

Federal Court of Appeal



Cour d'appel fédérale

Date: 20191016

Docket: A-48-19

Citation: 2019 FCA 254

**CORAM: STRATAS J.A.
LASKIN J.A.
MACTAVISH J.A**

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

**CORPORATION OF THE CITY OF CAMBRIDGE AND
THE CORPORATION OF THE CITY OF KITCHENER**

Respondents

Heard at Toronto, Ontario, on October 16, 2019.
Judgment delivered from the Bench at Toronto, Ontario, on October 16, 2019.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 16, 2019).

STRATAS J.A.

[1] This is an appeal from the decision dated June 14, 2018 of the Canadian Transportation Agency: Decision No. 40-R-2018. The Agency authorized the construction of a grade-separated road crossing under subsection 101(3) of the *Canada Transportation Act*, S.C. 1996, c. 10.

[2] The only aspect of the decision before this Court is the Agency's apportionment of costs of the grade-separated road crossing under subsection 101(4) of the *Canada Transportation Act* and subsection 16(4) of the *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.). The appellant submits that the Agency incorrectly interpreted and applied subsection 16(4) of the Act in considering the relative benefits that each party stands to gain from the road crossing.

[3] In our view, in reality the appellant does not take issue with the interpretation of subsection 16(4) of the Act but rather challenges the Agency's application of the subsection to the particular facts of the case, a factually suffused question of mixed fact and law. It is not the sort of pure question of law that this Court can entertain under subsection 41(1) of the *Canada Transportation Act*. The Agency itself considered the determinative issue before it to be one of weighing the respective benefits that the parties would realize from the grade-separated crossing (at para. 121).

[4] The appellant submits that the Agency erred in law in assessing relative benefits under subsection 16(4) of the Act by comparing the benefits of the grade separation to those of an at-grade crossing which it concluded would be unsuitable. The appellant also submits that the Agency has used different comparators in assessing benefits to the appellant and the respondents. We do not see these as unreasonable interpretations and applications of the subsection.

[5] The appellant also submits that the Agency failed to consider a relevant factor set out in an Agency policy document or guideline, namely that the costs of a grade-separated road crossing on a new route are normally paid in full by the party deciding to construct the new

route. As a matter of law, the policy document does not have the force of law nor does it bind. Even if the Agency did not follow it, it would not give rise to a legal error. On the very terms of the policy document, this factor is not mandatory; on the facts of a case, it may be departed from: *Apportionment of Costs of Grade Separations: A Resource Tool* (Ottawa: Minister of Public Works and Government Services, Canada, 2011) at p. 1. And again here, we do not consider there to be a pure question of law that this Court can entertain under subsection 41(1) of the *Canada Transportation Act*.

[6] The appellant submits that the Agency denied it procedural fairness by not giving adequate reasons for not applying the policy document. Procedural fairness can be entertained as a question of law under subsection 41(1) of the *Canada Transportation Act: Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573. However, adequacy of reasons is not a stand-alone ground of review: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. *Newfoundland Nurses* also instructs us that the reasons are to be viewed in light of the record. The Board's reasons are best regarded as its bottom-line conclusion as to which factors, on the evidence, were determinative in this particular case.

[7] Overall, the appellant parses the Agency's reasons quite closely. The Supreme Court has instructed us under the deferential reasonableness standard not to parse reasons as if we were on a "treasure hunt for error": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54. The appellant has not persuaded us that analysis missing from the Agency's reasons is due to a

misapprehension of its statute. Gaps in a decision-maker's reasons can be due to innocent distillation and synthesis of the evidence and points made before it. See, *e.g.*, *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 69.

[8] Therefore, the appeal will be dismissed with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-48-19

**APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY
DATED JUNE 14, 2018, CTA FILE NO. 40-R-2018**

STYLE OF CAUSE: CANADIAN PACIFIC RAILWAY
COMPANY v. CORPORATION OF
THE CITY OF CAMBRIDGE,
AND THE CORPORATION OF
THE CITY OF KITCHENER

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: OCTOBER 16, 2019

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.
LASKIN J.A.
MACTAVISH J.A.

DELIVERED FROM THE BENCH BY: STRATAS J.A.

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