Federal Court of Appeal | Cour d'appel fédérale

Date: 20210824

Docket: A-244-19

Citation: 2021 FCA 173

CORAM: **DE MONTIGNY J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY,
CANADIAN PACIFIC RAILWAY COMPANY,
THE FOREST PRODUCTS ASSOCIATION OF CANADA AND
THE FREIGHT MANAGEMENT ASSOCIATION OF CANADA

Respondents

Heard by online video conference hosted by the Registry on May 3, 2021.

Judgment delivered at Ottawa, Ontario, on August 24, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210824

Docket: A-244-19

Citation: 2021 FCA 173

CORAM: **DE MONTIGNY J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY,
CANADIAN PACIFIC RAILWAY COMPANY,
THE FOREST PRODUCTS ASSOCIATION OF CANADA
AND
THE FREIGHT MANAGEMENT ASSOCIATION OF CANADA

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a decision of the Canadian Transportation Agency (the Agency) dated April 15, 2019, which found that the Canadian National Railway Company (CN or the appellant) breached its level of service obligations set out in sections 113 to 115 of the *Canada*

Transportation Act, S.C. 1996, c. 10 (the Act). Specifically, the Agency held that CN had breached its service obligations when it announced its intention to impose embargoes on wood pulp shipments in September 2018, several months before any rail transportation challenges had emerged in the Vancouver area, and then imposed those embargoes in December 2018.

[2] The decision under appeal, Letter Decision No. CONF-9-2019 (the Final Decision), was rendered in the context of an investigation initiated by the Agency itself on January 14, 2019 into possible freight rail service issues in the Vancouver area. The Agency exercised for the first time its authority under subsection 116(1.11) of the Act to conduct, on its own motion and with the authorization of the Minister of Transport (the Minister), an investigation to determine whether a railway company is fulfilling its service obligations. After an extensive investigation, the Agency concluded that two of the three major railway companies operating in the Vancouver area (the Canadian Pacific Railway Company and the BNSF Railway Company) had not breached their level of service obligations, but that CN had done so with respect to its embargoes on shipments of wood pulp.

[3] The appellant claims that the proceeding before the Agency was unfair, to the extent that it was not informed of the case against it and was not afforded a meaningful opportunity to test the evidence and to respond to the case against it. The appellant also argues that the Agency created a reasonable apprehension of bias since the same Agency members who authorized the investigation adjudicated the allegations stemming therefrom. Finally, it is also contended that the Agency erred in law in making critical findings without evidence and based on pure speculation.

[4] For the reasons set out below, I am of the view that the appeal should be dismissed.

I. Background

[5] In December 2018 and January 2019, the Agency received information from a number of shipper associations asserting that serious freight rail service problems had emerged in the Vancouver area. Following receipt of this correspondence, the Agency gathered additional information from shipper associations, railway companies and relevant governmental departments.

[6] The representations of the various parties and the available data prompted the Agency to conclude that an "own motion" investigation would be appropriate in the circumstances, and on January 8, 2019, Mr. Scott Streiner, Chair and CEO of the Agency, successfully sought the authorization of the Minister to proceed with the investigation as required by subsection 116(1.11) of the Act.

A. *The Commencement of the Investigation*

[7] On January 14, 2019, the Agency launched the information-gathering phase of its investigation by appointing an Inquiry Officer and issuing letter decisions to each of the parties listed below (collectively, the Participants), informing them of the investigation and directing them to provide the Inquiry Officer with certain information:

a) five shipper associations: the Forest Products Association of Canada (FPAC), the Western Grain Elevator Association (WGEA), the Canadian Oilseed Processors

Association (COPA), the Freight Management Association of Canada (FMA), and the Western Canadian Shippers' Coalition (WCSC); and

b) three railway companies: CN, Canadian Pacific Railway (CP), and BNSF Railway (BNSF).

[8] The stated purpose of the investigation was to "determine whether railways are fulfilling their service obligations in the Vancouver area and if not, what remedies should be ordered". To this end, the Agency would look at whether performance of service obligations were being impeded as a result of certain measures, including the imposition of permits or embargoes, or preferential treatment of one or more commodities over others.

[9] The letter decisions notably informed the Participants of the appointment of Ms. Lidija Lebar as an Inquiry Officer, pursuant to subsection 38(1) of the Act, to assist with the information-gathering phase of the investigation. After having conducted interviews and taken written submissions, in addition to obtaining any documents, records and information deemed relevant to the inquiry, Ms. Lebar was to submit a summary report to the Agency no later than January 23, 2019.

[10] Furthermore, and perhaps most importantly, the letter decisions contained an informational request directed at each of the Participants and based on their respective operations. For instance, in the letter decision addressed to CN (LET-R-5-2019), the railway company was asked to "provide any information and data in its possession that is relevant to the issues identified [therein]", including, for the months of October to January in years 2015 to

2019, (1) waybill level data detailing shipper origins and destination for all movements in and out of Vancouver, (2) train segment/shipment data, (3) details for all permits issued, requested and denied during that period; and, for the months of October 2018 to January 2019, (4) interswitching data for movements over the Interchanges in the Lower Mainland of British Columbia, and (5) details of any traffic rerouted around the Vancouver corridor due to permits issued and embargoes imposed during that period.

[11] Finally, the letter decisions noted that, as part of the investigation, an oral hearing would be held on January 29 and 30, 2019, giving the Participants the opportunity to comment on the Inquiry Officer's report, provide supplementary information, and respond to questions posed by the Agency Panel. The letter decisions further advised that, following the oral hearing, the railway companies would have the opportunity to make written submissions.

[12] On January 17, 2019, the three railway companies (CN, CP and BNSF) as well as three of the five shipper associations (WGEA, FPAC and WCSC) submitted their response to the Agency's informational request. In particular, CN claimed to have provided over 5.8 million documents in the three-day period allocated by the Agency. Before us, the Agency advanced that its request concerned information that all Class 1 rail carriers are requested by law to tabulate and to provide to the Minister in the form of monthly reports.

[13] On January 16 and 17, CN and CP wrote to the Agency to make preliminary submissions regarding the investigation and the process, based on their interpretation of subsection 116(1.11) of the Act. After noting specific concerns, they inquired about the procedure that would follow,

in particular, the nature and scope of the Inquiry Officer's report, as well as the subsequent oral hearing. CN and CP also requested the production of the correspondence received by the Agency from the shipper associations prior to the launch of the investigation, as well as information regarding when and how they would be informed of the specific allegations laid against them.

