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Court File No.: A- 65-24

FEDERAL COURT OF APPEAL

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

FEDERAL COURT COUR FÉDÉRALE		D É P O S É
F I L E D	FEV 16 2024	
KYL A CHISHOLM		
TORONTO, ON		-1-

Appellant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent



NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Federal Court of Appeal in Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or if the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date FEB 16 2024 Issued by KYLA CHISHOLM
REGISTRY OFFICER
AGENT DU GREFFE
(Registry Officer)

Address of 180 Queen St W, Suite 200
local office: Toronto, Ontario M5V 1Z4

TO: CANADIAN TRANSPORTATION AGENCY
Legal Services Directorate
60 Laval Street, Unit 01
Gatineau, QC J8X 3G9

René David-Cooper
Rene.David-Cooper@otc-cta.gc.ca
Servicesjuridiques.LegalServices@cta-otc.gc.ca

**Counsel for the Respondent,
Canadian Transportation Agency**

APPEAL

With leave of the Court granted on December 20, 2023 in Court File No. 23-A-54, Canadian National Railway Company (“CN”) appeals to the Federal Court of Appeal from Decision No. R-2023-215 of the Canadian Transportation Agency (the “Agency”) dated October 27, 2023 in Case No. 23-27975 (the “Decision”).

THE APPELLANT ASKS that the Court:

1. Set aside the Decision of the Agency and issue the following orders:
 - (a) An Order remitting the matter back to the Agency to redetermine the 2022-23 volume-related composite price index in accordance with the reasons of this Court;
 - (b) An Order that the Agency, based on the new volume-related composite price index, redetermine the prescribed railway companies’ maximum grain revenue entitlement for crop year 2022-23 pursuant to the *Canada Transportation Act*; and,
 - (c) An Order that the Agency deduct in future crop years any revenues lost as a result of the redetermination of the maximum grain revenue entitlement, and determine the amount of such deduction;
2. Alternatively, set aside the Decision of the Agency and issue an Order that the Agency redetermine the section 32 application and apply the VRCPI as necessary;
3. Issue an Order, if necessary, pursuant to Rule 151 of the *Federal Court Rules* permitting the parties to file in this appeal certain documents confidentially;

4. Grant the Appellant the costs of this Appeal; and,
5. Such further and other relief as Counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

A. The Maximum Grain Revenue Entitlement and the Volume-Related Composite Price Index

1. Transport of western grain by rail is subject to regulation under the *Canada Transportation Act* (referred to in the Decision as CTA). In particular, the Agency must annually determine the maximum grain revenue entitlement (“MRE”), also known as the “**Revenue Cap**”, to which each railway company is entitled for a given crop year.
2. A crop year runs from August 1 to July 31. If CN exceeds its MRE for a particular crop year, it must pay all its surplus revenues above the MRE, as well as a penalty, to the Western Grains Research Foundation.
3. The Agency makes the final MRE determination in the December *following* the end of the relevant crop year. For crop year 2022-23 (August 1, 2022 – July 31, 2023), the MRE was decided on December 20, 2023.
4. The MRE is determined through a formula provided in the *Canada Transportation Act* and has several inputs. An important one of these inputs is the volume-related composite price index (“VRCPI”), which annually adjusts the level of the MRE for railway-related inflation. Unlike the MRE itself, the VRCPI must be determined by April 30 *in advance* of the relevant crop year. CN relies upon this determination to predict the MRE and to plan its activities and set grain transportation

prices accordingly. For crop year 2022-23, the VRCPI was decided on April 29, 2022.

5. Generally, a price index tracks the changes in the costs of a fixed basket of goods and/or services. A typical example is the consumer price index published by Statistics Canada, which measures price change by comparing, through time, the cost of a fixed basket of consumer goods and services. A composite index combines other indexes or averages. Typically, price indexes track historic prices and do not forecast future price changes.

