Federal Court of Appeal  Cour d'appel fédérale

Date: 20190201

Docket: A-242-17

Citation: 2019 FCA 24

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

UNIVAR CANADA LTD.

Respondent

Heard at Vancouver, British Columbia, on November 6, 2018.

Judgment delivered at Ottawa, Ontario, on February 1, 2019.

REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GLEASON J.A.
DISSENTING REASONS BY:	PELLETIER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Canadian Pacific Railway Company (CP or the appellant) appeals from a decision of the Canadian Transportation Agency (the Agency), dated February 28, 2017 (Reasons), wherein the Agency held, pursuant to sections 113 to 115 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the Act), that the appellant had failed to meet its level of service obligations to provide direct

rail service to Univar Canada Ltd. (Univar or the respondent) and accordingly ordered remedial measures, without costs.

[2] The appellant argues that the decision is unreasonable for two main reasons. First, the Agency is said to have erred in law by failing to apply the legal test set out by the Supreme Court in *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271 (*Patchett*) to the question of whether the appellant has breached its level of service obligations in failing to rebuild a damaged line. Second, the Agency is said to have erred in not considering and applying the terms of the appellant's Tariff. For the reasons that follow, I would reject the appeal.

I. Background

[3] The appellant is a federally regulated railway company. The respondent is a distributor of chemicals and related products and services.

[4] Univar's facility is located on the island of Richmond, British Columbia. It is connected to CP's rail system through the Marpole Bridge, which provides the only direct rail link to Univar's facility. CP has been Univar's servicing railway since the facility opened in 1968.

[5] On July 9, 2014, the Marpole Bridge was severely damaged by a fire caused by an unknown third party. On July 10, 2014, CP imposed an embargo prohibiting further movement of rail traffic over the bridge. On July 29, 2014, CP notified Univar that the fire was a *force majeure* event and that it would no longer provide Univar with direct rail service due to the damage caused by the fire. From the day of the fire until the decision of the Agency, it appears

that CP did not transport any loaded railway cars over the bridge (beyond repatriating 23 of Univar's own rail cars stranded at the facility), and did not take any action to repair it or to initiate a discontinuance process. In October 2014, CP offered to transfer the bridge to Univar, but that offer was ultimately declined.

[6] The parties do not have a confidential contract within the meaning of section 126 of the Act. Univar has shipped under the terms of a tariff with CP. Pursuant to section 87 of the Act, a railway company's tariff is the schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services. The Tariff under which CP provides service to Univar purports to excuse CP from performance of its service obligations in the event of *force majeure.*

[7] On September 29, 2015, Univar filed a level of service complaint with the Agency, claiming that CP breached its level of service obligations under sections 113 to 116 of the Act by failing to provide Univar with direct rail service. It alleged the breach caused financial and reputational damages, and sought an order that CP rebuild the bridge and compensate Univar from the date of the fire until the bridge was rebuilt. During the course of the proceedings, the Agency accepted additional evidence from CP regarding barge collisions involving the bridge that occurred on March 10, May 19 and July 30, 2016.

II. The decision under review

[8] The Agency rendered its decision on February 28, 2017. It first reviewed the applicable law with respect to the statutory level of service obligations and the statutory scheme that allows

a railway company to extinguish its obligation to operate a line of railway pursuant to section 146 of the Act (Reasons at paras. 23-28, 38). It explained that, pursuant to *Patchett*, level of service obligations must be interpreted in light of the test of reasonableness (Reasons at paras. 29-30). It also relied on its decision in *F. Ménard Inc. and Meunerie Cote-Paquette lnc.*, Decision No. 268-R-2013 (*Ménard*) to say that a railway company is generally expected to pay its costs to maintain a railway line, except where they are so disproportionate that they exempt the company from its duties (Reasons at paras. 33-34). The Agency further relied on the decision of its predecessor in *Canadian Pacific Limited (Esquimalt and Nanaimo Railway Company)*, [1976] C.T.C. 353 (*Esquimalt*), in support of the idea that:

> [37] … a railway company cannot permanently relieve itself of its statutory obligations by indirect means by deciding not to rehabilitate a railway line. Rather, if a railway company feels that it would be unreasonable from a financial point of view to rehabilitate a railway line, the railway company must follow the steps provided for by statute for transfer and discontinuance of the line.

