

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121102

Dockets: A-438-11
A-440-11

Citation: 2012 FCA 278

CORAM: DAWSON J.A.
GAUTHIER J.A.
STRATAS J.A.

Docket: A-438-11

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**CANADIAN NATIONAL RAILWAY COMPANY, PEACE RIVER COAL INC. and
CANADIAN INDUSTRIAL TRANSPORTATION ASSOCIATION**

Respondents

Docket: A-440-11

BETWEEN:

**PEACE RIVER COAL INC. and
CANADIAN INDUSTRIAL TRANSPORTATION ASSOCIATION**

Appellants

and

**CANADIAN NATIONAL RAILWAY COMPANY and
ATTORNEY GENERAL OF CANADA**

Respondents

Heard at Ottawa, Ontario, on September 12, 2012.

Judgment delivered at Ottawa, Ontario, on November 2, 2012.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

GAUTHIER J.A.
STRATAS J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121102

**Dockets: A-438-11
A-440-11**

Citation: 2012 FCA 278

**CORAM: DAWSON J.A.
GAUTHIER J.A.
STRATAS J.A.**

Docket: A-438-11

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

**CANADIAN NATIONAL RAILWAY COMPANY, PEACE RIVER COAL INC. and
CANADIAN INDUSTRIAL TRANSPORTATION ASSOCIATION**

Respondents

Docket: A-440-11

BETWEEN:

**PEACE RIVER COAL INC. and
CANADIAN INDUSTRIAL TRANSPORTATION ASSOCIATION**

Appellants

and

**CANADIAN NATIONAL RAILWAY COMPANY and
ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT

DAWSON J.A.

[1] Section 40 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act) confers a broad power on the Governor in Council to vary or rescind decisions of the Canadian Transportation Agency (Agency). In Order in Council P.C. 2010-749 the Governor in Council rescinded Agency Decision No. 392-R-2008. In consequence, the Canadian National Railway Company (CN) brought an application for judicial review of the decision of the Governor in Council. For reasons reported at 2011 FC 1201, 398 F.T.R. 218, the Federal Court allowed the application for judicial review. The Federal Court set aside the decision of the Governor in Council and restored the decision of the Agency.

[2] These are appeals from the decision of the Federal Court. For the reasons that follow, I have concluded that the Federal Court erred by applying the correctness standard of review to the decision of the Governor in Council. Applying the reasonableness standard of review, I have concluded that the decision of the Governor in Council was reasonable. I would therefore allow these appeals with costs and restore the decision of the Governor in Council as set out in more detail later in these reasons.

Factual Context

[3] Peace River Coal Inc. (Peace River) and CN entered into a confidential contract with respect to the transportation of Peace River's coal for the period from January 1, 2008 to June 30, 2010. The contract stated that for the duration of the contract the agreed upon base freight rates would be subject to 'Fuel Surcharge Tariff CN 7402 series, supplements thereto or reissues thereof'. Under

CN Tariff 7402, CN applied a fuel surcharge when the monthly average price of fuel equalled or exceeded a strike price of \$1.25.

[4] Effective April 1, 2008, CN implemented a new fuel surcharge entitled Tariff CN 7403. Under Tariff CN 7403 the strike price at which the fuel surcharge would begin to apply was \$2.30, rather than \$1.25 under CN 7402. CN advised its customers, including Peace River, that confidential contracts subject to fuel surcharge CN 7402 would continue to be subject to that surcharge until the contracts expired. Notwithstanding this advice, Peace River asked CN to apply the CN 7403 fuel surcharge to its contract instead of CN 7402. CN declined.

[5] On April 22, 2008, Peace River made an application to the Agency under section 120.1 of the Act. Subject to certain conditions, section 120.1 of the Act allows a shipper to file a complaint with the Agency with respect to the reasonableness of any charges for the movement of rail traffic. Specifically, Peace River sought “an order establishing reasonable fuel surcharge charges [...] to apply to the carriage of [Peace River’s] coal by Canadian National Railway Company”. Peace River asked that CN be required to vary its charges in CN Tariff 7402 “to reflect the charges [...] specified in CN Tariff 7403.”

