Federal Court Cour fédérale

Date: 20251104

Docket: T-769-24

Citation: 2025 FC 1776

2025 FC 1776 (CanLII)

Ottawa, Ontario, November 04, 2025

PRESENT: Justice Andrew D. Little

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] In August 2019, Transport Canada issued a Notice of Violation to the applicant, Canadian National Railway Company ("CN") relating to two incidents in which trains failed to stop at STOP signals near Edmonton.

[2] CN applied for a review of the Notice, arguing that it had taken all reasonable steps to prevent the incidents. A review decision dated May 24, 2022, by a member of the Transportation

Appeal Tribunal of Canada (the "TATC") found that the cause of the incidents was human error (the "Review Decision").

[3] The Minister appealed to a three-member appeal panel of the TATC. It allowed the appeal against the Review Decision. In a decision issued March 5, 2024, the appeal panel found that CN had not demonstrated that it exercised due diligence to prevent the violations (the "Appeal Decision"): see *Canada* (*Minister of Transport) v Canadian National Railway Company*, 2024 TATCE 6.

[4] On this application for judicial review, CN requests that the Court set aside the Appeal Decision. CN submitted that the Appeal Decision was unreasonable under the principles set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[5] For the following reasons, the application is dismissed.

I. Events leading to this Application

[6] Section 17.2 of the *Railway Safety Act*, RSC 1985, c 32 (4th Supp) provides:

Compliance with certificate, regulations and rules	**Conformité avec les certificats, règlements et règles**
17.2 No railway company shall operate or maintain a railway, including any railway work or railway equipment, and no local	**17.2** Il est interdit à toute compagnie de chemin de fer d'exploiter ou d'entretenir un chemin de fer, notamment les installations et le matériel

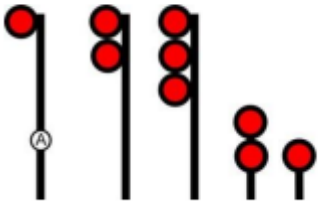
2025 FC 1776 (CanLII)

railway company shall operate railway equipment on a railway, otherwise than in accordance with a railway operating certificate and — except to the extent that the company is exempt from their application under section 22 or 22.1 — with the regulations and the rules made under sections 19 and 20 that apply to the company.	ferroviaires, et à toute compagnie de chemin de fer locale d'exploiter du matériel ferroviaire sur un chemin de fer, en contravention avec un certificat d'exploitation de chemin de fer, les règlements et les règles établies sous le régime des articles 19 ou 20 qui lui sont applicables, sauf si elle bénéficie de l'exemption prévue aux articles 22 ou 22.1.

2025 FC 1776 (CanLII)

[7] Rule 439 of the of the *Canadian Rail Operating Rules* includes the following image and statement:

439.



OPTIONAL: Unless required to clear a switch, crossing, controlled location, or spotting passenger equipment on station platforms, a movement not authorized by Rule 564 must stop at least 300 feet in advance of the STOP signal.

[8] Transport Canada issued a Notice of Violation to CN dated August 16, 2019. The Notice of Violation concerned two separate incidents that occurred in Alberta on October 25, 2018, and November 9, 2018. Both involved a failure by CN employees to stop a train as required by a STOP signal.

[9] In the Notice of Violation, Transport Canada identified two violations of Rule 439 of the *Canadian Rail Operating Rules* and section 17.2 of the *Railway Safety Act*, thereby violating section 40.13(1) of that statute, and assessed a monetary penalty of $58,666.08.

[10] CN applied to the TATC for a review of the Notice of Violation under section 40.16 of the *Railway Safety Act*. By decision dated May 24, 2022, the TATC dismissed the review. The Review Decision concluded that CN established the defence of due diligence by proving that the violations took place without CN's direction or approval; that CN exercised all reasonable care by establishing a proper system to prevent commission of the violations; and that CN took reasonable steps to ensure the effective operation of the system. The Review Decision found that the cause of the violations was human error on the part of the individuals involved, not deficiencies in the CN system.

[11] The Minister appealed to a three-person appeal panel of the TATC under section 40.19 of the *Railway Safety Act*.

[12] By decision dated March 5, 2024, the panel allowed the appeal. The appeal panel rescinded the Review Decision and upheld the Notice of Violation and administrative monetary penalty. The Appeal Decision concluded that the Review Decision was unreasonable. The Appeal Decision found that the Review Decision erred in law by failing to undertake a proper analysis of whether CN had exercised due diligence in light of heightened risks that existed at the time of each violation. The appeal panel concluded on the evidence that CN had not exercised due diligence to prevent the violations.

