Federal Court of Appeal | Cour d'appel fédérale

Date: 20100330

Docket: A-156-09

Citation: 2010 FCA 65

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY
and ATTORNEY GENERAL OF CANADA

Respondents

Heard at Montreal, Quebec, on February 2, 2010.

Judgment delivered at Ottawa, Ontario on February 25, 2010.

PUBLIC REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
STRATAS J.A.

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PUBLIC REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] Revenue earned in a crop year by prescribed railway companies for the movement of western grain is subject to a cap. The Canadian Transportation Agency ("CTA") determines a prescribed railway company's revenue for a crop year and whether it exceeds the revenue cap. The Canadian National Railway Company ("CN"), a prescribed railway company, says that the CTA wrongly included certain items in its revenue; the inclusion of an item in a railway company's revenue pushes it closer to the cap.

[2] CN has appealed the decision of the CTA (Decision No. 628-R-2008), dated December 30, 2008, and a decision in a confidential letter of the same date (File Nos. T6650-2 and T6650-7-7), in respect of the crop year 2007-08. CN's principal submissions are that the CTA erred in law or jurisdiction by including the following three items in its revenue cap calculation:

a. earnings from carrying American-grown grain from the U.S.-Canada border to ports in British Columbia for export to third countries, without entering the Canadian market. CN says that this grain is not "imported into Canada" within the meaning of the *Canada Transportation Act*, S.C. 1996, c. 10, section 147 ("Act");

b. earnings from lifting grain-carrying containers from a truck onto a flat-bed rail car and *vice versa*. CN says that this is not the "carriage of grain … over a railway line" within the meaning of section 147; and

c. a sum paid by [a shipper] to CN under a penalty clause in their contract of carriage for failing to ship the promised amount of grain. CN says that this sum was reasonably characterized as a performance penalty and should have been excluded under paragraph 150(3)(*b*).

[3] In my view, the standard of review applicable to these questions is unreasonableness. The CTA's decision on items (i) and (ii) was not unreasonable. A decision of this Court in *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2009 FCA 46, 387 N.R. 353 ("*CP*"), rendered after the CTA decision under appeal here, has effectively settled item (iii) in CN's favour.

[4] CN also argued that the CTA's decision respecting the nature of the payment by [the shipper] to CN was made in breach of the duty of fairness because CTA staff led CN to believe that the CTA would not decide this issue. However, since I am of the view that CN's substantive challenge succeeds, the procedural fairness issue does not arise.

[5] Accordingly, I would allow the appeal in part and, because success is divided, award no costs.

B. FACTUAL BACKGROUND

[6] Before 1996, the price of shipping western grain by rail was regulated by the CTA through the setting of freight rates. In order to allow more flexibility in pricing and to give market forces a greater role, rate-setting was replaced by a cap on the revenue that a railway company could earn in a crop year for shipping western grain by rail. Thus, the freight charged by a railway company to a producer is not directly regulated. However, if the CTA determines that a railway company's revenue has exceeded its cap in a crop year, the company must disgorge the amount by which its revenue exceeds its cap, and pay any penalty specified in the regulations (subsection 150(2)).

[7] The Act also specifies what is included in and excluded from a railway company's revenue from the movement of grain (subsections 150(3), (4) and (5)). The cap is calculated on the basis of a statutory formula, base year statistics, and the volume-related composite price index. Grain producers and, ultimately, consumers, are thus protected from excessively high rail freight costs.

[8] The Court granted CN leave to appeal on March 24, 2009. On the same date, it granted a motion by CN for a confidentiality order relating to the confidential Decision of the CTA respecting the performance penalty issue.

C. LEGISLATIVE FRAMEWORK

[9] An appeal lies from a decision of the CTA to this Court with leave of the Court on questions of law and jurisdiction. The CTA's determination of questions of fact within its jurisdiction is binding and conclusive.

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.	31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.
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) Toute 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.

[10] Section 150 contains the core provisions on the revenue cap imposed on a railway company's revenues from shipping western grain, lists inclusions in and exclusions from revenue for this purpose, and requires the CTA to determine a railway company's revenues in a crop year from the movement of grain. Paragraph 150(3)(*b*) is particularly relevant to this appeal.