[6] In response to this application CN brought a preliminary motion before the Agency in which it asked that the Peace River’s complaint be dismissed because:

- i) the fuel surcharge tariff formed part of CN’s confidential contract with Peace River and the Agency lacked jurisdiction to amend confidential contracts; and

- ii) CN's fuel surcharge is not an ancillary charge. Rather, it is part of the "rates for the movement of traffic" and as such was excluded by subsection 120.1(7) from matters which can be the subject of a complaint filed under section 120.1 of the Act.

[7] The Agency allowed CN's motion and dismissed Peace River's application on the basis that Peace River sought "to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge". It found that section 120.1 of the Act does not give the Agency "jurisdiction to change the terms of a contract between parties". The Agency did not find it necessary to consider CN's alternate argument that the fuel surcharge is part of the transportation rate and therefore excluded from the operation of section 120.1 by subsection 120.1(7) of the Act.

[8] Peace River did not seek leave to appeal the decision of the Agency to this Court.

[9] On February 3, 2009, the Canadian Industrial Transportation Association (CITA), a shipper association of which Peace River is a member, petitioned the Governor in Council to require the Agency to determine that a fuel surcharge is not a rate for the movement of traffic and to direct the Agency that a confidential contract between Peace River and CN does not preclude it from assessing the reasonableness of Tariff CN 7402.

[10] On June 10, 2010, the Governor in Council issued Order in Council P.C. 2010-749, rescinding the Agency's decision on the basis that the existence of a confidential contract is only "relevant to the question of whether the complainant will benefit from any order made by the Agency" under section 120.1 of the Act. It "has no bearing on the reasonableness" of a charge found

in a tariff that applies, as it found CN 7402 did, to “more than one shipper and that is not a tariff referred to in subsection 165(3) of the Act”. CN then sought judicial review of the order in council.

Legislative Framework

[11] Section 120.1 of the Act was enacted in 2008. It provides a remedy against rail carriers for charges other than “rates for the movement of traffic”. A shipper who meets the following four requirements may ask the Agency to review the reasonableness of a charge, term or condition. First, the shipper must be subject to the charge, term or condition for the movement of traffic or for the provision of incidental services. Second, the charge, term or condition must be found in a tariff. Third, the tariff must apply to more than one shipper. Finally, an application may not be made in respect of a tariff referred to in subsection 165(3) of the Act (that is a tariff determined through final offer arbitration).

[12] Upon review, the Agency may vary an unreasonable charge, term or condition.

[13] The relevant text of the legislation is [emphasis added]:

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance.

(2) The order shall specify the period of validity of the charges or conditions, which may not exceed one year.

(2) L'ordonnance précise la période de validité de ces frais ou conditions, qui ne peut excéder un an.

[...]

...

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

(5) La compagnie de chemin de fer modifie le tarif en conséquence dès le prononcé de l'ordonnance par l'Office.

(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

(6) La compagnie de chemin de fer ne peut modifier son tarif à l'égard des frais et conditions fixés par l'Office avant l'expiration de la période de validité précisée au titre du paragraphe (2).

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

(7) Il est entendu que le présent article ne s'applique pas aux prix relatifs au transport.

[14] As referenced above, section 40 the Act confers on the Governor in Council broad discretion, without express limitation, to vary or rescind an Agency decision, including one made under section 120.1 of the Act [emphasis added]:

40. The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

40. Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

The Decision of the Federal Court

[15] The Federal Court Judge identified and addressed eight issues.

[16] First, he decided that the Agency had correctly determined the nature of the application that Peace River had made to it. The Agency found that Peace River had in essence requested variation of its confidential contract (reasons, paragraphs 43 to 45).

[17] Second, the Judge found that the Agency dismissed Peace River's application on the basis that it did not have jurisdiction to amend the confidential contract. The Judge noted that as a result the Agency did not have to consider "whether a fuel surcharge is an ancillary charge or part of the transportation rate" (reasons, paragraphs 46 to 48).