2025 FC 1776 (CanLII)

[13] CN now asks the Court to set aside the appeal panel's decision as unreasonable.

II. Legal Principles

A. *Standard of Review in this Court*

[14] I agree with the parties that the standard of review on this application is reasonableness: *Canadian National Railway Company v. Canada (Attorney General)*, 2025 FC 203 (*"CNR (2025)"*), at para 28; *Canadian National Railway Company v. Attorney General of Canada*, 2024 FC 1667, at para 13*; Canadian National Railway Company v. Canada (Attorney General)*, 2020 FC 1119 (*"CNR (2020)"*), at paras 70-72.

[15] Reasonableness review entails a disciplined and robust evaluation of administrative decisions: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63; *Vavilov*, at paras 12-13. The court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15.

[16] A reasonable decision is one "that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Mason*, at paras 8, 66; *Vavilov*, at paras 85, 99. The legal and factual contexts of the decision generally operate as constraints on the decision maker in the exercise of its delegated powers. Such constraints include the governing statutory scheme and relevant common law; the material evidence before the decision maker; and the central submissions of the parties: *Vavilov*, at paras

2025 FC 1776 (CanLII)

106, 115-124, 125-126, 131, 133; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2024 SCC 4, at para 17.

[17] If the decision maker gives reasons, they are the starting point for reasonableness review. The reviewing court considers both the reasoning process and the outcome: *Mason,* at para 58; *Vavilov,* at paras 83, 86. In addition, the reviewing court must read the reasons "holistically and contextually", in light of the record before the decision maker and with due sensitivity to the administrative regime in which the reasons were given: *Mason,* at paras 61, 91; *Vavilov*, esp. at paras 94, 97, 103.

[18] The Supreme Court's reasons in *Mason* underlined the importance of responsive justification in a decision maker's written reasons. If a decision maker fails to provide a responsive justification for its decision – that is, there has been a significant failure to account for or meaningfully grapple with a party's key issues or central arguments – a reviewing court may lose confidence in the reasonableness of the decision: *Mason,* at paras 10, 86, 97, 98, 118; *Vavilov,* at paras 127-128.

[19] A reviewing court does not consider whether the decision maker's decision was correct, or what the court would do if it were deciding the matter itself: *Pepa v. Canada (Citizenship and Immigration),* 2025 SCC 21, at paras 48, 147, 179; *Mason,* at para 62; *Vavilov,* at paras 15, 83; *Amer v. Shaw Communications Canada Inc.,* 2023 FCA 237, at paras 60, 64.

2025 FC 1776 (CanLII)

[20] To avoid engaging in a correctness analysis, a reviewing court must not reweigh or reassess the evidence considered by the decision maker. However, a reviewing court may intervene if it loses confidence in the decision because it was "untenable in light of the relevant factual … constraints". The court may intervene if the decision maker fundamentally misapprehended the evidence, failed to account for critical evidence in the record that runs counter to a material conclusion, ignored evidence, or if there was no evidence to rationally support a finding: *Mason*, at para 73; *Vavilov*, at paras 101, 126 and 194; *Kahkewistahaw First Nation v. Canada (Crown-Indigenous Relations)*, 2024 FCA 8, at paras 56-57; *Amer*, at para 62; *Maritime Employers Association v. Syndicat des débardeurs (Canadian Union of Public Employees, Local 375)*, 2023 FCA 93, at paras 116-117; *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(4)(d).

[21] In conducting reasonableness review, the reviewing court must "be attentive to the application by decision makers of specialized knowledge" and "institutional expertise and experience": *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, at para 18; *Vavilov*, at para 93; *CNR (2025)*, at para 42.

[22] In the present case, the statute creating the TATC requires that its members have expertise in the transportation sectors in respect of which the federal government has jurisdiction: *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29, subsection 3(1). Members sitting on a review must have expertise in the transportation sector to which the review relates: section 12. Apposite to the present application, subsection 13(4) provides that, with the exception of the Chairperson and Vice-Chairperson, an appeal shall be heard by an appeal panel

2025 FC 1776 (CanLII)

consisting of members who have expertise in the transportation sector to which the appeal relates.

B. ***Due Diligence Defence for Strict Liability Offences***

[23] The parties agreed that the Rule 439 and section 17.2 of the *Railway Safety Act* were strict liability offences, in response to which CN could show it was not liable because it exercised due diligence to prevent the violations.

[24] CN did not dispute that the two CN trains did not stop as required by the *Canadian Rail Operating Rules* in both the October 2018 and November 2018 incidents. In other words, it admitted the conduct giving rise to the violations of the *Railway Safety Act* (the *actus reus*). Its position at the TATC was based on due diligence.

[25] In *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, the Supreme Court described the category of strict liability offences as follows, at p. 1326:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that [it] took all reasonable care. This involves consideration of what a reasonable [person] would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if [it] … took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.
>
> [Emphasis added.]

2025 FC 1776 (CanLII)

[26] At page 1331, Justice Dickson described the due diligence defence in strict liability matters:

> […] Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. […]
>
> [Emphasis added.]

[27] *Sault Ste Marie* also confirmed that the burden was on the defendant to show it exercised such due diligence: *Sault Ste Marie*, at pp. 1325-1326.

[28] Evidence presented to support a due diligence defence must relate to the specific violation or offence at issue in the case: *Violator no. 10 v. Canada (Attorney General)*, 2018 FCA 150, at para 62; *Office of the Superintendent of Bankruptcy v. MacLeod*, 2011 FCA 4, at para 33 (citing six cases from three provincial appeals courts). In *MacLeod*, the Federal Court of Appeal set out the following passage from *R. v. Raham*, 2010 ONCA 206:

> [48] The due diligence defence relates to the doing of the prohibited act with which the defendant is charged and not to the defendant's conduct in a larger sense. The defendant must show he took reasonable steps to avoid committing the offence charged, not that he or she was acting lawfully in a broader sense. […]

[29] These principles are well established: see *Ontario (Labour, Immigration, Training and Skills Development) v. Greater Sudbury (City)*, 2025 ONCA 329, at para 33; *R v Kal Tire*, 2020

2025 FC 1776 (CanLII)

ABCA 200, at paras 79-80; *R. v. Petro-Canada* (2003), 63 OR (3d) 219 (CA), at paras 26-27; *R. v. Rio Algom Ltd.* (1988), 66 OR (2d) 674 (CA), at p 684; *R. v. Gulf of Georgia Towing Co. Ltd.* (1979), 10 BCLR 134 (CA), at para 15.

2025 FC 1776 (CanLII)

[30] The Supreme Court confirmed principles relating to the due diligence defence as recently as 2023, in *R. v. Greater Sudbury (City),* 2023 SCC 28, at paras 48, 55, 60, 156. While *Greater Sudbury (City)* was a workplace health and safety case involving a statutory due diligence defence, the Court relied on decisions on the common law due diligence defence in strict liability offences in other areas of law: see paras 55 (citing *R. v. Gonder* (1981), 62 CCC (2d) 326)) and 60 (citing *R. v. Rio Algom Ltd.*, at p. 682; *R. v. Brampton Brick Ltd.* (2004), 189 OAC 44). The statutory due diligence defence required the accused to show that it took "every precaution reasonable in the circumstances". Consistent with the case law cited above, the Court's opinions confirmed that the evidence of due diligence applies to the specific circumstances of the alleged offence: see *Greater Sudbury (City),* at para 55 (adopting a passage from *Gonder*), 60, 156.

[31] These principles have also been confirmed in the present context of the *Canadian Rail Operating Rules* and notices of violation under the *Railway Safety Act*. In *Canadian National Railway Company v. Canada (Attorney General)*, 2024 FC 1297 ("*CNR (2024)*"), Justice Grammond stated:

> [19] The [TATC's] reasoning is consistent with the law governing the defence of due diligence in the regulatory context as laid out in *Sault Ste. Marie*. It stands to reason that evidence of due diligence must pertain to the period immediately prior to the offence. Likewise, the evidence must be sufficiently specific to the actual place where the offence happened. In other words, it is not enough to show the existence of a general policy if the policy was not actually implemented where and when the offence took place. CN

> does not challenge these requirements, which are amply supported by the case law: *Violator no 10 v Canada (Attorney General)*, 2018 FCA 150 at paragraph 62; [additional citations omitted].
>
> [Emphasis added.]

2025 FC 1776 (CanLII)

See also *CNR (2020)*, paragraphs 85, 95, 99-101; and *Canadian National Railway Company v. Canada (Attorney General)*, 2025 FC 203, at paras 54-55.

[32] A party wishing to rely on a due diligence defence has a heavy burden of proof – the party must go beyond showing an unintentional breach or one stemming from administrative errors and must show that it took all reasonable steps to avoid committing the specific infractions in question: *Violator no. 10*, at paras 61-62; *Macleod*, at paras 34-37. However, as this Court has confirmed, the requirement to demonstrate "all reasonable care" by establishing a proper system to prevent the commission of the offence and taking "reasonable steps" to ensure its effective operation, does not impose a standard of perfection: *Canadian National Railway Company v. Canada (Attorney General)*, 2025 FC 204, at para 62. As is sometimes stated by trial courts, the requirement is to take all reasonable steps, not all conceivable steps.

III. Analysis

[33] CN made numerous arguments to support its position that the appeal panel's decision was unreasonable under *Vavilov* principles. They may usefully be organized under two headings. The first concerns the appeal panel's application of the reasonableness standard to the review decision. The other concerns the appeal panel's own determination that CN did not exercise due diligence. I will analyze them in turn.

A. ***Did the Appeal Decision make a reviewable error in its application of the reasonableness standard to the Review Decision?***

[34] The Appeal Decision contained two sections. Under the heading "Appeal panel finding", it concluded that the Review Decision was unreasonable and had to be set aside. Then, under the heading "Appeal panel assessment and finding on due diligence", the appeal panel explained why it concluded that CN did not take all reasonable steps to avoid the violations in light of the heightened safety risks. CN's first argument principally concerned the first section.

[35] CN submitted that the TATC appeal panel erred in its application of the reasonableness standard by deciding the matter itself rather than deciding whether the Review Decision was reasonable. By doing so, the applicant's written submissions argued that the appeal panel essentially engaged in a correctness review under the guise of reasonableness and failed to respect the factual findings in the Review Decision.

[36] At the hearing, the applicant contended that the Appeal Decision erred in its application of the reasonableness standard by misstating CN's position, misapprehending what the Review Decision actually decided, failing to defer to the Review Decision's factual findings, and finding errors of law in the Review Decision where there were none.

[37] There is no merit in CN's position that the Appeal Decision made a reviewable error by applying a correctness standard rather than a reasonableness standard of review. The appeal panel's reasons set out a statement about the reasonableness standard of review from *Vavilov*, the parties' agreement that the reasonableness standard applied, and that it found the decision

2025 FC 1776 (CanLII)

unreasonable. The Appeal Decision found that the Review Decision failed to address a key issue raised by the Minister. It also found the Review Decision made errors of law by failing to address a principle of the *Railway Safety Act*, failing to follow due diligence legal principles, and reversing the onus on due diligence. The Appeal Decision concluded that the Review Decision lacked justification and transparency, and that its rationale failed to meaningfully address the key issues raised by the parties. Thus, it is apparent from the reasons that the Appeal Decision demonstrably considered and applied the principles of reasonableness review relating to legal constraints and responsiveness: see *Vavilov*, at paragraphs 12-13, 108, 112, 127-128; *Mason*, at paras 10, 74, 85.

2025 FC 1776 (CanLII)

[38] The Appeal Decision described the due diligence defence in *Sault Ste Marie*, a description not challenged by CN on this application. Referring to this Court's decision in *CNR (2020)*, the Appeal Decision stated that "what is meant by 'reasonable care' requires clear and specific evidence relative to an offence in question as opposed to general statements or descriptions about corporate policy or plans" (at paragraph 52).

[39] The Appeal Decision found that the Review Decision made several errors:

a) the Review Decision erred by failing to do a complete analysis of the specific circumstances when it determined that the operating errors (failures to stop) were attributable to employee error. The Appeal Decision stated that the review panel failed to address a "key and underlying principle" in the *Railway Safety Act*, namely the "need for effective and ongoing safety management and the existence of specific, clear and concrete risk prevention systems in principle and in

practice". The Appeal Decision found it was incumbent on the review member to determine whether or not CN had taken all reasonable steps to ensure the efficient operation of its safety systems;

b) the Review Decision erred by failing to look at the specific systems that existed to deal with an extenuating circumstance in October/November 2018 at the CN Edmonton yards. The Appeal Decision found that there was a "situation of elevated risk" and therefore a "need for elevated precaution"; and

c) the Review Decision erred by failing to go on to address or assess CN's preventative systems to deal with the operating personnel shortage prevailing at the time of the two incidents, as part of the railway company's "ongoing obligation to manage safety-related risks effectively" (quoting from the Minister's written argument on appeal). The Appeal Decision found that the Review Decision's failure to address this point was "critical" and the foundation of the Minister's case. The Review Decision "effectively presume[d] that CN was duly diligent, thereby placing the onus on the Minster to disprove it" which the Appeal Decision found was an error of law.

[40] In my view, this analysis in the Appeal Decision did not contain a reviewable error.

[41] First, I find no legal error in the appeal panel's analysis of the Review Decision. The Appeal Decision respected the legal constraints in the applicable case law on due diligence. The Appeal Decision recognized the *Sault Ste Marie* principles, including that a proper due diligence

2025 FC 1776 (CanLII)

analysis required a review of the "specific" aspects of CN's system to deal with the "extenuating circumstances" that existed at the time of violations at issue in the Notice of Violations. The Appeal Decision identified the extenuating circumstances that existed in the Edmonton area at the time (staff shortages) which had also been recognized by the Review Decision (at paras 45-47). The Appeal Decision found that there was elevated risk at the material times and therefore CN had to take elevated precautionary steps. These findings are all consistent with a proper due diligence analysis: see *Violator no. 10*, at para 62; *MacLeod*, at para 33; *Raham*, at pars 48; *CNR (2024)*, at para 19. The Appeal Decision found that the Review Decision did not go on in its analysis to address CN's preventive systems and effectively presumed that CN was duly diligent, which reversed the onus. This analysis was also consistent with the principles in the applicable due diligence cases: see e.g., *Sault Ste Marie*, at pp. 1325-1326; *Petro-Canada*, at paras 26-27.

[42] Second, the appeal panel did not have an unreasonable understanding of the Review Decision that led to an error in the Appeal Decision, as CN argued.

[43] The Review Decision concluded that CN had established a proper system to prevent the commission of the violations and that it took reasonable steps to ensure the effective operation of the system. In its assessment of the latter issue, the Review Decision analyzed the "root causes of the violations" and found that both incidents were attributable to human error (at paras 56, 59-60). On the second incident, the Review Decision found that the decision to ignore the need to prepare to stop the train was not due to any stress put on the employees by CN to train a new employee or any unfamiliarity with the area they were operating in or the jobs they were hired and trained to do. The Review Decision found that CN had taken reasonable steps to ensure the

2025 FC 1776 (CanLII)

effective operation of the system and did not accept the Minister's position on the root cause of the incident – the cause was human error, "not deficiencies in the CN system".

[44] Given the contents of the Review Decision, the Appeal Decision did not misapprehend its findings. Rather, it found that the analysis in the Review Decision was incomplete and did not address the true due diligence issue at stake – whether, in the specific circumstances, CN took all reasonable steps to prevent the occurrence of the events constituting the violations. The Review Decision's conclusions relating to human error did not answer the question of whether CN took all reasonable steps to avoid the particular events in question, so it was open to the appeal panel to conclude that the Review Decision erred in law by failing to do so.

[45] Third, having reasonably concluded that the review panel made reviewable errors in its decision, the Appeal Decision conducted its own assessment and determination on due diligence. It made no reviewable error by proceeding to do so. An appeal under the *Transportation Appeal Tribunal of Canada Act* is an appeal "on the merits" based on the record of the proceedings before the member from whose determination the appeal is taken (although the appeal panel may hear evidence not previously available): section 14. In addition, an appeal panel of the TATC is expressly authorized by the *Railway Safety Act* to substitute its own decision when it allows an appeal. Subsection 40.19(3) of the *Railway Safety Act* provides:

Disposition of appeal	**Sort de l'appel**
40.19(3) The appeal panel of the Tribunal assigned to hear an appeal may dispose of the appeal by dismissing it or by allowing it and, in allowing the appeal, the panel may substitute its decision for the	40.19 (3) Le comité du Tribunal peut rejeter l'appel ou y faire droit et substituer sa propre décision à celle en cause.

2025 FC 1776 (CanLII)

determination.

[46] Accordingly, I conclude that CN has not demonstrated that the Appeal Decision contained a reviewable error when it intervened to set aside the Review Decision.

[47] In reaching this conclusion, I express no opinion on whether reasonableness remains the proper standard of review on an appeal to the TATC following the Supreme Court's decision in *Vavilov*. As I understand it, the parties and the TATC all agreed in this case that reasonableness was the applicable standard, and it was not raised as an issue in this Court.

B. *Did the Appeal Decision unreasonably determine that CN had failed to exercise due diligence?*

[48] CN submitted that the Appeal Decision made reviewable errors in its assessment of due diligence.

[49] CN's submissions began with two related legal arguments. CN argued first that the Appeal Decision erred by failing to articulate or identify the standard of care it had to meet (citing *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 SCR 132, at para 80) and by failing to determine whether CN fell below that standard on the facts. CN argued that the Appeal Decision should have concerned itself with what could have prevented the human errors that caused the violations and whether CN took those steps.

[50] Second, CN contended that on this application, the Court should apply a correctness standard of review to the Appeal Decision's "articulation and identification of the standard of

2025 FC 1776 (CanLII)

care", as this issue concerns a question of law central to the legal system as a whole. CN argued that the issue of whether a regulatory tribunal is required to identify the standard of care is a question of law, because in all cases involving a defence of due diligence, the decision maker must consider whether the required standard of care was met on the legal standard applicable to due diligence which applies to all strict liability offences.

2025 FC 1776 (CanLII)

[51] I do not agree with CN's position.

[52] First, the presumptive standard of review to be applied by a reviewing court is reasonableness: *Vavilov*, at para 23. The court will derogate from that presumption only if there is a clear indication of legislative intent, or if correctness review is required by the rule of law: *Vavilov* at paras 10, 69. CN did not suggest any legislative intent that correctness should apply.

[53] I agree with CN that one exception to the presumptive reasonableness standard (when correctness is required by law) is on general questions of law central to the legal system as a whole. However, such questions are few and far between. The Federal Court of Appeal has noted that this exception to reasonableness review is very narrow and seldom applies: *Shoan v. Canada (Attorney General)*, 2020 FCA 174, at para 9 (referring to *Vavilov*, at paras 58-62).

[54] The mere fact that a question, when framed in a general or abstract sense, touches on an important issue, is not sufficient to fall within the exception: *Vavilov*, at para 60-61; *Zoghbi v. Air Canada*, 2024 FCA 123, at para 39; *Portnov v. Canada (Attorney General)*, 2021 FCA 171, [2021] 4 FCR 501, at para 14. The question of law must be of "'fundamental importance and

broad applicability', with significant legal consequences for the justice system as a whole or for other institutions of government", and must require a single determinative answer: *Vavilov*, at paras 53, 59, 62. The Supreme Court has held that the proper interpretation of a paragraph of a statute, when the issues raised were particular to the interpretation of it, is not such a question (*Mason*, at para 47, consistent with *Vavilov*, at paras 115-124). The examples of questions provided in *Vavilov* that require correctness review were: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process; the scope of the state's duty of religious neutrality; the appropriateness of limits on solicitor-client privilege; and the scope of parliamentary privilege: *Vavilov*, at para 60.

2025 FC 1776 (CanLII)

[55] In this case, the question identified by CN is the appeal panel's "articulation and identification of the standard of care". However, in my view, the "real essence" of the issue that arises here (*Portnov*, at para 15) is whether the Appeal Decision properly articulated and identified the constraints in the due diligence case law emanating from *Sault Ste Marie*. Reasonableness review applies to that issue: *Vavilov*, at para 112.

[56] While it may be important to appreciate the foreseeable risks and potential harm that could arise in the specific circumstances in order to determine whether a defendant's established due diligence system was effective, I am not convinced that the appeal panel was required in law to articulate a standard of care *per se* in order to render a decision on the defence of due diligence. Specifically, it is doubtful that the Appeal Decision was required to set out a generalized standard of care and then measure CN's acts and omissions against that standard: see

CNR (2024), at para 32 (citing *R v Gold Range Investments Ltd*, [1995] NWTR 264 (CA) at para 10).

[57] In my view, the present case does not raise a question of law central to the legal system as a whole that requires a singular determination, as contemplated by the Supreme Court cases. In the context of a defence of due diligence for a strict liability offence, the "articulation and identification of the standard of care" does not have the characteristics of the questions of law to which correctness review applies.

[58] Second, in *CNR (2024)*, Grammond J. stated:

> [28] CN first relies on the Supreme Court's statement, in *Fullowka v Pinkerton's of Canada Ltd,* 2010 SCC 5 at paragraph 80, [2010] 1 SCR 132 … that "the trial judge erred by failing to articulate the standard of care" to which the defendant was held. It may well be that, when giving reasons for a finding of negligence, a trier of fact will usually need to explain what the defendant should have done. However, this principle cannot be transposed to the present case, because the Tribunal never found that CN was negligent. Rather, the Tribunal found that CN, who had the burden of proof on this issue, failed to prove the facts that would be relevant to a defence of due diligence. This underscores the difference between a civil tort claim and a prosecution for a regulatory offence (or proceedings relating to an administrative monetary penalty). In a civil tort claim, the plaintiff bears the burden of proving that the defendant acted negligently. In contrast, in a regulatory prosecution, the defendant bears the burden of proving that it acted with due diligence (that is, not negligently). In the latter context, the defendant's failure to provide sufficient evidence (or any evidence) may result in a conviction without any positive finding of negligence and, consequently, without the need to articulate the standard of care.
>
> [Emphasis added.]

See also paragraph 35. The underlined reasoning applies to the present case.

2025 FC 1776 (CanLII)

[59] The Appeal Decision had to address due diligence in the specific circumstances of the two alleged violations – whether or not CN took all reasonable steps to avoid the violations.

[60] In my view, the Appeal Decision did so. As noted above, the Appeal Decision stated that the review panel failed to address a principle in the *Railway Safety Act* concerning the need for "effective and ongoing safety management" and the existence of "specific, clear and concrete risk prevention systems in principle and in practice". The Appeal Decision had earlier referred to the parties' submissions on paragraph 3(c) of the *Railway Safety Act* that, in the words of the decision, "stresses the importance of safety management systems in order to 'continuously manage risks related to safety matters' ".

[61] The Appeal Decision found that the review panel's analysis ended when it determined that the events were caused by employee error and that the Review Decision did not engage in a complete inquiry of the proper question when it assessed due diligence. The proper inquiry concerned whether CN took all reasonable steps to prevent the events that constituted the violations by creating a system to prevent the commission of the violations and by taking reasonable steps to ensure the effective operation of the system. For the first violation, the Appeal Decision found that there were heightened risk factors that CN either did not anticipate or did not assess. As a result, the Appeal Decision found that "[r]easonably", there was a prevailing extra duty on CN to properly manage the situation. CN did not adduce evidence to show that it exercised due diligence in the specific circumstances to prevent the violation. Similarly, for the second violation, the appeal panel found that there was a series of events that increased the operating risks beyond what the panel found was "normal". The Appeal Decision

2025 FC 1776 (CanLII)

found that apart from CN's macro system, which was comprehensive and effective, there was no reasonably effective treatment by CN of the "specific risk sequencing" that arose and existed at the time of the violation. Given the importance of paragraph 3(c) of the *Railway Safety Act* (which provides that one objective of the statute is to "recognize the responsibility of companies to demonstrate, by using safety management systems and other means at their disposal, that they continuously manage risks related to safety matters"), the appeal panel found that CN did not exercise all reasonable steps to prevent the violation.

2025 FC 1776 (CanLII)

[62] I also do not agree with CN that the Appeal Decision erred in law by failing to focus on what could have prevented the human errors that caused the violations and whether CN took those steps. Foreseeable human error must be considered in designing a proper due diligence system and ensuring its efficacy. Taking steps to prevent human error will very often be part of a well-designed and effective system, but it is only one part of that system: see *Violator no. 10,* at paras 61, 65; *R. v. Emil K. Fishing,* 2008 BCCA 490, at para 30; *Gulf of Georgia Towing,* at paras 13, 15; *R. v. Island Industrial Chrome Co. Ltd.,* 2002 BCPC 97, at paras 2, 9. In a different statutory context, see also the discussion in *R. v. Dofasco Inc.,* 2007 ONCA 769, at paras 8-9, 21-30 (leave to appeal dismissed, April 24, 2008, SCC No. 32414).

[63] The Appeal Decision was constrained to follow the legal requirements for due diligence. However, it was not constrained to focus (solely or principally) on the causes of the human errors in this case, and what could have prevented them. Indeed, an undue focus on human error and its causes may distract or deflect from an analysis of the proper question (i.e., whether a defendant took all reasonable steps to prevent the events that constituted the violation). That trap

did not ensnare the Appeal Decision in this case. It kept its gaze on the proper test for due diligence.

[64] CN advanced two other arguments with respect to due diligence.

[65] CN contended that the Appeal Decision failed to grapple with the relevant evidence and that the only reasonable conclusion was that it exercised due diligence to prevent the violations. CN maintained that the Appeal Decision contained fundamental factual errors, misconstrued or ignored evidence, and came to the wrong conclusion on due diligence. CN's submissions described the evidence of witnesses and exhibits entered during the hearing before the review panel. CN described how employees were trained and monitored and argued that it took all reasonable steps to guard against its employees being inexperienced and unfamiliar with local territory. According to CN, the Appeal Decision considered whether CN took all reasonable steps to avoid the violations, but it should have applied a deferential standard of whether there was "some evidence" to support the Review Decision's finding that CN took reasonable steps to prevent the violations and had established due diligence.

[66] In response to CN's position, the respondent also made detailed submissions to show that the Appeal Decision's analysis was sound in light of the evidence. The respondent referred to the Appeal Decision's findings on the first violation of heightened risks existing at the time of the alleged violations, that it was "not clear that anything was done by CN to adequately address this increased risk" and that there was "no evidence adduced by CN to show that there had been added steps to address the specific operating risks found to exist …" (at paragraph 64 of the

2025 FC 1776 (CanLII)

Appeal Decision). The respondent referred to the Appeal Decision's findings of the higher risks related to the second violation, and its conclusion that there was no effective treatment by CN of the specific risk that arose (at paragraph 71).

2025 FC 1776 (CanLII)

[67] The Court's role on this application is not to determine for itself whether CN exercised due diligence on the evidence in the record. The Court may only intervene if the Appeal Decision fundamentally misapprehended the evidence, failed to account for material evidence, or reached a conclusion that is not supported by the evidence. CN's submissions did not meet any of these requirements and were essentially a re-argument of its position on due diligence on the merits. It is not the Court's function to re-assess or re-weigh the due diligence evidence, particularly when reviewing a decision of a tribunal whose members are required by statute to have expertise in the specific transportation sector at issue: *Transportation Appeal Tribunal of Canada Act*, subsections 3(1) and 13(4). See similarly, *CNR (2025)*, at paras 41-42.

[68] The appeal panel had a statutory mandate, in allowing the appeal, to "substitute its decision for the determination" of the review panel: *Railway Safety Act*, subsection 40.19(3). The appeal panel decided that there were reviewable errors in the review panel's decision, including errors of law, and then proceeded to make its own decision. The errors in the Review Decision included a failure to complete a proper due diligence analysis, which the Appeal Decision carried out itself. As discussed above, it found an absence of evidence to support CN's due diligence defence in respect of heightened risk factors at the time of the alleged violations that had not been addressed by the Review Decision. When substituting its decision for the review panel's determination, the appeal panel was not required in law or constrained to defer to the Review

Decision's finding that CN had taken all reasonable steps to prevent the violations if there was "some evidence" to support it, as CN contended. To impose such deference would run counter to the words in subsection 40.19(3) and, in this case, turn the provision on its head.

2025 FC 1776 (CanLII)

[69] Finally, CN maintained that the Appeal Decision imposed a standard of perfection on CN, rather than the due diligence standard of "all reasonable steps". I cannot conclude that the Appeal Decision imposed a standard of perfection. CN characterized the Appeal Decision as finding that CN had insufficient safety systems because a violation occurred. In my view, that characterization of the appeal panel's reasons is not sustainable.

[70] CN also relied on the appeal panel's statement that it was "incumbent on the CN managers to anticipate and mitigate such [safety] risks on a situation-by-situation basis" which, according to CN, was an error of law because it "seemingly impl[ied] that CN must anticipate any and all risks that might arise." The appeal panel's statement referred to safety risks in situations such as the alleged violations when events created heightened risks. The statement confirmed the principle that heightened risks require heightened precautions, which did not impose a standard of perfection.

[71] I conclude that CN has not demonstrated that the Appeal Decision contained a reviewable error in its assessment of whether CN exercised due diligence to prevent the violations.

IV. Conclusion

[72] For these reasons, the application for judicial review must be dismissed.

[73] The parties agreed that the successful party should be awarded costs in the amount of $4,000. The Judgment will reflect that agreement.

2025 FC 1776 (CanLII)

JUDGMENT in T-769-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicant shall pay costs to the respondent fixed in the amount of $4,000, all-inclusive.

"Andrew D. Little"
Judge

2025 FC 1776 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

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2025 FC 1776 (CanLII)