Federal Court of Appeal | Cour d'appel fédérale

Date: 20251009

Docket: A-142-24

Citation: 2025 FCA 184

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
GOYETTE J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Heard at Toronto, Ontario, on September 18, 2025.

Judgment delivered at Ottawa, Ontario, on October 9, 2025.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: MONAGHAN J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Canadian National Railway Company appeals from the Canadian Transportation Agency's rates-setting decision dated November 24, 2023, under section 127.1 of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended: *Determination No. R-2023-237*.

In its decision, the Agency set rates for interswitching for 2024.

[2] In this appeal, CN submits that the Agency erred in law. For the following reasons, I agree with CN. Thus, I would allow the appeal with costs, set aside the Agency's decision, and remit the matter to the Agency for redetermination.

[3] First, a word or two about interswitching. In many places in Canada, a shipper, such as a shipper of grain, can hire only one railway company to take grain to an interchange. At an interchange, another railway company can take the grain to its destination. In this situation, the railway company taking the grain to the interchange often enjoys a monopoly—the shipper is captive to the railway line of that railway company—and, but for price regulation under the *Canada Transportation Act*, the railway company can charge a monopoly rate.

[4] In this appeal, the sole issue is what the Agency must consider when setting interswitching rates.

[5] In particular, CN raises a narrow point for decision: has the Agency improperly failed to have regard to factors that it must consider when setting interswitching rates under section 127.1 of the Act? Specifically, CN argues that the Agency must consider market-based evidence. It points to section 112, which applies to rates-setting under section 127.1. Under section 112, rates set by the Agency must be "commercially fair and reasonable to all parties".

[6] CN says that the Agency erred in law in this case by not considering "commercially fair and reasonable to all parties". In particular, it did not consider evidence concerning relevant commercial markets, including any interswitching rates in other markets, and commercial market

prices (collectively “commercial market factors”). It says that the Agency is unduly focused on costs as calculated under the Agency’s own “costs methodology”. Although the Agency’s costs methodology does include some return for shareholders, CN says that this excludes any consideration of commercial market factors. CN adds that interswitching rates set by the Agency have not increased commensurately with the rates in the commercial market, denying CN sufficient returns.

[7] The Agency disagrees. It says that CN’s evidence concerning commercial market factors is irrelevant.

[8] The Agency’s position can be seen in the decision under appeal and in the Agency’s previous decisions. Typically, the Agency uses a cost-of-capital methodology that gives CN compensation for costs, with, at best, some rate of return for shareholders, namely the return investors would expect from a security of equivalent risk: see, *e.g.*, *Decision 425-R-2011* (December 9, 2011); *Determination No. R-2020-194* (November 30, 2020); *Determination R-2023-178* (September 18, 2023); *Determination R-2022-39* (April 8, 2022); *Determination R-2019-230* (November 29, 2019). In *Decision 425-R-2011*, above, a leading decision that the Agency has followed consistently, the Agency adopted a methodology that did not consider commercial market factors. This seems to have been based not on any rigorous statutory interpretation analysis but rather on the Agency’s own view of “practicality” and “reliability” (at paras. 74-84).

[9] Of note—and we will return to this at the end of these reasons—the Agency has never conducted and presented, with supporting reasons, a full analysis of the text, context and purpose of the sections in the *Canada Transportation Act* that bear on the issue in this case. Here, at least judging by the Agency's reasons, it did not do that analysis, nor did it cite to any decision that did that analysis. Instead, over many years, in case after case, it seems that the Agency has applied standards that may or may not have come from the Act—we simply do not know.

[10] But we do know this: consistently the Agency has not considered commercial market factors when it sets interswitching rates. Given the lack of reasons, we can only assume that over the years the Agency has formed and maintained the view that commercial market factors are irrelevant under the *Canada Transportation Act* when it sets interswitching rates. We shall proceed on the basis that the Agency has been interpreting the Act in that way and did so in this case.

[11] Is the Agency's interpretation wrong?

[12] The answer to that depends on a proper interpretation of the relevant sections of the *Canada Transportation Act*. This issue—statutory interpretation—is a question of law for which the standard of review is correctness: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573.

[13] The Supreme Court has said much on how courts and administrative decision-makers must interpret statutory provisions.

[14] The words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26. In this process, the text is "the anchor of the interpretive exercise": *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para. 24, citing M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022), 59 *Alta. L. Rev.* 919, at p. 927.

[15] It is important to have regard to both official language versions of the Act: *Piekut v. Canada (National Revenue)*, 2025 SCC 13; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269. That is unnecessary here, as both versions say the same thing.