[18] Third, the Judge characterized the nature of CITA's petition to the Governor in Council. In his view, there had been "a shift in ground" between CITA's petition to the Governor in Council (reasons paragraph 52). The Judge stated that the CITA "was asking the Governor-in-Council [...] to ignore [Peace River]'s request that the Agency vary the contract and to simply ask the Agency to review the Tariff for 'reasonableness' without regard to the contract" (reasons, paragraph 53).

[19] Fourth, the Judge characterized the nature of the decision reflected in the order in council. He interpreted the order in council to require the Agency to assess the reasonableness of CN 7402 without regard for Peace River and CN's contract, because the tariff did not solely apply to Peace River (reasons, paragraph 55).

[20] Fifth, the Judge considered whether the Governor in Council acted within the scope of the powers given to it under section 40 of the Act. He determined that pursuant to sections 40 and 41 of the Act both the Governor in Council and this Court have authority to decide questions of law and jurisdiction arising from Agency decisions (reasons, paragraphs 57 and 61). However, in the Judge's view, the Governor in Council's authority is not limited to questions of law and jurisdiction because it "is the only forum in which a variance or rescission of the decision of the Agency may be sought on grounds beyond questions of law or jurisdiction" (reasons, paragraph 57).

[21] Sixth, the Judge found that the standard of review to be applied to the order in council was correctness for questions of "pure jurisdiction", such as the interpretation and application of the Act "to the issues before the Agency" (reasons, paragraphs 68 and 76). In his view, section 40 of the Act gave the Governor in Council jurisdiction to vary the Agency's decision so that the Agency "was to look only at reasonableness of the tariff without regard to amending the contract between [Peace River] and CN" (reasons, paragraph 64). He noted that if a shipper requested a review of a tariff without seeking to amend its confidential contract, the Agency would be obliged to review the tariff. In his view, if that were the substance of the decision of the Governor in Council, the "decision would have been both correct and reasonable" (reasons, paragraph 66).

[22] Seventh, in order to apply the correctness standard of review, the Judge examined select provisions of the confidential contract, referred to some of the affidavit and cross-examination testimony (reasons, paragraphs 10 to 17) and then found "that the fuel surcharge as expressed in Tariff 7402 was part of the 'rate' charged to the shipper as contemplated by that Act" (reasons, paragraphs 18 and 71). Therefore, the tariff was excluded from review under section 120.1 by

subsection 120.1(7). The Judge concluded that the Agency correctly held that it did not have jurisdiction to review the tariff and, therefore, the Governor in Council incorrectly rescinded that decision (reasons, paragraph 71).

[23] Finally, the Judge acknowledged that while the Agency can vary a tariff that applies to more than one shipper, it has no jurisdiction to determine “[t]he effect of that variance on an existing contract” or to “vary a contract between a shipper and a carrier” (reasons, paragraph 73). Because the Judge viewed Peace River’s request as one for variation of its contract, he found that the Agency had no jurisdiction and the Governor in Council again erred by “returning the subject matter of the Application to the Agency” (reasons, paragraph 75).

[24] The Judge therefore set aside the order in council and restored the Agency’s decision.

[25] Subsequently, the Attorney General of Canada filed an appeal from the decision of the Federal Court. A second appeal was filed by Peace River and the CITA. In these reasons together these three parties are referred to as the appellants. The appeals were consolidated for hearing by an order dated January 13, 2012, which provided that Court file A-438-11 be considered to be the lead file. In accordance with that order, a copy of these reasons shall be placed in Court file A-440-11.

The Issues

[26] In my view, the issues raised on these appeals are:

- a) What was the nature of the petition placed before the Governor in Council and what is the proper characterization of the resulting decision?

- b) What standard of review should be applied to the decision of the Governor in Council?
- c) Depending upon the appropriate standard of review, was the decision of the Governor in Council incorrect or unreasonable?
- d) Did the Federal Court err by finding the CN Tariff 7402 to be a component of the rates for the movement of traffic within the meaning of subsection 120.1(7) of the Act?

