

**Date: 20080206**

**Docket: A-177-07**

**Citation: 2008 FCA 42**

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

**BETWEEN:**

**CANADIAN PACIFIC RAILWAY COMPANY**

**Appellant**

**and**

**CANADIAN TRANSPORTATION AGENCY,  
ATCO PIPELINES, a division of ATCO GAS AND PIPELINES**

**Respondents**

Heard at Edmonton, Alberta, on January 15, 2008.

Judgment delivered at Ottawa, Ontario on February 6, 2008.

**REASONS FOR JUDGMENT BY:**

**SHARLOW J.A.**

**CONCURRED IN BY:**

**DÉCARY J.A.  
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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] The Canadian Pacific Railway Company (CPR) is appealing, with leave, Decision No. 709-R-2006 of the Canadian Transportation Agency dated December 22, 2006. In that decision, the Agency granted the application of Atco Pipelines, a division of Atco Gas and Pipelines Ltd., for the authority to construct above ground safety valves for its natural gas pipeline at two locations where the pipeline runs under the CPR railway right of way, parallel to the railway track. CPR argues that this decision is not within the jurisdiction of the Agency. The issue raised in the appeal is whether

the portions of the pipeline on which the safety valves are to be constructed fall within the definition of “utility crossing” in section 100 of the *Canada Transportation Act*, S.C. 1996, c. 10.

### Statutory provisions

#### (A) *Canada Transportation Act*

[2] The relevant provisions of the *Canada Transportation Act* are sections 98, 100 and 101, and the definition of “railway” in section 87. All of these provisions are found in Part III, entitled “Railway Transportation”. The definition of “railway” reads as follows:

**87.** In this Part,  
[...]  
"railway" (*chemin de fer*) means a railway within the legislative authority of Parliament and includes  
(a) branches, extensions, sidings, railway bridges, tunnels, stations, depots, wharfs, rolling stock, equipment, stores, or other things connected with the railway, and  
  
(b) communications or signalling systems and related facilities and equipment used for railway purposes [...].

**87.** Les définitions qui suivent s'appliquent à la présente partie.  
«chemin de fer» (*railway*) Chemin de fer relevant de l'autorité législative du Parlement. Sont également visés :  
a) les embranchements et prolongements, les voies de garage et d'évitement, les ponts et tunnels, les gares et stations, les dépôts et quais, le matériel roulant, l'équipement et les fournitures, ainsi que tous les autres biens qui dépendent du chemin de fer;  
b) les systèmes de communication ou de signalisation et les installations et équipements connexes qui servent à l'exploitation du chemin de fer [...].

[3] The definition of “railway” quoted above was enacted in 1996. Its statutory predecessor is found in section 2 of the *Railway Act*, R.S.C. 1985, c. R-3 (S.C. 1952, c. 234). That definition reads as follows:

2. (1) In this Act, and in any Special Act,

[...]

“railway” (*chemin de fer*) means any railway that the company has authority to construct or operate, and includes all branches, extensions, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure that the company is authorized to construct; and, except where the context is inapplicable, includes street railway and tramway [...].

2. (1) Les définitions qui suivent s’appliquent à la présente loi ainsi qu’à toute loi spéciale:

[...]

« chemin de fer » (*railway*) Tout chemin de fer que la compagnie est autorisée à construire ou à exploiter, y compris tous les embranchements et prolongements, toutes les voies de garage et d’évitement, toutes les gares et stations, tous les dépôts et quais, tout le matériel roulant, tout l’équipement, toutes les fournitures, tous les biens meubles ou immeubles et tous les ouvrages qui en dépendent, et aussi tout pont de chemin de fer, tout tunnel ou toute autre construction que la compagnie est autorisée à ériger et, si le contexte le permet, le chemin de fer urbain et le tramway.

[4] Sections 98, 100 and 101 of the *Canada Transportation Act* read as follows:

**98.** (1) A railway company shall not construct a railway line without the approval of the Agency.

(2) The Agency may, on application by the railway company, grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line.

(3) No approval is needed for the construction of a railway line  
(a) within the right of way of an existing railway line; or  
(b) within 100 m of the centre line of an existing railway line for a distance of no more than 3 km.

[...]

**98.** (1) La construction d’une ligne de chemin de fer par une compagnie de chemin de fer est subordonnée à l’autorisation de l’Office.

(2) Sur demande de la compagnie, l’Office peut accorder l’autorisation s’il juge que l’emplacement de la ligne est convenable, compte tenu des besoins en matière de service et d’exploitation ferroviaires et des intérêts des localités qui seront touchées par celle-ci.

(3) La construction d’une ligne de chemin de fer à l’intérieur du droit de passage d’une ligne de chemin de fer existante ou, s’il s’agit d’une ligne de chemin de fer d’au plus trois kilomètres de long, à 100 mètres ou moins de l’axe d’une telle ligne n’est pas subordonnée à l’autorisation.

[...]