[14] On January 21, 2019, the Agency issued a procedural direction (LET-R-17-2019) whereby it specified that "the record before the Agency will comprise the Inquiry Officer's report, the information received during the oral hearing and participants' written submissions". The Agency did not mention the correspondence sought by CN and CP which, by necessary implication, was deemed not to form part of the record. In that same procedural direction, the Agency provided additional clarifications regarding the process that would be followed at the oral hearing as well as the nature and scope of the Inquiry Officer's report, in particular that it would not draw conclusions nor make determinations with respect to railway companies' service obligations.

B. *The First Inquiry Report*

[15] On January 24, 2019, the Agency communicated the *Inquiry Report – 2019 Vancouver Freight Rail Investigation* (the First Inquiry Report), which summarized the information and data gathered by the Inquiry Officer without drawing any conclusions. The First Inquiry Report identified five main themes which it noted "may be relevant in assessing whether a railway company has fulfilled its service obligations", one of which being the imposition of embargoes and/or permits. In this respect, the First Inquiry Report recounted that "[a]llegations have been made that some railway companies are deploying embargoes and issuing permits 'more often

than normal,' harming some commodity sellers more than others in an effort to push through the maximum overall volume".

[16] The First Inquiry Report then went on to describe the embargoes imposed and the permits issued by the three railway companies in the course of the reference period, being the months of October to January over the years 2015-2019. Of particular relevance is the First Inquiry Report's observation that the greatest number of concerns expressed by shipper associations came from the forest products sector and were directed at CN's practices.

C. *The Oral Hearing*

[17] The oral hearing set for January 29 and 30, 2019 was conducted in accordance with the Order of Proceedings sent to the Participants on January 24, 2019. In addition to discussing the Inquiry Report and their own submissions, as well as replying to the submissions or representations made by other parties to the proceeding, the Participants were allowed to provide substantiating or supplemental evidence.

[18] A cursory review of both the Participants' presentations and the railways' replies reveals that the use of embargoes and permits became one of the central points of discussion at the hearing.

[19] At the conclusion of the oral hearing on January 30, 2019, the Agency indicated that the information-gathering phase of the investigation would continue for a short additional period, to allow parties to comply with the undertakings given during the hearing. During that same period,

the Inquiry Officer continued to collect information, notably from officials of the United States Surface Transportation Board, port terminals and facilities operators working in the Vancouver area, and members of industry associations that did not participate in the initial phases of the investigation.

[20] The additional information provided in the answers to the undertakings by the Participants, including responses to questions raised by the Agency Panel, and the additional information gathered by the Inquiry Officer as part of the ongoing investigation led to the issuance of a second report from the Inquiry Officer (the Second Inquiry Report).

D. *The Second Inquiry Report*

[21] On March 6, 2019, the Agency released the Second Inquiry Report, which concluded the information-gathering phase of the investigation. Apart from two "new" themes (the operations at CN's Thornton Yard and port terminal capacity), the Second Inquiry Report revisited a key theme of the First Inquiry Report, namely the imposition of embargoes and permits.

[22] The Second Inquiry Report's description of embargoes imposed by CN and CP on paper and wood pulp car shipments focused on how these measures had been presented by the two railway companies; while CP characterized its use of the embargo and permit system as a "tool of last resort", CN advanced that the embargoes under consideration were imposed as a "proactive measure" to improve network fluidity.

II. Decisions Below

A. *The Preliminary Decision (Decision LET-R-29-2019)*

[23] Contemporaneously with the issuance of the Second Inquiry Report, on March 6, 2019, the Agency rendered Decision LET-R-29-2019 (the Preliminary Decision), by which it commenced the assessment phase of the proceeding. The focus of the Preliminary Decision was placed on matters identified by the Agency as warranting further examination.

[24] The Preliminary Decision identified two key findings that emerged from the record as it then stood. First, it appeared that various shortfalls or delays in the transportation of traffic primarily affected terminals on the North Shore of Vancouver, and were related in part to congestion at CN's Thornton Yard in October and November 2018. Second, it had become clear that CP and CN imposed several embargoes on traffic destined for Vancouver area terminals.

[25] In this light, the Agency directed CN and CP, and provided the other Participants with an opportunity, to respond to a number of specific questions related to these findings. For instance, CN was asked whether, having regard to considerations listed in subsection 116(1.2), the placement of embargoes on wood pulp traffic and other traffic "was exceptional rather than routine in nature, proportionate, targeted, and non-discriminatory".

[26] On March 26, 2019, CN and CP answered the questions posed by the Agency and three submissions were made in reply, at which point the record was considered closed.

B. *The Final Decision (Decision CONF-9-2019)*

[27] On April 15, 2019, the Agency rendered its Final Decision finding that, of the three railway companies investigated, only CN had breached its level of service obligations.

[28] The Agency began its analysis by emphasizing the broad discretion conferred upon it to decide when to initiate an "own motion" investigation under subsection 116(1.11) of the Act, what matters that investigation will examine, and the manner in which the investigation will be pursued (Final Decision, at para. 18). This broad discretion, coupled with a clear statutory intent for an "own motion" investigation to address broad-based or systemic issues, was deemed to have several implications for the investigation process. First, an "own motion" investigation may include an information-gathering phase aimed at providing a more complete evidentiary record before any specific questions related to statutory compliance are identified (Final Decision, at para. 19). Second, information submitted prior to the launch of an "own motion" investigation will not form part of the record, since that information's sole use consists of assisting the Agency in deciding whether to undertake an investigation (Final Decision, at para. 20). Third, in the context of an "own motion" investigation with a more systemic orientation, the evidence is likely to be broad and not as detailed in respect of each incident (Final Decision, at para. 21). Fourth, the remedies ordered by the Agency, if finding that the federally-regulated entity breached a statutory obligation, may be of a relatively broad nature (Final Decision, at para. 22). In the same vein, the Agency noted that an "own motion" investigation could be incremental, hence the possibility of abandoning some lines of inquiry and actively pursuing others in the course of collecting evidence (Final Decision, at para. 25).

