

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Canadian National Railway Co. *v.* Canada (Attorney General), 2014 SCC 40, [2014] 2 S.C.R. 135 | **Date:** 20140523**Docket:** 35145 |

Between:

Canadian National Railway Company

Appellant

and

Attorney General of Canada,

Peace River Coal Inc. and

Canadian Industrial Transportation Association

Respondents

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**(paras. 1 to 69) | Rothstein J. (McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring) |

cn *v.* canada (a.g.), 2014 SCC 40, [2014] 2 S.C.R. 135

Canadian National Railway Company Appellant

v.

Attorney General of Canada,

Peace River Coal Inc. and

Canadian Industrial Transportation Association Respondents

**Indexed as: Canadian National Railway Co. *v.* Canada (**Attorney General)

2014 SCC 40

File No.: 35145.

2014:  January 14; 2014:  May 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

on appeal from the federal court of appeal

 *Administrative law — Transportation law — Boards and tribunals — Judicial review — Standard of review — Governor in Council rescinding decision of Canadian Transportation Agency — Whether Governor in Council empowered to vary or rescind decision of Agency — Whether applicable standard of review is correctness or reasonableness — Canadian Transportation Act, S.C. 1996, c. 10, ss. 40, 41, 120.1.*

 The confidential contract between PRC and CN for shipping coal specified that a fuel surcharge set out in Tariff 7402 would be applied when the monthly average price of highway diesel fuel equalled or exceeded the “strike price”. Tariff 7402 set the strike price at US$1.25 per gallon. CN could make unilateral changes to Tariff 7402, and the contract provided no mechanism for PRC to challenge any such change.

 Shortly after the confidential contract took effect, CN introduced Tariff 7403, which provided for a higher strike price. Tariff 7402 and its lower strike price would remain in effect until the expiration of those contracts to which it applied. CN refused to apply the higher strike price to PRC’s traffic, and the Canadian Transportation Agency (“Agency”) dismissed PRC’s application under s. 120.1 of the *Canada Transportation Act* (“*CTA*”) for an order that the strike price in Tariff 7402 be varied to reflect the higher strike price in Tariff 7403. The Canadian Industrial Transportation Association then filed a petition under s. 40 of the *CTA* requesting that the Governor in Council vary the Agency’s decision and direct the Agency that the confidential contract does not preclude the Agency from assessing the reasonableness of the fuel surcharge in Tariff 7402. The Governor in Council rescinded the Agency’s decision. On judicial review, the Federal Court found that the issue before the Governor in Council was one of pure jurisdiction, applied the correctness standard and set aside the Order of the Governor in Council, and restored the Agency’s decision. The Federal Court of Appeal, applying a reasonableness standard, set aside the judgment of the Federal Court and dismissed CN’s application for judicial review of the Governor in Council’s decision.

 *Held*: The appeal should be dismissed.

 Section 40 of the *CTA* confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. Where Parliament intends to limit the Governor in Council’s authority, it does so expressly, but the only inherent limitation on the authority conferred by s. 40 is that the Governor in Council’s authority is limited to matters already dealt with by the Commission. Limitations like those placed on the right to appeal a decision of the Agency to the Federal Court of Appeal or on the Governor in Council’s authority under other legislation are not found in s. 40.

 The *Dunsmuir* framework, which applies to administrative decision makers generally and not just to administrative tribunals, applies to adjudicative decisions of the Governor in Council made under s. 40, and the applicable standard of review is reasonableness. It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Parliament has recognized that the Governor in Council has particular familiarity in the area of economic regulation and transportation law and policy is closely connected to the Governor in Council’s review function. The presumption of deference applies and is not rebutted. Whether a party to a confidential contract can bring a complaint under s. 120.1 is a question of law which does not fall within one of the established categories of questions to which correctness review applies. There is no issue of constitutionality or competing jurisdiction between tribunals. The question at issue is not a question of central importance to the legal system as a whole. Finally, it is an issue of statutory interpretation and could not be a true question of jurisdiction or *vires* of the Governor in Council.

 The Governor in Council’s conclusion that a party to a confidential contract is able to bring a complaint under s. 120.1 in certain circumstances was reasonable. It is supported by the facts and the wording of s. 120.1(1). The conclusion that the existence of a confidential contract did not bar a shipper from applying for a reasonableness assessment under s. 120.1(1) is consistent with the terms of the *CTA*, which do not preclude the Agency from reviewing the reasonableness of a charge contained in a tariff applicable to more than one shipper, whether or not it is incorporated by reference into a confidential contract. In addition, it was open to the Governor in Council to conclude that Parliament’s intent in enacting s. 120.1 was to provide a measure of protection for shippers. Accordingly, without deciding whether in any particular case a confidential contract would preclude a shipper from relief under s. 120.1, leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with that intention. The Governor in Council’s interpretation of s. 120.1 was reasonable.

**Cases Cited**

 **Referred to:** *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Katz Group Canada Inc. v. Ontario (Health and Long‑Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

**Statutes and Regulations Cited**

*Broadcasting Act*, S.C. 1991, c. 11, s. 28.

*Canada Marine Act*, S.C. 1998, c. 10, ss. 52(2), 94(3).

*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O‑7, s. 51.