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

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

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

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

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

(c) compensation for running rights.

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

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

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

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

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

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

c) les indemnités pour les droits de circulation.

(4) Pour l'application du présent article, ne sont pas déduites du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole les sommes versées ou

unloading grain before the expiry of the period agreed on for loading or unloading the grain.	les réductions accordées par elle à titre de primes de célérité pour le chargement ou le déchargement du grain avant la fin du délai convenu.
(5) For the purposes of this section, if the Agency determines that it was reasonable for a prescribed railway company to make a contribution for the development of grain-related facilities to a grain handling undertaking that is not owned by the company, the company's revenue for the movement of grain in a crop year shall be reduced by any amount that the Agency determines constitutes the amortized amount of the contribution by the company in the crop year.	(5) Pour l'application du présent article, est déduite du revenu d'une compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole la somme qui, selon l'Office, constitue la portion amortie de toute contribution versée par la compagnie, au cours de la campagne, à une entreprise de manutention de grain n'appartenant pas à la compagnie pour l'aménagement d'installations liées au grain si l'Office estime qu'il était raisonnable de verser cette contribution.
(6) The Agency shall make the determination of a prescribed railway company's revenues for the movement of grain in a crop year on or before December 31 of the following crop year.	(6) L'Office calcule le montant du revenu de chaque compagnie de chemin de fer régie pour le mouvement du grain au cours d'une campagne agricole au plus tard le 31 décembre de la campagne suivante.

[11] Section 147 is a definitional provision. The definitions of "grain" and "movement" are relevant to this appeal.

"grain" means (*a*) any grain or crop included in Schedule II that is grown in the Western Division, or any product of it included in Schedule II that is processed in the Western Division, or	« grain » *a*) Grain ou plante mentionnés à l'annexe II et cultivés dans la région de l'Ouest, y étant assimilés les produits mentionnés à cette annexe provenant de leur transformation dans cette région;
(*b*) <u>any grain</u> or crop included in Schedule II <u>that is grown outside Canada and imported into Canada</u>, or any product of any grain or crop included in Schedule II that is itself included in Schedule II and is processed outside Canada and imported	*b*) <u>grain</u> ou plante mentionnés à l'annexe II <u>et importés au Canada après avoir été cultivés à l'étranger</u>, y étant assimilés les produits mentionnés à cette annexe qui, d'une part,

into Canada;	proviennent de la transformation à l'étranger de grains ou plantes qui y sont également mentionnés et, d'autre part, ont été importés au Canada
"movement", in respect of grain, means the carriage of grain by a prescribed railway company over a railway line from a point on any line west of Thunder Bay or Armstrong, Ontario, to (*a*) Thunder Bay or Armstrong, Ontario, or (*b*) Churchill, Manitoba, or a port in British Columbia for export, but does not include the carriage of grain to a port in British Columbia for export to the United States for consumption in that country;	« mouvement du grain » Transport du grain par une compagnie de chemin de fer régie sur toute ligne soit dans le sens ouest-est à destination de Thunder Bay ou d'Armstrong (Ontario), soit au départ de tout point situé à l'ouest de Thunder Bay ou d'Armstrong et à destination de Churchill (Manitoba) ou d'un port de la Colombie-Britannique, pour exportation. La présente définition ne s'applique pas au grain exporté d'un port de la Colombie-Britannique aux États-Unis pour consommation.

C. DECISION OF THE CTA

[12] The Decision concerns the western grain revenue caps for the crop year 2007-08 for the two prescribed railway companies under the Act, CN and Canadian Pacific Railway Company ("CP"). We are only concerned with the revenue inclusion issues raised by CN in its appeal.

(i) "imported into Canada"

[13] The CTA noted that a panel of the World Trade Organization ("WTO") ruled in 2004 that subsections 150(1) and (2) of the Act as then drafted might adversely affect the competitive position of imported grain, because the revenue cap only applied to earnings of the prescribed railway companies from the movement of grain grown in Canada. In response to this ruling, Parliament amended the definition of "grain" in section 147 by adding paragraph (*b*), which expands the meaning of "grain" to include foreign-grown grain "imported into Canada".

