Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100602

Docket: A-361-09

Citation: 2010 FCA 147

CORAM: **NADON J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

NORTHGATE TERMINALS LTD.,
WESTRAN PORTSIDE TERMINAL LIMITED and
CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Ottawa, Ontario, on April 14, 2010.

Judgment delivered at Ottawa, Ontario, on June 2, 2010.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.

DISSENTING REASONS BY: NADON J.A.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20100602

Docket: A-361-09

Citation: 2010 FCA 147

CORAM: **NADON J.A.**
SHARLOW J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

NORTHGATE TERMINALS LTD.,
WESTRAN PORTSIDE TERMINAL LIMITED and
CANADIAN TRANSPORTATION AGENCY

Respondents

REASONS FOR JUDGMENT

SHARLOW J.A.

[1] Northgate Terminals Ltd. ("Northgate") operates an export terminal in North Vancouver, British Columbia. The terminal is serviced by Canadian National Railway Company ("CN"). In 2008, Northgate complained to the Canadian Transportation Agency (the "Agency") pursuant to subsection 116(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "*CTA*"), that CN was in breach of its service obligations. In Decision No. 166-R-2009, the Agency concluded that Northgate's complaint was well founded and ordered a remedy. CN sought and obtained leave to appeal that decision. For the reasons that follow, I would dismiss the appeal with costs.

Facts

[2] Northgate's customers are producers of forest products in northern British Columbia. They contract with CN for the transportation of pulp, paper, lumber, and panel to Northgate's terminal, and they are responsible for the payment of applicable rail freight tariffs and demurrage charges. CN delivers the products to the unloading track at the Northgate terminal, where they are transloaded to trucks for delivery to various export docks in the Vancouver area. Under normal conditions, Northgate is capable of receiving 12 rail cars at its unloading track at any one time. During exceptionally good weather conditions, Northgate may receive 14 rail cars at one time because an uncovered ramp accommodates two additional rail cars.

[3] Northgate normally operates only on weekdays, unloading approximately 20 rail cars per weekday, based on a delivery of 12 to 14 cars in the morning, and 6 to 10 rail cars in the afternoon. Using traffic data produced by CN, the Agency verified the consistency of these traffic distribution patterns and determined that during the period 2004-2008, 49 percent of the first daily deliveries account for 12 or more rail cars while 83 percent of the second daily deliveries are composed of six rail cars or more.

[4] CN is the only provider of rail service to the Northgate terminal. Northgate competes with a number of other terminals in the Vancouver area, including a terminal operated by CN.

[5] In 2008, CN reduced its level of service to terminal operators in the Greater Vancouver area, including Northgate, from two deliveries (switches) per day Monday through Friday to one delivery

per day, but indicated that it would provide additional service upon payment of the tariff under Item 13200 of *CN Tariff 9000, Optional Special Switch and Special Train Services*. That service reduction is the subject of Northgate's complaint to the Agency. The complaint was supported by an intervener, Westran Portside Terminal Limited, which operates another terminal that it said was captive to CN.

[6] CN submitted to the Agency that some terminal operators affected by the service reduction expanded their in-plant trackage or increased their operations from 5 to 7 days per week to accommodate the change. Northgate provided evidence that: (1) it had examined the possibility of expanding trackage at its facility but concluded that it would not be physically possible or economically feasible; (2) if it increased its operations from 5 to 7 days per week, its labour costs would increase significantly but Northgate would realize no benefit because the docks and trucking companies with which it dealt did not operate on weekends; and (3) if CN's level of service as reduced in 2009 were to remain in place and Northgate were required to pay the amount required by Item 13200 of Tariff 9000 for the additional services that Northgate would require, the increased cost to Northgate would exceed $450,000 per year.

[7] The Agency concluded that CN was in breach of its service obligations and ordered CN to continue to provide Northgate with a second switch each weekday (Monday through Friday) when requested. The Agency also ordered that the second switch performed in a day resulting from an order placed by Northgate for no fewer than 6 cars would be exempt from the application of Item

13200 of Tariff 9000. CN and Northgate were ordered to work together to determine an appropriate time schedule for the delivery of the cars.

Relevant provisions of the *Canada Transportation Act*

[8] Section 5 of the *CTA* states its objectives. It reads as follows:

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when	5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :
(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;	*a)* la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;	*b)* la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;
(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of	*c)* les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des

goods from Canada;	marchandises du Canada;
(d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and	*d)* le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;
(e) governments and the private sector work together for an integrated transportation system.	*e)* les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

[9] Sections 113 to 115 of the *CTA* set out the service obligations of a railway company. Only section 113 is relevant to this appeal. It reads as follows:

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	*e)* fournit les autres services normalement liés à l'exploitation d'un service de

in connection with the business of a railway company.	transport par une compagnie de chemin de fer.
(2) Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.	(2) Les marchandises sont reçues, transportées et livrées aux points visés à l'alinéa (1)a) sur paiement du prix licitement exigible pour ces services.
(3) Where a shipper provides rolling stock for the carriage by the railway company of the shipper's traffic, the company shall, at the request of the shipper, establish specific reasonable compensation to the shipper in a tariff for the provision of the rolling stock.	(3) Dans les cas où l'expéditeur fournit du matériel roulant pour le transport des marchandises par la compagnie, celle-ci prévoit dans un tarif, sur demande de l'expéditeur, une compensation spécifique raisonnable en faveur de celui-ci pour la fourniture de ce matériel.
(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.

[10] Section 116 of the *CTA* sets out two separate 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's investigation of the complaint discloses that the complaint is warranted, the Agency may make a remedial order pursuant to subsection 116(4). Second, subsection 116(5) creates a cause of action for "every person aggrieved" by a railway company's neglect or refusal to meet its service obligations. Subsections 116(1), (4) and (5) read as follows:

116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(*a*) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(*b*) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

…

(4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may

(*a*) order that

(i) specific works be constructed or carried out,

(ii) property be acquired,

(iii) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or

(iv) any specified steps, systems or methods be taken or followed by the company;

(*b*) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;

(*c*) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be

116. (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

[…]

(4) L'Office, ayant décidé qu'une compagnie ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, peut :

a) ordonner la prise de l'une ou l'autre des mesures suivantes :

(i) la construction ou l'exécution d'ouvrages spécifiques,

(ii) l'acquisition de biens,

(iii) l'attribution, la distribution, l'usage ou le déplacement de wagons, de moteurs ou d'autre matériel selon ses instructions,

(iv) la prise de mesures ou l'application de systèmes ou de méthodes par la compagnie;

b) préciser le prix maximal que la compagnie peut exiger pour mettre en oeuvre les mesures qu'il impose;

c) ordonner à la compagnie de remplir ses obligations selon les modalités de forme et de temps qu'il estime indiquées, eu égard aux intérêts légitimes, et préciser les détails de l'obligation à respecter;

fulfilled;

(*d*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps to discontinue operating the line; or

d) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie d'ajouter l'embranchement au plan visé au paragraphe 141(1) à titre de ligne dont elle entend cesser l'exploitation;

(*e*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company, on the terms and conditions that the Agency considers appropriate, to grant to another railway company the right

e) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie, selon les modalités qu'il estime indiquées, d'autoriser une autre compagnie :

(i) to run and operate its trains over and on any portion of the line, and

(i) à faire circuler et à exploiter ses trains sur toute partie de l'embranchement,

(ii) in so far as necessary to provide service to the line, to run and operate its trains over and on any portion of any other portion of the railway of the company against which the order is made but not to solicit traffic on that railway, to take possession of, use or occupy any land belonging to that company and to use the whole or any portion of that company's right-of-way, tracks, terminals, stations or station grounds.