6. Unlike other price indexes, the VRCPI is not a true price index in that it does not measure past performance of pricing in a particular section. Rather, the Agency calculates the VRCPI as a forecast of future prices. According to the Agency, this forecast is based on historical data, various other inputs obtained from the railway companies including actual historical cost of labour, cost of materials, cost of fuel, cost of capital, leased hopper cars, and amortization.

7. Although each railway company is required to provide its historical data to the Agency each year, the Agency ultimately makes its own determination based on (according to the Decision at paragraphs 5 and 14) alleged “well-established forecasting models which incorporate/rely primarily on forecasts by expert third parties”.

B. The Agency’s Forecast Errors for the 2022-23 Crop Year

8. On April 29, 2022, the Agency issued Determination No. R-2022-50 (the “2022-23 VRCPI Decision”), determining CN’s VRCPI forecast for crop year 2022-23. The Agency increased CN’s VRCPI by 11.99%. This increase consisted of a 4.55%

in forecasted price changes along with a 7.44% increase to reset the baseline following a large under-forecast in the 2021-22 VRCPI.

9. On April 27, 2023, the Agency issued Determination No. R-2023-91 (the “**2023-24 VRCPI Decision**”), which determined CN’s VRCPI for the next crop year, namely crop year 2023-24. The total increase to the VRCPI for 2023-24 was 12.11%. In addition to forecasted price changes of -0.08%, the Agency stated that a staggering 12.19% of its total forecast constituted revisions to the 2022-23 VRCPI to account for an earlier forecast error in the 2022-23 VRCPI Decision for the 2022-23 crop year.

10. For the second year in a row, the VRCPI forecast turned out to be substantially inaccurate due to unpredictable world events. The revisions to the VRCPI determined by the Agency are not retroactive.

11. Indeed, the Agency’s correction to its forecast in the 2023-24 VRCPI Decision was prospective only. It did not allow CN to recover revenues lost from the 2022-23 crop year. Nor did the Agency apply a “double correction” to allow CN to reclaim those revenues in the subsequent crop year.

12. In the 23-year history of the current regulatory regime, there had never been a VRCPI forecast error of such magnitude. The previous largest error was the 7.44% under-forecast for the 2021-22 crop year, referred to above. And before that, the largest error was an over-forecast of approximately 4.1% for the 2014-15 crop year.

13. On December 22, 2022, the Agency issued Determination No. R-2022-183, determining CN’s MRE for crop year 2021-22 (the “**2021-22 MRE Decision**”). The

Agency did not make any allowance for or correction to the 2021-22 VRCPI in making its MRE determination.

14. For the 2021-22 crop year, the 7.44% error led to approximately \$43.8 million of lost revenues to CN. Therefore, on January 20, 2023, CN applied to the Agency under section 32 of the *Canada Transportation Act* for review and variance of the 2021-22 VRCPI Decision (which only granted CN 0.50% increase in VRCPI) and 2021-22 MRE Decision. On April 25, 2023, the Agency refused that request, finding that the Revenue Cap scheme already provides a mechanism to address any discrepancy between the forecasted figures and the actual data by taking these differences into account in the following year's VRCPI determination. That decision is currently under appeal in Court File A-207-23 (the "**Companion Appeal**").

15. Anticipating that, as in the 2021-22 crop year, the Agency would not correct the VRCPI in making its MRE determination for crop year 2022-23, on May 26, 2023, CN applied to the Agency under section 32 of the *Canada Transportation Act* for review and variance of the 2022-23 VRCPI Decision given the significant new facts revealed by the 2023-24 VRCPI Decision.

C. The Decision under Appeal

16. On October 27, 2023, the Agency released the Decision, refusing CN's request for review and variance of the 2022-23 VRCPI Decision. In essence, the Agency held, among other things, that section 32 did not apply, because it would introduce unpredictability into the VRCPI process, there was no express mechanism to adjust the VRCPI for forecast discrepancies, and forecast discrepancies are not "changes in facts

or circumstances”.