*Canada Transportation Act*, S.C. 1996, c. 10, ss. 40, 41, 120.1, 126, 161, 162(1), 165(1), (3).

*National Transportation Act*, S.C. 1966-67, c. 69.

*National Transportation Act, 1987*, S.C. 1987, c. 34, s. 120.

*Pilotage Act*, R.S.C. 1985, c. P‑14, s. 35(7).

*Railway Act*, S.C. 1888, c. 29, s. 11(*r*).

*Railway Act, 1868*, S.C. 1868, c. 68, s. 23.

*Railway Act, 1903*, S.C. 1903, c. 58.

*Telecommunications Act*, S.C. 1993, c. 38, s. 12.

**Authors Cited**

Canada. House of Commons. *Debates of the House of Commons of the Dominion of Canada*, vol. LVIII, 3rd Sess., 9th Parl., March 20, 1903, pp. 248 and 259.

Canada. House of Commons. *House of Commons Debates*, vol. XI, 1st Sess., 27th Parl., January 10, 1967, p. 11630.

Canada. House of Commons. Standing Committee on Transport, Infrastructure and Communities. *Evidence*, No. 2, 2nd Sess., 39th Parl., November 22, 2007, pp. 1‑2.

Canada. House of Commons. Standing Committee on Transport, Infrastructure and Communities. *Evidence*, No. 3, 2nd Sess., 39th Parl., November 27, 2007, pp. 1‑2.

Canada. Parliamentary Information and Research Service. Legislative Summary LS‑569E. “Bill C‑8: An Act to Amend the Canada Transportation Act (Railway Transportation)”, by David Johansen, Law and Government Division, November 2, 2007, revised June 27, 2008.

Canada. Transport Canada. *Freedom to Move: The Legislation: Overview of National Transportation Legislation 1986*. Ottawa: Transport Canada, 1986.

Coyne, H. E. B. *The Railway Law of Canada*. Toronto: Canada Law Book Co., 1947.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

 APPEAL from a judgment of the Federal Court of Appeal (Dawson, Gauthier and Stratas JJ.A.), 2012 FCA 278, 440 N.R. 217, [2012] F.C.J. No. 1438 (QL), 2012 CarswellNat 4527, setting aside a decision of Hughes J., 2011 FC 1201, 398 F.T.R. 218, [2011] F.C.J. No. 1469 (QL), 2011 CarswellNat 4297. Appeal dismissed.

 Guy J. Pratte, *Nadia Effendi* and Éric Harvey, for the appellant.

 Peter Southey and Sean Gaudet, for the respondent the Attorney General of Canada.

 Forrest C. Hume and Cynthia A. Millar, for the respondents Peace River Coal Inc. and the Canadian Industrial Transportation Association.