Consideration of the Issues

- (a) What was the nature of the petition placed before the Governor in Council and what is the proper characterization of the resulting decision?

[27] The parties vigorously contest the nature of Peace River's complaint to the Agency and, flowing from this, the nature of the decision made by the Governor in Council.

[28] In the submission of the appellants, as framed by the Attorney General:

36. The Governor in Council in this case did not deal with a question of jurisdiction at all. Rather, the Governor in Council disagreed with the Agency over whether the complaint brought by [Peace River] was about amending the terms of the contract. The Governor in Council found that the complaint was, in essence, a request for an assessment of the reasonableness of Tariff 7402.

37. The mere fact that the tariff happened to have been incorporated by reference into the contract between [Peace River] and CN does not mean that the complaint was about amending the terms of the contract. The nature of the complaint to the Agency concerned the reasonableness of Tariff 7402, a modification of which does not amend the terms of the contract in any event. Whether [Peace River] benefits from an amendment to Tariff 7402 does not affect the Agency's ability to determine the reasonableness of this tariff fuel surcharge, which applies to other shippers as well.

[footnote omitted]

[29] In the submission of CN, the only issue before the Governor in Council was “a pure question of law which did not require consideration of any controversial facts or policy” (factum, paragraph 75). The question of law was whether the Agency had jurisdiction to entertain Peace River’s application in light of the existence of the confidential contract between it and CN.

[30] In order to properly characterize the nature of the petition made to the Governor in Council and the nature of the resulting decision, regard must be had to:

- i) Peace River’s complaint to the Agency;
- ii) the decision of the Agency;
- iii) the petition submitted by the CITA to the Governor in Council; and
- iv) the decision of the Governor in Council.

[31] Each document will be reviewed in turn. For completeness, I note that CN’s motion to the Agency is not in evidence before us.

- i) Peace River’s complaint to the Agency

[32] As set out above, in its application Peace River sought “an order establishing reasonable fuel surcharge charges as described in this application, to apply to the carriage of [Peace River’s] coal by [CN].”

[33] Peace River expressly noted in its submission, at paragraph 31, that CN Tariff 7402 applied to more than one shipper. It quoted from the tariff:

“This fuel surcharge tariff, CN 7402, applies to the following types of commodities moved:

- Bulk commodities: coal, fertilizer, and grain
- All other carload commodities”

[34] Its prayer for relief claimed the following remedy [emphasis added]:

39. As a result of the above, [Peace River] requests that the Agency issue an order establishing reasonable fuel surcharge charges to apply to the carriage of [Peace River]’s coal by CN. Specifically, [Peace River] requests the Agency to order CN to vary its Tariff 7402 to reflect the charges and associated terms and conditions that are contained currently in CN Tariff 7403, for a period of one year.

ii) The decision of the Agency

[35] The Agency, in brief reasons, described Peace River’s application to be a request for “an order requiring new fuel surcharge rates to apply to the confidential contract for carriage of its traffic by [CN].”

[36] It framed the issue to be decided as:

Does the Agency have jurisdiction to consider the terms of a confidential contract under section 120.1 of the [Act]? If so, is a fuel surcharge part of the rate for the movement of traffic such that subsection 120.1(7) would preclude its consideration under section 120.1 of the [Act]?

[37] The Agency’s analysis and findings were [emphasis added]:

In this case, both parties have agreed that the traffic in question is covered by the terms and conditions of a confidential contract, including fuel surcharges, which are incorporated by reference into the confidential contract between the parties. Although [Peace River] submits that it does not seek to alter any of the terms of the confidential contract, the Agency finds that [Peace River] is in fact seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.

Contracts are entered into willingly and freely by two parties for their mutual benefit. One of the key purposes is to ensure certainty and predictability on matters

agreed to for the duration of the contract. The parties are bound by the contract and the Agency has no jurisdiction to change the terms of a contract between parties on application under section 120.1 of the [Act] and dismisses the application.