[29] Having explained how it approached the process underlying "own motion" investigations, the Agency turned, on a more substantive level, to its interpretation of railway companies' level of service obligations. From a comprehensive review of the relevant case law, the Agency extracted the following "key" principles: "[service] obligations are neither absolute nor soft; a railway company is required to make every reasonable effort to receive, carry, deliver, and unload traffic offered without delay, even in the face of challenges beyond its control, but it is not asked to do the impossible; and this obligation can only be determined or particularized in light of the specific circumstances of each situation" (Final Decision, at para. 41). Further, the Agency noted the interpretative guidance offered by subsection 116(1.2) of the Act, and the non-exhaustive list of factors contained therein (Final Decision, at para. 46).

[30] With those principles in mind, the Agency proceeded to determine whether the three railway companies breached their respective level of service obligations under sections 113 to 115 of the Act or, put differently, whether they failed to provide the highest level of service that they could reasonably provide in the circumstances, having regard to considerations listed in subsection 116(1.2).

[31] With respect to the first issue identified in the Preliminary Decision – namely, the shortfalls or delays in the transportation of traffic primarily affecting terminals on the North Shore of Vancouver during the period from October 2018 to January 2019 – the Agency found that there was cause for concern and some evidence indicating that the service provided by CN to shippers fell short of the service requested by those shippers. Because the purpose of this "own

motion" investigation was to examine systemic matters, however, the Agency concluded that the evidence was not sufficient to support a finding of a breach of a systemic nature.

[32] With respect to the embargoes imposed by CN on traffic destined for Vancouver area terminals between September and December 2018, the Agency concluded that CN, unlike CP and BNSF, breached its level of service obligations. In the Agency's words, the breach occurred when CN announced its intention to impose embargoes on wood pulp shipments in September 2018, several months before rail transportation challenges emerged in the Vancouver area, and then imposed those embargoes in December 2018, rather than making every reasonable effort to deal with those challenges (Final Decision, at para. 133).

[33] The Agency recognized that CN's pulp embargoes met some of the justification criteria in that they resulted, at least in part, from a factor beyond CN's control (*i.e.*, issues around shipper-terminal coordination) and that they were designed to minimize impacts on the transportation of traffic (Final Decision, at para. 117). However, on balance, the Agency found that such embargoes were not justified in the circumstances. In essence, CN's premature announcement of its intention to deny service, in a context where traffic surges tend to materialize at the same period each year, came closer to being a first rather than a last resort (Final Decision, at paras. 118-119).

[34] In coming to its conclusion, the Agency declined to infer, as urged by CN, that any demand for service had been met since a portion of the permits issued to the shippers of pulp products had not even been used. Such inference would overlook, in the Agency's view, the

mitigating measures likely undertaken by the shippers upon receipt of CN's advance notice. The Agency added:

> […] It would be inconsistent with the statutory scheme for a railway company to be relieved of its level of service obligations because there is no quantifiable evidence of service traffic demand left unfulfilled, if the absence of such demand has likely been caused by the railway company's own action or inaction. Approaching the level of service provisions in such a way would force shippers to suffer prejudice, by not mitigating the impact of the denial of service or future service on them, in order to retain their access to recourse under the level of service provisions of the CTA.
>
> Final Decision, at para. 115.

[35] The Agency then addressed other arguments put forward by CN, but concluded that it breached its obligation under the Act essentially because it signalled its intention to impose embargoes on pulp shipments long before it experienced operational challenges. In the Agency's view, such behaviour demonstrates that CN was not willing to take all reasonable measures necessary to deal with issues it could anticipate, and therefore to provide pulp shippers with the level of service to which they are entitled.

[36] Exercising the authority of subsection 116(4) of the Act, the Agency therefore ordered CN, in respect of its operations in the Vancouver area, to:

> 1. Develop a detailed plan, each year for the next three years, to respond to surges in traffic that occur in the Vancouver area towards the end of the calendar year with a view to avoiding or minimizing the use of embargoes and maintaining the highest level of service reasonably possible, as required by the CTA. The plan is to be submitted to the Agency's Chief Compliance Officer by August 1, of each calendar year beginning on August 1, 2019, and should include a list of all embargos imposed by CN for traffic within, or destined to, their Vancouver area rail network in the preceding year;
>
> 2. Only resort to embargoes on an exceptional basis where factors beyond its control make the timely carriage and delivery of traffic difficult and all reasonable

> alternatives to address those challenges have been attempted and found to be insufficient; and
>
> 3. Only implement embargoes that are targeted to address specific and actual challenges, are designed to minimize impacts on traffic carriage and delivery while in place, and are temporary and lifted at the earliest reasonable opportunity.
>
> Final Decision, at para. 134.

[37] CN sought leave to appeal the Final Decision under section 41 of the Act, which provides a statutory appeal mechanism on questions of law or jurisdiction. This Court granted leave to appeal by Order dated June 7, 2019.

III. Issues

[38] The appellant contends that the Agency made three errors of law or jurisdiction in reaching its Final Decision. I have rephrased these issues as follows:

A. Did the Agency breach its duty of procedural fairness owed to CN, in that (i) CN was not advised of the case to be met, and was thereby deprived of a reasonable opportunity to defend itself; and (ii) the underlying process used by the Agency created a reasonable apprehension of bias?

B. Did the Agency err by concluding, without evidence, that shippers likely took measures to mitigate the impacts of the announced embargoes?

C. Did the Agency err by misinterpreting the level of service regime, and holding that a breach can be determined without evidence of unfulfilled demand?

IV. Standard of Review

[39] In the past, the Agency's expertise in various contexts, including in the assessment of railway companies' level of service obligations, led this Court to apply the reasonableness standard in conformity with the teachings of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: see, for example, *Canadian National Railway Company v. Richardson International Limited*, 2015 FCA 180, 476 N.R. 83 at paras. 25-31; *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264 at paras. 27-29; *Canadian National Railway Company v. Greenstone (Municipality)*, 2008 FCA 395, 384 N.R. 98 at para. 52. Following the more recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], however, reviewing courts have been instructed to respect the legislative intent when it is clearly expressed, and to derogate from the presumption of reasonableness when the legislature has explicitly opted for a statutory appeal mechanism from an administrative decision to a court: *Vavilov*, at paras. 36-37.