(ii) dans la mesure nécessaire pour assurer le service sur l'embranchement, à faire circuler et à exploiter ses trains sur toute autre partie du chemin de fer de la compagnie, sans toutefois lui permettre d'offrir des services de transport sur cette partie du chemin de fer, de même qu'à utiliser ou à occuper des terres lui appartenant, ou à prendre possession de telles terres, ou à utiliser tout ou partie de l'emprise, des rails, des têtes de lignes, des gares ou des terrains lui appartenant.

(5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

(5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.

Standard of review

[11] CN has raised five grounds of appeal. It is convenient to deal with the applicable standard of review for each ground of appeal separately. At this stage it is sufficient to refer to recent jurisprudence on the issue of the standard of review in an appeal from a decision of the Agency.

[12] Generally, the standard of review on an appeal from a decision of the Agency is reasonableness, even on a question of the interpretation of the Agency's home statute, the *CTA*: see *Council of Canadians with Disabilities v. VIA Rail Canada*, [2007] 1 S.C.R. 650, 2007 SCC 15 ("*VIA Rail*"). A decision is reasonable if it falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law: see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47 ("*Dunsmuir*").

[13] Following *VIA Rail*, this Court has applied the reasonableness standard in a number of appeals involving the interpretation of the *CTA*. See, for example, *Canadian Pacific Railway Co. v. Canada (Canadian Transportation Agency)*, [2009] 2 F.C.R. 253, 2008 FCA 42 (F.C.A.) (interpretation of "railway line"); *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)***,** 2008 FCA 363 (implementation of new statutory provisions relating to western grain freight rates); *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)***,** 2010 FCA 65 (determination of revenue cap).

[14] However, the standard of correctness was applied in *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*, [2009] 1 F.C.R. 287, 2008 FCA 199, in which the

appellant challenged the decision of the Agency that it has the implied authority to extend a certain statutory limitation period. That was held to be a "true question of jurisdiction or *vires*" as explained in paragraph 59 of *Dunsmuir*, which reads as follows:

> **¶59** …"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction ….

[15] The standard of correctness was also applied in *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)***,** 2008 FCA 123. In that case the issue was whether the Agency had properly understood and applied a point of statutory interpretation that had been settled in a prior case, *Canadian Pacific Railway Co. v. Canada (Canadian Transportation Agency)*, [2003] 4 F.C. 558, 2003 FCA 271 (F.C.A.).

First issue: Was Northgate entitled to complain?

[16] The first ground of appeal challenges the Agency's conclusion that subsection 116(1) of the *CTA*, properly interpreted, gives the Agency the statutory authority to investigate a complaint made by the operator of a terminal that is directly affected by the decision of a railway company to reduce the level of service to the terminal. That seems to me to be a question of *vires* as explained in paragraph 59 of *Dunsmuir*, quoted above, reviewable on the standard of correctness.

[17] CN argued before the Agency, and in this Court, that the Agency had no legal authority under subsection 116(1) to investigate Northgate's complaint because Northgate was not the shipper of the traffic in issue or a party to the contract of carriage. The Agency rejected that argument because Northgate, as the operator of a terminal designated by the shipper to receive the goods in issue, was directly impacted by the decision of CN to reduce the level of service to the terminal. The Agency explained this conclusion as follows in paragraphs 44 to 51 of its decision:

> ¶44. CN questions Northgate's standing to file the present complaint on the ground that in the vast majority of cases, Northgate is neither the shipper nor the consignee of the traffic at issue. It is with the shipper that CN contracts for the provision of transportation services and it is from the shipper that CN receives the shipping instructions.
>
> ¶45. CN argues that in accordance with the Agency's decision in the *Scotia Terminals Ltd. v. CN* case (Decision No. 715-R-2000), the complaint of Northgate is not well founded and, on this basis alone, should be dismissed as the facts of that case are similar and equally applicable to the Northgate situation. According to CN, its service obligations pursuant to the CTA do not extend to Northgate, a terminal operator which exercises no control over the movement of the traffic and with whom CN has no service contract.
>
> ¶46. Although the Agency acknowledges that the facts of Scotia Terminals case are very similar to those of the present complaint, namely that both applicants are terminal operators, have no contractual arrangements with CN and exercise no control over the subject traffic, there is a major distinction between the two cases that is of primary importance. In the Scotia Terminals case, the terminal operator complained in respect of traffic moved by CN and routed through competitor terminals in the Port of Halifax. Scotia Terminals was in no way part of the logistics chain of the subject traffic. There was no traffic being shipped to Scotia Terminals. In the present complaint, although Northgate has no contractual arrangement with CN for the transportation of the traffic, it does receive the traffic moved on behalf of the shippers and, as a receiver of traffic, is directly impacted by the level of service provided by CN.
>
> ¶47. The Agency notes that the Supreme Court of British Columbia has considered the level of service obligations of a railway company in the context of a dispute in respect of the appropriateness of charging demurrage to a party that is not a shipper in *Canadian National Railway Company v. Neptune Bulk Terminals (Canada) Ltd.* 2006 BCSC 1073 (Neptune Terminals decision). In her Reasons for Judgment, Madam Justice Wedge asserts that the level of service obligations of railway companies, as set out in section 113 of the CTA, are only owed to parties with whom the railway company has a contract for the carriage of goods. The Agency is of the opinion that her