As a result, there is no need for the Agency to consider CN's alternate argument related to whether the fuel surcharge forms part of the transportation rate.

iii) The petition submitted by the CITA to the Governor in Council

[38] The CITA framed the issue to be one of public policy as is evidenced from the following extracts from its petition:

AND WHEREAS in Agency Decision No. 392-R-2008 dated July 31, 2008 (the "Decision") the Agency erroneously granted CN's motion on the basis that [Peace River] was seeking to have the fuel surcharge which was incorporated into the contract changed to reflect a different fuel surcharge, without addressing any other issue;

[...]

AND WHEREAS the membership of CITA-ACTI is greatly concerned that the Decision has, in fact, rendered the remedy enacted by Parliament in section 120.1 of the Act effectively inoperative;

AND WHEREAS CITA-ACTI considers that it is in the public interest that the ability of the Agency to review the reasonableness of the railways' fuel surcharge tariffs pursuant to section 120.1 of the Act be confirmed and clarified, and has decided to file the within Petition to the Governor in Council for that purpose; [my emphasis]

YOUR PETITIONER THEREFORE HUMBLY PRAYS that the Governor in Council vary the Decision to require that the Agency

- (a) determine that CN's old fuel surcharge tariff is an ancillary charge within the meaning of subsection 120.1(7) of the Act, and is one that may be properly considered under section 120.1 of the Act; and
- (b) determine that the Agency may consider the reasonableness of CN's old fuel surcharge tariff notwithstanding the existence of the confidential transportation contract between the parties that incorporates the old fuel surcharge.

In support of this Petition, your Petitioner advises the following:

[...]

INTENT OF PARLIAMENT IN ENACTING SECTION 120.1

- The confidential transportation contracts is not a bar to the Agency's consideration of [Peace River]'s application under section 120.1 of the Act

26. Section 120.1 of the *Canada Transportation Act* was introduced specifically because the federal government recognized that the monopoly position of the federal railways was capable of empowering the railways to force unreasonable terms and conditions into their ancillary tariffs. Due to their effective monopoly positions for certain shippers, there is no leverage to dispute the contents of these tariffs in the absence of a statutory remedy such as section 120.1.

27. It is common railway practice to insist that a term be included in every confidential contract which incorporates by reference all of the railway's tariffs. This clause has the effect of rendering every tariff applicable to the shipper that a railway lawfully enacts. In many cases, the shipper is powerless to negotiate this term out of the contract because of the railway's monopoly position. [my emphasis]

28. The existence of a confidential transportation contract could not have been intended to frustrate the application of section 120.1, since the shippers that need relief from unreasonable charges are the very shippers that are subject to the railways' market power, and thus forced to sign railway contracts that require that specific railway tariffs be included, or that require all of the railway's tariffs be incorporated by reference.

29. When Parliament intended that the existence of a confidential transportation contract be a bar to regulatory relief, it has so specified. For instance, the existence of a confidential transportation contract is a bar to a shipper filing a submission with the Agency for a final offer arbitration, if the subject matter of that confidential transportation contract covers the matter submitted for final offer arbitration (subsection 126(2) of the Act). There is no such prohibition in section 120.1 of the Act.

30. In any event, in the instant case, [Peace River] is not seeking to resile from its agreement to pay the fuel surcharge under the old fuel surcharge tariff specified in the contract. [Peace River] is merely seeking the Agency's consideration as to the reasonableness of the old fuel surcharge tariff pursuant to section 120.1 of the Act. Should the Agency determine that the old fuel surcharge tariff is reasonable, [Peace River] will continue to pay it for the term of the contract. Should the Agency determine that the old fuel surcharge tariff is unreasonable, and requires CN to vary the old fuel surcharge tariff accordingly, [Peace River] will pay the fuel surcharge so

varied. In other words, contrary to the finding of the Agency in the Decision, [Peace River] is not seeking to have the fuel surcharge which was incorporated by reference into the contract changed to reflect a different fuel surcharge; it was merely seeking a determination by the Agency as to the reasonableness of the tariff containing that fuel surcharge. That is a right conferred by section 120.1 of the Act. [my emphasis]

[...]