17. On December 20, 2023, the Agency issued Determination No. R-2023-254, determining CN’s MRE for crop year 2022-23 (the “**2022-23 MRE Decision**”). As anticipated, the Agency did not make any allowance for or correction to the 2022-23 VRCPI in coming to its MRE determination. As a result, it found that CN had exceeded its MRE and ordered CN to pay the Western Grains Research Foundation \$3,630,836 consisting of \$3,457,939 in excess revenue and a \$172,897 penalty.

18. The effect of the Decision and the maintaining of the 2022-23 VRCPI, and forecast error, is that CN lost approximately \$131 million in revenues¹ for crop year 2022-23, as a direct result of the artificially low VRCPI and MRE. CN has also had to pay a penalty to the Western Grains Research Foundation that it cannot recover.

D. The Agency’s Errors of Law and Jurisdiction

19. In making its Decision, the Agency made several errors of law and jurisdiction.

(i) The Agency Improperly Restricted the Scope of Section 32 of the *Canada Transportation Act*

20. The Agency erred in law in how it interpreted section 32 of the *Canada Transportation Act*. More specifically, the Agency erred in improperly restricting the scope of section 32 in at least three ways.

a. *Section 32 is not Dependent on A Separate Adjustment Provision*

21. First, the Agency erred in law by narrowing the application of section 32 only to cases where there is an explicit provision in the *Canada Transportation Act*

¹ At the time of CN’s section 32 application, CN anticipated that its loss would be approximately \$134 million.

providing for the Agency to adjust its decision. Such a condition does not exist in section 32.

22. More specifically, the Agency erred by holding that section 32 could not apply because “there is no express mechanism to adjust the VRCPI for discrepancies between forecasts and actual prices”. This finding contradicts the language and intent of section 32.

23. Furthermore, this finding is diametrically opposed to the Agency’s decision in the Companion Appeal, in which it held that “the MRE program [Revenue Cap scheme] already provides a mechanism to address any discrepancy”. Both of these holdings cannot be correct.

b. Forecasts are not Excluded from the Scope of Section 32

24. Second, the Agency erred in law by excluding the application of section 32 because the VRCPI is a forecast. Section 32 does not include such a limitation.

25. More specifically, the Agency erred in concluding that “[d]ifferences between a forecasted price and an actual price are simply to be expected and ultimately, these are captured in the VRCPI for the subsequent crop year.” This interpretation is inconsistent with the statute, past jurisprudence, and the Agency’s published guidance.

26. Nowhere in the *Canada Transportation Act* or the provision itself is it contemplated that section 32 should not be used to vary forecasting matters. Had Parliament intended that section 32 be limited to certain kinds of reviews, it would have included such language. Since it did not, it follows that importing such a restriction as

the Agency has done is inconsistent with the scheme of the *Canada Transportation Act*. The whole point of section 32 is to allow for the adjustment of decisions when unpredictable events occur.

27. Furthermore, the Agency relied on its finding in the 2023-24 VRCPI Decision that the price differential was “unexpected” to hold that similar discrepancies could occur again. However, it failed to consider the consequence of those findings in whether there was a change in facts or circumstances taking it beyond the expected margin for error.

c. Reduced Predictability was not a Valid Reason to Refuse to Apply Section 32

28. Third, the Agency erred in law by refusing to apply section 32 on the basis that to do so would reduce predictability for all stakeholders.

29. The Agency misconstrued the nature of CN’s application. CN did not argue that every VRCPI forecast error should be subject to adjustment, but only those where the error is significant and the result of unpredictable events. It was open to the Agency under section 32 to grant a variance in respect of this application while leaving open the possibility of denying it in cases where the forecast discrepancy is within the historical error margin.

30. Furthermore, CN recognized in its submissions that any correction could not realistically be applied during the 2022-23 crop year, and it accordingly asked the Agency to deduct any correction against future crop years. The Agency failed to consider whether a future deduction would resolve its stated concern with predictability since the impact of its decision would only be felt in the subsequent crop years.

