided under subsection 146(1), make three annual payments to the municipality or district in the amount equal to $10,000 for each mile of the line or portion in the municipality or district.

Cessation d’exploitation

146. (1) Lorsqu’une compagnie de chemin de fer s’est conformée au processus établi en vertu des articles 143 à 145, sans qu’une convention de transfert d’une ligne de chemin de fer n’en résulte, la compagnie de chemin de fer peut mettre fin à l’exploitation de la ligne pourvu qu’elle en avise l’Office. Par la suite, la compagnie de chemin de fer n’a aucune obligation, en vertu de la présente loi, relativement à l’exploitation de la ligne ni aucune obligation à l’égard de l’utilisation de la ligne par VIA Rail Canada Inc.

Non-obligation

(2) En cas d’aliénation par la compagnie de chemin de fer de la ligne ou de droits qu’elle y détient, en vertu d’une convention résultant du processus établi en vertu des articles 143 à 145 ou autrement, la compagnie de chemin de fer cessionnaire n’a plus d’obligation en vertu de la présente loi relativement à l’exploitation de la ligne de chemin de fer ou à son utilisation par la VIA Rail Canada Inc. depuis la date de signature de l’acte d’aliénation.

Indemnisation

146.1 (1) La compagnie de chemin de fer qui cesse d’exploiter un embranchement tributaire du transport du grain mentionné à l’annexe I, ou une partie d’un tel embranchement, passant dans une municipalité doit faire à celle-ci trois versements annuels à compter de la date où elle avise l’Office en application du paragraphe 146(1). Chaque versement est égal au produit de 10 000 $ et du nombre de milles de l’embranchement ou de la partie d’embranchement sur le territoire de la municipalité.

THE FACTS AND PROCEDURE

[4] The Municipality did not participate in these appeal proceedings. Pursuant to an Order of Sharlow J.A., dated March 25, 2008, the Agency, who had filed a notice of appearance, was added as a respondent.

[5] On December 6, 2004, the appellant listed part of the Kinghorn Subdivision in the province of Ontario as a discontinuance candidate on its Three-Year Rail Network Plan (Plan). According to the Plan, the line from mileage 0.00 to 195.60 would be discontinued: see appeal book, tab 3, at page 20.

[6] The Plan was revised on October 19, 2006. It indicated that the line would be discontinued from mileage 1.70 to 193.00: *ibidem*, at page 31.

[7] In accordance with section 143 of the Act, the appellant advertised in national and local newspapers a Notice of Discontinuance of Railway Lines (Notice) which described the line that it intended to discontinue and solicited an expression of interest from potential buyers.

[8] The Notice contained a description of the line which differed from the one appearing in the revised Plan. The description read as follows:

Kinghorn Subdivision in the province of Ontario
between a point near Longlac (mile 1.7 Kinghorn Subdivision)
and a point near Red Rock (mile 130.0 Kinghorn Subdivision)
and
between a point near Black Sturgeon River
(mile 138.1 Kinghorn Subdivision) and point near Thunder Bay
(mile 193.0 Kinghorn Subdivision)

[9] Essentially, the description exempted from discontinuance a portion of 8.1 miles comprised between mile 130.0 and 138.1: *ibidem*, tab 4, at page 39.

[10] At the beginning of May 2006, the Municipality informed the appellant in writing that it had an interest in acquiring the line: *ibidem*, tab 5, at page 41. After discussions between the two parties, the appellant was informed on October 2, 2006 that neither the Municipality nor the Greenstone Economic Development Corporation, which, in conjunction with the Municipality, had shown an interest in the line, would submit an offer to acquire it: *ibidem*, tab 15, at page 70.

[11] However, in that letter to the appellant, the Municipality reserved its rights to acquire the line for its net salvage value once the line had been offered to governments pursuant to section 145 of the Act: *ibidem*.

[12] The appellant proceeded to offer to sell to the various governments mentioned in section 145 of the Act its interests in the line for no more than its net salvage value: *ibidem*, tab 17, at pages 72 to 85.