> reasoning is restricted to consideration of obligations related to the transit of traffic, or the movement of goods, such that, under subsection 113(2), a railway company is required to accept traffic and move goods once the lawfully payable rate has been paid.
>
> ¶48. However, the obligations set out in subsection 113(1) are broader and include the general obligation to provide "adequate and suitable accommodation" for, among other things, the delivery of traffic. The fact that the traffic is being delivered to a facility owned by a person who is not a party to the contract for the carriage of traffic does not relieve the railway company of its various obligations under subsection 113(1) to provide accommodation for traffic. Furthermore, the legislation specifically provides a statutory right of complaint to "any person" and is not limited to "shippers", or parties with whom the railway company has a contract for the carriage of goods. This permits another party in the logistics chain, such as a transloader, to complain that the railway company is not fulfilling its level of service obligations with respect to the rail transportation of the traffic of a shipper that is ultimately delivered to that transloader.
>
> ¶49. Subsection 113(1) may be usefully contrasted with subsections 113(3) and (4) which explicitly provide for specific level of service obligations owed by the railway company to shippers. Furthermore, section 116 of the CTA provides for a complaint made by <u>any person</u> regarding a railway company that is not fulfilling any of its service obligations. Contrary to the broad language of subsection 116(1), other rail provisions in the CTA are limited by their terms to provide relief to particular categories of persons. For example, subsection 120.1 specifically provides for complaints to be filed by shippers. Similarly, subsection 152.1(1) specifically provides for applications by public passenger service providers.
>
> ¶50. Clearly, Northgate falls within the category of "any person" and, as such, has standing under section 116 of the CTA to file a level of service complaint against CN. Further, the use of "any person" in subsection 116(1) can be contrasted with subsections 116(2) and (3), which specifically acknowledge the possible existence of contracts between a shipper and the railway company that may affect the outcome of an investigation into such a complaint.
>
> ¶51. Accordingly, the Agency concludes that it has jurisdiction to consider Northgate's complaint under section 116 of the CTA and will therefore determine whether CN has failed to fulfill its common carrier obligations.

[18] In my view, the Agency's interpretation is consistent with the language and statutory context of subsection 116(1). CN does not argue that there is any provision of the *CTA* that compels a different interpretation. Rather, CN argues that there is jurisprudence binding on the Agency compelling it to adopt the narrower interpretation of subsection 116(1) advocated by CN. That

jurisprudence consists of three cases: *Scotia Terminals Ltd. v. CN* (Decision No. 715-R-2000, Canadian Transportation Agency) ("*Scotia Terminals*"), *Canadian National Railway Company v. Neptune Bulk Terminals (Canada) Ltd.*, 2006 BCSC 1073 ("*Neptune Bulk Terminals*"), and *Kiist v. Canadian Pacific Railway Co.*, [1982] 1 F.C. 361 (F.C.A.) ("*Kiist*")

[19] Only *Scotia Terminals* and *Neptune Bulk Terminals* were cited to the Agency. The Agency did not consider either case to compel the conclusion that the right to make a complaint under subsection 116(1) is limited to a shipper or a party to a contract of carriage. I agree, essentially for the reasons given by the Agency as quoted above.

[20] It remains only to consider *Kiist*, a case that CN did not cite to the Agency or in its memorandum of fact and law in this appeal. CN referred to this case for the first time in oral argument. I note however that the Agency was aware of *Kiist* because that case is cited in the Agency's memorandum of fact and law, albeit on a different point.

[21] *Kiist* was an appeal of a judgment of the Federal Court (then the Trial Division of the Federal Court of Canada) striking out a statement of claim and dismissing an action in damages against CN and Canadian Pacific Railway Company ("CP"). The Federal Court had concluded that the statement of claim did not disclose a reasonable cause of action and that in any event the Federal Court was without jurisdiction to entertain the claim ([1980] 2 FC. 650).

[22] The appellants were grain producers who had commenced an action on their own behalf and on behalf of all grain producers who, like themselves, sold their grain to Canadian Wheat Board (the "CWB") and had a statutory right to receive a share of the surplus realized by CWB on the resale of the grain, net of expenses. They alleged that for two specified crop years CN and CP had breached their service obligations to the CWB in a number of respects, thereby causing financial loss to the CWB and reducing the surplus entitlements of the appellants, for which they sought compensation. The appellants also alleged that the failure of CN and CP to fulfil their service obligations resulted in lost future sales and goodwill, for which they sought additional compensation. They claimed damages totalling almost $700 million.

[23] The appellants' claim was based primarily on subsection 262(7) of the *Railway Act*, R.S.C. 1970, c. R-2, the predecessor to subsection 116(5) of the *CTA*. The two provisions read as follows (my emphasis):

Canada Transportation Act	*Loi sur les transports au Canada*
116. (5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.	**116.** (5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.
Railway Act	*Loi sur les chemins de fer*
262. (7) Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section has, subject to this Act, an action therefor against the company, from which action the	**262.** (7) Quiconque a été lésé par le négligence ou le refus da la compagnie de se conformer aux exigences du présent article, a, sous réserve de la présente loi, le droit d'intenter une poursuite contre la

company is not relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servant.	compagnie ; et la compagnie ne peut se mettre à l'abri de cette poursuite en invoquant un avis, une condition ou une déclaration, si le tort résulte d'une négligence ou d'une omission de la compagnie ou de ses employés.

(The portion of subsection 262(7) of the *Railway Act* that precludes a railway company from relying on a notice, condition or declaration to relieve it of liability for negligence or an omission is the statutory predecessor of subsection 116(6) of the *CTA*, which is not relevant to this appeal.)

[24] The service obligations of a railway company under the *Railway Act* are set out in subsection 262(1), the statutory predecessor to subsection 113(1) of the *CTA*. Paragraph 262(1)(*b*) of the *Railway Act* is similar to paragraph 113(1)(*b*) of the *CTA*. Those two provisions read as follows:

Canada Transportation Act	*Loi sur les transports au Canada*
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 :
…	[…]
(*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 […].
….	
Railway Act	*Loi sur les chemins de fer*
262. (1) The company shall, according to its powers,	**262.** (1) La companie doit, selon ses pouvoirs,

…	[…]
(*b*) furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic ….	*b*) fournir des installations suffisantes et convenables pour le transport, le déchargement et la livraison de ces marchandises et effets […].

[25] Justice Le Dain, writing for the Court, concluded that the Federal Court was the appropriate forum for a claim for damages under subsection 262(7) of the *Railway Act*, rejecting the argument of CN and CP that the Canadian Transport Commission (the predecessor of the Agency) had the exclusive jurisdiction to entertain such a claim. However, he also concluded that the Commission had the sole jurisdiction to determine whether CN and CP had failed to fulfil their service obligations, and that in the absence of such a determination by the Commission, the Federal Court was without jurisdiction to entertain the claim for damages.

[26] In case that conclusion was wrong, Justice Le Dain went on to say that the statement of claim did not disclose a reasonable cause of action because the appellants were not "persons aggrieved" within the meaning of that phrase in subsection 262(7) of the *Railway Act*. Justice Le Dain explained the scope of that duty as follows (at page 383):

> It has been said on several occasions that the liability of a railway under the provisions of the *Railway Act* is essentially that of a common carrier: *Canadian National Railway Co. v. Harris*, [1946] S.C.R. 352 at page 376. While the specific duty that is found in section 262 to furnish adequate and suitable accommodation may be said to be the creation of statute, it could not have been contemplated that it should be owed to persons outside the scope of a common carrier's liability because they do not have contractual relations with the carrier and are not the owners of the goods offered for carriage.