[14] Relying on the decision in *R. v. Bell*, [1983] 2 S.C.R. 471 at 488 ("*Bell*"), the CTA stated (at para. 34) that, since the Act did not provide a special definition of "imported" "… its ordinary meaning should apply and that ordinary meaning is simply to bring into the country or to cause to be brought into the country."

[15] Consequently, the CTA concluded, "grain" includes grain brought into Canada, whether for sale or consumption in Canada, or for export by ship from a west coast port to a third country. Hence, the revenue earned by CN in transporting this grain from the Canadian border to the port from which it was being exported was properly included in CN's "revenue" for that crop year.

(ii) "carriage … over a railway line"

[16] Whether revenue earned by CN for lifting grain containers from a truck and onto a railway car was included in its revenue was one of several items related to intermodal movements considered by the CTA in this proceeding.

[17] Revenue earned by grain companies for moving grain from an elevator into a hopper rail car is not rail transportation revenue. Hence, CN argued, revenue earned by CN from lifting grain containers from truck to rail car should also be excluded from its revenue cap, on the ground that the lifting is not an activity "over a railway line".

[18] The CTA rejected this argument, noting (at para. 79) that, unlike loading grain from elevators, "… the lifting of containers is done by the railway companies using railway company labour and equipment, operating on railway company land."

[19] The CTA concluded (at para. 81):

> The issue here is whether lifting relates to the carriage of grain by a prescribed railway company over a railway line. CN's argument that lifting costs do not relate to the carriage of grain over a railway line simply because they are not an over a railway line activity, is not valid. Lifting is a service that the railway companies provide and which is integral to containerized rail movement.

Accordingly, the CTA included in CN's revenue its earnings from the lifting services that it provided to customers.

(iii) the performance penalty issue

[20] In the confidential Decision, the CTA stated that whether a payment by [the shipper] to CN for failure to perform a contractual obligation is reasonably characterized as a performance penalty depends on whether [the shipper]'s non-performance caused a corresponding detriment to CN. Finding no such detriment, the CTA concluded that the payment was not a penalty and thus not excluded from CN's revenue by paragraph 150(3)(*b*).

D. ISSUES AND ANALYSIS

Issue 1: What is the standard of review applicable to the CTA's decision?

[21] CN argues that, since the questions in dispute involve the interpretation of statutory definitions and are thus either jurisdictional in nature or questions of law that are subject to a right of appeal, the applicable standard of review is correctness. I do not agree.

[22] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), stated (at para. 59) that administrative bodies must correctly decide "true" questions of jurisdiction. However, to the extent that provisions of a tribunal's enabling legislation can be characterized as "jurisdictional questions", without the need for a standard of review analysis, they constitute a narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of unreasonableness: see *Public Service Alliance of Canada v. Canadian Federal Pilots Association*, 2009 FCA 223, 392 N.R. 128 at paras. 36-52, leave to appeal to SCC refused, 33362 (January 14, 2010).

[23] Writing for the Court in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2. S.C.R. 678 at paras. 33-34, Justice Rothstein emphasized the narrowness of the category, "jurisdictional questions", as applied to a tribunal's interpretation of its enabling statute. A reviewing court should apply a correctness standard only when the interpretation of a provision in its legislation "raises a broad question of the tribunal's authority." Subsequently, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 at para. 11, Justice Rothstein characterized as

jurisdictional, and thus reviewable on a standard of correctness, the question of whether a non-Canadian supplier had standing to complain to the Canadian International Trade Tribunal of a breach of the Agreement on Internal Trade.

[24] In my opinion, the interpretation of the phrases in the CTA's enabling Act, "imported into Canada" and "carriage over a railway line", do not raise broad questions of the CTA's authority, and thus are not jurisdictional in nature. Counsel for CN argued that the fact that the disputed provisions are definitional renders them "jurisdictional". I do not agree. There is no basis in the authorities for regarding the fact that a provision in an administrative agency's enabling statute is definitional as automatically warranting judicial review for correctness.