**100.** In this section and section 101,

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

"utility crossing"

(*franchissement par desserte*) means the part of a utility line that passes over or under a railway line, and includes a structure supporting or protecting that part of the utility line or facilitating the crossing;

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

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

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

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

(4) Section 16 of the *Railway Safety Act* applies if a person is unsuccessful in negotiating an agreement relating to the

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

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

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

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

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

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

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

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

apportionment of the costs of constructing or maintaining the road crossing or utility crossing. franchissement.

[5] Section 326 of the *Railway Act*, the statutory predecessor to section 101 of the *Canada Transportation Act*, dealt with the construction and maintenance of utility lines near railway lines.

That provision reads as follows:

326. (1) Lines, wires, other conductors or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Commission, except as provided in subsection (5), be constructed or maintained

(a) along or across a railway, by any company other than the railway company owning or controlling the railway; or

(b) across or near such other lines, wires, conductors, structures or appliances that are within the legislative authority of Parliament.

326. (1) Sauf de la manière prévue au paragraphe (5), il ne peut être érigé ni maintenu, sans la permission de la Commission, de lignes, fils métalliques, d'autres conducteurs ou d'autres structures ou appareils de transmission téléphonique ou télégraphique, ou servant à la transmission de la force motrice ou de l'électricité employée à d'autres objets:

a) soit le long ou en travers d'un chemin de fer, par une autre compagnie que la compagnie de chemin de fer possédant ou contrôlant le chemin de fer;

b) soit en travers ou près d'autres semblables lignes, fils métalliques, conducteurs, structures ou appareils qui relèvent de l'autorité législative du Parlement.

### (B) *Railway Safety Act*

[6] The point of statutory interpretation in issue in this case requires consideration of a related statute, the *Railway Safety Act*, R.S.C. 1985, c. 32 (4<sup>th</sup> Supp.). The *Railway Safety Act* and the regulations made under that Act establish railway safety standards for, among other things, the

construction, maintenance and operation of a “railway work”. Those regulations are administered by the Minister of Transport.

[7] The term “railway work” is defined in section 4 of the *Railway Safety Act* to include any “crossing work”, which in turn is defined to include any “utility crossing”. The definition of “utility crossing” in the *Railway Safety Act* is substantially the same as the definition in the *Canada Transportation Act*.

#### Facts

[8] Atco owns and operates a natural gas pipeline in Alberta. The pipeline was built by Atco’s corporate predecessor, Canadian Western Natural Gas Company Limited. A portion of the pipeline, approximately 20 miles long, is located on the CPR railway right of way between Kananaskis and Banff, between mile 57.85 and mile 76.95. That 20 mile portion of the pipeline runs mostly beside the CPR railway track on the railway right of way, and it crosses under the railway track at three locations. Permission to build that 20 mile portion of the pipeline was given to Canadian Western Natural Gas Company Limited by CPR pursuant to an agreement dated June 30, 1951.

[9] In 2004, Atco filed the 1951 agreement with the Canadian Transportation Agency pursuant to subsection 101(1) of the *Canada Transportation Act*. By virtue of subsection 101(2), the 1951 agreement became an order of the Agency (Order No. 2004-AGR-478 dated November 16, 2004).

The record discloses no evidence that CPR objected to the filing of the 1951 agreement, or to the resulting order.

[10] It is undisputed that the proposed construction of the above ground valves is part of the maintenance of the existing pipeline and is intended to improve the safety of the pipeline, in that installing the valves above ground will make it easier to shut the pipeline down in an emergency.

[11] It is also undisputed that the 1951 agreement does not expressly permit the construction of above ground valves on any portion of the pipeline covered by the agreement. Atco attempted to negotiate an agreement with CPR for authorization to construct the safety valves. When no agreement could be reached, Atco applied to the Agency for authorization pursuant to subsection 101(3) of the *Canada Transportation Act*, S.C. 1996, c. 10.

#### Standard of review

[12] CPR argues that, in an appeal from a decision of the Agency on a question of the interpretation of a statutory provision that defines the Agency's jurisdiction, the standard of review is correctness. That argument is based on *Canadian Pacific Railway Co. v. Canada (Transportation Agency) (C.A.)*, [2003] 4 F.C. 558 (at paragraphs 14 to 21), which followed *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (at paragraphs 10 to 19).



[13] The Agency and Atco argue that the standard of review is reasonableness. They rely on a more recent decision of the Supreme Court of Canada, *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650. That was an appeal from a decision of this Court reversing a decision of the Agency requiring Via Rail Canada Inc. to take certain steps to accommodate disabled passengers. In that case Justice Abella, writing for the majority, discussed the issue of standard of review at paragraphs 87 to 111. The key passages appear at paragraphs 98 to 100, and read as follows:

[98] The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate [...].

[99] The allegedly jurisdictional determination the Agency was being asked to make [...] falls squarely within its statutory mandate. It did not involve answering a legal question beyond its expertise, but rather requires the Agency to apply its expertise to the legal issue assigned to it by statute. [...].