 The judgment of the Court was delivered by

 Rothstein J. —

1. Overview
2. In *The Railway Act, 1868*, S.C. 1868, c. 68, the Governor in Council was given the power to approve railway freight rates in Canada. In 1903, the regulation of freight rates devolved to the Board of Railway Commissioners and the role of the Governor in Council changed to that of a reviewing body with the power to vary or rescind decisions of the Board of Railway Commissioners. Section 40 of the *Canada Transportation Act*, S.C. 1996, c. 10 (“*CTA*”), continues this role for the Governor in Council to vary or rescind any decision or order of the Canadian Transportation Agency (“Agency”).
3. The questions at issue in this appeal centre on whether the Governor in Council was empowered to vary or rescind a decision of the Agency on a point of law. In my respectful opinion, the Governor in Council has such authority.
4. Facts
5. This appeal concerns a confidential contract between the Canadian National Railway Company (“CN”) and Peace River Coal Inc. (“PRC”). PRC operates a coal loading facility at Trend, British Columbia. The confidential contract, effective for the period from January 1, 2008 to June 30, 2010, was for shipping coal from Trend to Ridley Terminals in Prince Rupert, British Columbia.
6. The confidential contract incorporated by reference all applicable tariffs, rules and regulations. In particular, it incorporated “Fuel Surcharge Tariff CN 7402 series, supplements thereto or reissues thereof”, which provided for the addition of a mileage-based fuel surcharge to the base rate CN charged for carriage of freight. The surcharge would be applied when the monthly average price of highway diesel fuel equalled or exceeded a set price called the “strike price”. Tariff 7402 set the strike price at US$1.25 per gallon. CN and PRC both understood that, during the lifetime of the contract, CN could unilaterally make changes to Tariff 7402. The contract did not provide a mechanism for PRC to challenge any change to the Tariff unilaterally made by CN.
7. On February 21, 2008, CN advised its customers that, effective April 1, 2008, it would be introducing Tariff 7403, which provided for a strike price of US$2.30 per gallon. However, Tariff 7402 would remain in effect until the expiration of those contracts to which Tariff 7402 applied.
8. PRC asked CN to apply Tariff 7403 to PRC’s traffic as of April 1, 2008. CN declined this request.
9. On April 22, 2008, PRC applied to the Agency under s. 120.1 of the *CTA* for an order establishing a reasonable fuel surcharge to apply to PRC’s traffic. PRC requested that the Agency require CN to vary its charges in Tariff 7402 to reflect the charges in Tariff 7403; that is, that its rates for the movement of its coal from Trend to Ridley Terminals in its confidential contract could not be increased by a fuel surcharge until the strike price of US$2.30 per gallon was equalled or exceeded.
10. On motion by CN, the Agency dismissed PRC’s 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 did not seek leave to appeal to the Federal Court of Appeal, despite having the option to do so pursuant to s. 41 of the *CTA*, which provides for a right of appeal, on leave being obtained, on a matter of law or jurisdiction brought within one month of the Agency’s decision.
11. Six months after the Agency’s decision, the Canadian Industrial Transportation Association (“CITA”), a trade association representing the interests of shippers, filed a petition with the Governor in Council requesting a variance of the Agency’s decision pursuant to s. 40 of the *CTA*. PRC is a member of CITA. CITA asked the Governor in Council to direct the Agency that the confidential contract between PRC and CN does not preclude the Agency from assessing the reasonableness of the fuel surcharge in Tariff 7402. On June 10, 2010, the Governor in Council rescinded the Agency’s decision.
12. Relevant Statutory Provisions
13. The relevant statutory provisions are contained in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 40, 41 and 120.1 of the *CTA*.
14. Administrative Decisions
	1. The Decision of the Agency
15. CN brought a preliminary motion before the Agency, seeking to dismiss PRC’s application on two grounds: (1) the Agency did not have jurisdiction to amend the terms of a confidential contract under s. 120.1 of the *CTA* and (2) the fuel surcharge was part of the rate for the movement of traffic such that s. 120.1(7) would preclude review of the surcharge under s. 120.1 of the *CTA*.
16. The Agency found that PRC was seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.
17. Citing certainty and predictability of contract, the Agency found that the parties were bound by the contract and that it had no jurisdiction to change the terms of a contract under s. 120.1. The Agency did not find it necessary to go on to consider whether the fuel surcharge forms part of the rate for the movement of traffic within the meaning of s. 120.1(7). The Agency dismissed PRC’s application.
	1. The Decision of the Governor in Council
18. The Governor in Council rescinded the Agency’s decision. The Order in Council, P.C. 2010-749, stated that s. 120.1 of the *CTA* is a complaint-based regulatory remedy against unreasonable charges for the movement of traffic imposed by a railway company. Section 120.1 is aimed at benefiting all shippers subject to the charges in the challenged tariff rather than only benefiting the complainant. The complaint filed by PRC was for the benefit of all shippers subject to the charge contained in Tariff 7402, which applies to more than one shipper.
19. The Order in Council stated that the Governor in Council was of the opinion that, while the existence and terms and conditions of a confidential contract are relevant to whether PRC will benefit from an order made by the Agency under s. 120.1, the confidential contract had no bearing on the reasonableness of a charge in a tariff that applies to more than one shipper and is not a tariff referred to in s. 165(3) of the *CTA*.
20. Judicial History
	1. Federal Court of Canada, 2011 FC 1201, 398 F.T.R. 218
21. CN sought judicial review of the Governor in Council’s decision. Hughes J. set aside the Order of the Governor in Council and restored the Agency’s decision. Hughes J. characterized the issue before the Governor in Council as one of “pure jurisdiction” as it centred on the Agency’s jurisdiction over PRC’s application and determined that the applicable standard of review was correctness (para. 68).
22. Hughes J. found that PRC was seeking to have the fuel surcharge in the contract changed to reflect a different fuel surcharge. He also held that Tariff 7402 was part of the “rate” for the movement of traffic and was therefore exempt from review by the Agency on the basis of s. 120.1(7). The Agency had no power to vary a contract entered into by the parties and did not have jurisdiction to review rates which are covered by the s. 120.1(7) exemption. Although the Governor in Council has the authority to determine questions of law and jurisdiction, the decision of the Governor in Council to rescind the Agency’s decision was incorrect.
	1. Federal Court of Appeal, 2012 FCA 278, 440 N.R. 217
23. The Federal Court of Appeal set aside the judgment of the Federal Court and dismissed CN’s application for judicial review of the Governor in Council’s decision.
24. Applying a reasonableness standard, Dawson J.A. held that the decision of the Governor in Council was reasonable. She determined that “[t]he effect of the Governor in Council’s decision was to impugn the Agency’s factual determination that [PRC]’s application sought ‘an order requiring new fuel surcharge rates to apply to the confidential contract . . .’” (para. 43). The Governor in Council substituted its own view, which was that PRC’s application was for the benefit of all shippers. Dawson J.A. held that the characterization by the Governor in Council of the nature of PRC’s application to the Agency was a question of fact that carried a policy component. Accordingly, it was not necessary for the Federal Court of Appeal to consider whether the Governor in Council is a proper forum for determining questions of law and jurisdiction.
25. Dawson J.A. concluded that the specific remedy sought, together with the fact that s. 120.1 is “‘aimed at benefiting all shippers subject to the . . . challenged tariff’ provided a basis upon which the Governor in Council could reasonably conclude that [PRC]’s application ‘was for the benefit of all shippers subject to the alleged charge’” (para. 50). She held that the Governor in Council’s decision was supported by the evidence and fell within a range of outcomes defensible in respect of the facts and law. The decision was therefore reasonable. In addition, as the Agency declined to decide whether the fuel surcharge was part of the rate for the movement of traffic within the meaning of s. 120.1(7), the Federal Court judge sitting on judicial review erred by determining this issue, which remained a live issue before the Agency. The s. 120.1(7) issue was not a proper basis for setting aside the decision of the Governor in Council. Making the judgment that the Federal Court ought to have pronounced, the Federal Court of Appeal dismissed CN’s application for judicial review.
26. Issues
27. This appeal raises four issues:

(1) What was the nature of the question answered by the Governor in Council in this case?