The grain producers were not the owners of the wheat because they had sold it to the CWB, and they were not parties to the contract of carriage. Therefore, they were not "persons aggrieved" within the meaning of subsection 262(7) of the *Railway Act*.

[27] *Kiist* may well be authority for the proposition that the phrase "every person aggrieved" (or the French phrase « *quiconque souffre préjudice* ») in subsection 262(7) of the *Railway Act* (and therefore presumably subsection 116(5) of the *CTA*) includes only the owner or shipper of the traffic in issue or a person who has a contractual relationship with the railway company in relation to that traffic. However, it does not necessarily follow that a similar limitation must apply in determining the class of persons who are entitled to have the Agency investigate a complaint under subsection 116(1) that a railway company is not fulfilling its service obligations.

[28] The *Railway Act* does not contain a predecessor to subsection 116(1) of the *CTA*, but it does contain a statutory predecessor to subsection 116(4) of the *CTA*, the provision that authorizes a remedial order for a breach of a service obligation. That statutory predecessor is subsection 262(3) of the *Railway Act*, which reads as follows:

262. (3) If in any case such accommodation is not, in the opinion of the Commission, furnished by the company, the Commission may order the company to furnish the same within such time or during such period as the Commission deems expedient, having regard to all proper interests; or may prohibit or limit the use, either generally or upon any specified railway or part thereof, of any engines, locomotives, cars, rolling stock, apparatus, machinery, or devices, or any class or kind thereof, not equipped as required by this Act,	**262.** (3) S'il arrive que, de l'avis de la Commission, la compagnie ne fournit pas les installations et les commodités nécessaires, la Commission peut ordonner à la compagnie de les fournir dans un délai ou durant une période qu'elle juge convenable en tenant compte de tous les intérêts légitimes; ou elle peut interdire ou restreindre l'emploi, sur tous les chemins de fer généralement, sur un chemin de fer déterminé ou sur un tronçon de ce chemin de fer, de machines, locomotives, wagons, matériel roulant,

or by any orders or regulations of the Commission made within its jurisdiction under the provisions of this Act.	appareils, machineries ou dispositifs, ou d'une espèce ou catégorie quelconque, non équipés selon les prescriptions de la présente loi ou des ordonnances rendues ou des règlements établis par la Commission dans les limites de ses attributions en vertu des dispositions de la présente loi.

The phrase "such accommodation" in subsection 262(3) of the *Railway Act* refers to the accommodation that a railway company is required to provide pursuant to subsection 262(1), including paragraph 262(1)(*b*), the statutory predecessor to paragraph 113(1)(*b*) of the *CTA* (both provisions are quoted above).

[29] The *Railway Act* did not require a complaint to be made as a precondition to the Commission's authority to make a remedial order under subsection 262(3) of the *Railway Act*. Therefore, it seems that the Commission's remedial powers were exercisable on the Commission's own motion, which necessarily implies that the Commission could act in response to information received from anyone. Further, the Commission was required, in exercising the authority to make a remedial order under subsection 262(3), to have regard to "all proper interests" (in French « *tous les intérêts légitimes* »), suggesting that the class of persons whose interests the Commission was required to consider in relation to a controversy about a railway company's level of service was broader than the class of persons ("persons aggrieved") who were entitled to make a claim for damages under subsection 262(7) (as interpreted by this Court in *Kiist*).

[30] The apparent breadth of subsection 262(3) of the *Railway Act*, compared to subsection 262(7), is consistent with the position of the Agency that subsection 116(1) of the *CTA* creates a

class of potential complainants that is broader than the class of “persons aggrieved” referred to in subsection 116(5). In that regard, the Agency correctly noted that the English version of subsection 116(1) permits a complaint to be made by “any person”, a phrase that is more general than “persons aggrieved” and necessarily includes a larger class of persons. The French version does not expressly limit the class of complainants at all, but simply states that the Agency must act « *sur réception d’une plainte* ».

[31] For these reasons, I agree with the conclusion of the Agency that it had the authority under subsection 116(1) of the *CTA* to investigate Northgate’s complaint, and I would reject CN’s first ground of appeal.

Second issue: Did the Agency apply the proper principles in finding a breach?

[32] CN argues that the Agency failed to apply properly, or at all, the principles stated in *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Company*, [1959] S.C.R. 271 (“*Patchett*”). This ground of appeal goes to the merits of the Agency’s decision, which must be reviewed on the standard of reasonableness.

[33] This argument is based largely on CN’s characterization of the Agency’s decision, which Northgate disputes. CN says that the Agency ordered CN to provide an increased level of service to Northgate free of charge. However, Northgate says that the Agency required CN to restore a long standing level of service to Northgate, a level of service that CN had reduced and offered to restore only upon receiving payment of a tariff. Northgate’s description is more accurate.

[34] *Patchett* is generally recognized as the leading case on the determination of the adequacy of the service provided by a railway company. CN argues that *Patchett* established three principles of law that were not applied properly, or at all, by the Agency. CN asserts that the three principles are: (1) a railway company is not bound to furnish cars at all times sufficient to meet all demands, (2) the obligation to give transportation is subject to reasonable charges, and (3) on the duty of a railway company to furnish services there is a correlative obligation on the customer to furnish reasonable means of access.

[35] *Patchett* stands for the general proposition that the duty of a railway company to fulfil its service obligations is "permeated with reasonableness in all aspects of what is undertaken" (except in relation to its special responsibility as an insurer of goods, which is not in issue in this case). As I read *Patchett*, the three propositions to which CN refers in its argument are not free-standing principles of law. They are guidelines that must inform any determination by the Agency of a service complaint, but they do not necessarily compel a particular outcome. That is because 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.

[36] A fair reading of the decision of the Agency discloses that it was well aware of its obligation to strike a reasonable balance between the interests of CN and the interests of Northgate in the factual context of the Northgate complaint. Contrary to the submissions of CN, the Agency did not require CN to furnish cars at all times sufficient to meet all of Northgate's demands. The Agency did not deprive CN of the right to make a reasonable charge for its services or to require an extra

payment for services requested in excess of the minimum level prescribed by the Agency. Nor did the Agency require CN to provide Northgate with service in circumstances where CN had no reasonable means of access. In my view, the Agency's decision strikes a reasonable balance that is consisted with *Patchett*. I would reject CN's second ground of appeal.

Third issue: Was the Agency entitled to relieve Northgate of a tariff obligation?

[37] CN argues that the Agency did not have the legal authority to relieve Northgate of the obligation to pay the tariff charge for the second daily switch pursuant to Item 13200 Tariff 9000. In my view, this ground of appeal could be interpreted either as a challenge to the Agency's interpretation of the scope of its legal authority to make a remedial order, which is reviewable on the standard of correctness, or a challenge to the merits of the Agency's decision, which is reviewable on the standard of reasonableness. I do not consider it necessary to determine the standard of review on this point because, in my view, there is no merit to this ground of appeal on any standard.

