

Date: 20090709

Docket: A-156-09

Citation: 2009 FCA 228

Present: LÉTOURNEAU J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

**CANADIAN TRANSPORTATION AGENCY
and ATTORNEY GENERAL OF CANADA**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 9, 2009.

REASONS FOR ORDER BY:

LÉTOURNEAU J.A.

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REASONS FOR ORDER

LÉTOURNEAU J.A.

Facts and Procedural History

[1] The appellant filed a motion to have the content of the appeal book determined by this Court. At issue in the dispute are a number of e-mails exchanged between the Agency's counsel and staff. These e-mails reference, among other things, a Canadian Pacific (CP) suggestion concerning the definition of "grain", which is a key issue in the debate on appeal. Some of the e-mails refer to advice received from Transport Canada counsel at the relevant time.

[2] Allegedly unknown to the appellant, these e-mails were before the Agency members when they engaged in their decision-making process some five months before the Agency's final determinations that are now the subject of the appeal.

Submissions of the parties

[3] The respondents want these e-mails to be included in the appeal book. The appellant objects to the inclusion of that information since it had no notice and no opportunity to address and comment on that information that was before some members of the Agency.

[4] Should these e-mails be allowed to be included in the appeal book, the appellant requests that it be granted leave to amend its Notice of Appeal to include grounds of appeal alleging breaches of the rules of natural justice as well as leave to include in the appeal book an affidavit of Jean Patenaude which addresses the new grounds of appeal.

[5] In opposition to the appellant's request to amend its Notice of Appeal, the respondents submit that the e-mails were subject to solicitor-client privilege and, therefore, did not have to be disclosed to the appellant. Consequently, they argued, there was no breach of the rules of natural justice.

[6] In the alternative, the respondents submit that the appellant was aware of the substance of the information contained in the disputed documents at the time of their creation and had an opportunity at that time to make comments and submissions.

Decision

[7] The decision of the Agency makes no reference to these e-mails and their content. There is no indication that the information contained in these e-mails played a role in the final determinations of the Agency.

[8] But more importantly, after having read the disputed documents, I am satisfied that this Court does not require them to dispose of the legal issues raised in the appeal.

[9] I also agree with the appellant that their inclusion would have the undesirable and detrimental effect of supplementing the reasons provided by the Agency for its decision and fortifying “its published decision on grounds that are unrelated to its published decision”.

[10] The approach taken by the Agency does little to enhance its credibility in its future relationships with the litigants who appear before it. Nor does it increase the confidence of the litigants in the Agency, especially when a new hearing is ordered.

[11] For these reasons, the disputed e-mails will not be included in the appeal book and the appellant's motion will be allowed in part. The content of the appeal book will be determined in the issuing order.

“Gilles Létourneau”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-156-09

STYLE OF CAUSE: Canadian National Railway Company v. Canadian
Transportation Agency et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: LÉTOURNEAU J.A.

DATED: July 9, 2009

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