[13] On March 2, 2007, the Municipality wrote to the Agency to inform it of its interest in acquiring the appellant’s line as described in the Notice, i.e. Longlac Ontario MP 1.70 to Red Rock Ontario MP 130.0 and Black Sturgeon River MP 138.1 to Thunder Bay MP 193.0, when sold for the net salvage value: *ibidem*, tab 18, at pages 86 to 88. It also sought the assistance of the Agency in determining as soon as possible the net salvage value of the line.

[14] This letter of March 2 was followed by a letter of March 13, 2007 in which the Municipality sought clarification from the Agency as to what portions of the line were in fact offered to the governments under section 145 of the Act: *ibidem*, tab 20, at pages 90 and 91. It pointed out an alleged discrepancy between the Plan available on the appellant’s website and what the appellant was offering to it and others. The website, which indicated that the site had been revised on February 8, 2007, continued to state that the entire section from mile 1.7 to 193.0 was discontinued while the letters of offer from the appellant subtracted 8.1 miles, i.e. the distance between mile 130.0 to 138.1.

[15] Pursuant to the Municipality’s application for clarification, the Agency requested comments from the appellant on the Municipality’s application. The Municipality was given 10 days from the receipt of the appellant’s comments to file its reply with the Agency and send a copy to the appellant: *ibidem*, tab 21, at page 93.

[16] In response to the Agency’s request for comments, the appellant, in a letter dated April 17, 2007 submitted there was no discrepancy between the mileages indicated in the Plan, what was

advertised for sale in the newspapers and what was offered to the governments pursuant to section 145 of the Act: *ibidem*, tab 22, at page 96.

[17] On May 9, 2007, the Municipality officially complained to the Agency that the appellant failed to adhere to the requirements of the Act by not offering to the Municipality the entire line as currently described in the three-year Plan on December 6, 2004: *ibidem*, tab 25, at page 102.

[18] No government showed an interest in buying the line. The appellant then gave notice to the Agency that operations on the lines would be discontinued as of May 31, 2007.

[19] The Agency proceeded to adjudicate on the Municipality's complaint. It rendered its decision on July 13, 2007 and concluded that the appellant had failed to comply with the transfer and discontinuance process set out in Part III, Division V of the Act. It ordered the appellant to either restart the transfer and discontinuance process by revisiting its three-year Plan or continue the process from the point that it last revised its Plan, i.e. October 19, 2006. Hence the appeal from the Agency's decision.

ANALYSIS

The standard of review

[20] The parties have argued different standards of review for the various grounds of appeal. As some of the grounds are without merit, there is no point in engaging into a discussion in the abstract

as to the appropriate standard of review. I will discuss the issue where it matters and when the parties do not agree on the applicable standard.

Whether there was a breach of natural justice by the Agency

[21] There is no dispute that the applicable standard is correctness. The appellant's contention is that the Agency either decided the matter before it received the appellant's submissions or gave the appearance that the matter was already decided.

[22] The appellant's assertion is based on the following excerpt from an affidavit of Mr. Iain Angus whose consulting firm was retained by the Municipality:

> 10. Around the time of this letter, I contacted the CTA on several occasions, on the Municipality's behalf, regarding the NSV assessment process and the potential for an extension of the government acquisition process minimum standard deadlines. During one of these conversations with the CTA, I was informed by the CTA that CN was required to offer the same Kinghorn Subdivision line for acquisition, pursuant to section 145 of the Act, as it had listed in its Three Year Rail Network Plan of December 6th, 2004, required by section 141 of the Act. The CTA also informed me of a CTA precedent on this very issue.

[Emphasis added]

The underlined sentence is the passage relied upon by the appellant.

[23] There is evidence on the record that the Municipality was not familiar with the process and sought the assistance of the Agency. It is in that context that the attention of the Municipality was

drawn to a decision that the Agency had previously rendered on the issue therein mentioned. As it turns out, the appellant now claims the information was erroneous.

[24] The impugned statement is too broad and too vague to ground a finding or a reasonable inference that the Agency had already decided the issue in the appellant's case. The affiant was not cross-examined by the appellant. We do not know who in the Agency gave the information to Mr. Angus. As counsel for the respondent submitted, no panel had been struck at that time to hear the appellant's case. It is also current practice for employees in administrative boards to provide information to members of the public who seek their assistance. It would be a finding made on pure speculation if I were to conclude that the information as to the existence of a precedent was given by a member of the panel which later heard the appellant's case. It would be both wrong and unreasonable to accept the appellant's submission that the impugned statement establishes that the Agency had decided or appeared to have decided the matter in the appellant's case.