- The Agency's Decision frustrates the intent of Parliament

[...]

37. The overall effect of the Decision is to render section 120.1 remedy completely nugatory if a confidential contract is in place between the shipper and railway. All CN has to do is point to the contract and the fact that each and every railway tariff, no matter how reasonable or unreasonable, is incorporated by reference into the contract in order to avoid the application of section 120.1.

38. Because the vast majority of rail movements are governed by a confidential contract, and because virtually every confidential contract has an incorporation by reference clause, the vast majority of train movements are subject to tariffs which cannot be challenged under section 120.1 of the Act. This is clearly not what Parliament intended when it enacted this section.

CONCLUSION

39. [Peace River]'s application is the first application that has been made pursuant to the new section 120.1 of the Act. To CITA-ACTI's knowledge, it is the only application that has been made pursuant to the new section 120.1 of the Act. It is important that this remedy be given the chance to work. In the rail transportation industry, shippers have already experienced the frustration of having remedies enacted by Parliament emasculated or effectively rendered inoperative by railway action. [...]

40. It should be noted that CITA-ACTI is not asking that the Governor in Council substitute its decision for that of the Agency in this matter. CITA-ACTI is only asking that the Governor in Council act to ensure that the Agency does its job in considering and determining [Peace River]'s application, as contemplated by Parliament with the enactment of section 120.1.

DETAILS OF REQUEST FOR RELIEF

41. As a result of the matters set out in this Petition, CITA-ACTI humbly prays that the Governor in Council, pursuant to section 40 of the Canada Transportation Act, vary the Decision to require that the Agency

- (a) determine that CN's old fuel surcharge tariff is an ancillary charge within the meaning of subsection 120.1(7) of the Act, and is one that may be properly considered under section 120.1 of the Act; and
- (b) determine that the Agency may consider the reasonableness of CN's old fuel surcharge tariff notwithstanding the existence of the confidential transportation contract between the parties that incorporates the old fuel surcharge.

iv) The decision of the Governor in Council

[39] The decision is not long [emphasis added]:

Whereas the Canadian Transportation Agency ("Agency") issued Decision No. 392-R-2008 on July 31, 2008, dismissing the complaint of Peace River Coal Inc. ["Peace River"] pursuant to section 120.1 of the *Canada Transportation Act* ("Act"), with respect to Canadian National Railway Company's ("CN") fuel surcharge contained in the CN Tariff No. 7402, on the basis that the Agency lacked jurisdiction to hear the matter as the tariff was incorporated by reference into a confidential contract between CN and [Peace River];

Whereas the Canadian Industrial Transportation Association ("CITA") petitioned the Governor in Council, pursuant to section 40 of the Act, to vary Decision No. 392-R-2008 and determine that the fuel surcharge contained in CN Tariff No. 7402 is a charge within the meaning of section 120.1 of the Act and that the Agency may consider the reasonableness of the fuel surcharge despite the existence of a confidential contract between CN and [Peace River] that by reference incorporates that fuel surcharge;

Whereas [Peace River], CN and CITA filed submissions in respect of the petition;

Whereas section 120.1 of the Act is a complaint-based regulatory remedy against unreasonable charges and associated terms and conditions for the movement of traffic or the provision of incidental services imposed by a railway company that is aimed at benefiting all shippers subject to the charges and associated terms and conditions found in the challenged tariff rather than only benefiting the complainant;

Whereas the complaint filed pursuant to section 120.1 of the Act by [Peace River] was for the benefit of all shippers subject to the alleged charge and associated terms and conditions for the movement of traffic or the provisions of an incidental service contained in CN Tariff No. 7402, a tariff that applies to more than one shipper and that is not a tariff referred to in subsection 165(3) of the Act;

And whereas the Governor in Council is of the opinion that while the existence of a confidential contract between a railway company and a complainant under section 120.1 of the Act, and the terms and conditions of such contract, are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, it has no bearing on the reasonableness of the charge and associated terms and conditions for the movement of traffic or for the provisions of incidental services that are found in a tariff that applies to more than one shipper and is not a tariff referred to in subsection 165(3) of that Act;

Therefore, Her Excellency the Governor in Council, on the recommendation of the Minister of Transport, pursuant to section 40 of the *Canada Transportation Act*, hereby rescinds Canadian Transportation Agency Decision No. 392-R-2008 of July 31, 2008.

[40] Having reviewed relevant extracts from the salient documents, I turn to the characterization of nature of the petition placed before the Governor in Council and the characterization of the resulting decision.

[41] The Judge characterized the petition of the CITA to be a request that the Agency review CN Tariff 7402 “for ‘reasonableness’ without regard to the [confidential] contract” (reasons, paragraph 53). In my view, the Judge correctly characterized the petition.

[42] I also substantially agree with the Judge’s characterization of the nature of the Governor in Council’s decision:

55 What the Governor-in-Council has done, in effect, is to say to the Agency that it is to go ahead and determine the reasonableness of the Tariff notwithstanding the existence of a contract between [Peace River] and CN. It has said that since the Tariff applies to more than one shipper, the review of the Tariff will be of benefit to all of them and not just [Peace River]. The Order-in-Council expressly *does not* direct that the Agency require that [Peace River] and CN amend their contract to reflect the amended Tariff. That, presumably, is left for another day and perhaps another forum. [emphasis in original]

To this characterization I would only add that the Governor in Council did not make any express finding that Peace River was subject to CN Tariff 7402 within the meaning of section 120.1 of the Act.

[43] The effect of the Governor in Council's decision was to impugn the Agency's factual determination that Peace River's application sought "an order requiring new fuel surcharge rates to apply to the confidential contract for carriage of its traffic" by CN. The Governor in Council substituted its view of the nature of Peace River's application for that of the Agency's. In the view of the Governor in Council, Peace River's application was for the benefit of all shippers. It followed that the Agency had incorrectly framed the issue before it. The Governor in Council expressly did not decide the legal question of whether the existence of the confidential contract precluded Peace River from benefiting from any finding that CN Tariff 7402 was unreasonable.

[44] Having characterized the decision of the Governor in Council, it is necessary to consider the standard of review to be applied to that decision.

(b) The applicable standard of review

[45] The characterization by the Governor in Council of the nature of Peace River's application to the Agency is a question of fact, or a question of mixed fact and law with the factual component predominating.

[46] In *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344 this Court concluded, at paragraph 31, that the reasonableness standard of review

applied to decisions made by the Governor in Council with respect to questions of mixed fact, policy and law.

[47] The decision at issue is fact-based and carried a policy component. The decision-maker is the Governor in Council who is given broad powers of review in section 40. In my view, *Globalive* determined in a satisfactory manner the requisite deference to be afforded to the decision of the Governor in Council at issue on these appeals. The decision is to be reviewed on the standard of reasonableness.

[48] It follows that the Federal Court erred in law by applying the correctness standard, and that this Court must assess the reasonableness of the Governor in Council's decision.

(c) Was the Governor in Council's decision reasonable?

[49] As detailed above at paragraph 33, in its application to the Agency, Peace River quoted from the fuel surcharge tariff in order to support its submission that the tariff applied to other shippers. The remedy Peace River sought was an order requiring "CN to vary its Tariff 7402."

[50] The specific remedy sought, together with the fact that, as noted by the Governor in Council, section 120.1 of the Act is "aimed at benefiting all shippers subject to the [...] challenged tariff" provided a basis upon which the Governor in Council could reasonably conclude that Peace River's application "was for the benefit of all shippers subject to the alleged charge." As the decision is supported by the evidence and by the reasons it falls within the range of outcomes that are defensible in respect of the facts and law. The decision was, therefore, reasonable.

[51] It follows that I would dismiss CN's application for judicial review of the Governor in Council's decision.

- (d) Did the Federal Court err by finding the CN Tariff 7402 to be a component of the rates for the movement of traffic within the meaning of subsection 120.1(7) of the Act?