[25] Counsel also argued that, even if the phrases in dispute are not "jurisdictional", their interpretation is a question of law. Because Parliament has provided a right of appeal from the CTA to this Court on questions of law, he submitted, correctness is the applicable standard of review. In my opinion, this argument is untenable.

[26] First, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 23 and 26, the Court specifically reaffirmed its decision in *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 S.C.R. 557. In that case, the Court held that an agency's interpretation of a provision of its enabling legislation may be reviewable on the standard of unreasonableness, even if Parliament has provided a right of appeal to a court. However, the

presence of a right of appeal may be a contextual factor to be taken into account at the stage of determining whether an appellant has established that the decision under appeal was unreasonable.

[27] Second, in order to reduce unnecessary complexities in determining the standard of review, a court should not conduct a standard of review analysis when prior judicial decisions have resolved in a satisfactory manner the standard applicable to the same category of question decided by the same agency: *Dunsmuir* at paras. 54, 57, and 62. Prior jurisprudence has satisfactorily dealt with the standard of review applicable to the CTA's interpretation of the Act.

[28] Thus, a pre-*Dunsmuir* decision from the Supreme Court of Canada (*Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650), and two post-*Dunsmuir* decisions of this Court (*Canadian National Railway Co. v. Greenstone (Municipality of)*, 2008 FCA 395, 384 N.R. 98 at para. 46, and *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*, 2008 FCA 363, 383 N.R. 349 at paras. 49-51), have held that the CTA is entitled to deference in the interpretation of provisions of the Act.

[29] CN did not argue that these cases are distinguishable on the ground that the statutory provisions in dispute in the present appeal raise "questions of central importance to the legal system and outside the specialized area of expertise of the administrative decision maker", and that their interpretation is therefore subject to review for correctness (*Dunsmuir* at para. 55). Accordingly, unreasonableness is the standard of review applicable to the CTA's interpretation of the phrases in the Act, "imported into Canada" and "over a railway line".

[30] Recent developments in the law of judicial review have overtaken the statement by Justice Rothstein, then of this Court, in *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, 2003 FCA 271, [2003] 4 F.C. 558 at para. 18, that the CTA's interpretation of its enabling statute was reviewable on a standard of correctness, because "questions of statutory interpretation are generally within the province of the judiciary", not the expertise of the CTA.

[31] As for the standard of review applicable on the performance penalty issue, this Court in *CP* did not decide whether the standard was correctness or unreasonableness because it concluded that the CTA's decision not to treat a payment as a penalty was both wrong and unreasonable. In my view, it is not necessary here to say more. The decision in *CP* is dispositive of the appeal on this issue.

Issue 2: Did the CTA unreasonably interpret "imported into Canada" by including foreign-grown grain transported by rail in Canada for re-export from a Canadian port?

[32] CN argued that the CTA erred by deciding that the meaning of the words "imported into Canada" was settled by the decision of the Supreme Court in *Bell*. In that case, the Court was interpreting the words in the context of the *Narcotic Control Act*, R.S.C. 1970, c. N-1. Counsel argued that it was consistent with the objectives of that Act to conclude that the offence of importing drugs into Canada, created in section 5, was complete as soon as the drugs were brought across the border. However, it did not follow that a similarly broad approach should be taken to the phrase as used in the Act because quite different legislative objectives are in play.

[33] Counsel submitted that paragraph (*b*) was added to the definition of "grain" in section 147 in response to a decision of a Panel of the WTO, *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain*, dated April 6, 2004. That decision upheld a claim by the United States that the benefit of the railway revenue cap available to Canadian grain growers should be equally available to growers of American grain destined for the Canadian market and transported by rail in Canada, in order to ensure that foreign products received the same treatment as like products of national origin. Consequently, counsel argued, since the definition of "imported grain" was amended to bring Canada into compliance with the WTO Panel's decision, it should be interpreted as only applying to foreign-grown grain entering the Canadian market.

[34] The preferable approach to statutory interpretation was said in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, to be best expressed by the following passage in Elmer A. Driedger, *Construction of Statutes* 2nd ed. (Toronto: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

This same idea is also captured by the principle that legislation is to be interpreted by reference to its text, context, and purpose, in order to "find a meaning that is harmonious with the Act as a whole": *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10.