31. Furthermore, there was no evidence before the Agency (seeing as CN did not make any submissions on this and there were no other parties) regarding the general impact of VRCPI variances on shippers or other stakeholders, nor about the potential number of applications that might result. As set out above, there is no reason why allowing CN's application would necessarily weaken the Revenue Cap scheme.

32. Put another way, there is no reason in principle why VRCPI decisions would necessarily devolve into a "series of interim decisions", and there was no evidence before the Agency that this would, in fact, take place. It is not clear on what material the Agency based this finding.

33. Third, the Agency found that shippers would be unlikely to bring section 32 applications, but in doing so ignored that shippers and railway companies are not in equivalent positions under the *Canada Transportation Act*. Shippers are not subject to a Revenue Cap. Therefore, shippers are not subject to disgorgement or penalties for exceeding the cap if the VRCPI is set too low. The position is different for CN, which must pay its suppliers at market rates but cannot charge higher prices or otherwise recoup its losses. CN is effectively squeezed between the inflated prices and the artificially low Revenue Cap.

(ii) The Agency Improperly Restricted the Scope of section 112 of the *Canada Transportation Act*

34. The Agency erred in law in misinterpreting section 112 of the *Canada Transportation Act*. Section 112 provides that a rate or a condition established by the Agency must be "commercially fair and reasonable to all parties". This provision applies to the Revenue Cap scheme by virtue of section 148.

35. More specifically, the Agency erred when it concluded that it could only evaluate whether the effect of the 2022-23 VRCPI Decision is “commercially fair and reasonable” through a formal costing review, for which there was no authority under the *Canada Transportation Act*.

36. Before the Agency, CN submitted that if the 2022-23 VRCPI Decision is left uncorrected, it prevents the operation of normal market forces, and artificially depresses rates, such that they are not commercially fair and reasonable to CN pursuant to section 112 of the *Canada Transportation Act*.

37. In finding that the only way to ensure fairness and reasonableness is through a costing review and foreclosing the possibility of examining the VRCPI pursuant to section 112 of the *Canada Transportation Act*, the Agency misinterpreted section 112 and erred in law.

38. Costing reviews were part of the historic regulation of western grain, under the *Western Grain Transportation Act*, but were repealed with the passage of the *Canada Transportation Act*.

39. However, Parliament chose to keep section 112. In fact, Parliament specifically provided in section 148 of the *Canada Transportation Act* that section 112 applied to Division VI which concerns the Revenue Cap. Therefore, as a matter of statutory interpretation, section 112 of the *Canada Transportation Act* must have an application to the Revenue Cap scheme that is independent of costing reviews. It is a governing principle which the Agency must consider when determining the VRCPI and MRE under the Revenue Cap.

40. A correct application of section 112 to the VRCPI would consider whether an unusually high variance from the forecast warranted a correction in order to ensure that the index – and thus the Revenue Cap – was “commercially fair and reasonable”.

(iii) The Agency Breached its Duty of Procedural Fairness to CN

41. The Agency breached CN’s procedural fairness rights by, among other things, failing to provide CN an opportunity to make submissions and failing to engage with CN’s submissions.

42. The Agency failed to give CN an opportunity to make submissions. As set out above, the Agency ultimately concluded, with no evidence, that varying its determinations involving forecasting matters would reduce predictability for stakeholders, but gave CN no opportunity to make submissions on this issue. Likewise, there was no evidence before the Agency that the VRCPI decision would, in fact, devolve into a “series of interim decisions”, and the Agency again gave no opportunity to CN to make submissions on this issue.

43. Furthermore, the Agency failed to engage with CN’s submissions that, among other things: (i) in practice, forecast errors do not balance out over time, particularly when the error is large; (ii) because the Agency does not make a “double correction” when it addresses a forecast error in the subsequent crop year, any revenue lost due to an under-forecast cannot be recovered; and (iii) any correction to the VRCPI should be deducted against future years (thereby reducing or removing any predictability concerns).

