Court File No.: A-

FEDERAL COURT OF APPEAL

B E T W E E N:

CANADIAN NATIONAL RAILWAY COMPANY

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 _____ Issued by _____
(Registry Officer)

Address of local office: 330 University Avenue
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APPEAL

With leave of the Court granted on June 23, 2023 in Court File No. 23-A-32, Canadian National Railway Company ("**CN**") appeals to the Federal Court of Appeal from Decision No. R-2023-88 of the Canadian Transportation Agency (the "**Agency**") dated April 25, 2023 in Case No. 23-04740 (the "**Decision**").

THE APPELLANT ASKS that the Court:

1. To set aside the Decision of the Agency and make the following orders:

    (a) An Order remitting the matter back to the Agency to redetermine the 2021-22 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 2021-22 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. An Order pursuant to Rule 151 of the *Federal Courts Rules* permitting the parties to file in this appeal certain documents confidentially;

3. Costs of this Appeal; and,

4. 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* ("***Act***"). In particular, the Agency must annually determine the maximum grain revenue entitlement ("**MRE**") 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 ("**WGRF**").

3. The Agency makes the final MRE determination in the December *following* the end of the relevant crop year. For crop year 2021-22, the MRE was decided in December 2022.

4. The MRE is determined through a formula provided in the *Act* and has a number of inputs: an important one being the volume-related composite price index ("**VRCPI**"), which annually adjusts the level of the MRE for 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.

5. The VRCPI is therefore a forecast, based on historical data, various other inputs obtained from the railway companies including cost of labour, cost of materials, cost of fuel, cost of capital, leased hopper cars, and amortization.

B. The Agency's Forecast Errors for the 2021-2022 Crop Year

6. On April 29, 2021, the Agency issued Determination No. R-2021-64 (the "**2021 VRCPI Decision**"), determining CN's VRCPI forecast for crop year 2021-22, and increasing it by 0.50%. This percentage turned out to be a significant under-forecast.

7. On April 29, 2022, the Agency issued Determination No. R-2022-50 (the "**2022 VRCPI Decision**"), which determined CN's VRCPI for the next crop year: crop year 2022-23. The total increase to the VRCPI for 2022-23 was 11.99%. The Agency stated

that 7.44% of that increase constituted "revisions" to the 2021-22 VRCPI to account for the earlier forecast error.

8. The Agency's correction to its forecast in the 2022 VRCPI Decision was prospective only. It did not allow CN to recover revenues lost from the 2021-22 crop year. Nor did the Agency apply a "double correction" to allow CN to reclaim those revenues in the subsequent crop year.

9. Until the time of the Decision, in the 22-year history of the current regulatory regime, there had never been a VRCPI forecast error of such magnitude. The previous largest error was an over-forecast of approximately 4.1% for the 2014-15 crop year.

10. On December 22, 2022, the Agency issued Determination No. R-2022-183, determining CN's MRE for crop year 2021-22 (the "**2022 MRE Decision**"). The Agency did not make any allowance for or correction to the 2021-22 VRCPI in making its MRE determination.

11. Therefore, on January 20, 2023, CN applied to the Agency under section 32 of the *Act* for review and variance of the 2021 VRCPI Decision and the 2022 MRE Decision given the significant and important new fact since these decisions.

C. <u>The Decision under Appeal</u>

12. On April 25, 2023, the Agency released the Decision, refusing CN's request for review and variance of the 2021 VRCPI Decision and the 2022 MRE Decision. In essence, the Agency held that:

(a) The factors which caused the large discrepancy between the original forecast were very difficult to predict and could occur again in the future;

(b) The under-forecast of 7.44% was not exceptional and CN had benefited from over-forecasts in the past, such as a 4.1% over-forecast in the 2014-15 crop year;

(c) CN did not lose revenue as (i) the error was corrected in the subsequent crop year, ignoring the fact that the correction is only to compensate CN for increased costs in the subsequent year and not the increased costs in

the crop year just ended, and (ii) errors balance out over time; and

(d) Because the MRE program allegedly provided an alternative mechanism to address discrepancies between forecasted figures and actual data by adjusting the VRCPI in the subsequent crop year, section 32 did not apply.

13. Because the Agency did not vary its 2022 MRE Decision, CN was ordered to pay $3,221,492 to the WGRF, consisting of $3,068,088 of excess revenues and a $153,404 penalty.

14. Furthermore, the effect of the VRCPI forecast error (and the subsequent refusal to correct it) is that CN lost approximately $43.8 million in revenues for crop year 2021-22, as a direct result of the artificially low VRCPI and MRE.

D. The Agency's Errors of Law and Jurisdiction

15. The Agency made several errors of law and jurisdiction in making its Decision.

(i) The Agency Added an Improper Restriction on Section 32 into the *Act*

16. The Agency erred in law when it concluded that section 32 of the *Act* did not apply because the MRE program "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". More specifically, by making this finding, the Agency erred in law by inserting an additional element to the test under section 32 that is inconsistent with the *Act*, the Agency's previous jurisprudence, and the Agency's published guidance. It also erred in law by refusing to accept the undisputed fact that the $43.8 million in lost revenues for crop year 2021-22 would never be recovered, even through the following year's VRCPI determination.

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

17. The Agency breached CN's procedural fairness rights in that, among other things:

(a) It failed to engage with CN's submissions by, among other things, finding that CN's submission was "misleading", not engaging with the submission

that 7.44% was exceptional and therefore would not balance out over time and not addressing CN's economic arguments;

(b) It failed to give adequate reasons for its Decision by, among other things, (i) finding without any explanation or analysis that section 32 of the *Act* did not apply because the MRE program somehow provided an alternative mechanism to address any discrepancy between the forecasted VRCPI figures and the actual data, (ii) not explaining how it was applying the test for review or reconsideration under section 32 of the *Act*, and (iii) not explaining how the VRCPI – an "inflation index" intended to account for the increased costs in the subsequent crop-year – can compensate CN for increased costs of the previous crop-year, nor how it would allow CN to recover "the amount paid to the WGRF"; and

(c) It failed to apply its own past case law, procedures and published guidance thereby breaching CN's legitimate expectations.

(iii) The Agency Erred in Interpreting the Test under section 32 of the *Act*

18. The Agency erred in law by failing to properly interpret both the "facts or circumstances" and the "sufficient magnitude" branches of the test under section 32. In so doing, it misapplied section 32 inconsistently with the statute, past jurisprudence, and the Agency's own published guidance.

19. The Agency erred in law in how it interpreted and applied the first part of the section 32 test, namely "a change in facts or circumstances", among other things, as follows:

(a) At no point in its Decision did the Agency state whether the events and price changes which caused the large discrepancy with the original VRCPI forecast, constituted a "change in the facts or circumstances". As such, the Agency did not apply the first branch of the section 32 test; and

(b) Alternatively, the Agency found that in the context of the VRCPI, a significant change to VRCPI inputs caused by unpredictable world events such as the war in Ukraine and the aftermath of the global COVID-19

pandemic did not amount to a "change in facts or circumstances" without any explanation nor justification.

20. Both of these errors involve the statutory interpretation of the term "change in facts or circumstances", as well as the VRCPI and MRE provisions, all of which are defined in the *Act*.

21. The Agency erred in law by misinterpreting and/or failing to apply the second branch of the section 32 test, namely whether the change is material or of "sufficient magnitude" to warrant review or variance, among other things, as follows:

(a) It failed to address whether the consequences that flowed from the forecast error both in terms of lost revenue, disgorgement and penalties, as well as the economic impact on CN, were of sufficient magnitude to warrant variance;

(b) Having found that there were significant unpredictable world events that led to the forecast error, the Agency did not consider whether the 7.44% discrepancy was of sufficient magnitude to warrant a variance; and

(c) It conflated the VRCPI forecast with the MRE program as a whole. CN did not submit that the MRE program was not commercially fair or reasonable. It submitted only that the original VRCPI forecast was commercially unfair and unreasonable because it was wrong by such a significant margin, such that it warranted variance under section 32. The Agency did not consider this at all in its Decision.

22. CN intends to rely on:

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

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

23. 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 documents, reports, working papers prepared, used, considered by the Agency, or otherwise provided to the Agency for the purpose of the Decision (Determination No. R-2023-88);

(b) the forecasting models referred to in the Decision (Determination No. R-2023-88), used by the Agency to prepare the VRCPI forecasts;

(c) the forecasting models and underlying data used to prepare the VRCPI forecasts set out in the 2021 VRCPI Decision (Determination No. R-2021-64) and the 2022 VRCPI Decision (Determination No. R-2022-50);

(d) the "series of regressions" used by the Agency as part of its forecasting and referred to in the 2021 VRCPI Decision (Determination No. R-2021-64);

(e) the methodology followed by the Agency in establishing its VRCPI forecasts for the 2021-22 and 2022-23 crop years;

(f) the "projections of historical trends" and "established labour contracts that extend into the future" used by the Agency as part of its forecasting and referred to in the 2021 VRCPI Decision (Determination No. R-2021-64);

(g) the "model based on the relationship of railway fuel prices and the price of crude oil" used by the Agency as part of its forecasting and referred to in the 2021 VRCPI Decision (Determination No. R-2021-64); and

(h) the data used by the Agency to determine that "Much of this price change is linked to recent world events" used by the Agency to determine the forecast correction as part of the 2022 VRCPI Decision (Determination No. R-2022-50).

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