[16] Section 127.1 of the *Canada Transportation Act*, the section that specifically empowers the Agency to make the decision it did, is the starting point. Section 127.1 tells the Agency to set interswitching rates every year. It also tells the Agency that when setting interswitching rates, it must consider the following:

- the reduction in costs resulting from handling cars in a more efficient way (paragraph 127.1(2)(*a*));

- the long-term investment needed in the railways (paragraph 127.1(2)(*b*));

- certain average variable costs (subsection 127.1(3)); and

- the floor for the rates: they cannot be lower than the average variable costs (subsection 127.1(3)).

[17] There is nothing in the precisely worded text of section 127.1 that says that the factors in subsections 127.1(2) and (3) are the only ones the Agency can or should consider. In other words, section 127.1 does not set out a complete and exclusive list of factors, nor does it set a ceiling for interswitching rates. Section 127.1 only sets out things the Agency must consider. We must go elsewhere in the *Canada Transportation Act* to see what other factors the Agency must consider.

[18] There are other sections in the *Canada Transportation Act* that speak to that. They confirm that section 127.1 does not set out a complete and exclusive list of considerations, nor a ceiling for interswitching rates.

[19] Of prime importance is section 112 of the *Canada Transportation Act*. It provides that "[a] rate...established by the Agency" in Division IV ("Rates, Tariffs and Services") "must be commercially fair and reasonable to all parties". Section 127.1 appears in Division IV of the Act. Thus, when setting interswitching rates, the Agency must apply that standard.

[20] "[M]ust be commercially fair and reasonable to all parties" is usefully broken down into three parts: what is "fair and reasonable", what is "commercially" fair and reasonable, and what is commercially fair and reasonable "to all parties".

[21] "Fair and reasonable" is one of the broadest phrases in the statute book. It is similar in breadth to "just and reasonable" rates in subsection 27(1) of the *Telecommunications Act*. S.C. 1993, c. 38 and "equitable remuneration" for tariffs in section 19 of the *Copyright Act*, R.S.C. 1985, c. C-42. This Court has opined that words of such breadth empower administrative decision-makers to consider "broad policy considerations…in the Act", using their "factual appreciation", "regulatory experience", "policy appreciation" and "expertise about [the] regulated sector", with some "subjective judgment calls" and "subjective weighings and assessments" along the way: *Teksavvy Solutions Inc. v Bell Canada,* 2024 FCA 121 at para. 22; *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101 at paras. 48-49; *Re:Sound v. Canadian Association of Broadcasters*, 2017 FCA 138 at paras. 41-51; *Bell Canada v. Bell Aliant Regional Communications,* 2009 SCC 40, [2009] 2 S.C.R. 764.

[22] Just from the words "fair and reasonable", we can conclude that section 112 is broad enough to encompass commercial market factors. The Agency's apparent view—that commercial market factors are always irrelevant—improperly limits the broad range of factors that the Agency must consider under section 112.

[23] Now "to all parties" in section 112 of the *Canada Transportation Act*. The Agency must consider what is "fair and reasonable" from the perspective of all parties. When the Agency fails

to consider commercial market factors, which are factors important to CN, it effectively cuts out "to all parties" from the section.

[24] Finally, section 112 of the *Canada Transportation Act* contains the word "commercially". The legislative history behind the addition of "commercially" to section 112 underscores its significance.

[25] Section 112 and "commercially" first became part of Canadian law in 1996 when Parliament enacted the *Canada Transportation Act*, substantially replacing the less market-oriented *Railway Act*, R.S.C. 1985, c. R-3 and the *National Transportation Act, 1987*, R.S.C. 1987 (3rd Supp.), c. 28. Significantly, subsection 112(2) of the *National Transportation Act, 1987* used the much narrower word, "compensatory", rather than "commercially".

[26] The 1996 reform, significant as it was, did not stand alone. It was part of a whole suite of statutes enacted during the previous decade aimed at deregulating the national economy to make it more market oriented: for a complete analysis of this legislative history and its great significance, see the discussion in *Upper Lakes Group Inc. v. Canada (National Transportation Agency)*, [1995] 3 F.C. 395 (C.A.).

[27] The Agency has regarded commercial market factors as irrelevant to its determination of interswitching rates. The plain meaning of "commercially" and the legislative history concerning and surrounding section 112 show that this is wrong. Effectively, the Agency has acted as if "commercially" were read out of section 112. This it cannot do.