E. Present Appeal to be Heard with Appeal in Court File No. A-207-23

44. In accordance with the Court's Order granting leave to appeal dated December 20, 2023 (in Court File No. 23-A-54), this appeal is to be heard together with the appeal in Court File No. A-207-23 (Companion Appeal).

F. Confidentiality of Documents

45. CN anticipates that the certified tribunal record will include documents, such as forecasts, that include confidential CN data. The public disclosure of such data would grant competitors an unfair advantage. Should such documents be disclosed, CN seeks an order granting confidentiality over those documents for the purposes of this appeal.

46. CN intends to rely on:

(a) the *Canada Transportation Act*, S.C. 1996, c. 10, including sections 32, 41, 112, 147, 150 and 151; and

(b) the *Federal Courts Rules*, SOR/98-106.

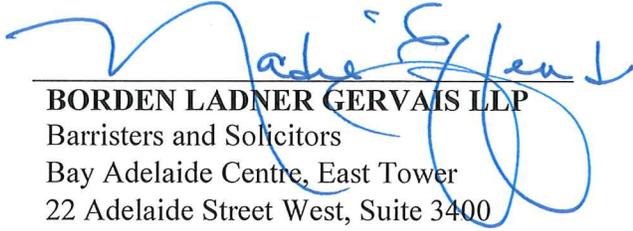
47. Such further and other grounds as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE that the appellant, CN, requests pursuant to Rules 317 and 350 of the *Federal Courts Rules*, copies of all material relevant to this appeal that are in the possession of the Agency, including:

- (a) all the documents, reports, working papers prepared, used, considered by the Agency, or otherwise provided to the Agency (either by its staff or others) for the purpose of the Decision (Decision No. R-2023-215);
- (b) all the evidence or documents on which the Agency based its findings, at paragraphs 24 to 27 of the Decision, that “varying [the VRCPI] reduces predictability for all stakeholders in the MRE program and could undermine the fairness of that program”;
- (c) all the “forecasts”, the “forecasting models” and “the best data available at the time of determination” referred to at paragraphs 5 and 14 of the Decision used by the Agency to calculate the “forecasted figures for the various key price components” of the VRCPI forecasts;
- (d) all the “expert third party forecasts available at the time of determination” referred to at paragraphs 5 and 14 of the Decision on which the forecasting models rely and are incorporated therein and used by the Agency to prepare the VRCPI forecasts; and
- (e) all the evidence or documents on which the Agency based its findings, at paragraph 18 of the Decision, that “It is possible that similar discrepancies could occur again in future to the benefit or detriment of the railway companies or shippers, given the volatility of fuel pricing, the possibility of economic downturns and the effect on commodity pricing of climate change and unexpected world events”, which appears to incorporate the finding in the 2023-24 VRCPI Decision that “Much of this year’s price

differential [...]is directly linked unexpectedly high fuel and related material costs in 2022”.

February 16, 2024



BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3
F: 416.367.6749

Nadia Effendi (LSO# 49004T)
neffendi@blg.com
T: 416.367.6728

Benedict Wray (LSO# 69786W)
bwray@blg.com
T: 613.787.3570

Lawyers for the Appellant, Canadian
National Railway Company

to copy and a true copy of
the original is to be filed in the Court on the
day of _____ 2024
Signed this _____ day of _____ 2024

KONTA CORPORATION

[Handwritten signature]

I ~~HEREBY CERTIFY~~ that the above document is a true copy of
the original ~~issued out~~ of / filed in the Court on the _____

day of FEB 16 2024 A.D. 20 _____

Dated this _____ day of FEB 16 2024 20 _____

[Handwritten initials]

**KYLA CHISHOLM
REGISTRY OFFICER
AGENT DU GREFFE**