[9] The Agency ultimately found that the appellant was in breach of its level of service obligations except for two "reasonable pause" periods arising from *force majeure* events, more particularly for one year after the bridge fire, and for a further 13 weeks after the March 2016 barge collision. These "reasonable pause" periods accounted for the amount of time that it would have taken the appellant to repair the bridge and restore direct rail service following the two *force majeure* events (Reasons at para. 65). Except for those two "reasonable pause" periods, the Agency held that, by refusing to repair the bridge and resume direct rail service, the appellant acted unreasonably and breached its level of service obligations to the respondent. Relying notably on the *Esquimalt* and *Ménard* decision, the Agency concluded:

> [66] CP's claim of an extended or indefinite cessation of its service obligation solely because of the costs associated with the reconstruction of the Marpole Bridge is unreasonable and contrary to the level of service provisions of the CTA.

> The reasonable pause should be limited to the amount of time it would have taken CP to rehabilitate the infrastructure damaged as a result of each of the *force majeure* events and restore direct service to Univar, had CP chosen to undertake such repairs without delay.

[10] Having found that CP was in breach of its service obligations to Univar outside of the two pause periods, the Agency held (pursuant to paragraph 116(4)(c.1) of the Act) that CP was obligated to compensate Univar for the expenses it incurred from the end of the first reasonable pause until the commencement of the second reasonable pause, and from the end of the second reasonable pause until such time as CP either rehabilitates the damaged infrastructure and effectively restores direct service to the shipper, or until it has completed the discontinuance process (Reasons at para. 77).

[11] On December 20, 2017, the Agency issued Decision No. CONF-17-2017, by which it determined the quantum of compensation owed by the appellant and ordered CP to pay an ongoing monthly sum until the bridge is rehabilitated or the line discontinued.

[12] CP sought leave to appeal the February 28, 2017 decision under section 41 of the Act, which allows for statutory appeals on questions of law or jurisdiction. Leave was granted by order of this Court on June 28, 2017.

III. Issues

[13] In my view, the present appeal raises two questions which can be formulated as follows:

A. Did the Agency err in failing to apply the correct legal test?

B. Did the Agency err in failing to consider the appellant's Tariff?

IV. Analysis

[14] Although this is a statutory appeal, administrative law principles apply (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para. 38), and the parties are correct in identifying that the applicable standard of review to the questions raised by the appellant is reasonableness. Whether these questions can be properly characterized as questions of law or questions of mixed fact and law (an issue I will return to later in these reasons), there is no doubt that the Agency's decision is entitled to a wide margin of appreciation (*Canadian National Railway Company v. BNSF Railway Company*, 2018 FCA 135 at para. 8; *Canadian National Railway Company v. Canada (Canadian Transportation Agency)*, 2008 FCA 363 at paras. 49-51). It is well established that decision-makers' interpretations of their home statute, with which they have particular familiarity, call for deference when judicially reviewed (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 22; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54).

[15] This Court has recognized on a number of occasions, and in various contexts, the Agency's expertise (*Canadian National Railway Company v. Richardson Limited*, 2015 FCA 180 at paras. 25-31; *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65 at paras. 27-29; *Canadian National Railway Company v. Greenstone (Municipality of)*, 2008 FCA 395 at para. 52). Such expertise is particularly obvious when adjudicating level of service complaints under the level of service provisions of the Act. As this Court stated in

Canadian National Railway Company v. Emerson Milling Inc., 2017 FCA 79 at para. 72 (*Emerson Milling*), the assessment of the service level obligations "lies at the very bullseye of its regulatory know-how and mandate, the very reason why Parliament has vested the Agency with jurisdiction over the merits of cases like this and has left us with just a reviewing role".

[16] As a result, the Agency's determination of Univar's level of service complaint will be reviewed on a reasonableness basis. That is to say that as long as the decision demonstrates "justification, transparency and intelligibility" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", it will be regarded as reasonable (*Dunsmuir* at para. 47). Reasonableness takes its colour from the context, and I fully concur with this Court's reasoning in *Emerson Milling*, at para. 70, that in a case involving the interpretation and application of subsection 113(1) of the Act, one important factor is the existence of a binding judicial pronouncement, the Supreme Court's decision in *Patchett.* Provided the Agency adopts a defensible approach for determining reasonable conduct, one that is consistent with the principles of *Patchett*, and provided it does so in a manner that is mindful of the evidence before it, this Court must refrain from second-guessing (*Emerson Milling* at para. 73).