(2) What is the scope of the Governor in Council’s authority under s. 40 of the *CTA*?

(3) What is the applicable standard of review?

(4) Does the Governor in Council’s decision withstand judicial review?

1. Background to the Regulatory Scheme
	1. Section 120.1 of the CTA
2. Section 120.1 was added to the legislation following a 2001 statutory review of the *CTA* and as part of amendments aimed at updating the legislative framework (Parliamentary Information and Research Service, Legislative Summary LS-569E, “Bill C-8: An Act to Amend the Canada Transportation Act (Railway Transportation)”, revised June 27, 2008, at p. 1). Shippers had expressed concerns about incidental or ancillary charges, applied over and above freight rates for the movement of traffic. Examples of such charges include those imposed for cleaning cars, storing cars, weighing product and demurrage, a charge imposed for taking longer than the permitted free time to load or unload a car. Unlike rates for the movement of traffic from origin to destination, which may be challenged through final offer arbitration, shippers had limited recourse to challenge incidental or ancillary charges established unilaterally by the railway companies (Standing Committee on Transport, Infrastructure and Communities, *Evidence*, No. 2, 2nd Sess., 39th Parl., November 22, 2007, at p. 2).
3. The amendments came as part of a move towards partial re-regulation in the rail sector after two decades of deregulation. Beginning with legislative reform in 1987 and continuing with further amendments in 1996, the goals of deregulation were to increase efficiency and improve service in the rail industry in Canada (Standing Committee on Transport, Infrastructure and Communities, *Evidence*, No. 3, 2nd Sess., 39th Parl., November 27, 2007, at pp. 1-2). Although deregulation was seen to achieve these aims, rail services were and are not provided in a perfectly competitive marketplace. In certain circumstances, the railway companies were seen to have superior market power to shippers. This superior market power of the railway companies, combined with the complaints of shippers over railway service and rates, led to Parliament’s efforts to respond to these concerns (Standing Committee on Transport, Infrastructure and Communities, November 22, 2007, at p. 1). As the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities explained: “I believe the time has come to rebalance the legislative framework in favour of shippers” (*ibid*., at p. 2).
4. In the context of this “rebalancing” in favour of shippers, s. 120.1 was introduced to provide a new remedy for shippers who are subject to unreasonable charges or associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper, other than a tariff resulting from a decision of an arbitrator in a final offer arbitration. It provides that, if, on complaint in writing to the Agency, the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may establish new charges or associated terms and conditions. Under s. 120.1(7), this complaint-based remedy does not apply to rates for the movement of traffic from origin to destination.
	1. Confidential Contracts
5. Under s. 126 of the *CTA*, carriers and shippers may enter into confidential contracts. A confidential contract may pertain to the rates to be charged by the railway company to the shipper, reductions or allowances pertaining to rates in tariffs, rebates or allowances pertaining to rates in tariffs or confidential contracts, any conditions relating to the traffic to be moved by the railway company and the manner in which the railway company shall fulfill its service obligations.
6. Confidential contracts were introduced in 1987 amendments to railway legislation (*National Transportation Act, 1987*, S.C. 1987, c. 34, s. 120). Parliament provided for confidential contracts in order to promote flexibility in negotiations between railway companies and shippers for rates and services (*Freedom to Move: The Legislation: Overview of National Transportation Legislation 1986* (1986), at p. 8). Confidential contracts provide an alternative to the historic requirement that a railway company could only charge a rate in respect of the movement of traffic if the rate was set out in a tariff that had been issued and published by the railway company.
7. Where a rate is not contained in a confidential contract, typically when a confidential contract expires, a shipper dissatisfied with the rate proposed by the railway company may submit the matter to the Agency for final offer arbitration (*CTA*, s. 161). The Agency itself does not conduct the final offer arbitration. Rather, if the parties do not agree upon the arbitrator or if no arbitrator is chosen, the arbitrator will be appointed by the Agency (*CTA*, s. 162(1)(*a*)). However, a party to a confidential contract cannot submit a matter governed by the confidential contract to the Agency for final offer arbitration unless the parties consent (*CTA*, s. 126(2)).
8. As the evidence in this case established, it is common railway industry practice to include a term in confidential contracts which incorporates by reference all of the railway’s tariffs covering ancillary and incidental charges (CITA petition, at para. 27, cited in Federal Court of Appeal reasons, at para. 38).
9. Analysis
	1. The Nature of the Question Answered by the Governor in Council
10. The Governor in Council rescinded the Agency’s decision. PRC argues, and the Federal Court of Appeal found, that the issue before the Governor in Council was predominantly fact-based and, in addition, carried a policy component. PRC submits that the Agency mischaracterized its application as it was not in fact seeking to have the Agency amend the terms of its confidential contract. Rather, PRC alleges that a finding by the Agency that the fuel surcharge in Tariff 7402 is unreasonable could result in an order from the Agency requiring CN to vary the fuel surcharge, such that a higher strike price would apply to shippers subject to Tariff 7402, including PRC. As I understand it, PRC’s position is that, because the confidential contract states that fuel surcharges would be subject to supplements or reissuances of Tariff 7402, any variance of the fuel surcharge would be incorporated by reference into the confidential contract by reason of the issuance of a supplement to or reissuance of Tariff 7402, without constituting an amendment to the contract. Accordingly, the Agency mischaracterized PRC’s application and the Governor in Council simply disagreed with the Agency in this regard — a question of fact that it says carried a policy component in light of the purpose of s. 120.1.
11. The Order in Council contained two key findings. First, the Governor in Council found that PRC’s complaint was for the benefit of all shippers subject to the fuel surcharge contained in Tariff 7402. Tariff 7402 applied to more than one shipper and was not a tariff referred to in s. 165(3) of the *CTA* (a tariff resulting from a decision of a final offer arbitrator). As these are the statutory conditions for bringing a complaint, PRC’s application met the requirements of s. 120.1 of the *CTA*.
12. Second, the Governor in Council stated that while the existence of a confidential contract between a railway company and a complainant and the terms and conditions of such contract are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, a confidential contract has no bearing on the reasonableness of the charge that is found in a tariff that applies to more than one shipper.
13. Having regard to these two findings, the Governor in Council determined that the Agency can hear a complaint brought by a party to a confidential contract under s. 120.1. The necessary implication of the Governor in Council’s key findings is that, where an applicant meets the statutory requirements of s. 120.1(1), the Agency must consider the reasonableness of the charge, notwithstanding the existence of a confidential contract. The decision therefore held that a confidential contract is not an impediment to a shipper’s ability to bring a complaint under s. 120.1 about charges in a tariff that applies to more than one shipper. This decision was a matter of statutory interpretation.
14. An issue of statutory interpretation is a question of law. In the present case, policy considerations that are at the heart of the complaint mechanism underlie the question of whether a party to a confidential contract can bring a complaint under s. 120.1. These policy considerations include the market power of a railway company in some circumstances and the relatively weaker position of shippers in those circumstances. These policy considerations may be at the root of the Governor in Council’s interest in the statutory interpretation issue. However, although there may be policy considerations underlying the question at issue, that does not transform the nature of the question to one of policy or fact. The question of whether a party to a confidential contract can bring a complaint under s. 120.1 is one of law.
	1. The Scope of the Governor in Council’s Authority Under Section 40 of the CTA
15. That the Governor in Council answered a question of law in this case raises the issue of whether the Governor in Council has the authority to do so. CN argues that s. 40 of the *CTA* does not confer authority on the Governor in Council to determine matters of law or jurisdiction. Rather, questions of law or jurisdiction must be appealed to the Federal Court of Appeal pursuant to s. 41 of the *CTA*. The Governor in Council only has authority to determine questions of fact and policy. With respect, I cannot agree.
16. For ease of reference, I produce the text of ss. 40 and 41(1) here:

 **40.** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council’s own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

 **41.** (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

1. The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67.
2. Section 40 does not contain any express limitations on the Governor in Council’s authority. Unlike s. 41, which places a number of restrictions on the right of appeal to the Federal Court of Appeal, s. 40 states that the Governor in Council may at any time vary or rescind *any* decision, order, rule or regulation of the Agency on petition of a party or an interested person, or even on the Governor in Council’s own motion. There is no language in the provision that suggests the Governor in Council’s authority is in any way circumscribed, nor is the Governor in Council’s authority restricted to answering issues of fact or policy.
3. In *Attorney General of Canada v. Inuit Tapirisat of Canada*,[1980] 2 S.C.R. 735, this Court described s. 64 of the *National Transportation Act*, the predecessor provision to the current s. 40, as providing for an “unlimited or unconditional” right to petition the Governor in Council, a “quite different” avenue of review from the right of appeal on questions of law or jurisdiction to the Federal Court of Appeal (p. 745). Section 64 was substantially the same as the current s. 40.
4. As Estey J. explained, “[t]here can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1)” (p. 745). (Although Estey J.’s conclusion, at p. 759, that the trappings of procedural fairness could not be implied into the provision may not represent the current view of how natural justice operates in an administrative context, the issue of procedural fairness owed by the Governor in Council is not before this Court.) Of course, the Governor in Council is “constrained by statute” and cannot, in the course of exercising its authority under s. 40, enact or change a law of Parliament (*Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344, at para. 29; see *Inuit Tapirisat*, at p. 752).
5. For the purposes of this appeal, it remains the case that the only inherent limitation is that the Governor in Council is not empowered to address issues arising under the *CTA* *ab initio*: “Cabinet’s authority is restricted to matters already dealt with by the Commission, and such matters must be orders, decisions, rules or regulations . . .” (*British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 119, citing B. S. Romaniuk and H. N. Janisch, “Competition in Telecommunications: Who Polices the Transition?” (1986), 18 *Ottawa L. Rev.* 561, at p. 628). In this sense, the Governor in Council does not have any substantive law-making capacity by virtue of s. 40; however, this restriction does not mean that questions of law are excluded from the scope of the Governor in Council’s authority on review of Agency decisions.
6. By contrast, where Parliament intended to circumscribe an avenue of review, it did so expressly. Section 41, for example, places a number of restrictions on the right to appeal a decision of the Agency to the Federal Court of Appeal: appeals under s. 41 are limited to questions of law or jurisdiction, leave to appeal must be obtained and the application for leave must be made within one month of the date of the decision, order, rule or regulation being appealed from, unless there are special circumstances which justify extending the time limit. The limitations contained in s. 41 provide strong indication that Parliament directed its attention to the issue of restrictions on the avenues of review and included intended limitations expressly.
7. Unlike s. 40 of the *CTA*, Parliament has expressly limited the scope of the Governor in Council’s authority under other legislation. The *Broadcasting Act*, S.C. 1991, c. 11, empowers the Governor in Council to set aside or refer back decisions made by the Canadian Radio-television and Telecommunications Commission only if the Governor in Council is “satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1)” of the legislation (s. 28(1)). This kind of limitation is not found in s. 40 of the *CTA*. The indication is that where Parliament has intended to limit the Governor in Council’s authority, it has done so expressly.
8. CN argues that s. 40 should be read as limiting the Governor in Council’s authority to questions of fact or policy on the basis of the legislative history of ss. 40 and 41. CN maintains that Parliament’s intention was to leave questions of law to the courts.
9. However, the legislative history is ambiguous. Although some of the Hansard references to which reference was made seem to indicate that Parliament’s intention was for the Governor in Council to review questions of fact and policy (*Debates of the House of Commons of the Dominion of Canada*, vol. LVIII, 3rd Sess. 9th Parl. (“*1903 Debates*”), March 20, 1903, at p. 248, per Hon. A. G. Blair, and vol. XI, 1st Sess., 27th Parl. (“*1967 Debates*”), January 10, 1967, at p. 11630, per Hon. J. W. Pickersgill), the Hansardalso contains ministerial statements suggesting that the Governor in Council’s power was intended to be untrammelled (*1903* *Debates*, March 20, 1903, at p. 259, *per* Hon. A. G. Blair).
10. The *1967 Debates* include a statement by the Minister of Transport that the legislation provided for “an appeal on questions of fact to the governor in council” (January 10, 1967, at p. 11630). Although this correctly states the Governor in Council’s legislative authority to determine questions of fact, this statement does not provide evidence of Parliament’s intention to limit the Governor in Council’s authority to reviewing questions of fact alone. In addition, although he was Minister of Transport at the time of the 1967 enactment of the *National Transportation Act*, S.C. 1966-67, c. 69, Mr. Pickersgill’s interpretation of earlier enactments by other parliaments do not provide evidence of the intent of the legislature at the time of the earlier enactments. As such, the Hansard evidence does not establish an unambiguous parliamentary intention to limit the authority of the Governor in Council.
11. In my view, the Hansardevidence does confirm that Parliament intended to prevent questions of fact from being appealed to the Federal Court of Appeal. This does not, without more, demonstrate that the Governor in Council’s role was intended to be limited to review of questions of fact or policy alone.
12. This Court has observed that, while Hansardevidence is admitted as relevant to the background and purpose of the legislation, courts must remain mindful of the limited reliability and weight of such evidence (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27,at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484; Sullivan, at pp. 608-14). Hansardreferences may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 44, *per* LeBel and Cromwell JJ.). Here, Hansardis advanced as evidence of legislative intent. However, such references will not be helpful in interpreting the words of a legislative provision where the references are themselves ambiguous (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 39, *per* LeBel J.). Accordingly, the evidence relied on by CN in this case does not support the argument that an implied restriction to questions of fact and policy should be read into the otherwise broad and unrestricted language in s. 40.
13. CN submits that it is rare for the Governor in Council to vary or rescind an administrative decision on a question of law. I accept that it is unusual for the Governor in Council to determine a question of law and agree that the Governor in Council is generally concerned with issues of policy and fact. Although it is rare for the Governor in Council to determine a question of law, this does not mean that the Governor in Council has no authority under the statute to do so. Indeed, parties may prefer to comply with the requirements of s. 41 and seek leave to appeal to the Federal Court of Appeal, where a traditional full hearing on the matter will be carried out. Although these may be practical or strategic considerations, they do not alter the fact that the legislation does not restrict the Governor in Council from determining a question of law.
14. Accordingly, petitions to the Governor in Council are not restricted to issues of fact or policy. The Governor in Council has the authority to answer legal questions. This authority is properly supervised by the courts in the course of judicial review.
	1. Standard of Review
15. Determining the appropriate standard of review in this case involves consideration of two issues. First, does the standard of review analysis set out by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, apply to decisions of the Governor in Council? Second, what is the applicable standard of review in this case?
	* 1. The *Dunsmuir* Framework Applies to Decisions of the Governor in Council
16. This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810,the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court’s judicial review of a s. 40 adjudicative decision of the Governor in Council.
17. When the Governor in Council exercises its statutory authority under s. 40 of the *CTA*, it engages in its own substantive adjudication of the issue brought before it. The decision of the Governor in Council is then subject to judicial review by the Federal Court (*Public Mobile*, at para. 26). In this way, the court exercises a supervisory function over the Governor in Council, a public authority exercising the statutory powers delegated to it under s. 40 of the *CTA*.
18. *Dunsmuir* is not limited to judicial review of tribunal decisions (paras. 27-28; *Public Mobile*,at para. 30). Rather, in *Dunsmuir*, the standard of review analysis was discussed in the context of “various administrative bodies”, “all exercises of public authority”, “those who exercise statutory powers”, and “administrative decision makers” (paras. 27-28 and 49).
19. This Court has applied the *Dunsmuir* framework to a variety of administrative bodies (see, for example, *Catalyst* *Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 13 and 35, *per* McLachlin C.J.). The precedents instruct that the *Dunsmuir* framework applies to administrative decision makers generally and not just to administrative tribunals. The *Dunsmuir* framework thus is applicable to adjudicative decisions of the Governor in Council.
	* 1. The Applicable Standard of Review
20. It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (*Dunsmuir*,at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator’s expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (*Dunsmuir*, at paras. 58-61, and *Alberta Teachers’ Association*,at para. 30, citing *Canada (Canadian Human Rights Commission)*, at para. 18, and *Dunsmuir*).
21. Economic regulation is an area with which the Governor in Council has particular familiarity. Authority similar to that conferred in s. 40 of the *CTA —* that is, authority to vary or rescind decisions of other administrative bodies — is found in a variety of federal economic regulatory legislation (*Telecommunications Act*, S.C. 1993, c. 38, s. 12; *Broadcasting Act*, at s. 28; *Canada Marine Act*, S.C. 1998, c. 10, ss. 52(2) and 94(3); *Pilotage Act*, R.S.C. 1985, c. P-14, s. 35(7); *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 51). The issues arising under these statutes are linked by the shared economic regulatory purpose of the legislation. The cluster of economic regulatory statutes in respect of which the Governor in Council is given authority to vary or rescind decisions of the tribunals administering the legislation is an indication of a parliamentary intention to recognize that the Governor in Council has particular familiarity with such matters. The presumption of reasonableness review therefore applies to adjudicative decisions of the Governor in Council under s. 40.
22. Although this indication of parliamentary intent is sufficient to justify a reasonableness review of the decision of the Governor in Council in this case, further support is found in the history of the Governor in Council’s involvement in the regulation of railways in Canada. The Governor in Council has always been closely connected to the regulation of railways in Canada. In the first session of the first Parliament of the Dominion, *The Railway Act, 1868*, was passed. This legislation, the first incarnation of the present *CTA*, provided that “[t]he Governor General may, from time to time, appoint such Members of the Privy Council, to the number of four at least, as he may see fit, to constitute the Railway Committee of the Privy Council” (s. 23). In amendments to the Act in 1888, the jurisdiction of the Railway Committee of the Privy Council was extended beyond regulatory powers to include the power to hear and determine any application respecting “[a]ny manner, act or thing, which by this . . . is sanctioned, required to be done, or prohibited” (*The Railway Act*, S.C. 1888, c. 29, s. 11(*r*); see also H. E. B. Coyne, *The* *Railway Law of Canada* (1947), at p. vi).
23. Although primary administrative jurisdiction over *The Railway Act* was later delegated to the Board of Railway Commissioners (the body that later became the Agency) in order to further efficiency in addressing issues arising under *The Railway Act*, the Governor in Council maintained an oversight role (*The* *Railway Act, 1903*, S.C. 1903, c. 58; Coyne, at pp. vi-vii). The long history of the Governor in Council’s involvement in transportation law and policy indicates that this is an area closely connected to the Governor in Council’s review function. Parliament has maintained a robust role for the Governor in Council in this area through s. 40, which confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. When reviewing orders or decisions of the Agency in its s. 40 role, the Governor in Council acts in an adjudicative capacity and determines *de novo* substantive issues that were before the Agency. In this way, Parliament has recognized the Governor in Council’s longstanding involvement in this area. As such, the principle that deference will usually result where a tribunal is interpreting statutes closely connected to its function, with which it will have particular familiarity, can be said to apply in this case.
24. The presumption of deference is not rebutted here. The question at issue does not fall within one of the established categories of questions to which correctness review applies. In the present case, there is no issue of constitutionality or competing jurisdiction between tribunals.
25. This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the *CTA*. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the *CTA* and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.
26. To the extent that questions of true jurisdiction or *vires* have any currency, the Governor in Council’s determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or *vires* of the Governor in Council — the decision maker under review in this case.
27. In this case, the Governor in Council was interpreting the *CTA*, legislation closely related to its economic regulation review function. This issue of statutory interpretation does not fall within any of the categories of questions to which a correctness review applies. As such, the applicable standard of review is reasonableness.
	1. Application of the Reasonableness Standard in This Case
28. In the present case, the Governor in Council concluded that a party to a confidential contract is able to bring a complaint under s. 120.1 of the *CTA* in certain circumstances. In my view, this decision was reasonable.
29. The wording of s. 120.1 provides the basis for the Governor in Council’s decision. Section 120.1(1) sets out the circumstances under which the Agency can inquire into the reasonableness of a charge imposed by a railway company: 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; the tariff must apply to more than one shipper; and the tariff must not be one referred to in s. 165(3) (a tariff resulting from a decision of a final offer arbitrator). As noted by the Governor in Council, PRC met all of these conditions. As such, the only reason to preclude PRC from bringing a complaint under s. 120.1 is the existence of the confidential contract between PRC and CN.
30. The Governor in Council concluded that, while the terms of a confidential contract are relevant to whether PRC may benefit from any order made by the Agency, the existence of a confidential contract does not bar a shipper from applying for a reasonableness assessment under s. 120.1(1). This conclusion is consistent with the terms of the *CTA*, which do not preclude the Agency from reviewing the reasonableness of a charge contained in a tariff applicable to more than one shipper, whether or not it is incorporated by reference into a confidential contract. There was also no evidence in this case that the parties attempted to contract out of the availability of the s. 120.1 remedy, nor is it necessary in this case to decide whether a shipper could contract out of the recourse provided by s. 120.1. The Governor in Council also did not resolve the question of whether PRC could benefit from any change to the tariff and this remains an open question.
31. The Governor in Council’s interpretation of s. 120.1(1) is also supported by a reasonable view of the provision’s purpose. It was open to the Governor in Council to conclude that Parliament’s intention in including this complaint-based mechanism in the *CTA* was to rebalance the legislative framework in favour of shippers in an industry where there are circumstances of railway market power. We are not deciding in this case whether the confidential contract between PRC and CN would preclude PRC from any relief ordered by the Agency under s. 120.1 or whether a mileage-based fuel surcharge tariff is a rate for the movement of traffic under s. 120.1(7). However, there was evidence before the Governor in Council that confidential contracts are standard in the industry (CITA petition to the Governor in Council, at para. 27, found in the Federal Court of Appeal reasons, at para. 38). Accordingly, without deciding whether in any particular case a confidential contract would preclude a shipper from relief under s. 120.1, the Governor in Council’s interpretation of s. 120.1 was reasonable. Leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with Parliament’s intention to provide a measure of protection for shippers.
32. The Governor in Council’s decision is supported by the facts and the wording of s. 120.1(1), and it is consistent with Parliament’s intention. The Governor in Council’s decision was reasonable.
	1. Rate for the Movement of Traffic
33. I agree with the Federal Court of Appeal that, as the Agency did not consider the question of whether fuel surcharges are a component of the “rates for the movement of traffic” within the meaning of s. 120.1(7) and the Governor in Council did not make any finding in this regard, this question remains a live issue before the Agency (Federal Court of Appeal reasons, at paras. 52-56). It is within the Agency’s jurisdiction to determine this question and it remains open for the Agency to do so.
34. Conclusion
35. I would dismiss the appeal with costs to the Attorney General of Canada and one set of costs to PRC and CITA.