(i) text

[35] No doubt, as the CTA stated, the words “imported into Canada” are “ordinary” words in the sense that they are used and understood in “ordinary” speech by those who have no legal training. It is not suggested by counsel that they have some technical meaning in section 147.

[36] However, that does not end the inquiry because words rarely have a single “ordinary” meaning. Rather, they normally have a range of “ordinary” meanings and the particular statutory context in which a word is used, in its “ordinary” sense, will often determine where on that range the particular shade of meaning of the word is located: *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 at para. 44.

[37] So it is with the word “imported” when used in connection with grain that has entered Canada. One possible meaning is that selected in *Bell*, and adopted in the present case by the CTA, namely, brought across the border into Canada. Grain may equally be described as “imported” when it enters the Canadian market for sale or consumption in Canada. In my opinion, either is linguistically possible. The question to be decided, therefore, is whether the shade of meaning selected by the CTA was unreasonable, given the context in which the words are used and the statutory purpose.

(ii) context

[38] International trade law is the context against which the word “imported” is to be interpreted in this case and, in particular the WTO Panel’s report. This report concerned, among other things,

complaints by the United States that Canadian legislation, section 57 of the *Canada Grain Act*, R.S.C. 1985, c. G-10 ("CGA") and subsections 150(1) and (2) of the Act, contravened Article III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT") in that it accorded less favourable treatment to grain imported into Canada than to domestic grain. Thus, as a result of paragraph 57(*c*) of the CGA, Canadian grain had access as of right to grain elevators in Canada, while foreign grain could only be received if elevator operators requested and obtained authorization from the Governor General in Council. The United States argued that this differential treatment imposed costs and inefficiencies and thus jeopardised American grain's access to the Canadian market. The Panel agreed (at para. 6.187) and rejected the various defences raised by Canada.

[39] As for the revenue cap provisions, the Panel held (at para. 6.337) that, since subsections 150(1) and (2) affected some movements of grain destined for the Canadian domestic market, they affected the internal transportation of "imported" grain and were therefore subject to Article III:4. The Panel concluded (at para. 6.352) that since the revenue cap in subsections 150(1) and (2) applied only to western Canadian grain, and not to foreign-grown grain, railways had an incentive to hold their rates for the transportation of western Canadian grain, an incentive which was not provided for imported grain. Hence, because subsections 150(1) and (2) treated imported grain less favourably than domestic grain, they were not consistent with Article III:4.

[40] Canada had argued before the WTO Panel that some of the American grain affected by section 57 of the CGA and subsections 150(1) and (2) of the Act was not "imported" into Canada, but was "in transit" and thus fell outside the scope of Article III:4 and within the scope of Article V.

This provides, among other things, for the free movement of goods in transit within the territory of each contracting party. For the purpose of Article V, goods are "in transit" across the territory of a contracting state when the passage across that territory,

> with or without change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes.

[41] Article V would thus appear to apply to grain that has entered Canada from the United States and is then transported in Canada to a Canadian port for export to a third country (see Raj Bhala, *Modern GATT Law* (London: Sweet & Maxwell, 2005) at p. 471). Indeed, Canada also argued (at para. 6:169) that a portion of the American grain that entered the bulk grain handling system was destined for re-export to third countries. Hence, it said, to the extent that section 57 affects grain that is in transit, and is therefore not "imported", it is outside the scope of Article III:4 and the Panel's terms of reference.

[42] The Panel did not deal with this argument since it was satisfied that at least some of the grain in question had been imported into Canada within the meaning of Article III:4, and the United States had not claimed a violation of Article V.

[43] To summarize, the WTO Panel decided that the impugned measures (paragraph 57(*c*) of the CGA, and subsections 150(1) and (2) of the Act) violated Article III:4 in so far as they affected grain imported into Canada. Canada took the position that the impugned measures did not violate Article III:4 to the extent that they affected foreign-grown grain that was merely in transit in Canada

within the meaning of Article V, including grain that was destined for re-export from Canada to a third country. However, the Panel expressly declined to decide this issue, since it was clear that some of the grain affected by the impugned measures was imported, in the sense that it was destined for the domestic Canadian market.