Whether the Municipality waived its right to acquire the railway lines at issue

[25] I see no merit in the contention that the Municipality waived its right to acquire the railway lines at issue. In the October 2, 2006 letter addressed to the appellant, the Municipality clearly reserved its right to acquire the line for its net salvage value.

Whether the Agency erred when determining that once a railway line is published in a railway company's three-year plan pursuant to section 141 of the CTA as a line that the company intends to discontinue, it cannot thereafter take steps to discontinue only a portion of that line unless it modifies its three-year plan
and
Whether the Agency erred when it found that the advertisement requirement provided at subsection 143(1) of the Act, and the steps to follow, must necessarily include the entire railway line indicated in a railway company's three-year plan as a candidate for discontinuance

[26] Quoting from an earlier decision (Decision No. 542-R-2000 dated August 17, 2000) the Agency recognized that a railway company can revise and alter its interest in a railway line according to subsection 144(5) of the Act and amend its plan. However, the Agency ruled that when a railway company does that, it must restart the discontinuance process as set out in Division V of the Act. This is illustrated by the following excerpt from paragraph 16 of the Agency's decision:

> [16] The statutory transfer process established by Division V Part III of the CTA contemplates that the railway line that is listed on the Three Year Plan pursuant to subsection 141(1) of the CTA, advertised for transfer pursuant to subsection 143(1) of the CTA and transferred to governments pursuant to subsection 145(1) of the CTA be consistent. This does not prevent CN to alter or revise its interest according to subsection 144(5) of the CTA, however if it chooses to do so, it must then restart the discontinuance process as set out in Division V of the CTA.

[Emphasis added]

[27] This conclusion of the Agency results from its interpretation of subsection 142(2) of the Act. For convenience, I repeat here the content of the provision which states:

142.	**142.**
…	[…]
(2) A railway company shall not take steps to discontinue operating a railway line	(2) Elle ne peut cesser d'exploiter une ligne que si son intention de ce faire a figuré au

before the company's intention to discontinue operating the line has been indicated in its plan for at least 12 months.	plan pendant au moins douze mois.

a) <u>The scope and purpose of subsection 142(2)</u>

[28] It is true as contended by the appellant that the purpose of Bill C-101 introduced in the House of Commons on June 20, 1995 was to reform the existing conveyance and abandonment procedures with a view to streamlining and shortening the current process for rail line rationalization so as to make it commercially oriented, less adversarial and more conducive to the sale or lease of surplus rail lines to new operators: see appeal book, tab 22, the document entitled *Rail Lines: Current Conveyance and Abandonment Procedures and Replacement Proposals in Bill C-101*. At page 2 of this document, David Johansen of the Law and Government Division writes:

> Insofar as rationalization of the rail network is concerned, the bill would shift the focus from the current abandonment of underused rail lines to the development of a healthy short line industry (i.e. local rail carriers). The proposed streamlined rail rationalization process is thus designed to encourage the sale or lease of rail lines to short line operators. According to departmental sources, approximately two-thirds of the rail lines in Canada that are likely candidates for rationalization could support viable short line operations.

[29] According to subsection 142(2), a railway company must state in its plan its intention to discontinue operating a railway line and, then, wait twelve (12) months before taking the steps leading to discontinuance.

[30] The subsection was enacted to provide a measure of protection to those who will be affected by the discontinuance of a railway line. It affords a period of time within which individuals, groups,

shippers, investors or potential buyers may inquire as to the rentability of the line and make whatever material, financial or alternate arrangements are appropriate and needed to protect their respective interests.

[31] The period of time allotted was two (2) months until an amendment in 2000 brought by Bill C-34 (S.C. 2000, c. 16) extended it to twelve (12) months. In this respect, the Minister, the Honourable David M. Collenette, made the following statement on moving the Bill to third reading:

> … We have included in this bill, because of the urgency and the need for balance in the system, specific provisions that would not only allow the two railways to reduce their costs, but facilitate the transfer of branch lines for continued operation.
>
> We are extending the notice period before a railway can take steps to discontinue a rail line from two months to twelve months. This would give more time for potential short line purchasers to come along. It would also allow a community based group which is ready to proceed with an offer to trigger an early curtailment of the twelve month notice period and extend the negotiation period from four months to six months. Also, either party may request the Canadian Transportation Agency during this stage to provide its estimate of the net salvage value of the line. (See the Edited Hansard, Number 114, 36th Parliament, 2nd session, June 14, 2000.)