[40] This is precisely the situation here. Pursuant to subsection 41(1) of the Act, Parliament has provided for an appeal mechanism, and the standard of review must therefore be the appellate standard enunciated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Accordingly, questions of fact and of mixed fact and law must be reviewed on a standard of palpable and overriding error, whereas issues of law are to be assessed on a standard of correctness. Since subsection 41(1) only allows appeal on questions of law or jurisdiction, the standard of review must necessarily be that of correctness on substantive issues: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para.

28. Questions of procedural fairness, on the other hand, require the reviewing court to ask whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at paras. 33-56; *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, 2021 CarswellNat 947 (WL Can) at paras. 42-47.

V. Analysis

[41] Before turning to the issues raised by this appeal, it is appropriate to say a few words with respect to the Agency's authority to investigate and the introduction of subsection 116(1.11) in the Act, which came into force on May 23, 2018 as one of the amendments found in the *Transportation Modernization Act*, S.C. 2018, c. 10, s. 23(2). This is apparently the first case brought under this new scheme.

[42] Subsection 116(1.11) has its origins in the recommendations of the *Canada Transportation Act* Review Panel, led by the Honourable David Emerson, entitled *Pathways: Connecting Canada's Transportation System to the World*. The report, submitted to the Minister of Transport in December 2015, proposed that the Agency be given the authority to address systemic issues on its own motion, and explained the rationale for adding powers to the existing complaint process as follows:

> […] the Agency's lack of own motion powers prevents it from examining overall network failures and issues. This can be frustrating when the Agency is aware of a widespread problem but can do nothing to address it. Even when a complaint is filed…the Agency can address only the specifics of that particular case. The benefits of conferring own motion and *ex parte* powers on the Agency are especially evident in the context of freight rail transportation. Insight into the freight rail transportation network solely from the perspective of an individual

> complaint may not provide the Agency with enough information on the operations of the network as a whole as it arrives at its decisions and directives. Rulings based on having examined an issue through the narrow lens of a single complaint may have undesirable or unintended consequences for the parties operating on the rest of the network.
>
> Canada, Canada Transportation Act Review, *Pathways: Connecting Canada's Transportation System to the World*, Vol. 1 (Ottawa: Minister of Transport, 2015) at pp. 242-243.

[43] The focus of these new powers is not the investigation of a level of service complaint, but rather the investigation of systemic rail service issues without a formal complaint. As noted by the Agency in its Final Decision (at paras. 19-22), this change in focus has a number of implications on the role of the Agency and the conduct of the investigation. These will be considered in the context of the following discussion pertaining to the alleged breaches of procedural fairness.

A. *Did the Agency breach its duty of procedural fairness owed to CN, in that (i) CN was not advised of the case to be met, and was thereby deprived of a reasonable opportunity to defend itself; and (ii) the underlying process used by the Agency created a reasonable apprehension of bias?*

[44] CN alleges that the Agency breached its duty of procedural fairness in three respects. Because the first two (the right to know the case to be met and the right to defend itself) are closely intertwined, I will deal with them together first and will then address the third (reasonable apprehension of bias) separately.

[45] CN claims that it was never advised of the case it had to meet, despite its several requests for specifics or particulars of conduct alleged to be in breach of its service level obligations. CN refers to letters sent to the Agency on January 16 and 25, February 19, and March 26, 2019,

where it complained that it was unaware of the case to be met, and to its submissions at the January 30, 2019 hearing to the same effect. Without specific allegations and details of breaches, the Agency's investigation could only be decontextualized and CN was never advised of the case it had to meet and could not defend itself. According to CN, even the Preliminary Decision did not raise any specific allegations of breach, but rather asked CN and CP whether they had met their statutory service obligations having regard to certain listed considerations.

[46] CN also argues that it was not provided a reasonable opportunity to defend itself. According to CN, the Agency was required "to step into the shoes of the complainant and to advance the type, volume, and quality of information that a complainant would", which it never did (Appellant's Memorandum of Fact and Law, at para. 44). Moreover, CN alleges that it was never given the opportunity to test the broad and unsubstantiated allegations put forward by the Participants. This failure was compounded by a number of procedural flaws, including short timelines to respond and differential treatment between the railway companies and the shippers with respect to the submission of evidence.

[47] At its roots, CN's position amounts to a denial of the distinction between a specific complaint and an own motion investigation, and a refusal to recognize the systemic and broad-based nature of the latter. At the hearing, counsel for CN went as far as saying that subsection 116(1.11) does not authorize the Agency to conduct systemic investigations, but only empowers the Agency to act on its own motion and, "at most", to investigate allegations of breaches of obligations from multiple shippers. In my view, this narrow reading of the amendment

introduced by the *Transportation Modernization Act* is unwarranted and contrary to the legislative history of that subsection.

[48] As previously mentioned (see paragraph 42, above), it is clear that subsection 116(1.11) was meant to address systemic issues in the context of level of service obligations. It is no doubt true that the addition of subsection 116(1.11) was not originally included in Bill C-49, and was only adopted as a result of an amendment proposed by the Senate and adopted by the House (with two modifications unrelated to the issue before the Court). In its oral submissions before the Court, CN seemed to suggest (without any supporting evidence) that Parliament did not adopt the rationale put forward by the Review Panel for this new subsection. Yet, it is very clear from a perusal of the proceedings before the Standing Senate Committee on Transport and Communications that the need to confer on the Agency broader powers to deal with systemic issues was very much on the minds of the witnesses appearing before the Committee; indeed, the senator proposing the amendment made specific reference to the Review Panel.

[49] Contrary to a complaint-based investigation, an “own motion” investigation is not designed to look into one or more specific statutory breaches, but to assess broader issues with respect to rail services. It is an incremental process, where the issues are first broadly canvassed and progressively refined as more information becomes available. Because the involvement of the Agency is not triggered by a complaint, it must often gather and proactively seek out the information before deciding whether specific questions can be put to the railway companies. At this investigation stage, CN (and, for that matter, CP and BNSF) was not in legal jeopardy and

could not be advised of the case against it because, at that point, no case had yet crystallized. As stated by the Agency, at paragraphs 25 and 26 of its Final Decision:

> […] Further, an own motion investigation, by its nature, can be incremental, with some lines of inquiry abandoned and others actively pursued as evidence accumulates. Step by step, the investigation grows more focused.
>
> In an own motion investigation, the specific issues a participant must address may only crystallize as the investigation proceeds, which, in this case was reflected in the specific questions posed in the March Decision. The process that was followed was consistent with the information provided to the railway companies and other participants about the investigation from the outset.