(iii) purpose

[44] One can infer from the WTO Panel's ruling no more than that it did not regard it as obvious that grain in transit through Canada for re-export from Canada to a third country was thereby "imported" into Canada.

[45] In adding paragraph (*b*) so as to extend the benefit of the revenue cap to "imported" grain, was Parliament's purpose to amend the law only to the extent necessary to comply with the Panel's decision respecting foreign grain imported for the Canadian market? Or, did it also intend paragraph (*b*) to apply to grain brought into Canada for the purpose of re-export from a Canadian port, with the objective of pre-empting a subsequent complaint to the WTO by the United States that, contrary to Canada's position before the Panel, such grain was nonetheless "imported" for the purpose of Article III:4, and not "in transit"?

[46] If the legislative record makes it clear that paragraph (*b*) was introduced to achieve the former, more limited objective, this would support CN's contention that the CTA's broader interpretation of "imported", as including grain brought into Canada for re-export, was unreasonable. I turn therefore to examine that record.

[47] Testimony was given to the Standing Committee on Bill C-40, *An Act to amend the Canada Grain Act and the Canada Transportation Act*, 1st Sess., 38th Parl., 2004 (as passed by the House of Commons, May 19, 2005), which proposed amendments to the Act to include imported grain under the revenue cap. This testimony supports the view that the amendments were intended to apply to American grain that entered Canada *en route* to a west coast port for export to a third country.

[48] Thus, Mr Howard Migie, Director General, Strategic Policy Branch, Department of Agriculture and Agri-Food, said in his opening remarks:

> The provisions we have put forward do not apply to grain in transit. It's clear it's only for imported grain. <u>But grain that is imported and then exported is eligible</u>. That way we are meeting the national treatment provisions. (Emphasis added)

(House of Commons Standing Committee on Agriculture and Agri-Food, *Evidence*, 38th Parl. 1st Sess., No. 039 (4 May, 2005) [Standing Committee Evidence] at 2.

[49] Mr Migie noted that the amendments had originally been drafted so as to exclude from the revenue cap foreign-grown grain shipped through Canada for re-export to a third country. However, it was thought that a broader amendment was necessary in order to comply with Article III:4. He explained the Government's position as follows (at 2):

> We would be out of compliance if we were to say grain that was legally imported into Canada and then later exported would be from now on called "grain in transit" under this bill. Because our traditional view of the words "import" and "grain in transit" means if it's imported and then exported, that is considered imported. If grain is in transit now, the way we have it – where it doesn't stop anywhere and doesn't get unloaded – that is in transit. We feel we would be challenged by the U.S. and out of compliance again; therefore, we have not gone that route.

[50] This passage indicates that those responsible for the proposed amendments intended to include export-bound foreign grain in the revenue cap, in order to avoid another American challenge. This supports the CTA's interpretation of "imported".

[51] However, as noted above, Canada had taken the position in the WTO proceeding that subsections 150(1) and (2) did not violate Article III:4 in so far as they affected the movement by rail of foreign-grown grain that entered Canada for re-export to a third country. Such grain was not "imported', it was argued, but "in transit" and covered by Article V, not Article III:4. Mr Migie, on the other hand, seemed to be of the view that American grain is "in transit" only if it enters Canada from the United States, is transported through Canada, and then re-enters the United States, without stopping or being unloaded.

[52] Officials from CN and CP who testified at the Committee hearing were critical of the proposed amendments and argued that the revenue cap should not apply to export-bound foreign grain. As Ms Janet Weiss, General Manager, Grain, Bulk Commodities and Government Affairs, Canadian Pacific Railway Company, put it, the amendment should only apply to foreign grain that "truly is being imported and is not simply being moved to position for export out of Canada" (Standing Committee Evidence at 12). In response to this argument, Mr Migie said that that approach would be contrary to Canada's traditional understanding of the difference between "imports" and "in transit",

> … and we would have another challenge to the decision that would probably be successful. The ruling the WTO made said we have to provide national treatment to imports. We do not have to provide national treatment to something in transit, and that's what this amendment does. What CP's amendment does, in my view, is change

> the definition; it puts in a definition of "in transit" that would cover imports that then go to B.C. ports for export.