[52] As set out above at paragraph 22, the Federal Court found as a matter of law "that the fuel surcharge as expressed in Tariff 7402 was part of the 'rate' charged to the shipper as contemplated by that Act" (reasons, paragraphs 18 and 71). This legal question was an issue which the Agency declined to decide. Nor did the Governor in Council make any finding on this legal question.

[53] In my respectful view the Judge, sitting on judicial review, erred by entering into this interpretive exercise of the Agency's home statute. If it was necessary for a determination to be made as to whether CN Tariff 7402 was a component of the rates for the movement of traffic, and I have found that it was not, the issue should have been returned to the Agency, the entity charged with the responsibility of interpreting its home statute.

[54] Moreover, as the appellants argue, the Judge's conclusion on this point is inconsistent with his conclusion at paragraph 66 of his reasons that if Peace River had simply "sought a review of the Tariff [...] the Agency would have had to oblige." The Agency could not oblige if the tariff was in respect of a rate within the meaning of subsection 120.1(7).

[55] This question is a live issue before the Agency, and is an issue within the Agency's mandate. It is, therefore, not appropriate for this Court to opine on the issue.

[56] For the purpose of this appeal, in my view, it is sufficient to state that this Court does not endorse the Judge's reasoning or his conclusion that the fuel surcharge was a component of the rates for the movement of traffic. This issue should be determined by the Agency which is not bound by the reasoning or conclusion of the Federal Court.

Conclusion

[57] For these reasons, I would allow the appeals, set aside the judgment of the Federal Court and, making the judgment that the Federal Court ought to have pronounced, dismiss CN's application for judicial review of Order in Council P.C. 2010-749. I would award costs both here and in the Federal Court to the appellants, with the qualification that Peace River and the CITA are together entitled to one set of costs between them in each court. This reflects the fact that both were represented by the same counsel and their respective memoranda of fact and law were essentially duplicative.

[58] In closing, on this disposition of the appeals it has not been necessary to consider the argument advanced by CN that the Federal Court erred in defining the scope of the power conferred upon the Governor in Council by section 40 of the Act. In the submission of CN, the Governor in Council is not empowered to decide pure questions of law and jurisdiction. The appellants did not directly engage this submission. As shown at paragraph 28 above, the appellants focussed on the proper characterization of the issue before the Governor in Council and the nature of its decision.

These reasons should not be read to endorse the conclusion of the Federal Court that the Governor in Council is a proper forum for determining questions of law and jurisdiction. In my view, this remains an open issue to be determined by this Court in a future case.

“Eleanor R. Dawson”

J.A.

“I agree.

Johanne Gauthier J.A.”

“I agree.

David Stratas J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-438-11, A-440-11

STYLE OF CAUSES: A-438-11
ATTORNEY GENERAL OF
CANADA v. CNR COMPANY
et al.

A-440-11
PEACE RIVER COAL INC. et al.
v. CNR COMPANY et al.

PLACE OF HEARING: September 12, 2012

DATE OF HEARING: Ottawa, Ontario

REASONS FOR JUDGMENT BY: Dawson J.A.

CONCURRED IN BY: Gauthier J.A.
Stratas J.A.

DATED: November 2, 2012

APPEARANCES:

Mr. Robert MacKinnon
Mr. Peter Nostbakken

FOR THE ATTORNEY GENERAL
OF CANADA

Mr. Forrest C. Hume

FOR PEACE RIVER COAL INC. et
al.

Mr. Guy J. Pratte
Ms. Nadia Effendi

FOR THE RESPONDENT /
CANADIAN NATIONAL
RAILWAY COMPANY

SOLICITORS OF RECORD:

Myles J. Kirvan
Deputy Attorney General of Canada

Forrest C. Hume Law Corporation
Vancouver, British Columbia

Borden Ladner Gervais LLP
Ottawa, Ontario

FOR THE ATTORNEY GENERAL
OF CANADA

FOR PEACE RIVER COAL INC. et
al.

FOR THE RESPONDENT /
CANADIAN NATIONAL
RAILWAY COMPANY