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Client Update

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Legal Update: Supreme Court Decision has Repercussions on Rail Shipper Remedies

On May 23, 2014 the Supreme Court of Canada ("**Court**") issued a judgment clarifying the availability and scope of the section 120.1 remedy found under the *Canada Transportation Act* ("**Act**"), which provides for complaints by shippers against unreasonable charges and terms incidental to the movement of goods by rail.[1]

The Court's judgment in *Canadian National Railway Co. v. Canada (Attorney General)* was an appeal of the Governor in Council's decision brought by Canadian National Railway Co. ("**CN**"), and opposed by Peace River Coal Inc. ("**PRC**"), the Canadian Industrial Transportation Association, and the Government of Canada.[2]

This decision is significant for three reasons:

1. Firstly, the Court discussed the overall railway policy environment and found that section 120.1 was enacted to "rebalance" the legislative framework in favour of shippers. The Court found that without section 120.1, shippers had limited recourse to challenge incidental or ancillary charges established unilaterally by the railway companies. Most importantly, the Court concluded that section 120.1 forms part of the partial "re-regulation" in the rail sector after two decades of deregulation. Section 120.1 was created in part because rail services "are not provided in a perfectly competitive marketplace" and because "railway companies were seen to have superior market power to shippers." The Court's language is a powerful recognition of the current state of the rail shipment industry and provides a strong policy rationale for future shipper complaints;

2. Secondly, the Court reviewed the powers of the Governor in Council ("**GIC**") and found that under section 40 of the Act the federal Cabinet of Ministers has broad authority to address any orders or decisions of the Agency, including those involving questions of law. The limitations found under section 41 (the right to appeal to Federal Court of Appeal) are not found under section 40 and Parliament did not intend to limit the GIC's authority. The right of appeal to the GIC through section 40 can be seen as a continuation of the reviewing powers which were put in place in 1903 when the GIC began its role as a reviewing body with the power to vary or rescind decisions of the Board or Railway Commissioners, the Agency's precursor; and

3. Thirdly, the Court clarified the issue of standing under the section 120.1 remedy. The Court concluded shippers have standing to bring complaints to the Canadian Transportation Agency ("Agency) in relation to unreasonable charges or terms found in tariffs, including tariffs incorporated by reference under a confidential contract between the railway and the shipper. The judgment therefore makes it easier for shippers to bring section 120.1 complaints relating to unreasonable charges and terms and conditions. By extension, the finding

[1] *Canada Transportation Act*, S.C. 1996, c. 10 ("Act")

[2] *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40. The judgment concerns an appeal from the Governor in Council's decision, brought under section 40 of the Act, to overturn a decision by the Canadian Transportation Agency.

highlights the importance for shippers of properly drafting confidential contracts to ensure that shippers are able to take advantage of this favourable ruling.

Impact of the Court's Judgment on Common Industry Practices

Rail carriers and shippers of goods by rail often enter into confidential contracts pertaining to the rates to be charged for the movement of goods. These confidential contracts may set out rebates from the railway company's tariff rates, provide for terms and conditions relating to the traffic to be shipped and the manner in which the railway company must fulfill its service obligations. Confidential contracts provide a flexible alternative to the tariffs issued and published by the railway company which apply to all shippers which have not entered into a confidential contract, or which apply when a confidential contract expires. Confidential contracts commonly include a term which incorporates by reference all of the railway's tariffs covering ancillary and incidental charges.

A section 120.1 complaint (brought on the grounds that any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services found in a tariff applicable to more than one shipper are unreasonable) could result in the Agency issuing an order forcing the railway company to immediately vary its tariff.

The circumstances under which the Agency can inquire into the reasonableness of a term or charge are:

- the shipper bringing the complaint must be subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services;
- the charges must be found in a tariff which applies to more than one shipper; and
- the tariff must not be one resulting from a final offer arbitration.

For the shipper to take full advantage of any benefit provided by the Agency's order, the confidential contract between the shipper and the railway should be properly drafted.

Section 120.1 does not apply to the rates for the movement of traffic from origin to destination; rather it applies to the wide variety of incidental or ancillary charges, including car cleaning fees, car storage fees, charges for weighing product, and demurrage. The Court also noted that section 120.1 may also apply to fuel surcharges, though this has yet to be confirmed at law and the question was left open for a future complaint before the Agency.

At any point during confidential contract negotiations, a shipper dissatisfied with the rate proposed by the railway company may submit the matter to the Agency for final offer arbitration under section 161 of the Act. The availability of final offer arbitration was not impacted by the Court's judgment.

Summary of Supreme Court of Canada's Decision

The appeal before the Court concerned a confidential contract between CN and PRC for the shipping of coal. The confidential contract incorporated by reference all of CN's applicable tariffs, rules and regulations, including a fuel surcharge tariff which imposed a fuel surcharge when the average monthly average price of highway diesel fuel passed the specified strike price.

PRC subsequently applied to the Agency under s. 120.1 of the CTA for an order stating that the fuel surcharge amount was unreasonable. The Agency dismissed the application on the ground that PRC was asking the Agency to amend its confidential contract, which the Agency said it did not have the jurisdiction to do. PRC and the Canadian Industrial Transportation Association, an industry association, filed an appeal to the GIC, as provided for under the Act.[3] The GIC rescinded the Agency's decision. In doing so, it found that the existence of a confidential contract does not bar a shipper from applying for a reasonableness assessment under s. 120.1(1). The GIC's decision was subsequently appealed at the Federal Court, the Federal Court of Appeal and, finally, before the Supreme Court.

The Supreme Court concluded that while the terms of a confidential contract are relevant to whether a shipper may benefit from any order made by the Agency, the existence of a confidential contract has no bearing on the issue of reasonableness of a charge in a tariff that applies to more than one shipper, and a shipper is not precluded from bringing a complaint. If the contract permits it, an Agency order may apply to the tariff incorporated by reference in the contract.

The judgment also helps reinforce the policy context under which the Act's remedies apply. The Court's conclusion that the remedies incorporated into the Act serve to "rebalance" the Act is helpful to shippers and may lead to more successful shipper complaints to the Agency, while also providing shippers with greater bargaining strength in their dealings with railways.

In combination with the recent legislative and regulatory actions brought by the government in the previous months, the Court, by upholding the GIC's decision, marks a new willingness on the part of government to curb excess railway market power.[4]

Conclusion

The judgment confirms the ability of shippers under confidential contracts to bring section 120.1 complaints to the Agency. Should any of the charges, terms and conditions to which it is subject be unreasonable, shippers may wish to seek relief.

[3] Act, section 40. While PRC could have sought leave to appeal to the Federal Court of Appeal pursuant to s. 41 of the Act (which provides for certain rights of appeal) it chose to pursue the s.40 appeal route by petition to the GIC.

[4] For a comprehensive overview of recent legislative and regulatory actions taken by the Canadian government earlier this year, please see previous client updates prepared by Conlin Bedard LLP (available online): "Rail Update - Government of Canada Issues Grain Transportation Order in Council" and "Client Update: Fair Rail for Grain Farmers".

Special care should be taken to benefit from this ruling in the drafting of any confidential contract.

Shippers who are unable to establish satisfactory rates, service levels, and other terms and conditions may submit the matter to final offer arbitration. In preparing final offer arbitrations, timing is of the essence and legal counsel should ideally be approached at least three months prior to the expiry of any confidential contract or the need for rail service.

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