(House of Commons Standing Committee on Agriculture and Agri-Food, *Evidence,* 38th Parl. 1st sess., No. 041 (10 May, 2005) at 4).

[53] This interchange underlines the Government's view that if foreign grain that entered Canada for re-export from a west coast port was not brought under the revenue cap, Canada would probably be found to be in breach of Article III:4. Again, this is the very opposite of the position that Canada had taken before the WTO, namely that, for the purpose of Article III:4, such grain was not "imported" but in transit.

[54] The debates on Bill C-40 provide no support for the view that the proposed amendments were only intended to include in the revenue cap earnings from the rail movement of foreign grain in Canada that had been imported for sale or consumption in the domestic Canadian market. Indeed, Mr Tony Martin MP criticised the Bill precisely because, in his view, by including grain entering Canada for re-export to a third country, it went further than was required to comply with the WTO Panel's ruling (*House of Commons Debates*, No. 084 (18 April, 2005) at 5200).

[55] Only the following statement (at 5190) by the Hon Carolyn Bennett, Minister of State (Public Health) might be thought to lend support to a narrower interpretation of "imported":

> … the revenue cap will be extended to foreign grain that is imported into Canada. It will not apply to foreign grain that is in transit through Canada to some other destination.

[56] In my opinion, however, when read in light of Mr Migie's more detailed explanation of the intended scope of the word "imported", the Minister may have meant simply that the cap did not include grain that was "in transit" in Mr Migie's sense. That is, she was referring to grain that enters Canada, and is transported in Canada before re-entering the United States, without stopping or being unloaded, not to grain that enters Canada to be re-exported from a west coast port to a third country.

(iv) conclusion

[57] On the basis of the legislative history of paragraph (*b*) of the definition of "grain" in section 147 of the Act, I have concluded that the CTA reasonably interpreted "imported" to include foreign-grown grain brought into Canada to be transported to a west coast port for re-export to a third country. Accordingly, it did not err in law when it included CN's earnings from these movements in its revenue cap. That the CTA's reasons did not explore this history does not render its decision unreasonable.

Issue 3: Was it unreasonable for the CTA to decide that CN's lifting of grain containers from a road truck onto a rail car was "the carriage of grain <u>over a railway line</u>"?

[58] The revenue cap is imposed by subsection 150(1) with respect to a prescribed railway company's revenues "from the movement of grain". The issue under consideration here arises from the definition in section 147 of "movement". It says: "'movement', in respect of grain, means the carriage of grain … over a railway line (« sur toute ligne »)…".

[59] CN argues that the words "carriage … over a railway line" have a clear meaning and cannot reasonably be interpreted as including the activity of lifting containers from a truck onto a flat-bed rail car. Hence, the earnings of CN from lifting grain containers from truck to rail car cannot be included in its cap revenues.

[60] Moreover, counsel says, the CTA misstated the legally relevant question when it said (at para. 81):

> The issue here is whether lifting relates to the carriage of grain by a prescribed railway company over a railway line. CN's argument that lifting costs do not relate to the carriage of grain over a railway line simply because they are not an over a railway line activity, is not valid. Lifting is a service that the railway companies provide and which is integral to containerized rail movement.

The error here, counsel alleges, is that the question is not whether lifting "relates to the carriage of grain over a railway line" or is "integral to containerized rail movement", but whether lifting is carriage over a railway line. Rather, it is said, lifting is a "pre-rail activity" undertaken to enable grain to be carried over a railway line; it is not itself the carriage of grain "over a railway line".

[61] In my view, this is an unduly narrow and literal view of the text and of the meaning that the disputed words may reasonably bear. Again, context is an important factor in determining the reasonableness of the CTA's interpretation. As the CTA indicated (at para. 79), the function of the definition is to distinguish between the rail and non-rail activities of railway companies. Only revenue derived from the former is included in the calculation of the revenue cap.