[50] Following correspondence from various shipper associations complaining of serious freight rail service problems in the Vancouver area, the Agency initiated an investigation (with the approval of the Minister) and requested information from each participant related to its operation. As previously stated at paragraph 8 of these reasons, one of the issues mentioned in the Letter Decision sent to CN on January 14, 2019 was whether it may not be meeting its service obligations as a result of measures "such as the imposition of permits or embargos". The Agency also made it very clear in its procedural direction of January 21, 2019 that the Inquiry Officer's report would not draw conclusions nor make determinations with respect to railway companies' service obligations.

[51] In the following steps of the investigation stage (the First Inquiry Report, the Oral Hearing and the Second Inquiry Report), the imposition of embargoes and/or permits was again identified as one of the issues of concern and it became exceedingly clear that it was emerging as one of the key themes of the investigation.

[52] In light of the foregoing, I am unable to accept CN's submission that it was never advised of the case to meet with respect to embargoes, which is the subject matter of this appeal. Not only was there no case to meet at the investigation stage, but it is clear from the record that CN must have known from the outset that its embargoes in the Vancouver area and their impact on its fulfillment of its statutory service obligations was one of the key issues that the Agency would consider. During that first stage of the process, the Agency did not draw conclusions or make determinations but merely gathered information and asked questions; there existed no need for CN to defend itself at that stage.

[53] Moreover, throughout the investigative stage, CN had every opportunity to provide any information that it believed could be relevant over and above the specific data requested by the Agency. Following the First Inquiry Report, for example, the Participants were advised that they could use their time to discuss any aspect of the report or their written submissions, provide substantiating or supplemental evidence, and respond to any aspect of submissions or representations made by other parties. At the end of the hearing, the Chair of the Agency reiterated for the Participants the opportunity to provide additional information or evidence, thereby continuing for a short additional period the information-gathering phase (Hearing Transcripts, January 29-30, 2019, Appeal Book, Vol. 2, Tab 25, at p. 493). This was also confirmed by email on February 1, 2019 and on the Agency's website (Appeal Book, Vol. 3, Tabs 30 and 31).

[54] At the adjudicative stage starting with the Preliminary Decision, the issues had crystallized and the Agency focused on two matters that warranted further examination, one of

which was the embargoes and their impact on level of service obligations. If there was any remaining doubt as to the case that CN would have to meet, it should have been easily dissipated by the questions that it was directed to answer. CN claims that the issues highlighted by the Agency through these questions were not the equivalent of specific allegations to answer. In my view, such an argument is disingenuous. The way the questions were framed was a clear indication of the criteria against which the embargoes imposed by CN would be assessed. For example, CN was asked whether and the extent to which:

> • [it] had in place, and activated, adequate contingency plans to respond to rising congestion in Thornton Yard;
>
> • [it] deployed sufficient crews and locomotives to provide the requested service as the volume of traffic increased…
>
> • [it] appropriately considered and implemented a full range of traffic management measures to deal with increased volumes of traffic…
>
> • the placement of embargoes on wood pulp traffic…was exceptional rather than routine in nature, proportionate, targeted and non-discriminatory;
>
> • the placement of embargoes on other traffic…was exceptional rather than routine in nature, proportionate, targeted and non-discriminatory.
>
> Appeal Book, Vol. 4, Tab 55, at p. 1017.

[55] It is very clear from these questions that blanket embargoes were considered to be problematic, and that CN was called upon to justify their use and to explain why they were needed. At the time of that preliminary decision, many shippers associations were on the record as stating that the embargo process is a violation by the railways of their common carriers obligations. Even at this late stage, CN was not precluded from adding to the evidence that was before the Agency and from responding to any other parties' submissions. Indeed, CN did respond to the Second Inquiry Report and addressed the specific service level inquiries

formulated by the Agency in its Preliminary Decision: see Appeal Book, Vol. 4, Tab 59, at pp. 1043-1079.

[56] In the end, it is clear that CN's complaints stem from its misunderstanding of the purpose of subsection 116(1.11) and its refusal to acknowledge that the investigation of systemic issues, such as the improper use of rail embargoes, is entirely different from an investigation of a specific complaint. To apply the same level of specificity required in the latter case to an "own motion" investigation would not only be impossible but would also negate the whole purpose of subsection 116(1.11). What matters when the evidence collected by the Agency relates to multiple issues, shippers and dates is that each participant be given a reasonable opportunity to explain its position and to file evidence in support of that position, and once the process moves to the adjudicative stage, to address the issues that have crystallized and to respond to the specific questions that will eventually be the subject of a determination by the Agency.

[57] In my view, this process has been rigorously explained and followed by the Agency at every step of its proceeding, and the allegations by CN that it was not advised of the case against it and was not provided a reasonable opportunity to defend itself have not been borne out.

[58] CN also alleged that the proceeding before the Agency gave rise to a reasonable apprehension of bias because the own motion procedure confers on the Agency a plurality of functions that would normally be kept separate in judicial proceedings. According to CN, the Agency can recommend the initiation of an investigation and, if authorized by the Minister, can investigate, prosecute and adjudicate the matter; such blurring of functions would be contrary to

the teachings of the Supreme Court in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577 [*Régie*], which apply with equal force to an administrative body invested with adjudicative powers, such as the Agency.

[59] CN's argument is premised on the notion that the proceeding, which in its view was comprised of four phases (the authorization phase, the evidentiary phase, the prosecutorial phase and the adjudicative stage), was conducted by the very same people without any separation between them. The reasonable apprehension of bias created by this process would become even more pressing considering that the Panel requested from the Forest Products Association, at the outset of the proceeding and unbeknownst to CN, evidence of additional costs incurred due to the embargo; such information, in CN's view, is only relevant if the Panel had already concluded that the railway companies were in breach of their service obligations. Also of concern and illustrative of bias would be the "remarkable lengths" the Panel went to accommodate the shipper participants in providing the evidence in support of the proceeding, and inexplicable observations castigating CN that are found in the Final Decision.