[28] Overall, the three elements of section 112—"fair and reasonable", "to all parties", and "commercially"—all lead to the conclusion that when setting interswitching rates, the Agency must receive evidence relevant to the commercial market factors and consider those factors.

[29] But the task of statutory interpretation is not yet finished. So far, we have examined the text of section 127.1 and the context in which it sits, particularly section 112. But when interpreting statutes, we must consider purpose as well: *Piekut* at paras. 44-45; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 48; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 at para. 10. In this Court, see also *CIBC World Markets Inc. v. Canada*, 2019 FCA 147 at para. 27 and *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 24. The meaning of words seen in their context is one thing; but sometimes their meaning becomes less clear or is altered when we consider general or section-specific purposes in the Act.

[30] In this case, we need not speculate about what the purposes of the *Canada Transportation Act* are or discover those purposes from the text of the Act and legislative history. Section 5 of the Act, under the heading "National Transportation Policy", supplies us with the purposes.

[31] Section 5 says that a "competitive, economic and efficient national transportation system… that makes the best use of all modes of transportation at the lowest total cost" is furthered, in part, by "regulation" to "achieve...outcomes that cannot be achieved satisfactorily by competition and market forces". That explains why section 127.1 empowers the Agency to

regulate rates. But section 5 also says that "a competitive, economic and efficient national transportation system" is essential to, among other things, "enable competitiveness and economic growth" and that is "most likely to be achieved" where, among other things, "competition and market forces…are the prime agents in providing viable and effective transportation services".

[32] Given these purposes, how can the Agency say that commercial market factors are always irrelevant as a matter of law to the setting of interswitching rates under section 127.1 of the Act? For one thing, in some circumstances, might higher interswitching rates allow railway companies to reduce their rates elsewhere, improve their services, or make new capital investments, all of which might further a "competitive, economic and efficient national transportation system"? CN is correct that commercial market factors are relevant in the sense that as a matter of law they must be considered—though, as will be discussed, they may not be deserving of weight in particular cases or a class of cases.

[33] We can test which interpretation "accords most harmoniously with text, context and purpose" and best expresses the authentic meaning of the legislation by examining real-world circumstances and the real-world effects of rival statutory interpretations: *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 at para. 52; see also, to similar effect, *Telus Communications Inc. v. Federation of Canadian Municipalities*, 2025 SCC 15 at para. 76. However, care must be taken not to allow real-world circumstances and real-world effects to place into Parliament's statute what is not authentically there. Here, real-world circumstances and the real-world effects genuinely confirm CN's interpretation.

[34] CN notes that in many interswitching cases, a shipper is served by only one carrier, thus giving rise to the threat of monopoly pricing. But CN points out that this is not always the case. Sometimes there are two carriers, creating a market of sorts, which could be a useful comparable in the rates assessment: see, *e.g.*, *Decision No. 35-R-2009*, dated February 6, 2009, at paras. 116-118. The Agency's interpretation in this case would allow it to close its eyes to this potential comparable when coming up with interswitching rates that are "commercially fair and reasonable" to "all parties".

[35] As well, in the real world, the rates a railway company can charge in the market can further the Agency's determination of what is "commercially fair and reasonable to all parties". While, as discussed above, the considerations set out in section 127.1 of the Act can set a floor for "commercially fair and reasonable" rates, evidence of the market price can serve as a ceiling. The Agency's task of setting "commercially fair and reasonable" rates is no doubt furthered by knowing both the floor and the ceiling.

[36] For completeness, I have considered two other Supreme Court authorities on rates-setting: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 and *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. The parties did not refer us to these. I consider them distinguishable.

[37] These cases concerned "just and reasonable" rates or "fair and reasonable rates" for the services provided by certain utilities. But the utilities were sole, monopolistic suppliers in all

their activities. This differs from CN, which competes with other railways and modes of transportation in many of its operations.

[38] As well, the statutory regimes in those two Supreme Court cases did not have the robust purpose clause we have in section 5 of the *Canada Transportation Act*, with its mention of "competition and market forces" to further a "competitive, economic and efficient national transportation system", and section 112's mention of "commercial[ity]", with all the legislative history surrounding it. For example, by contrast, in *Ontario Power Generation*, the purpose clause of the relevant statute referred to "the maintenance of a financially viable electricity industry" and it did not refer to "competition and market forces".

[39] Therefore, I conclude that when setting interswitching rates, the Agency must consider commercial market factors, as defined in paragraph 6, above.