[62] To turn to the text of the provision in question, the Act does not define the term “railway line”. However, in *Canadian National Railway Company v. Canada (Canadian Transportation Agency)* (1999), 251 N.R. 245 (F.CA.), Justice Rothstein distinguished “railway” from “railway line” by saying (at para. 14):

> Although the term “railway line” is narrower than “railway”, it still covers the structure and communication or signalling system, whether between termini or in a railway yard.

[63] On the basis of this explanation, the lifting equipment could reasonably be characterized as covered by the term “railway line”. It is situated alongside the track, has no function other than loading containers onto rail cars and *vice versa*, and for all practical purposes is essential for enabling grain in containers to be carried by rail.

[64] Unless clearly prohibited by the text of the definition, the CTA’s interpretation of “over a railway line” should be able to demarcate rail from non-rail activities in the light of technological changes and other developments in transportation. The developments relevant to the present case are the greater efficiencies of intermodal road/rail transportation and the increased use of containers to achieve this. As a result, railway companies can offer their customers a door-to-door delivery service at a single composite price. In contrast, the use of grain elevators has declined, because of the expense of trucking grain by road from the farm-gate to the nearest point on the railway line, unloading it into an elevator, unloading it from the elevator into a hopper car, and maintaining the necessary railway lines.

[65] Loading grain from an elevator into a hopper car is not considered a rail activity. However, the CTA concluded (at para. 79) that lifting a grain container from a truck onto a rail car and *vice versa* was different because it

> … is done by the railway companies using railway company labour and equipment, operating on railway company land.

These seem to me reasonable grounds on which to distinguish CN's lifting service from loading grain into a hopper from an elevator.

[66] In my opinion, the CTA did not err in law when it framed the issue in terms of the integration of CN's lifting service to the carriage of grain over a railway line. Its conclusion that, because of the high degree of integration, the lifting was properly characterized as a rail activity or "carriage over a railway line" was not unreasonable, particularly in view of Justice Rothstein's elucidation of the scope of the words "railway line", and of the context and purpose of the provision.

Issue 4: Did the CTA err in law by concluding that the payment by [the shipper] to CN for not fulfilling its contractual promise to ship a specified percentage of its grain with CN was not reasonably characterized as a "performance penalty" within the meaning of paragraph 150(3)(*b*)?

[67] As already indicated, this issue is effectively determined by the decision of this Court in *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2009 FCA 46. Referring to contractual provisions analogous to those in the present case, Justice Pelletier, writing for the Court, said (at para. 24):

> The fact that CP could receive revenue on two accounts – one of which is to be included in the revenue cap calculation, and one which is not – does not mean that it must choose to structure its affairs so that all revenue is included in the revenue cap calculation. In this case, it is clear that the Agency regarded the scheme contained in the three relevant tariffs as a graduated incentive scheme. CP may well have been able to obtain the efficiencies it sought by structuring its incentive program to provide for graduated incentives. Instead, it chose to seek those efficiencies by resorting to a combination of incentives and penalties. The fact that CP could have proceeded by way of a graduated incentive scheme is not a reason for concluding, contrary to the legal form and effect of the relevant tariffs, that it did so.

[68] Counsel for the CTA had no submissions to make in response to CN's argument that the above passage is equally applicable to the facts of the present case. I agree that, in light of the above decision, which was rendered after the CTA's decision under review in this appeal, the CTA erred in law when it decided that [the shipper]'s payment was not reasonably characterized as a performance penalty. It should have been excluded entirely from CN's revenue cap calculation in accordance with paragraph 150(3)(*b*).

E. CONCLUSIONS

[69] For these reasons, I would allow the appeal in part, set aside the decision of the Canadian Transportation Agency relating to the performance penalty, and remit that matter to the CTA for re-determination on the basis that the payment is reasonably characterized as a performance penalty, no part of which is to be included in the calculation of CN's revenue cap. In all other respects, I would dismiss the appeal. Since success on the appeal is divided, I would award no costs.

"John M. Evans"

J.A.

"I agree
M. Nadon J.A."

"I agree

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Eric Harvey	FOR THE APPELLANT
Elizabeth Barker	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CN Law Department Montreal, Quebec	FOR THE APPELLANT
Canadian Transportation Agency Legal Services Branch Gatineau, Quebec	FOR THE RESPONDENT