A. *Did the Agency err in failing to apply the correct legal test?*

[17] The appellant argues that, while the Agency acknowledged that determining the appropriate level of service requires a fair and reasonable balancing of the interests of the shipper and the railway company in the circumstances of each case, it failed to perform such a balance here. Rather, claims the appellant, the Agency held that it was in breach of its obligations because an indefinite cessation of service over the bridge due to the cost of reconstruction was,

in principle, unreasonable. On this basis, the appellant claims that an absolute obligation was imposed on it, in contravention of *Patchett*. The appellant also states that the Agency erred in finding that the only relief from service here was discontinuing the railway line. The appellant further states that this failure to apply the correct legal test is an error of law rendering the decision unreasonable.

[18] Before turning to the merits of this argument, I must first address the respondent's claim that this ground of appeal is not properly before this Court, as it is not a question of law or jurisdiction within the meaning of section 41 of the Act but rather a mere disagreement with the Agency's assessment of the evidence. Pursuant to that provision, this Court only has jurisdiction to hear statutory appeals that raise a question of jurisdiction, or an extricable question of law or legal principle.

[19] The respondent has raised this objection at the leave stage, apparently to no avail. This is not to say, however, that the issue has consequently been definitively resolved. The order granting leave is silent on that question, and one can only speculate as to the reasons why the panel did not accept that argument. The panel may well have been of the view that the argument, although interesting, was not unassailable, or conversely that it did not have much merit but was still arguable. Be that as it may, the issue remains live during the appeal and the Court must satisfy itself that it has jurisdiction to entertain this proceeding (*Emerson Milling* at para. 56).

[20] In its Notice of Appeal, the appellant stated its first ground of appeal in the following terms:

> The Agency erred in law by failing to apply the requisite legal test to Canadian Pacific Railway's ("CP") level of service obligations. The Agency failed to examine the relevant circumstances in order to determine whether or not, as a matter of commercial fairness and reasonableness between the parties, CP should be required to rebuild the Marpole Rail Bridge ("Bridge"). Instead the Agency held that CP was subject to an absolute obligation to rebuild and provide service over the Bridge. As a result, the Decision imposes on CP an unfair and unreasonable outcome in all the circumstances.

[21] As previously mentioned, the appellant's Memorandum of Fact and Law expands on this ground, but is essentially to the same effect. Contrary to the respondent's submission, I do not think that the appellant is merely taking issue with the way the Agency applied section 113 of the Act to the facts of this case, or is simply disagreeing with the way the Agency weighed the evidence. When considered in light of the appellant's Memorandum and the Agency's decision, it seems to me that the first ground of appeal really goes to the determination of the applicable legal standard, and raises the two following questions: i) Did the Agency err in law in holding that, as a matter of principle, an indefinite cessation of service over a railway line due to costs of reconstruction is unreasonable? and ii) Did the Agency err in law in holding that, as a matter of principle, the only possible relief from service over a railway line is the discontinuance of said line? These are clearly extricable questions of law of the kind contemplated by section 41 of the Act.

[22] On the merits, the respondent contends that the Agency clearly understood it had to find a reasonable balance between the interests of the parties, taking into consideration all the facts before it. The respondent states that in the end, the Agency found that the cost of repairing the bridge was not so disproportionate to justify permanently exempting the appellant from its

statutory service obligations. According to the respondent, this finding should be given deference on appeal and is consistent with both the case law and the Act.

[23] Sections 113 to 115 of the Act set out the level of service obligations of federally regulated railway companies. Section 113, the controlling provision for the purposes of this appeal, requires the railway company to provide adequate and suitable accommodation for traffic, and to carry traffic at the rates set out in a tariff or in a confidential contract:

113 (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,	113 (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :
(a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;	a) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;
(b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;	b) fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;
(c) without delay, and with due care and diligence, receive, carry and deliver the traffic;	c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;
(d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and	d) fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;
(e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.	e) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.
(2) Traffic must be taken, carried to	(2) Les marchandises sont reçues,

and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.	transportées et livrées aux points visés à l'alinéa (1)a) sur paiement du prix licitement exigible pour ces services.
…	…
(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.

[24] Also relevant for this appeal is section 112 of the Act, pursuant to which a rate or condition of service established by the Agency must be "commercially fair and reasonable to all parties". Finally, section 116 of the Act sets out the consequences of a railway company's failure to meet its service obligations. First, a complaint may be made to the Agency under subsection 116(1). If the Agency finds that the complaint is warranted, it may make a number of remedial orders pursuant to subsection 116(4) of the Act. Subsection 116(5) of the Act also creates a cause of action for "every person aggrieved" by a railway company's neglect or refusal to meet its service obligations. Such a claim has been filed with the Federal Court by the respondent and will be held in abeyance pending conclusion of this appeal.