[60] I agree with CN that every litigant, whether appearing before an administrative tribunal or a court of law, has the right to expect that an impartial adjudicator will deal with his or her claim. In the absence of clear language to the contrary, courts will generally infer that Parliament or the legislature intended that a tribunal's process will be in compliance with the principles of natural justice. As stated by the Supreme Court in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at

para. 21 [*Ocean Port*], courts will not lightly assume that legislators intended to deviate from natural justice, including the requirement for an impartial decision-maker.

[61] In *Régie*, the Supreme Court cautioned against an overlapping of functions. What was particularly problematic in that case was the dual role of counsel, who were acting both at the investigation and adjudication stages. As subsequently explained in *Ocean Port*, at para. 40:

> […] The apprehension of bias in *Régie* resulted from the possibility of a *single* officer participating at each stage of the process, from the investigation of a complaint through to the decision ultimately rendered. The central concern in *Régie*, succinctly stated by Gonthier J., was that "prosecuting counsel must in no circumstances be in a position to participate in the adjudication process". [Citations omitted]

[62] The Supreme Court prefaced its analysis of institutional bias in *Régie* with an explicit acknowledgment that a plurality of functions in a single administrative agency "is not necessarily problematic" (at para. 47). Subsequently, the highest court went even further. After quoting that sentence from *Régie,* Chief Justice McLachlin (writing for a unanimous court) stated in *Ocean Port*, at para. 41:

> The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Without deciding the issue, I would note that such flexibility may be appropriate in a licensing scheme involving purely economic interests.

[63] In the case at bar, it is clear that neither the Inquiry Officer (Ms. Lebar) nor the Agency counsel (Mr. Shaar) fulfilled dual functions. The mandate of the Inquiry Officer was clearly defined at the outset of the investigation in the following terms:

- Conduct interviews and take written statements from individuals and organizations involved in, or affected by, the alleged freight rail service issues;
- Obtain any documents, records, and information that she deems relevant to the inquiry; and
- Submit a summary report to the Agency no later than January 23, 2019.

Letter Decision No. LET-R-5-2019, Appeal Book, Vol. 1, Tab 5, at p. 40.

[64] As for Mr. Shaar, there is no indication on the record that making submissions to the Panel was in any way part of his functions, and counsel for CN acknowledged as much at the hearing. There is, therefore, no hint of impermissible combination of advisory and prosecutorial roles played by these two individuals.

[65] With respect to the Agency members who participated in the investigation, there is absolutely no substance to CN's allegations that they "authorized the investigation, created the record, advanced allegations against CN, adjudicated those allegations, and found CN in breach thereof" (Appellant's Memorandum of Fact and Law, at para. 4c). During the investigation stage, there is no indication that the Agency acted in any shape or form as a prosecutor; its task, as contemplated by subsection 116(1.11), was to collect the information with the assistance of the Inquiry Officer. As the Final Decision makes it clear, "[t]he investigation is an active but neutral fact-finding exercise that establishes an evidentiary record to support decision-making" (at para. 20). Even the Preliminary Decision was not meant to be an indictment of the railway companies, but merely listed the issues that had been raised by the shipper participants during the investigation. It cannot seriously be contended, therefore, that the Agency members who participated in the proceeding were acting both as prosecutors and adjudicators. At no point

during the entire process was there any confusion about their role, as evidenced by their own description of that process in the Preliminary Decision:

> [2] The investigation is made up of two phases. The first phase was the information-gathering phase, which began with the issuance of letter decisions to railway companies and shipper associations and the appointment of an Inquiry Officer. The Inquiry Officer prepared a first report based on the information and data submitted in response to the letter decisions. The Agency gathered additional information during an oral hearing in Vancouver on January 29 and 30, 2019, and through subsequent submissions from participants. This additional information is summarized in a second and final report from the Inquiry Officer, which is appended to this Decision. The first phase of the investigation has now concluded.
>
> [3] The second phase focuses on matters identified by the Agency as warranting further examination, based on the record before it, and begins with the issuance of this Decision, which directs the Canadian National Railway company (CN) and the Canadian Pacific Railway Company (CP) to respond to specific questions, and provides other participants with an opportunity to do so as well. CN, CP and other participants will then be provided an opportunity to reply to those answers, at which point the record will be closed. […]
>
> [4] The investigation will conclude with the issuance of the Agency's final decision on the issues identified in this Decision. In that final Decision, the Agency will make a determination on whether the railway companies have fulfilled their service obligations with respect to freight rail service in the Vancouver area. If the Agency determines that a railway company has not done so, it may make an order based on the remedies set out in subsection 116(4) of the CTA.
>
> Appeal Book, Vol. 4, Tab 55, at p. 1014. See also Final Decision, at paras. 23-24.

[66] In many respects, the facts of this case are much more similar to those underlying the decision of the Supreme Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 [*Brosseau*] than those in *Régie*. In *Brosseau*, the issue was whether the Chairman's participation at both the investigatory and adjudicatory levels created a reasonable apprehension of bias. Writing for a unanimous court, Justice L'Heureux-Dubé found that the *nemo judex* principle can be set aside when the overlap of functions has been authorized by statute, assuming the constitutionality of that statute has not been challenged (*Brosseau*, at pp.

309-310). To the extent that Parliament is of the view that a certain degree of overlapping of functions is necessary to achieve its goals, then the reasonable apprehension of bias doctrine will not apply.

[67] This is precisely the situation here. The Agency is explicitly authorized, on its own motion, to conduct an investigation and to determine whether a railway company is fulfilling its service obligations. Unless it can be established that the Agency went beyond its express statutory duties, it cannot be disqualified on the ground that the procedure it followed gave rise to a reasonable apprehension of bias. That demonstration was not, and could not be made, on the basis of the record that is before us.

[68] Finally, CN failed to raise its bias argument in a timely fashion. It is well-established that allegations of bias must be raised at the earliest practical opportunity: *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68 [*Maritime Broadcasting*]; *Hennessey v. R.*, 2016 FCA 180, 484 N.R. 77 at paras. 20-22. As this Court stated in *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, 66 Admin. L.R. (6th) 1 at para. 47, this is not a question of formal waiver; this requirement is rather meant to ensure that the decision-maker will have an opportunity to address the matter before any harm is done. When a litigant is aware of the relevant information, it is reasonable to expect him or her to raise the issue: *Restrepo Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 461, [2007] 1 F.C.R. 107 at para. 220, aff'd, 2007 FCA 199, [2008] 1 F.C.R. 155, quoted in *Maritime Broadcasting*, at para. 67.