[40] This does not mean that the Agency will always have to give significant weight to commercial market factors. Far from it. The assessment of weight is entirely for the Agency to decide on the evidence in each case, relying upon its industry appreciation, regulatory experience, and transportation expertise. As well, in some cases, the Agency may find the evidence concerning the commercial market factors to be unhelpful or deserving of little or no weight.

[41] It might be that in a particular case or a class of cases, after properly considering all the relevant factors under the Act, including the commercial market factors, the Agency sets rates at

a level not much different from previously set rates. On the other hand, the Agency might set lower or higher rates. Either way, without any legal error, error on an extricable question of law or procedural error—and where the Agency adequately explains itself in its reasons—this Court cannot review the Agency's decision under section 41 of the *Canada Transportation Act*: see *Emerson Milling*, above.

[42] One last comment. Above, in paragraph 8, I noted that when the Agency has considered whether it can or cannot do something under its jurisdiction to set interswitching rates, it has not conducted a full and rigorous statutory interpretation analysis, *i.e.*, explicitly examining the elements of text, context and purpose, as has been done in these reasons.

[43] On occasion, the Agency seems to have looked to section 127.1 to supply the exclusive or dominant criteria for its decision, when the above analysis shows that section 127.1 sits in a wider statutory context (especially section 112), shaped by a general statutory purpose. For example, in one case, the Agency equated "commercially fair and reasonable" rates with "ensur[ing] the railway companies are fully compensated for non-variable costs while at the same time, ensuring the margin does not materially exceed the total costs of the railway companies": *Determination R-2023-178* (September 18, 2023) at paras. 19-21. It gave no reasons for that. And nowhere can any statutory interpretation analysis be seen.

[44] Cutting corners and conclusory statements, without more, are not how the Agency should roll: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 115-124. In *Vavilov*, the Supreme Court instructed administrative decision-

makers to show in their reasons that they are alive to the issues of text, context and purpose in the statutory interpretation process. For a major administrative decision-maker like this, one that is dealing with an issue like this, only explicit and rigorous analysis will do: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21. The same must be said for applying the statutory standards to the evidence in a case like this.

[45] True, the Supreme Court's comments in *Vavilov* were offered in the context of an administrative decision-maker subject to reasonableness review in a judicial review, not, as here, correctness review in an appeal. But the underlying rationales for the Supreme Court's comments in *Vavilov* tell us much about how major administrative decision-makers, like the Agency, should conduct themselves.

[46] There are at least three rationales. First, adequate reasons, especially those that analyze text, context and purpose, require careful and rigorous work that often exposes faulty reasoning before the decision is released. Second, in high stakes determinations like this, adequate reasons tell the parties that their key arguments were taken on board and considered, something resting at the core of procedural fairness. Third, adequate reasons further the transparency, legitimacy and accountability of administrative decision-makers to the parties before them, other regulatees, reviewing courts, and the wider public—something needed more than ever in these days of widespread skepticism, cynicism, and mistrust of government. See *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 F.C.R. 425 at para. 16 and *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24.

[47] So administrative decision-makers, such as the Agency, must offer adequate reasons for their decisions whether they are subject to reasonableness review or correctness review: *Halton (Regional Municipality) v. Canada (Transportation Agency)*, 2024 FCA 122 at paras. 21-33. But the explanations given in their reasons need not be repeated over and over again. Once an administrative decision-maker has rigorously interpreted a statutory provision and has explained itself well, in later cases it can simply cite that interpretation and analysis: *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at paras. 13-15; *Teksavvy* at para. 37; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2023 FCA 245 at para. 16. Expedition, economy and concision are sound practices in administrative adjudication.

[48] In this case, the Agency did not identify any of its earlier decisions where it has conducted a complete and adequate statutory interpretation analysis. It could not, because there haven't been any. And, in this case, that analysis was nowhere to be seen.

[49] The Agency requests that there be no costs. Normally, when the Agency restricts itself to providing context as to its procedures and its jurisdiction, costs are not awarded against it: *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at para. 102. And in this case, based on *Westjet v. Lareau*, 2024 FCA 77, this Court asked the Agency to go further and to provide more complete submissions on the statutory interpretation issues in this case. However, that was due to the Agency's failure in its reasons to set out any statutory interpretation analysis. In my view, in these circumstances, the normal rule—the successful party is awarded costs—should apply here. CN requests its costs and it should get them.

[50] Therefore, I would allow the appeal with costs, set aside the Agency's decision dated November 24, 2023, and remit the matter to the Agency for redetermination.

"David Stratas"
J.A.

"I agree.
K. A. Siobhan Monaghan J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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