[38] As I read subsection 116(4), it clearly permits the Agency to do exactly what it did, which was to order CN to take specific steps to restore a reasonable level of service to Northgate and to specify the maximum charge that CN could make in respect of those steps. I would reject CN's third ground of appeal.

Fourth issue: Should Northgate have been obliged to provide further information about the possibility of expanding its facility?

[39] CN argues that the Agency breached the rules of natural justice when it refused to permit CN to obtain information from Northgate concerning the possibility of constructing additional

trackage at the site operated by Northgate and then concluded that there was no room for additional trackage. This relates to CN's argument on the third *Patchett* proposition referred to above, which was that Northgate bore some responsibility for ensuring the adequacy of its facilities.

[40] The Agency has adopted procedures in relation to a subsection 116(1) investigation that permit opposing parties to obtain information from one another. However, the Agency as the master of its own procedure has the discretion to supervise the disclosure process. That includes the discretion to limit the disclosure process on a particular point if the Agency concludes, reasonably, that it has the information it requires on the point, the information requested is not relevant, or the burden of producing the information is disproportionate to its probable usefulness.

[41] CN was seeking extensive and detailed information from Northgate about the basis for its submission that it was not feasible to expand its site and Northgate objected to providing that additional information. The Agency sustained the objection because it considered that it had sufficient information about the Northgate facility and its limited prospects for expansion and that additional information would not be necessary or relevant. In my view, the Agency's disposition of the Northgate objection was not a breach of the rules of natural justice but a reasonable exercise of the Agency's discretion to limit the disclosure process. I would reject CN's fourth ground of appeal.

Fifth issue: Was CN unfairly deprived of the right to be heard in relation to certain evidence?

[42] CN argues that the Agency breached the rules of natural justice when it asked CN to file a large amount of data in respect of the volume of traffic delivered to Northgate's facility between 2004 and 2008 and then interpreted the data without providing CN the opportunity to comment on it, despite CN having "cautioned" the Agency that the data could be misinterpreted.

[43] The data that the Agency requested from CN is well within the core of the Agency's expertise. CN does not allege that the Agency misinterpreted the data, or that the Agency's understanding of the data could have been enhanced by a further submission from CN. Rather, CN is arguing that, having provided the Agency with the requested information with a "caution" against possible misinterpretation, the Agency was obliged to refrain from concluding its factual analysis without inviting further submissions from CN.

[44] As I understand the record, CN cannot claim that it had no opportunity to explain the data it provided to the Agency. In fact, CN provided the Agency with a three-page explanation of the data when it was submitted. Nothing precluded CN from providing a more detailed explanation or any submission it wished to make on the interpretation of the data. Indeed, nothing precluded CN from asking expressly for the right to make an additional submission, but it did not do so. Certainly no such request is implicit in the "caution" to which CN refers, which was simply a statement that some of the data "may not be easily interpreted", followed by three reasons why that might be so. In my view, in these circumstances the Agency's duty of fairness did not preclude it from analyzing the CN data without inviting further submissions. I would reject CN's fifth ground of appeal.

Conclusion

[45] I would dismiss this appeal with costs payable by CN to Northgate.

"K. Sharlow"

J.A.

"I agree
Carolyn Layden-Stevenson"

NADON J.A. (Dissenting)

[46] I have read, in draft, the Reasons of Sharlow J.A. For the reasons that follow, I cannot agree with her that the appeal should be dismissed.

[47] More particularly, I do not agree that Northgate was entitled to complain under subsection 116(1) of the *CTA* that CN was not fulfilling its service obligations under paragraph 113(1)*(b)* of the *CTA*. This is the only conclusion of Sharlow J.A. with which I disagree.

[48] In my view, on a fair reading of the provisions at issue, CN owed no obligation or duty to Northgate under section 113 of the *CTA*. Hence, Northgate had no standing to complain under subsection 116(1). This interpretation of the provisions finds support in three decisions, namely, the Agency's decision in *Scotia Terminals*, the British Columbia Supreme Court's decision in *Neptune Bulk Terminals*, and this Court's decision in *Kiist*.

[49] I need not summarize the relevant facts as they are correctly summarized in Sharlow J.A.'s Reasons. I would only state that the dispute between Northgate and CN concerns the schedule of delivery of CN's rail cars to Northgate's terminal. Specifically, the dispute arises because of CN's decision to modify the schedule of delivery to terminal operators in the Greater Vancouver Area from two deliveries per day, Monday through Friday, to one delivery per day, seven days a week.

[50] Paragraph 113(1)*(b)* of the *CTA* requires a railway company to "furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;…".The word

traffic", as is easily apparent from the French version of the paragraph, means the goods or the merchandise carried by the railway company, in regard to which subsection 113(2) provides that the railway company's obligation to receive, carry and deliver from the point of origin to destination is premised on the payment of a "lawfully payable rate" to the railway company.

[51] Of relevance is subsection 113(4), which makes it clear that shippers and railway companies can, by way of a confidential contract or other written agreement, determine the precise obligations pursuant to which the railway company will fulfill its service obligations under subsection 113(1).

[52] Subsection 116(1) of the *CTA* provides that upon receipt of a complaint "made by any person" that a railway company is not fulfilling all or part of its service obligations, the Agency shall investigate the complaint and make a determination within 120 days after receipt of the complaint as to whether the railway company is fulfilling its service obligations.

[53] I am satisfied that the words "on receipt of a complaint by any person", found in subsection 116(1), do not mean that anyone can file a complaint against a railway company with regard to the company's service obligations under subsection 113(1). Rather, the provision can only mean that any person to whom a railway company is obligated to furnish those services set out at subsection 113(1) may file a complaint in regard to the company's failure to provide adequate service. In other words, if, in this case, CN was bound to provide to Northgate the service set out at paragraph 113(1)*(b)* of the *CTA*, then Northgate was entitled to file a complaint under subsection 116(1).

However, I am of the view that CN had no duty to provide Northgate with the service described at paragraph 113(1)*(b)*.

[54] In my view, the services set out at subsection 113(1) of the *CTA* are services which a railway company is bound to provide or furnish only to those persons who have required it to provide the services and have paid or undertaken to pay the "lawfully payable rate" in regard to those services. I cannot see how the provision can otherwise be understood.

[55] The fact that a party, such as Northgate in the present instance, might be affected by CN's decision to reduce or modify the level of service to its terminal does not, in my respectful view, bring Northgate within the class of persons to whom CN is bound to provide services under subsection 113(1). It should not be forgotten that CN's services were retained by a shipper who required it to take its traffic from the point of origin and deliver it to Northgate's terminal. Nor should it be forgotten that Northgate's services were retained by the same client who retained CN's services. Thus, both Northgate and CN are dealing with the same entity, but providing different services to it.

[56] It is also relevant to point out that there is no evidence that CN's client has either taken objection to or filed any complaint in regard to the fact that CN proposes to modify the schedule of delivery of its rail cars to Northgate.