**APPENDIX**

*Canada Transportation Act*, S.C. 1996, c. 10

 **40.** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council’s own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

 **41.** (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

. . .

 **120.1** (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(*a*) the objective of the charges or associated terms and conditions;

(*b*) the industry practice in setting the charges or associated terms and conditions;

(*c*) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

(*d*) any other factor that the Agency considers relevant.

 (4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

 (5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

 (6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

 (7) For greater certainty, this section does not apply to rates for the movement of traffic.

. . .

 **126.** (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting

(*a*) the rates to be charged by the company to the shipper;

(*b*) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;

(*c*) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;

(*d*) any conditions relating to the traffic to be moved by the company; and

(*e*) the manner in which the company shall fulfill its service obligations under section 113.

 (1.1) If a shipper wishes to enter into a contract under subsection (1) with a railway company respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may request that the railway company make it an offer to enter into such a contract.

(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

(1.3) The railway company must make its offer within 30 days after the day on which it receives the request.

(1.4) Subject to subsection (1.5), the railway company is not required to include in its offer terms with respect to a matter that

(*a*) is governed by a written agreement to which the shipper and the railway company are parties;

(*b*) is the subject of an order, other than an interim order, made under subsection 116(4);

(*c*) is set out in a tariff referred to in subsection 136(4) or 165(3); or

(*d*) is the subject of an arbitration decision made under section 169.37.

 (1.5) The railway company must include in its offer terms with respect to a matter that is governed by an agreement, the subject of an order or decision or set out in a tariff, referred to in subsection (1.4) if the agreement, order, decision or tariff expires within two months after the day on which the railway company receives the request referred to in subsection (1.1). The terms must apply to a period that begins after the agreement, order, decision or tariff expires.

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

. . .

 **161.** (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

. . .

 **162.** (1)Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

(*a*) if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)(*e*) or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

(*b*) if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

(i) to the arbitrators named by the parties under paragraph 161(2)(*e*) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

(ii) if an arbitrator referred to in subparagraph (i) is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency determines is appropriate and available to conduct the arbitration.

. . .

 **165.** (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

. . .

(3) The carrier shall, without delay after the arbitrator’s decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.

 *Appeal dismissed with costs.*

 Solicitors for the appellant: Borden Ladner Gervais, Ottawa; Canadian National Railway Company, Montréal.

 Solicitor for the respondent the Attorney General of Canada:  Attorney General of Canada, Toronto.

 Solicitors for the respondents Peace River Coal Inc. and the Canadian Industrial Transportation Association:  Davis, Vancouver.