[Emphasis added]

[32] The scheme put in place by Division V of the Act is an attempt to reconcile the interests of both the railway companies and the users of the discontinued lines offered for sale.

[33] The Agency was aware of and sensitive to this dual legislative objective. Such awareness is reflected in the following passages of its decision at paragraphs 16 and 19:

> [16] The Agency finds that changing the nature of the interest in the railway line can present undue hardship to potential purchasers by way of creating uncertainty as to the

> interest that is included in the transfer. The Agency expects railway companies that propose to discontinue or transfer railway lines to exercise due diligence in ensuring that the nature and extent of all their interests they wish to transfer or discontinue are fully represented and clearly articulated from the outset, rather than subsequently revising or amending the offer when the lines are to be transferred to governments.
>
> …
>
> [19] The Agency notes that one of the key components of the CTA is to provide a more commercially oriented process for railway companies to sell or lease surplus railway lines to new operators, rather than discontinue service. The steps outlined in the CTA for the transfer or discontinuance of railway lines were established not only to allow parties to consider operating a short line railway over the line, but also to allow shippers on the line to make alternate arrangements in the event it is discontinued and to provide levels of government an opportunity to decide whether to purchase the line. The process provides time frames for interested parties to review their options, and their plans can be hampered when the "railway line" offer changes. Therefore, the Agency sees inconsistencies or changes in the "railway line" during the process as contraventions to the intent of Parliament and the existing legislation.
>
> [Emphasis added]

[34] This brings me to an analysis of the core issue in this appeal, i.e. the interpretation given by the Agency to subsection 142(2) of the Act.

b) The interpretation given by the Agency to subsection 142(2) of the Act

[35] Paragraphs 17 and 18 of the Agency's decision contain the gist of that decision:

> [17] The Agency notes that, in this case, CN indicated in its three-year plan dated December 6, 2004 that it intended to discontinue the Kinghorn Subdivision from mileage 0.0 to 195.6. Yet, in its advertisement dated April 24, 2006 pursuant to section 148 of the CTA, CN offered for sale, lease or transfer the portions of the Kinghorn Subdivision from mileage 1.7 to 130.0 and from mileage 138.1 to 193.0. As the "railway line" identified in the three-year plan was not consistent with the "railway line" that was offered for sale, lease or transfer, the Agency finds that CN failed to comply with the transfer and discontinuance process set out in Part III, Division V of the CTA. The Agency is of the opinion that the

> Municipality's interest in acquiring the railway line has been affected by the changes to CN's description of the railway line.
>
> [18] The Agency reiterates that once a "railway line" has been identified in the three-year plan, the same "railway line" should be offered throughout the steps of the transfer and discontinuance process. The Agency is of the opinion that changing the mileage points or portions of the "railway line" during the process frustrates the intent of the CTA.

[36] The approach taken by the Agency, whereby the 12-month delay period before a railway company can take steps to discontinue operating a line is triggered anew when the company brings changes to its plan, is consistent with earlier decisions and the interpretation it gave to subsection 142(2) of the Act in these decisions: see Decision No. 445-R-1997, July 11, 1997, at page 4; Decision No. 542-R-2000, August 17, 2000 at pages 6 and 7.

[37] The appellant argues that the interpretation given by the Agency to the subsection fails to take into account the fact that the definition of "railway line" in subsection 140(1) includes a portion of a railway line. Thus, the argument goes, portions of a line can be subtracted from the whole line announced in a three-year plan. In the present instance, the appellant, having announced a discontinuance of mile 1.7 to mile 193.0, submits that it could subtract the portion between mile 130.0 and mile 138.1 in subsequent advertisements.

[38] In addition, the appellant contends that the interpretation retained by the Agency is costly, prejudicial and time-consuming for railway companies. In contrast, interested buyers would suffer no prejudice if the discontinuance process were allowed to continue when portions of the line are deleted from the initial offer because they would have obtained all relevant information regarding

the discontinuance of the whole line. They could then quickly make the adjustments to their own interest.

[39] I think the appellant's contention fails to take into account other likely scenarios. It may be that persons who refrained from participating in the process because of the extent of the discontinuance announced could become interested when the discontinuance is later reduced and becomes more affordable or manageable for them. These persons would be deprived of the benefit of the 12-month period necessary to make their assessment as well as needed material and financial arrangements. Thus, an opportunity to continue in the public interest the operation of a portion of the line could be lost. I am convinced that this is not what Parliament intended.

[40] In view of the wording of subsection 142(2) and the definition of "railway lines" in subsection 140(1), I think that the interpretation suggested by the appellant runs counter to both the text of subsection 142(2) and the legislative intent.

[41] The prohibition in subsection 142(2) to start the discontinuance process applies not only when there is discontinuance of a line, but also, as envisaged by the definition of "railway lines", when there is discontinuance of "a portion of a railway line". This is the conclusion reached by the Agency. It is one which, in my view, meets the letter and the spirit of the provision as well as the objectives of the Act.

[42] The interpretation given by the Agency to subsection 142(2) is also reasonable. The discontinuance process, once engaged by the advertisement mentioned in subsection 143(1), is governed by short, strict and mandatory time-limits within which an agreement between purchasers and a railway company must be reached and the sale or transfer process completed. In *Canadian National Railway Company and Canadian Pacific Railway Company v. Canadian Transportation Agency*, A-355-07, May 29, 2008, Noël J.A. stressed that point when reviewing the terms and conditions of the discontinuance process in Division V. At paragraph 48 of his reasons for judgment, he wrote:

> [48] Indeed, Division V is a complete code which operates in accordance with a definite time line. It is couched in mandatory terms and the detailed steps which must be followed leave no doubt about when the process begins and when it ends. Amongst those steps is the railway's obligation to offer the line for sale to the relevant public bodies for its net salvage value if no agreement is reached within the sic month period (subsection 145(2)). In my view, the corresponding right to acquire the line at its net salvage value which accrues to the relevant public bodies by the operation of subsection 145(1) at that juncture, eliminates the possibility that the parties on consent, or the Agency by order, could extend the six month statutory period. Neither the parties nor the Agency can effectively do away with the right which accrues to public bodies by the operation of the statute.

[Emphasis added]

[43] In this context, the protection afforded by the 12-month period to potential purchasers before the discontinuance process can be formally engaged takes all its significance in view of the stated objective of "giving more time for potential short line purchasers to come along": see the quoted statement of the Minister, *supra*.

c) <u>The standard of review applicable to the decision of the Agency</u>

[44] As previously mentioned, the core issue in the Agency's decision is its interpretation of subsection 142(2). The appellant submits that it involves a pure question of law on a matter which is not technical and within the specific expertise of the Agency. Therefore, this Court should apply the standard of correctness. In any event, the appellant says that even on the deferential standard of reasonableness, the Agency's decision "does not fall within a range of intelligible and acceptable outcomes": see appellant's memorandum of facts and law at paragraph 59.

[45] Unsurprisingly, the respondent argues that the applicable standard is reasonableness pursuant to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Deference is required here, counsel says, because the Agency is interpreting its own statute on an issue closely connected to its function, with which it has particular familiarity. She quotes Bastarache J. at paragraph 54 of the *Dunsmuir* decision.

[46] I have already concluded that the Agency's decision is correct and reasonable. I agree with the respondent that deference should be given to the Agency's decision on the interpretation of subsection 142(2). The discontinuance process found in Division V of the Act raises an issue within the expertise of the Agency. It is one with which the Agency has familiarity. The Agency was entrusted with the monitoring of the process to ensure implementation of the government's policy and the legislative intention. It is in performing that function that the Agency was called upon to interpret its own statute. It is an interpretation closely connected to its functions.

[47] The appellant relied on two decisions of this Court to justify its claim that correctness was the standard to be applied.

[48] The first is a decision of Rothstein J.A. in *Canadian Pacific Railway v. Canadian Transportation Agency*, 2003 FCA 271 involving the interpretation of paragraph 150(3)(*b*) of the Act which relates to the reasonableness of a railway company's demurrage revenues. Rothstein J.A. found that the interpretation of that paragraph was not a "polycentric" question involving the balancing of interests and one which fell in the expertise of the Agency: see paragraphs 18 and 19 of his reasons for judgment. In our instance, the question involves a balancing of interests and as previously stated falls in, and calls for, the expertise of the Agency which is familiar with the discontinuance process and entrusted with the duty of conciliating its fairness and its efficiency. Our case is distinguishable from the case cited by the appellant.

[49] Moreover, Rothstein J.A.'s decision predates the decision of the Supreme Court of Canada in *Dunsmuir* and has to be reviewed according to the meaning assigned to "reasonableness" by the Supreme Court in *Dunsmuir*. As Bastarache J. said at paragraph 47 of his reasons for judgment:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned

> with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[Emphasis added]

[50] In my view, the decision of the Agency in this instance meets the criteria of the definition of reasonableness. There may be other possible interpretations of the prohibition in subsection 142(2). However, bearing in mind the objectives of the Act and the intent and spirit of the subsection, I cannot conclude that the decision of the Agency is not an "acceptable outcome defensible in respect of the facts and law" and, therefore, is unreasonable.

[51] The second precedent invoked by the appellant is the decision of our colleague Noël J.A. in *Canadian National Railway Company and Canadian Pacific Railway Company v. Canadian Transportation Agency*, *supra*. In that case, our colleague applied a standard of correctness. However, that case is also distinguishable. The issue was one of jurisdiction in the narrow sense as defined in *Dunsmuir*, paragraph 30, namely whether or not the Agency had the authority to conduct the inquiry (see paragraph 20 of Noël J.A.'s reasons which sets out the jurisdictional issues). In our case, the issue is not jurisdictional. It relates to an interpretation of a provision of the Act which the Agency is required to make in the exercise of its jurisdiction pursuant to a complaint.

d) Conclusion on the standard of review

[52] For these reasons, deference ought to be given to the Agency for its interpretation of the prohibition contained in subsection 142(2) of the Act.

Whether the Agency erred in law in failing to conclude that the Municipality was estopped by its conduct from making a complaint to the Agency and whether the Agency erred in failing to consider the estoppel arguments in its reasons in support of its decision

[53] The appellant submits that the Municipality was estopped from lodging a complaint to the Agency because it participated in the discontinuance process without objecting to it. Relying upon Black's Law Dictionary, the appellant defines estoppel as "an affirmative defence alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance": see appellant's memorandum of facts and law at paragraph 86.

[54] The definition endorsed by the appellant speaks of a positive defence, raised by a person alleging that, in good faith, he or she relied upon a misleading representation and, as a result, suffered a prejudice or changed position to his or her detriment.

[55] It is certainly not clear to me how estoppel as defined by the appellant applies in this case. The defence is raised by the appellant. I cannot see how the appellant was misled by the Municipality. If anything, it is the Municipality which complains of having been misled by the appellant's Plan and its subsequent letters to governments. In addition, no evidence of prejudice was filed by the appellant nor is there any evidence that the appellant changed its position as a consequence of relying upon a misleading representation made by the Municipality.

[56] In any event, Division V of the Act establishes a mandatory process for the discontinuance of railway lines. The appellant is under a clear and positive statutory duty to comply with the obligations therein that are imposed upon it. An interested or potentially interested buyer of the lines, such as the Municipality in the present instance, cannot through consent, its participation or its conduct in the process relieve a railway company of its statutory obligations: see *Kenora Hydro v. Vacationland Dairy*, [1994] 1 S.C.R. 80; *Canadian National Railway Company and Canadian Pacific Railway Company v. Canadian Transportation Agency*, *supra*. I cannot accept the appellant's contention with respect to this ground of appeal.

[57] In view of the conclusion that I have reached, it is not necessary to determine whether the Agency erred in not considering the estoppel arguments in its reasons for its decision.

CONCLUSION

[58] For these reasons, I would dismiss the appeal.

"Gilles Létourneau"
J.A.

"I agree
Robert Décary J.A."

"I agree
Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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