[100] The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

[14] In my view, the nature of the legal issue in this case is sufficiently like the legal issue in the *Via Rail* case that the same standard of review should apply. It follows that this Court is bound to apply the standard of review applied in *Via Rail*, which is reasonableness.

### Discussion

[15] The position of CPR is that the definition of “utility crossing” in the *Canada Transportation Act* is not broad enough to capture the portions of the Atco pipeline where Atco proposes to construct the above ground valves, because at those locations the pipeline runs beside the railway track, not under it. That position is based on a literal meaning of the words, “the part of a utility line that passes over or under a railway line”, assuming the words “railway line” mean only “railway track” and cannot have a broader meaning. CPR points to the distinction between the words used in the current definition (“over or under a railway line”), and the words used in its statutory predecessor, section 326 of the *Railway Act* (“along or across a railway”). CPR also relies on section 98 of the *Canada Transportation Act* (quoted above), in which the phrase “railway line” is apparently used to mean a railway track. According to the interpretation proposed by CPR, the fact that the work is to be done on the railway right of way is irrelevant, no matter how close the work may be to the railway track.

[16] The position of Atco and the Agency relies on the purposive, contextual approach adopted in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and numerous decisions of the Supreme Court of Canada decided after that case. They argue that, given the purpose of the statutory scheme and the statutory context, the phrase “railway line” is intended to include the right of way on which a railway track is located. It follows that the definition of “utility line” would include any part of a pipeline that is on or under the railway right of way.

[17] There is no jurisprudence squarely on point. However, the Agency's conclusion on this point is supported by *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)* (1999), 251 N.R. 245 (F.C.A.). In that case, this Court upheld the decision of the Agency that section 98 of the *Canada Transportation Act* (quoted above), which requires the Agency approval for the construction of a "railway line", applied to the construction of a railway yard. Justice Rothstein, then a member of this Court, explained as follows (at paragraph 8):

[...] A railway line is the structure upon which locomotives and rolling stock of railway companies move and the communications or signalling system and related facilities and equipment. Colloquially one might refer to "railway tracks", but, of course much more is involved, as C.N.'s counsel indicated, including the provision of grade and subgrade, including the construction of embankments and cuts, the installation of facilities for drainage, bridges, tunnels, and the track structure itself consisting of ballast, ties, rails, spikes, switches, and the like. All these components together, located on the right of way occupied by the railway company are what permit and facilitate the movement of locomotives and rolling stock, namely, a railway line.

[18] The Agency also points to its Decision No. 124-R-1997, in which the Agency applied section 101 to an application for a power line to be placed on a railway right of way, to run parallel to the track without crossing it. The application in that case had been commenced under section 326 of the *Railway Act* (quoted above), and continued under the *Canada Transportation Act* by virtue of the *Discontinuance and Continuance of Proceedings Order*, 1996, SOR/96-383.

[19] Other jurisprudential support for the proposition that a railway line includes the railway right of way are found in decisions of the Agency relating to the determination of the salvage value of a railway line, which includes the value of the land comprising the right of way: Agency Decisions 175-R-1999 (Tisdale Subdivision Decision), 467-R-1996 (CN Chatham Subdivision), 530-R-1998 (CP Goderich Subdivision), 545-R-1999 (CN Arbourfield Subdivision), 542-R-2000 (CN Cudworth Subdivision).

[20] The Minister of Transport apparently agrees with Atco and the Agency. The Minister has asserted jurisdiction over the railway safety implication of the proposed construction of above ground valves, relying on the definition of “utility crossing” in the *Railway Safety Act*. As mentioned above, that definition is substantially the same as the definition of “utility crossing” in the *Canada Transportation Act*. It is undisputed that if the Agency has erred in its interpretation of the definition of “utility crossing” in the *Canada Transportation Act*, the Minister has made the same error in relation to the *Railway Safety Act*. If that is the case, then a question would arise as to whether and to what extent the *Railway Safety Act* gives the Minister the statutory authority to consider railway safety issues in relation to the proposed work.

[21] Given the statutory context, the Agency’s interpretation gives the language of the definition of “utility line” a meaning that it can reasonably bear, and that is consistent with its purpose. In my

view, the Agency's interpretation of the definition of "utility line" is reasonable. I see no basis for the intervention of this Court.

[22] I would add that I would have proposed the same result if the standard of review had been correctness. I do not accept that Parliament, in the course of enacting the current interrelated statutory schemes for the regulation of railways and railway safety, intended to adopt legislation that would preclude those schemes from applying to the construction of above ground safety valves on a natural gas pipeline located on a railway right of way.

### Conclusion

[23] For these reasons, I would dismiss this appeal with costs.

\_\_\_\_\_  
"K. Sharlow"

J.A.

"I agree  
Robert Décary J.A."

"I agree  
Marc Noël J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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CANADIAN  
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ET AL

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

**DATED:** FEBRUARY 6, 2008

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