[25] The leading case on the determination of the adequacy of service provided by a railway company is the decision of the Supreme Court in *Patchett*. The issue in that case was whether a railway company was in breach of its obligation as a result of its employees refusing to cross a union picket line on the customer's premises. The majority held that in those circumstances, it fell upon the customer to take legal action to have the illegal picket line removed (it was illegal because it involved a labour dispute to which the customer was not a party). As a result, the

railway company was found not to have breached its level of service obligations. In coming to that conclusion, Justice Rand made the following remarks:

> Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed.
>
> (*Patchett* at pp. 274-275.)

[26] Following that decision, this Court has repeatedly reaffirmed that reasonableness permeates an assessment of a level of service complaint (*Canadian National Railway Company v. Dreyfus*, 2016 FCA 232 at para. 20 (*Dreyfus*); *Canadian National Railway Company v. Canadian Transportation* Agency, 2013 FCA 270 at para. 21; *Emerson Milling* at para. 71; *Canadian National Railway Company v. Northgate Terminals Ltd.*, 2010 FCA 147 at paras. 35-36 (*Northgate*)).

[27] Having carefully read the decision, I am of the view that the Agency stated the law accurately and applied it reasonably. When read as a whole, it is clear that the Agency was aware of its obligation to strike a reasonable balance between the interests of both parties in the factual context before it. In its overview of the applicable law and of the relevant jurisprudence, the

Agency repeatedly insists on the relative nature of the level of service obligations (Reasons at paras. 23 to 38). Of particular relevance are the following paragraphs:

> [28] For the Agency to be satisfied that a railway company has not breached its level of service obligations, the railway company must provide evidence of the efforts it has made to furnish adequate and suitable accommodation for the movement of the shipper's traffic, or it must provide compelling reasons why the shipper's request cannot be reasonably accommodated.
>
> …
>
> [30] The… Supreme Court… in [*Patchett*] found that the level of service obligations of railway companies are not absolute but relative ones, and that the railway company's duty is "permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods" (page 274). In other words, a railway company cannot be bound to meet its level of service obligations when it is not reasonably possible to do so…
>
> [31] In [*Northgate*], the Federal Court of Appeal examined how the principle of reasonableness in *Patchett* was to be applied, and stated that "the determination of a service complaint requires the Agency to balance the interests of the railway company with those of the complainant in the context of the particular facts of the case."
>
> …
>
> [34] Accordingly, the Agency found that costs imposed on a railway company by a third party do not necessarily constitute a *force majeure*. Rather, a railway company is generally expected to pay the costs necessary to maintain its railway line and discharge its statutory service obligations, except where the costs of doing so are so disproportionate that they justify exempting the railway company from its statutory duty to provide service.
>
> [Emphasis added.]

[28] These principles are reiterated by the Agency in its analysis. By way of introduction to the portion of its reasons devoted to the level of service obligations, the Agency writes:

> [60] A careful review of the relevant statutory provisions and jurisprudence… makes it clear that, on the one hand, shippers are entitled ongoing rail transportation services for their traffic on an existing line, barring extraordinary circumstances and until such time as the operation of that one is properly transferred or discontinued, and, on the other hand, a railway company is not

> required to provide service that it previously provided when factors beyond its control make it impossible or clearly unreasonable for it to do so. How these considerations are balanced will depend on the specific circumstances of each case. As a rule, any interruption in the obligation that would otherwise exist to provide rail service on the line should be as limited as possible, consistent with the purposes of the level of service provisions.
>
> [Emphasis added.]

[29] In light of the above, it is difficult to interpret the decision of the Agency as imposing an absolute obligation on the appellant, or as holding that the costs associated with the reconstruction of a railway line could never, as a matter of principle, justify an indefinite cessation of service. In fact, the Agency says precisely the opposite at paragraph 34 of its reasons.

[30] I understand the Agency's decision as simply holding that the appellant's alleged repair costs, in the specific context of this case, did not rise to the level sufficient to relieve it permanently from its statutory obligations to provide direct rail service to the respondent. This could have been made clearer by the Agency. However, contrary to the opinion expressed in the dissenting reasons, I do not think that the lack of more fulsome reasons is sufficient to render the Agency's decision unreasonable. It should be recalled that, as far as adequacy of reasons is concerned, "perfection is not the standard" (*Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 at para. 163). Taken as a whole, the Agency's reasons provide a reviewing court with an adequate explanation as to why it found that CP breached its level of service obligations to Univar, and serve the purpose of showing whether the result falls within a range of possible outcomes. Moreover, the mere fact that the Agency has come to different

conclusions in other factual circumstances in no way demonstrates, contrary to what the appellant seems to suggest, that its determination in the present case is unreasonable.

[31] The conclusion reached by the Agency, that the appellant's alleged repair costs did not rise to the level sufficient to relieve it permanently from its statutory obligations, is a highly factual one, and not one based on a misapprehension of the applicable legal principles. I am satisfied that, in reaching this conclusion, the Agency considered all of the evidence before it, which evidence it mentioned at paragraphs 6 to 17, 45, and 51 to 53 of its reasons. I am also satisfied, notably in light of the very exhaustive summary provided by the Agency at paragraphs 39 to 59 of its reasons, that the Agency was alive to, and fully understood, the submissions of both parties with respect to the level of service obligations owed by the appellant. In my view, demanding that the Agency come up with a particular mathematic formula or standardized approach to evaluate the reasonableness of statutory obligations would undermine the flexibility required by the assessment of such a fluid concept as "level of service".

[32] The Agency's conclusion is also consistent with the purpose behind the level of service provisions. The common carrier obligations set out in sections 113 to 115 of the Act impose high service standards on railways because they are meant to remedy the imbalance in negotiating positions between shippers and railways, and to establish a level playing field despite the monopoly or near monopoly power that a railway company may exert. As stated by the Agency in *Louis Dreyfus Commodities Canada Ltd. v. Canadian National Railway Company*, October 3, 2014, Letter Decision No. 2014-10-03, Case No. 14-02100 (*Dreyfus CTA*), upheld by this Court in *Dreyfus*:

> [10] …the provisions [sections 113 to 116] are intended to ensure that the level of service is not established solely on the basis of a railway company's interests and preferences, especially where railway companies can exercise monopoly power over captive shippers. When interpreting these provisions, it is necessary to give them the fair, large and liberal construction and interpretation that best ensures the attainment of their objectives. This means that an overly restrictive interpretation that does not attain its objectives must be rejected.
>
> (*Dreyfus CTA* at para. 10, cited with approval in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 86 at para. 41, leave to appeal to the S.C.C. refused, 37645 (February 22, 2018).)

[33] There are, admittedly, some ambiguous statements in the decision under review that, to use the words of my colleague Justice Stratas in *Emerson Milling* (at para. 81), "if plucked out of context and read in isolation", could be said to support the appellant's reading. The statements in paragraphs 37 and 63 of the Agency's decision read as follows:

> [37] The [*Esquimalt*] decision makes it clear that a railway company cannot permanently relieve itself of its statutory obligations by indirect means by deciding not to rehabilitate a railway line. Rather, if a railway company feels that it would be unreasonable from a financial point of view to rehabilitate a railway line, the railway company must follow the steps provided for by statute for transfer and discontinuance of the line.
>
> [63] Such a reasonable pause should be distinguished from the discontinuance process, which removes the railway company's obligations in respect of the operation of the railway line. Until that process is complete, a railway company cannot be relieved of level of service obligations in perpetuity.

[34] The appellant understands these paragraphs to mean that, "where the cost of restoring service over a railway is economically infeasible, the only relief from service is to discontinue" (appellant's Memorandum of Fact and Law, at para. 75). On this basis, it says that the Agency misconstrued and misapplied its previous decision in *Esquimalt*. I cannot agree. On a fair reading of these paragraphs, and considering the decision as a whole, it seems to me that what the Agency is really saying is that, where the costs of operating a line are high, but not high enough

to justify a total cessation of service under the level of service provisions, the only remedy left open to a railway company is discontinuance.

[35] Such a reading of the decision is not only consistent with the Agency's previous decisions in *Esquimalt* and *Ménard*, among others, but it is also respectful of the scheme of the Act. The transfer and discontinuance process set out in Part III, Division V of the Act specifically allows railway companies like the appellant to discontinue the operation of railway lines if they see them as uneconomical to operate. These provisions (sections 140 to 146.6 of the Act) set out an orderly procedure, and require that a railway company wait between 14 and 27 months before discontinuing the operation of a line. It would make a mockery of that elaborate process if a railway company could indirectly circumvent its requirements by unilaterally deciding not to repair its lines.

[36] This is not to say that there may never be special circumstances where the financial burden of rebuilding a line after it has been damaged, through no fault of the railway, will outweigh the public interest of having the line rebuilt. This is precisely the kind of assessment that is better left to an expert tribunal like the Agency. In the case at bar, the Agency found that no such circumstances were established, and the appellant has not convinced me that this finding falls outside of the range of acceptable outcomes that are defensible in respect of the facts and law.

[37] To summarize, I find that the decision below neither imposes an absolute service obligation on the appellant, nor rules out that reparation costs might, in some exceptional

circumstances, permanently exempt a railway from its statutory service obligations. Rather, I believe it strikes a reasonable balance between the parties' interests in the present case, as is required by *Patchett*. Indeed, far from being inflexible, the Agency held that CP, even without applying for a discontinuance, was not required to serve the respondent for two reasonable pause periods totalling one year and three months, which in its view was the amount of time it would have taken CP to repair the infrastructure damaged as a result of the two *force majeure* events of July 9, 2014 and March 10, 2016. As pointed out by the respondent, had the appellant started the statutory discontinuance process immediately after the first incident, it could have been liable for as little as two months.

[38] For the foregoing reasons, I would therefore reject this first ground of appeal.

B. *Did the Agency err in failing to consider the appellant's Tariff?*

[39] The appellant submits that the Agency's determination that it is in breach of its obligations to the respondent for not rehabilitating the bridge or discontinuing the line is also inconsistent with the terms of its Tariff, which it says governs their relationship. Specifically, it states that the Agency was wrong to find that a *force majeure* can only provide temporary relief from service, while the Tariff makes clear that only "reasonable steps" to remedy the problem are required. The failure to consider and apply the Tariff, the appellant contends, makes the decision unreasonable.

[40] This argument can be easily disposed of. The level of service obligations are statutory in nature, and are governed by the reasonableness test set out in *Patchett*. It is only when the parties

have entered into a "confidential contract" that the Agency will apply the terms of the contract rather than the reasonableness test set out in *Patchett* (see *Canadian National Railway Company v. Viterra Inc.*, 2017 FCA 6 at paras. 64-66). This exception is outlined in subsections 113(4) and 116(2) of the Act, which read as follows:

113(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	113(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.
116 (2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.	116 (2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

[41] In the case at bar, the Agency found that the parties have not entered into a confidential contract (Reasons at para. 8). This is a finding of fact that is not subject to appeal in this Court, and which the appellant has not challenged.

[42] The Tariff relied upon by CP is quite distinct from a confidential contract, if only because it is established unilaterally by the railway company pursuant to sections 117 to 119 of the Act, whereas a contract necessarily involves an agreement between the parties. The Act distinguishes between a tariff and a confidential contract in a number of its provisions (see, for example, sections 116(6), 121(1), 126(1)(b) and(c), and 136.4 of the Act).

[43] A "tariff", as it is defined at section 87 of the Act, "means a schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services". It is a powerful tool in the hands of a railway company, but it certainly cannot alter the level of service obligations mandated by the Act. It would indeed be extraordinary if a railway company could unilaterally modify its statutory level of service obligations toward shippers.

[44] Be that as it may, and even if I were to accept, for the sake of discussion, that the Tariff at issue could alter the level of service obligations owed by the appellant, I fail to see how this could impact on the Agency's conclusion. The relevant portion of the Tariff reads as follows:

> 16. *Force majeure*
>
> a) Either Shipper, or Consignee, or CP shall be excused from its or their obligations, with the exclusion of obligations related to ensuring safety, under the Contract or applicable tariffs provided that Customer or CP is prevented or delayed in such performance by any event which is unavoidable or beyond its reasonable control, including, without limitation, act of God, act of the Queen's or public enemies, flood, rockslides, landslides, snow-slides, washouts, avalanches, storm earthquake, expropriation, fire or explosion, strikes, lockouts, walkouts or other industrial dispute, war, sabotage, riot, insurrection, derailment, labour shortages, power or fuel shortages, the act or failure to act of any government or regulatory body. Lack of funds shall not be considered an event of force majeure.
>
> b) All time periods provided for in the applicable tariffs shall be extended for a period equal to the period in which the event of force majeure is continuing and so far as reasonably possible, the party affected will take all reasonable steps to remedy the event of force majeure; (…) In the event of force majeure, the party affected shall give prompt written notice to the other party describing the event in question in reasonable detail, and such party shall also furnish prompt notice when the condition of force majeure has ended. Failure to provide notice shall not preclude a party from relying on the existence of a condition of force majeure.
>
> [Emphasis added.]

[45] I cannot help but find that the above-quoted clause of the Tariff closely resembles the test enunciated in *Patchett*. To some extent, the wording in the Tariff is even more damaging to the

appellant than the jurisprudential norm, as it appears to be more stringent. Far from making clear, as the appellant would have it, that *force majeure* events provide permanent relief from service, I find that the clause at issue rather seems to indicate the contrary. Specifically, the reference to "the period in which the event of force majeure is continuing" appears to suggest that it will more often than not provide only temporary relief. Moreover, I find noteworthy the mention in the Tariff to the effect that "[l]ack of funds shall not be considered an event of force majeure".

[46] Accordingly, I find this second ground of appeal far from convincing.

V. Conclusion

[47] As a result, the appeal of the Agency's decision should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree
Mary J.L. Gleason J.A."

PELLETIER J.A. (Dissenting Reasons)

[48] I have read my colleague's reasons and regret that I cannot agree that the Agency's decision is reasonable. In my view, the Agency's reasons do not permit us or, more importantly CP, to understand why it decided that CP's position that it should be relieved of its level of service obligations to Univar due to the disproportionate cost of repairing the Marpole Bridge was unreasonable.

[49] The Supreme Court has identified, in the context of criminal proceedings, the purposes served by reasons:

> 1. Reasons tell the parties affected by the decision why the decision was made. …
>
> 2. Reasons provide public accountability of the judicial decision; justice is not only done, but is seen to be done. …
>
> 3. Reasons permit effective appellate review. …
>
> *R. v. R.E.M.*, 2008 SCC 51 at para. 11, [2008] 3 S.C.R. 3.

[50] There is no shortage of jurisprudence in the administrative law context which holds that reasons which do not permit a reviewing court to effectively exercise its supervisory jurisdiction will result in a finding that the tribunal's decision is unreasonable: see *Canada (Attorney General) v. Franchi*, 2011 FCA 136 at para. 36, 418 N.R. 357, *Lloyd v. Canada (Attorney General)*, 2016 FCA 115 at para. 24, [2016] D.T.C. 5051, *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paras. 33-35, 13 Admin. L.R. (6th) 11, *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para. 53, 426 D.L.R. (4th) 333. See also *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 at

paras. 136-137, [2014] 1 F.C.R. 766, *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2007] 1 F.C.R. 490.

[51] There is also jurisprudence in support of the proposition that litigants must be able to understand why a tribunal decided as it did. In *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 (*Lake*), an appeal from the judicial review of the Minister of Justice's surrender order in extradition proceedings, the Supreme Court noted that:

> The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision.
>
> *Lake* at para. 46 [my emphasis].

[52] In *Newfoundland and Labrador v. Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13 at para. 11, 294 Nfld. & P.E.I.R. 161, the Newfoundland and Labrador Court of Appeal wrote that "reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision." Interestingly enough, the Supreme Court of Canada, in its reasons (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 9, [2011] 3 S.C.R. 708) (*Newfoundland Nurses*), while quoting this passage, did not return to this point.

[53] In *Clifford v. Ontario Employees Retirement System*, 2009 ONCA 670 at para. 29, 98 O.R. (3d) 210 (*Clifford*), the Ontario Court of Appeal said:

> In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review.
>
> [My emphasis.]

[54] *Clifford* was cited with approval by the Court of Appeal for British Columbia in *Gichuru v. Law Society of BC*, 2010 BCCA 543 at para. 30, 426 D.L.R. (4th) 333.

[55] The same point was made in *Wall v. Office of the Independent Police Review Director*, 2014 ONCA 884 at para. 62, 123 O.R. (3d) 574, where the following appears:

> But, as the Divisional Court observed, they must at least answer the question "Why?". The complainant, and the court (for purposes of review), are entitled to know the rudiments of the explanation for why the complaint has been screened out. [My emphasis.]
>
> See also: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 83, [2011] 1 S.C.R. 160 (per Deschamps J., concurring), *Spinks v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at para. 30, 505 A.R. 260.

[56] Notwithstanding the note of caution sounded by this Court in *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at para. 15, [2011] 4 F.C.R. 425 with respect to importing criminal law views on the sufficiency of reasons into administrative law, the administrative law jurisprudence recognizes that one of the principal purposes of tribunal reasons is to allow the parties to understand why the tribunal decided as it did. As a result, it seems to me that, in deciding whether reasons are sufficient, courts should not limit themselves to whether they can exercise their supervisory jurisdiction. They should also consider whether a fair-minded litigant could make sense of the reasons. This requires something more than a mere conclusory statement that a given standard has or has not been met.

[57] In this case, the Agency's reasons do not explain why it rejected CP's argument as to the economics of repairing the Marpole Bridge and, for that reason, are insufficient.

[58] CP relies on the Supreme Court's decision in *Patchett & Sons Ltd v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271, 1959 CanLII 41 (*Patchett*) in which the Court recognized that, notwithstanding a railway company's statutory obligations, as a private entity whose shareholders' capital was at risk, its duty to meet its level of service obligations is to be assessed on the basis of economic reasonableness, which is to say that its statutory duty is relative and not absolute: see *Patchett* at pp. 274, 309, 311.

[59] The Agency itself has recognized that while a railway company should not lightly be excused from satisfying its level of service obligations, it can be relieved or exempted where "the costs of doing so are so disproportionate that they justify exempting the railway company from its statutory duty to provide service": Reasons at para. 34.

[60] CP says that, on the facts of this case, the substantial cost of repairing the Marpole Bridge relative to the modest revenue generated by Univar's traffic "means that it will never recover the return on capital investment on a 100 year asset": Reasons at para. 52. Summarizing CP's argument, the Agency wrote:

> CP argues that the reconstruction of the Marpole Bridge is not a reasonable outcome given the costs involved, the time to rebuild, the regulatory uncertainties for bridge approvals, the low traffic volumes involved, the uncertainty of future traffic volumes, and the availability of the immediate transload option to nearby rail storage points, an option that Univar claims it had been using for [REDACTED] of its traffic even before the bridge fire.
>
> Reasons at para. 53

[61] The Agency's analysis reviews the legal principles involved and the statutory context, in particular the discontinuance provisions found in Part 3 Division V of the *Canada Transportation Act*, S.C. 1996, c.10. In its analysis, the Agency addresses the availability of the discontinuance provisions and the possibility of a temporary suspension of a railway company's level of service obligations. It then concludes:

> CP's claim of an extended or indefinite cessation of its service obligation solely because of the costs associated with the reconstruction of the Marpole Bridge is unreasonable and contrary to the level of service provisions of the CTA.
>
> Reasons at para. 66

[62] This conclusion is ambiguous. It could be understood to mean that a railway company can never obtain an indefinite cessation of its service obligations solely on the basis of repair costs. Such a proposition would be problematic in light of *Patchett*. Or, the Agency may have meant to say that CP had not shown that the costs associated with the repair of the Marpole Bridge were disproportionate. Given what is known about the economics of repairing the bridge, this conclusion is not self-evident.

[63] In either case, further explanation is required. As noted earlier, a mere conclusory statement that CP's argument is unreasonable is insufficient. Furthermore, before this Court can assess whether the Agency's decision is consistent with the Supreme Court's decision in *Patchett*, we should know why the Agency says that it is.

[64] It is not sufficient for a tribunal to correctly state the legal test which it must apply, it must actually apply that test: see *Canada (Director of Investigation and Research) v. Southam*

Inc., [1997] 1 S.C.R. 748 at para. 39, 1997 CanLII 385, *Sawyer v. Alberta (Energy and Utilities Board)*, 2007 ABCA 297 at para. 15, 422 A.R. 107.

[65] Deference requires us to read a tribunal's reasons with an eye to the record and, to borrow a phrase from the world of patent litigation, with a mind willing to understand: *Newfoundland Nurses* at para. 15, *Gabeyehu v. M.C.I.* [1995] F.C.J. No. 1493 (F.C.T.D.) at para. 4, 1995 CarswellNat 2578. Deference does not require us to excuse a senior tribunal such as the Agency from justifying its decision:

> [Deference] does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations …
>
> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 48, [2008] 1 S.C.R. 190.

[66] In this case, the Agency simply failed to address the economic argument upon which CP relied. This is not a case in which the implicit (and therefore unexpressed) reasoning of the tribunal can be discerned by following the dots on the page. There are no dots: *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431 at para. 11, 16 Imm. L.R. (4th) 267, cited with approval in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 28, [2018] 1 S.C.R. 6.

[67] Transparency, justification and intelligibility require that CP be able to understand why the substantial costs required to provide a level of service which generates a modest level of revenue do not rise to the level of unreasonableness or lack of proportionality. Concepts such as reasonableness and proportionality imply a rational relationship which is capable of expression. The Agency has failed to express its view of that relationship on the facts of this case. As a result, we are not in a position to meaningfully exercise our supervisory obligations.

[68] Equally importantly, CP does not understand why the Agency decided as it did and neither do I.

[69] I would therefore allow the appeal and remit the matter to the Agency for redetermination.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

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APPEARANCES:

Simon Coval Bridget Gilbride Kerry Kaukinen	FOR THE APPELLANT
Forrest C. Hume P. John Landry Alex Hudson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP Vancouver, British Columbia	FOR THE APPELLANT
DLA Piper (Canada) LLP Vancouver, British Columbia	FOR THE RESPONDENT