[69] In the case at bar, CN cannot claim that it was left in the dark as to the involvement of the Inquiry Officer, the Agency counsel or the members of the Panel. It knew of the appointment and mandate of the Inquiry Officer as early as January 14, 2019, and of the involvement of the Agency counsel. All of the procedural decisions leading up to the oral hearing were identified as having been signed by the same three members that participated in the oral hearing and in the Preliminary Decision. Instead of raising their concerns at the very least after the Preliminary Decision, CN was content to make vague allegations of procedural errors in paragraph 46 of its response, and to allude to the shortcomings of the proceeding with respect to "institutional safeguards to ensure the impartiality of level of service" with a reference to *Régie* in a footnote. This falls far short of what is required to raise an allegation of bias in a timely manner. I can do no better than to adopt the words of Donald, J.A., when faced with a similar situation:

> [47] If, during the course of a proceeding, a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court intervention. In that way the tribunal can set out its position and a proper record can be formed. This, of course, would not apply when the ground of disqualification is discovered after the tribunal has completed the case and rendered a decision on the merits of the dispute. There is, however, a more fundamental problem with the approach taken by the appellants.
>
> [48] I do not think it is proper for a party to hold in reserve a ground of disqualification for use only if the outcome turns out badly. Bias allegations have serious implications for the reputation of the tribunal and in fairness they should be made directly and promptly, not held back as a tactic in the litigation. Such a tactic should, I think, carry the risk of a finding of waiver. Furthermore, the genuineness of the apprehension becomes suspect when it is not acted on right away.
>
> *Eckervogt v. British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398, 241 D.L.R. (4th) 685 at paras 47-48.

[70] I appreciate that in the case at bar, the allegation is one of institutional bias and is not directed at any particular individuals. However, the rationale underlying the above quoted

decision is no less apposite. If anything, the requirement that a potential issue of bias be raised at the first reasonable opportunity is even more justified when it is predicated on the architecture of an institution or on the manner it exercises its powers, especially when such power is used for the first time. In those circumstances, the parties will normally be well aware of any procedural defect early on in the process, and the administrative tribunal should be given an opportunity to address the problem and remedy it if need be.

B. *Did the Agency err by concluding, without evidence, that shippers likely took measures to mitigate the impacts of the announced embargoes?*

[71] CN claims that the Agency made an error of law by concluding that it had breached its statutory service obligations without any supporting evidence. During the investigation, CN allegedly led evidence establishing that wood pulp shippers actually failed to utilize 30% of the permits it provided for shipping during the embargo period, which means it could have moved 30% more traffic than that which was presented. Instead of relying on that undisputed evidence, argues CN, the Agency preferred to speculate and to assume that the affected shippers may have shipped more traffic if CN had not communicated its intention to impose an embargo in the first place. The gist of the Agency's reasoning to which CN objects is captured in the following excerpt of the Final Decision:

> [115] In addition, CN's claim that not all permits issued to the shippers of pulp products were used is evidence that any demand for service was met, does not hold up to scrutiny. A shipper that receives advance notice of a likely future refusal by a railway company to transport its traffic can be expected to take measures to mitigate the associated impacts by, for instance, accelerating or slowing down production to avoid shipping during the embargo period or arranging for alternative means of transportation […]

[72] In my view, the Agency could refuse to draw the inference urged upon it by CN to the effect that any service obligations must have been met since not all permits issued to the wood shippers were used, and find an alternative explanation for the same fact. CN's inference is entirely unsupported by the record. Moreover, the alternative explanation favoured by the Agency (*i.e.*, that the shippers had made other arrangements) is informed by its experience and expertise. As a specialized tribunal with a deep knowledge of the industry for which it has been assigned the sole jurisdiction to determine whether railways fulfill their service obligations, the Agency was certainly well situated to assess the inference suggested by CN and to conclude that it did not hold up to scrutiny.

[73] In addition, and contrary to CN's submission, there was some evidence on the record that pulp shippers made alternate shipping arrangements and warehousing arrangements to obviate the embargoes: see FPAC's Letter to the Agency, dated January 17, 2019 (Appeal Book, Vol. 1, Tab 12, at p. 64) and FPAC's Response to the Agency, dated February 8, 2019 (Appeal Book, Vol. 3, Tab 33, at p. 829). CN retorted that this evidence does not relate to the alteration of plans between September and December 2018, but only to what was done in December 2018. This strikes me as a very narrow reading of that evidence, which does not appear to be strictly limited to what took place in a single month, as the following excerpt of the Submission to the Inquiry Officer dated February 8, 2019 indicates:

> Shippers apply for the permits they need. When fewer permits than requested are granted, a shipper will do one or more of the following:
>
> a. Redirect loads for which permits were shorted to an alternate rail destination for which no permit is required;
>
> b. Redirect traffic to an alternate mode (e.g., truck) for which no permit is required;

> c. Resubmit permit requests for the shorted loads on a "spot" basis; and
>
> d. Add the shorted loads to its next regular request for permits for the next 3- or 4-day period.
>
> Both of the first two options impose potentially significant additional costs on the shipper. In all of four scenarios, the total number of permits requested will necessarily exceed what the shipper intends to ship.
>
> CN's attempt to characterize this as an indication that shippers requested permits in excess of their requirements or that pulp shippers 30% of the permits granted "on the table" unused is highly misleading.
>
> Appeal Book, Vol. 3, Tab 33, at pp. 829-830.

[74] Be that as it may, we are not dealing here with findings of fact relating to the availability of permits (an issue over which this Court would not have jurisdiction in any event), but with the inference that can be drawn from the information put forward by CN. It is clear that the alternative explanation given by the Agency is at least as plausible as that provided by CN, and is moreover consistent with the statutory scheme and the rationale behind the level of service obligations. As the Agency explained in the second half of paragraph 115 of its Final Decision, which I have already reproduced at paragraph 34 of these reasons but which bears repeating:

> […] It would be inconsistent with the statutory scheme for a railway company to be relieved of its level of service obligations because there is no quantifiable evidence of service traffic demand left unfulfilled, if the absence of such demand has likely been caused by the railway company's own action or inaction. Approaching the level of service provisions in such a way would force shippers to suffer prejudice, by not mitigating the impact of the denial of service or future service on them, in order to retain their access to recourse under the level of service provisions of the CTA.
>
> Final Decision, at para. 115.

[75] Finally, it is worth pointing out that the Agency's alternative inference is not only reasonable and supported by the overall objective of the level of services provisions of the Act,

but is also in line with the implication of CN's own assertion when it gave notice of the embargoes and permits to the shippers in September 2018. As counsel asserted at the Oral Hearing (Appeal Book, Vol. 2, Tab 25, at p. 466) and in its Response to the Agency dated March 26, 2019 (Appeal Book, Vol. 4, Tab 59, at p. 1076), CN wanted to be proactive and avoid a full-blown embargo by constraining shippers exceeding terminal capacity. The implicit objective was to curb the amount of traffic coming into the Vancouver area. CN cannot have it both ways, and now dispute the same inference drawn by the Agency. In other words, CN cannot be allowed to talk out of both sides of its mouth, denying or delaying shippers' abilities to offer traffic for carriage and then using the resulting reduced traffic levels to claim that it has met all demands. This would clearly be inconsistent with the objectives of the level of service provisions of the Act, that is, to counterbalance the unequal powers of the railway companies and of the shippers: see *Louis Dreyfus Commodities Canada Ltd. v. Canadian National Railway* Company (October 3, 2014), Letter Decision No. 2014-10-03, Canadian Transportation Agency, aff'd, *Canadian National Railway v. Louis Dreyfus Commodities Canada Ltd.*, 2016 FCA 232, [2016] F.C.J. No. 1018; *Canadian Pacific Railway Company v. Univar Canada Ltd.*, 2019 FCA 24, 2019 CarswellNat 14681 (WL Can) at para. 32.

C. *Did the Agency err by misinterpreting the level of service regime, and holding that a breach can be determined without evidence of unfulfilled demand?*

[76] Finally, CN submits that the Agency erred in finding that a railway can be in breach of its service obligations even in the absence of any evidence that the railway failed to move any shipments. In other words, even if there had been evidence that shipper demand had diminished because of CN's intention to impose embargoes, CN could still not be found in breach of its

common carrier obligations unless a specific demand for the movement of traffic had not been met.

[77] This argument is loosely intertwined with the preceding one, and does not deserve extensive comments. Quite apart from any evidence of unfulfilled demand, it is clear that the use of embargoes amounts to a breach of the level of service obligations imposed by the Act. In essence, embargoes are meant to deny or, at the very least, to delay the movement of shipments and are, as stated by the Agency, "by their nature, unilateral restrictions on current or future traffic" (Final Decision, at para. 103). For that reason, I strongly disagree with CN that quantifiable evidence of unfulfilled service traffic demand is "virtually the only factor" against which to judge the railway's performance.

[78] This is not to say that embargoes (with or without permits) can never be justified. It is their arbitrary use that is prohibited. Indeed, the Agency found that all three embargoes issued by CP were justified and did not breach the level of service obligations under sections 113 to 115 of the Act. Some of the embargoes issued by CN were also found to be reasonable. In dealing with CP's embargoes, the Agency explained why it found them reasonable in the circumstances:

> Taken together, the record demonstrates that all three embargoes were imposed as a result of factors beyond CP's control; were exceptional measures rather than steps that were planned in advance or routine in nature; were carefully targeted to address specific and actual challenges; were designed to minimize impacts on traffic carriage and delivery while in place; and were temporary in nature and lifted at the earliest reasonable opportunity.
>
> Final Decision, at para. 69.

[79] The same could not be said of the pulp embargoes imposed by CN:

> Having regard to all the considerations set out in subsection 116(1.2) of the CTA, the Agency finds that, on balance, CN did not provide the highest level of service it could reasonably provide in the circumstances. Although the record makes it clear that during the investigation period, CN faced operational challenges related in part to congestion in the Vancouver area, having signalled its intention to impose embargoes on pulp shipments in September, well in advance of these operational challenges, leads to the conclusion that CN was not prepared to take all reasonable measures to deal with issues that it anticipated in the Vancouver area and to provide pulp shippers with the reasonable service to which they are entitled under the CTA. Moreover, this premature announcement of their intention to deny service is likely to have had negative consequences for affected shippers, to the extent that they altered preferred business plans after it was communicated.
>
> Final Decision, at para. 120.

[80] I am unable to find that the Agency erred in its interpretation of its home statute and, in particular, in adopting this nuanced approach with respect to the justification that is required for an embargo to be in conformity with the level of service obligation. Even on a correctness standard, the Agency's approach is entirely consistent with the rationale behind sections 113-115 of the Act. It will also be recalled that CN was explicitly asked to show that they provided the highest level of service they could provide in the circumstances, and notably, the extent to which "the placement of embargoes on wood pulp traffic (…) was exceptional rather than routine in nature, proportionate, targeted and non-discriminatory" (Preliminary Decision, at para. 11; Appeal Book, Vol. 4, Tab 55, at p. 1017). The criteria used by the Agency to assess the justifiability of the embargoes were therefore not only appropriate but also well-known to CN.

VI. Conclusion

[81] For all of the foregoing reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

“I agree
Judith Woods J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-244-19
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. CANADIAN TRANSPORTATION AGENCY et al.
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	MAY 3, 2021
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
DATED:	AUGUST 24, 2021

APPEARANCES:

Douglas Hodson Ryan Lepage	FOR THE APPELLANT
Karine Matte	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
Lucia M. Stuhldreier	FOR THE RESPONDENT THE FOREST PRODUCTS ASSOCIATION OF CANADA
Forrest C. Hume Monique Evans	FOR THE RESPONDENT THE FREIGHT MANAGEMENT ASSOCIATION OF CANADA

SOLICITORS OF RECORD:

MLT Aikins LLP Saskatoon, Saskatchewan	FOR THE APPELLANT
Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY
McMillan LLP Vancouver, British Columbia	FOR THE RESPONDENT THE FOREST PRODUCTS ASSOCIATION OF CANADA
DLA Piper (Canada) LLP Vancouver, British Columbia	FOR THE RESPONDENT THE FREIGHT MANAGEMENT ASSOCIATION OF CANADA