[57] The Agency's rationale for concluding as it did is found at paragraphs 44 to 51 of its Reasons, which Sharlow J.A. has reproduced in her Reasons. At paragraphs 44 to 47 of its Reasons, the Agency sets out CN's arguments and proceeds to distinguish the two cases relied upon by CN, namely, *Scotia Terminals*, and *Neptune Bulk Terminals*. Then, at paragraphs 48 to 51 which, for ease of reference, I also reproduce, the Agency sets out its rationale for concluding that Northgate was entitled to file a complaint under subsection 116(1) of the *CTA*:

> [48] However, the obligations set out in subsection 113(1) are broader and include the general obligation to provide "adequate and suitable accommodation" for, among other things, the delivery of traffic. The fact that the traffic is being delivered to a facility owned by a person who is not a party to the contract for the carriage of traffic does not relieve the railway company of its various obligations under subsection 113(1) to provide accommodation for traffic. Furthermore, the legislation specifically provides a statutory right of complaint to "any person" and is not limited to "shippers", or parties with whom the railway company has a contract for the carriage of goods. This permits another party in the logistics chain, such as a transloader, to complain that the railway company is not fulfilling its level of service obligations with respect to the rail transportation of the traffic of a shipper that is ultimately delivered to that transloader.
>
> [49] Subsection 113(1) may be usefully contrasted with subsections 113(3) and (4) which explicitly provide for specific level of service obligations owed by the railway company to shippers. Furthermore, section 116 of the CTA provides for a complaint made by any person regarding a railway company that is not fulfilling any of its service obligations. Contrary to the broad language of subsection 116(1), other rail provisions in the CTA are limited by their terms to provide relief to particular categories of persons. For example, subsection 120.1 specifically provides for complaints to be filed by shippers. Similarly, subsection 152.1(1) specifically provides for applications by public passenger service providers.
>
> [50] Clearly, Northgate falls within the category of "any person" and, as such, has standing under section 116 of the CTA to file a level of service complaint against CN. Further, the use of "any person" in subsection 116(1) can be contrasted with subsections 116(2) and (3), which specifically acknowledge the possible existence of contracts between a shipper and the railway company that may affect the outcome of an investigation into such a complaint.
>
> [51] Accordingly, the Agency concludes that it has jurisdiction to consider Northgate's complaint under section 116 of the CTA and will therefore determine whether CN has failed to fulfill its common carrier obligations.

[58] I will shortly examine *Scotia Terminals, Neptune Bulk Terminals,* and this Court's decision in *Kiist*. However, before doing so, I wish to make the following remarks in regard to the Agency's rationale for concluding as it did.

[59] Instead of determining whether Northgate is a person to whom a duty is owed by CN under subsection 113(1), the Agency deems this to be the case because of its interpretation of subsection 116(1) that "any person" can complain. Consequently, in the Agency's view, as the right to complain is not limited to "shippers", those in the logistics chain, such as Northgate, can file a complaint in regard to a railway company's failure to fulfill its service obligations. In my view, that reasoning finds no support in the legislation.

[60] The Agency's rationale cannot be reconciled with subsection 113(4), which allows shippers and railway companies to determine, if they so wish, "the manner in which the obligations under this section are to be fulfilled by the company". In other words, the parties may agree to determine the precise nature of the services which the railway company will render to the shipper and the manner in which the services will be rendered. To the extent that the railway company meets the level of services provided in the written agreement, the shipper may not successfully bring a complaint under subsection 116(1).

[61] The Agency, at paragraph 49 of its Reasons, indicates that "[S]ubsection 113(1) may be usefully contrasted with subsections 113(3) and (4) which explicitly provide for specific level of service obligations owed by the railway company to shippers". That assertion, in my view, misses

the point, which is that the obligations owed by the railway company under subsection 113(1) are obligations owed to its contracting party, the shipper, or possibly to the consignee of the goods where the shipper's rights have been transferred to the consignee.

[62] In any event, the answer to the question at issue does not depend on the words "any person" found in subsection 116(1). As I have already indicated, those who may complain under the subsection are those who are entitled to receive services from the railway company under subsection 113(1). It is worthwhile pointing out that the French version of subsection 116(1) simply provides that the Agency must investigate and make a determination in regard to a complaint made against a railway company that it is not fulfilling its service obligations under sections 113 or 114. There is no equivalent in the French version to the words "made by any person" found in the English version. This supports my view of the section that it does not apply to persons other than those who are entitled to the railway company's services under subsection 113(1).

[63] Having stated my view of the provisions at issue, I now turn to the two decisions relied on by CN before the Agency.

[64] I begin with *Scotia Terminals*. Scotia Terminals operated as an intermediary: it transferred nickel sulphide from ships onto trains for inland transportation. The two shipping lines that served Scotia Terminals then signed an Agreement whereby Scotia Terminals would handle all of their cargo, not just nickel sulphide. CN refused to provide direct rail service for this additional containerized cargo and stated that it would only provide direct service for the nickel sulphide

shipments. Scotia Terminals complained to the Agency that by refusing service, CN violated its level of service obligations and caused it significant economic loss. The Agency dismissed the complaint, ruling that it was "not well founded". Specifically, it found that Scotia Terminals did not have a contract with CN and exercised no control over the routing of the traffic beyond the port.

[65] The Agency's analysis appears at pages 4 and following of its Reasons. More particularly, at pages 4 and 5, the Agency explains why it cannot entertain Scotia Terminals' complaint under subsection 116(1). In my view, the Agency's reasoning in *Scotia Terminals* is correct and is entirely in line with the interpretation that I am proposing:

> Sections 113 to 115 of the CTA set out the statutory service obligations of federally-regulated railway companies and include the services that a railway company must provide to accommodate traffic. Section 113 of the CTA deals with what is generally referred to as the common carrier obligations. Under this provision, a railway company must provide, according to its powers, adequate and suitable accommodation for the receiving, loading, carrying, unloading and delivering of all traffic offered for carriage on its railway.
>
> To determine whether CN has breached its statutory service obligations, it is important to examine the characteristics of the traffic subject to the present complaint, focussing primarily on the selection of the terminal operator to be used for transloading the cargo at the port, the involvement of the terminal operator in the routing of traffic, and the contractual relationship between the rail carrier and the terminal operator.
>
> A review of the evidence and information provided by the parties revealed that, in general terms, both the rail carrier and the terminal operator act as contracted service providers to the same client, either the cargo owner or the shipping line. The terminal operator is the contractor responsible to provide terminal services such as cargo handling to and from the vessel and to and from the inland carriers, either by rail or truck. Similarly, the rail carrier is also a contractor hired by the shipping line or the cargo owner to transport the cargo inland. The service contracts for the rail transportation portion of the movement are negotiated directly with the rail carrier involved, and these contracts are negotiated separately from those governing the marine terminal services performed by the terminal operator. Terminal operators do not contract for rail transportation services.

…

With respect to the selection of the terminal operator, it is either the shipping line or the owner of the cargo who determines which terminal operator is going to be used to transload the cargo; the shipping lines or the cargo owners will negotiate directly with the terminal operators at a given port seeking the most competitive terms and conditions. In the case of the traffic moving on the account of Sherritt, Sherritt is responsible for the cost associated with the discharge of the cargo and, consequently, it determines where the traffic will be handled. In the case of containers where the shipping line is essentially the principal, the shipping line would determine which terminal operator will be used for the transloading of the cargo.

An examination of the evidence and information provided by the parties demonstrates clearly that it is the shipping line or the cargo owner, depending mainly on the type of traffic involved, that determines the routing of the traffic and negotiates contracts separately with the rail carrier and the terminal operator involved. As a result, the relationship between the rail carrier and the terminal operator is mainly for operational purposes. CN indicated that there is no formal agreement between CN and terminal operators, but rather a letter of understanding concerning the operational requirements. Scotia Terminals confirmed that the relationship between a rail carrier and a marine terminal operator is that of a cooperative effort, the goals of both of those service providers being to meet the needs of the client.

Furthermore, the evidence adduced reveals that Scotia Terminals does not enter into contractual arrangements with CN for rail transportation service and it does not exercise any degree of control over the routing of that traffic. Scotia Terminals admitted that the decision to divert the container traffic from Pier 9A to Halterm Limited's container terminal was a decision made by the shipping line.

Having determined that Scotia Terminals does not exercise any degree of control over the routing of the traffic, the Agency must conclude that the present complaint is not well founded. Only the parties who do control the routing of the traffic, either the shipping lines or the cargo owners, depending on the type of traffic, and who do enter into contractual arrangements with CN for the rail transportation of the traffic may legitimately request the Agency to undertake an investigation of the service offered by CN at Pier 9A. In that context, the Agency has determined that it would be inappropriate to investigate further the issues raised in the complaint of Scotia Terminals.

The Agency would like to stress, however, that should a complaint be filed by the proper parties, the Agency would be receptive to reconsider the issues underlying the present

> complaint and to make a determination on whether or not CN has failed to fulfil its common carrier obligations to provide adequate service at Pier 9A at the port of Halifax.
>
> [Emphasis added]

[66] I see no basis whatsoever to distinguish the present case from *Scotia Terminals*. Northgate claims that this case is different because traffic actually passed through its yard. However, I believe that this is a distinction without substance. The essence of the complaint in *Scotia Terminals* was that the terminal had lost business to other transloaders because CN would not provide adequate service. The Agency ruled that Scotia Terminals did not have a valid complaint because railways only owe level of service obligations to parties bound by contract or who have control over the destination of the cargo. In the present matter, the only distinguishing factor is that instead of being unable to attract business, which was the case in *Scotia Terminals*, Northgate is losing business it already has. This difference is insubstantial and entirely unrelated to the *ratio decidendi* of the case.

[67] I would conclude regarding *Scotia Terminals* by simply saying that the Agency correctly pointed out in its analysis that section 113 of the *CTA* sets out the obligations which are generally referred to as the common carrier obligations. Under such provisions, as the Agency explained, a railway company must provide adequate and suitable accommodation with respect to the receiving, loading, carrying, unloading and delivering of the traffic offered to it for carriage on its railway. Clearly, under such provisions, a railway owes a duty to the persons who retain its services.

[68] I now turn to *Neptune Bulk Terminals*. In distinguishing that decision, the Agency stated at paragraph 47 of its Reasons:

> [47] … In her Reasons for Judgment, Madam Justice Wedge asserts that the level of service obligations of railway companies, as set out in section 113 of the CTA, are only owed to parties with whom the railway company has a contract for the carriage of goods. The Agency is of the opinion that her reasoning is restricted to consideration of obligations related to the transit of traffic, or the movement of goods, such that, under subsection 113(2), a railway company is required to accept traffic and move goods once the lawfully payable rate has been paid.

[69] Again, in my view, the distinction which the Agency seeks to make is without substance. The reasons given by Madam Justice Wedge for concluding as she did cannot, in my respectful view, be dismissed offhand in the way the Agency does. The Agency attempts to make a distinction based on subsection 113(2), but that distinction is clearly without any foundation. Subsection 113(2) cannot be disassociated from subsection 113(1). As the Agency itself indicated in *Scotia Terminals*, the obligations found in subsection 113(1) are generally referred to as the common carrier obligations. Subsection 113(2) clearly states the obvious: unless payment is made or undertaken to be made to the railway, it has no obligations under subsection 113(1).

[70] The issue before Madam Justice Wedge was whether CN could demand the payment of demurrage from Neptune, a terminal operator. The facts were that CN, as in the present matter, did not have a contract for the carriage of goods or any other contract with the terminal operator.

[71] At paragraph 92 of her Reasons, Madam Justice Wedge states that the *CTA* "continues to impose on railway companies such as CN certain duties often referred to as 'common carrier obligations' and to which CN refers to as 'level of service' obligations". She then states that those obligations are those found in section 113 of the *CTA* and, in particular, in paragraph 113(1)*(a)*,

which requires a railway company to furnish "adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway" and for "the carriage, unloading and delivering of the traffic". She then makes the following remarks at paragraph 93:

> [93] Nevertheless, a railway's relationship with its customer is a contractual one. Railway companies such as CN have level of service obligations described in s. 113 to provide "adequate and suitable accommodation", but only with respect to those with whom it contracts. That is made clear by s. 113(2) which requires the railway carrier to take, carry and deliver traffic "on the payment of the lawfully payable rate." CN sets the rate for the movement of the traffic, and once the customer has agreed to pay the rate, CN must deliver the cars to the destination specified in the contract.
>
> [Emphasis added]

[72] Then, at paragraphs 101 to 103, Madam Justice Wedge deals with the Agency's decision in *Scotia Terminals*. After citing relevant extracts from that decision, Madame Justice Wedge states unequivocally at paragraph 103:

> [103] Neptune's circumstances resemble those of Scotia Terminals as described by the Agency in the above decision. It does not contract with CN for the carriage of goods. It does not pay freight on its own behalf or on behalf of the party whose commodities it unloads. It does not issue or receive bills of lading. It takes rail traffic delivered by CN, but only pursuant to the contracts of carriage CN holds with its customers, who are the shippers or cargo owners. The terminal authorization and five-day notice procedures are administrative processes which assist both CN and Neptune to meet the needs of the same client, which is the cargo owner or the shipper.
>
> [Emphasis added]

[73] In my respectful view, both *Scotia Terminals* and *Neptune Bulk Terminals* clearly support the proposition that CN owed no duty to Northgate under subsection 113(1) of the *CTA*.

[74] It now remains for me to address this Court's decision in *Kiist*. I need not repeat the salient facts of that decision, as they are clearly set out at paragraphs 21 and following of Sharlow J.A.'s Reasons. However, I do not agree with my colleague's understanding of that decision. Contrary to her, I believe that *Kiist* clearly supports the interpretation that I am proposing.

[75] After concluding that it fell within the jurisdiction of the Canadian Transport Commission to determine whether the respondent railways had furnished adequate and suitable accommodation for the carriage of grain during the crop years at issue, Le Dain J.A., writing for the Court, proceeded to determine, should he be wrong with regard to the question of jurisdiction, whether the statement of claim disclosed a reasonable cause of action. At paragraph 40 of his Reasons, he stated that issue in the following terms:

> 40. The issue as to whether the statement of claim discloses a reasonable cause of action is whether, assuming the truth of the allegations of fact in the statement of claim, the appellants are persons aggrieved within the meaning of subsection 262(7) of the *Railway Act*. Since the action is based on alleged failure to perform the statutory duty to provide adequate and suitable accommodation the question is whether the duty is one that was owed by the respondent railways to the appellants. In my opinion, it was not.

[76] Thus, in order to determine whether the appellants were "persons aggrieved" within the meaning of subsection 262(7) of the *Railway Act*, a determination of whether the respondent railways had breached their statutory duty to provide adequate and suitable accommodation for the carrying, unloading and delivering of the appellants' traffic had to be made by the Court. More particularly, Le Dain J.A. indicated that the Court had to determine whether the respondent railways owed a duty to the appellants.

[77] I should point out that there is no material difference between paragraph 262(1)*(a)* of the *Railway Act* and paragraph 113(1)*(b)* of the *CTA*.

[78] In concluding that the respondent railways owed no duty to the appellants with regard to the furnishing of adequate and suitable accommodation for the carrying, unloading and delivering of their traffic, Le Dain J.A. gave the following reasons at paragraphs 41 and 42:

> 41 The duty is, as indicated in paragraph 262(1)(a), to furnish adequate and suitable accommodation "for the receiving and loading of all traffic offered for carriage upon the railway". It is, therefore, a duty owed to one who offers goods for carriage. It is clear from the allegations of the statement of claim and the applicable provisions of the Canadian Wheat Board Act, to which reference has been made, that the additional or excess grain (to use the expression employed by the Trial Judge) which the Board could have sold and would have authorized producers to deliver, but for the alleged failure of the respondent railways to furnish adequate accommodation, was not, and could not have been, offered for carriage by the appellants to the respondent railways. The allegations of the statement of claim and the provisions of the Act make it clear that producers do not make the necessary arrangements with the railways for the transportation of grain that is marketed through the Board. Grain is sold and delivered by individual producers to the Board at primary elevators or railway cars where ownership of it passes by operation of the statute to the Board and it becomes mixed with other grain. It is the Board that makes the necessary arrangements with the railways for transportation of the grain sold by it. It does so for its own account as owner of the grain and not as agent of the producers. As alleged by the statement of claim, the Board participated in the necessary planning with the railways through the Transport Committee for the carriage of grain during the crop years in question and received a confirmation or commitment from the railways that they would provide the necessary capacity to carry the grain sold by the Board. Paragraph 9 of the statement of claim reads:
>
> > 9. At all material times The Canadian Wheat Board arranged with the Defendant railway companies for the carriage of grain through the device of the Transportation Committee for forecasting long-range requirements and through a Block Shipping System for allocating rolling stock and related facilities on a six-week shipping cycle. The Defendant railway company participated in the decisions so made and confirmed their capacity to carry the grain in question.
>
> It must be remembered, moreover, that the Board has the authority to allocate available railway cars, and that it necessarily participated with the railways in the joint decisions as to

> the disposition of available rolling stock. The railways do not deal with individual producers at all in respect of specific quantities of grain sold and delivered by them to the Board and later carried for the Board by the railways. The consequence for an individual producer of a particular failure in the entire system to provide adequate accommodation could not be foreseen by the railways.
>
> 42 It has been said on several occasions that the liability of a railway under the provisions of the *Railway Act* is essentially that of a common carrier: *Canadian National Railway Co. v. Harris* [1946] S.C.R. 352 at page 376. While the specific duty that is found in section 262 to furnish adequate and suitable accommodation may be said to be the creation of statute, it could not have been contemplated that it should be owed to persons outside the scope of a common carrier's liability because they do not have contractual relations with the carrier and are not the owners of the goods offered for carriage.
>
> [Emphasis added]

[79] Le Dain J.A.'s reasons for concluding as he did do not rest on the meaning of the words "persons aggrieved" found in subsection 262(7) of the *Railway Act*. Rather, he concludes that the appellants in *Kiist* cannot succeed because they are not persons to whom a duty was owed by the respondent railways under subsection 262(1) of the *Railway Act*. More particularly, because the appellants did not enter into any contract with the respondent railways and because they were not the owners of the goods offered to the railways for carriage, the railways had no obligation to furnish adequate and suitable accommodation to the appellants. Thus, as no duty was owed to the appellants, they did not constitute "persons aggrieved" under subsection 262(7) of the *Railway Act*. Consequently, no right of action lay in their favour.

[80] Le Dain J.A.'s reasoning is, for all intents and purposes, the reasoning that I am proposing in the present matter. Consequently, as CN owed Northgate no duty under subsection 113(1) of the *CTA*, it cannot be found to have failed to furnish Northgate with adequate and suitable

accommodation for the carrying, unloading and delivering of the traffic. Thus, no complaint was receivable under subsection 116(1).

[81] At paragraph 30 of her Reasons, Sharlow J.A. indicates that the Agency correctly observed that the words “any person” found in subsection 116(1) of the *CTA* were broader or more general than the words “persons aggrieved” found in subsection 262(7) of the *Railway Act* and, thus, “necessarily includes a larger class of persons”. In my respectful view, that distinction does not allow us to distinguish *Kiist* from the present matter.

[82] For these reasons, I would allow the appeal with costs, I would set aside the Agency’s decision and I would dismiss Northgate’s complaint.

“M. Nadon”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-361-09
APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED APRIL 23, 2009 DECISION NO. 166-R-2009	
STYLE OF CAUSE:	Canadian National Railway Company v. Northgate Terminals Ltd., Westran Portside Terminal Limited and Canadian Transportation Agency
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	April 14, 2010
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	LAYDEN-STEVENSON J.A.
DISSENTING REASONS BY:	NADON J.A.
DATED:	June 2, 2010

APPEARANCES:

Eric Harvey	FOR THE APPELLANT
Forrest Hume	FOR THE RESPONDENT, NORTHGATE TERMINALS LTD.
Carolina Mingarelli	FOR THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

Canadian National Railway Company Montreal, Quebec	FOR THE APPELLANT
Forrest C. Hume law Corporation	FOR THE RESPONDENT,

Vancouver, British Columbia	NORTHGATE TERMINALS LTD.
Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY