
CANADA / JUDGMENT

R. v. Canadian Pacific Railway Co.

2008 BCSC 1681

COURT

Supreme Court of British Columbia

DECIDED

4 December 2008

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2008 BCSC 1681 R. v. Canadian Pacific Railway Co.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Canadian Pacific Railway Co.,

2008 BCSC 1681

Date: 20081204

Docket: X070887

Registry: New Westminster

Between:

Regina

Respondent

And

Canadian Pacific Railway Company and

Canadian Pacific Railway Limited

Appellant

Before: The Honourable Mr. Justice Grist

Reasons for Judgment

Counsel for the appellant

K.A. Blair

Counsel for the respondent

T.C. Gerhart

Date and Place of Trial/Hearing:

May 28 and 29, 2008

New Westminster, B.C.

- [1] The defendant railway appeals conviction and sentence resulting from a charge of depositing a deleterious substance, ethylene glycol, in a fish bearing body of water. The charge relates to ss. 36(3) and 40(2) of the Fisheries Act, R.S.C. 1985, c. F-14.
- [2] The charge was laid following a derailment of tank cars during the early morning hours of February 5th, 2003. The cars were being moved on a siding next to the Canadian Pacific Railway ("CPR") mainline, adjacent to a wharf facility in Port Moody, on the shore of Burrard Inlet. As a result of the derailment, 2 of the cars fell over near the mainline and were subsequently struck by an eastbound train. The contents, approximately 75,000 litres of ethylene glycol, spilled from the tank cars onto the track bed and into a ditch on the south side of the tracks, opposite from the shore of the Inlet. Approximately 11,000 litres were recovered in the mitigation efforts following the derailment but the balance of the liquid either flowed into the marine environment, or was absorbed into the soil and would eventually leach into the Inlet.
- [3] The railway admitted that the derailment was responsible for a deleterious substance being deposited into water frequented by fish; the actus reus of the offence. The defence advanced was one of "due diligence", a defence that obliges the defendant to establish that all reasonable care was taken to prevent the deposit of the pollutant into the fish bearing water.
- [4] On the expert evidence given at trial, the trial judge found that the probable cause of the derailment was the inward movement of a wheel on one of the axles of one of the tank cars involved. This caused the wheels on that axle to fall inside the span of the rails. As the tank cars were moved along the siding, inside-out pressure was applied to the rails by this failed wheel set until the rails separated causing the wheels of a number of other cars to fall inside of the tracks. The cars subsequently jack-knifed with 2 of the tank cars falling in the way of the mainline.
- [5] In its defence, the defendant attempted to establish that reasonable care had been taken to prevent this kind of derailment, or alternatively, that it was not foreseeable, and further that once it had occurred, all reasonable care was taken to minimize the effect on the marine environment.
- [6] The trial judge held that failures of this kind were foreseeable and had been recognized as associated with a particular repair facility used by the combined railways operating on North American trackage, and did not accept that the defendant had established that it had employed the necessary level of care. In a further finding of breach of the statute she held that the reactive measures, once the derailment had occurred, were deficient in failing to

recognize that a drainage route built into the ditch along the tracks was allowing glycol to drain into an eastern culvert, which crossed under the tracks into the waters of the Inlet.

- [7] In my view, the trial judge's finding that the appellant had failed to establish the defence of due diligence on a balance of probabilities was a reasonable conclusion and is one that can be supported on the evidence. Perhaps better said, the absence of any evidence of measures taken to reduce the risk of loose-wheel derailments left it open to the trial judge to conclude, as she did, that the defence of due diligence had not been established.
- [8] This conclusion is dispositive of the appeal against conviction and I do not find it necessary to consider the alternate grounds for conviction resulting from the failure to determine the drainage route to the eastern cross culvert.
- [9] Lastly, I am satisfied that the principles applied on sentencing were the appropriate ones indicated by the circumstances of the event and, although it is difficult to speak of a range of sentences for convictions of this sort, the penalties imposed were consistent with what can be gathered from the authorities.

APPEAL FROM CONVICTION

- [10] Wheels are attached to rail car axles by friction fitting the wheels onto the axles with a high pressure press. The evidence given at trial was that failures of wheels fixed in this manner through a wheel becoming loose on an axle, were known to have occurred in the past, but such failures were historically a fairly rare event. However, in February 2001, the continent-wide system maintained by a joint authority maintained by the 6 major North American railways for the maintenance and repair of rolling stock - the American Association of Railways ("AAR") - recognized that wheel sets produced at a particular Canadian National Railway Company ("CNR") Repair Centre in Manitoba were particularly prone to this form of failure. The Association issued 2 bulletins to the participating railways. The first was an Early Warning Bulletin issued in November 2001. This bulletin recommended that about 5,000 tank cars which had wheels associated with this CNR shop should be found and removed from service. The second, a February 2002 bulletin related to another 9,400 tank cars which also had wheels from this CNR Centre. This second bulletin advised that the cars should be removed from service when identified "on shop or repair track".
- [11] In this case the stated cause of the derailment did not initially refer to a loose-wheel failure; the incident was attributed to a more simple form of track separation. It was thought that the gauge or width between the tracks had widened from the appropriate gauge due to inadequacies in installation or maintenance. Recognition of the failure as a loose-wheel derailment only emerged through further examination of what was seen following the incident during preparation for the trial. Accordingly, no steps were taken at the time of the incident to examine the wheel sets of the cars involved and they were removed and scrapped following the incident. With the loss of the wheel sets, it could not be determined with finality if a plate attached to the wheel bearing might have indicated that the wheels in

question were associated with the CNR Repair Centre. If this could have been determined from the plate, the risk associated with the wheels would have been directly tied to the failure rates associated with wheels originating at this facility. If not associated with the CNR wheel plant, the risk of such failure would have been significantly less. At para. 90 of her reasons the trial judge describes the lack of information on the wheel set and its effect on the defence of due diligence:

This hinders the Defence, because the onus is on the Defence to establish due diligence. In the absence of evidence that this car's wheels were or were not from the defective CN production line, the Court is bound to conclude that the degree of foreseeability of this car's wheels coming loose was higher than if the Defendant could establish that these wheels were not from this source.

[12] In the result, at para. 96 she held that, "this case must be assessed on the basis that the loose wheel could have been one of those wheels recalled by the Early Warning Bulletin ." Following this conclusion, she went on to examine the evidence, or as it was in this case, the absence of evidence, that the defendant acted appropriately to find the tank cars identified by the AAR Bulletin. In this regard, she found at para. 96:

I expect the Defendant likely complied with the Early Warning Bulletin in some fashion, but there is no direct evidence of this. I heard no evidence from any employee that a program of inspections was carried out specifically to determine if there were any tank cars covered by this Early Warning Bulletin I think it would have been quite easy for a company of this size to keep a record of the cars inspected due to this Bulletin and it would have been prudent to do so, in view of the severity of the problem they were trying to prevent.

[13] The trial judge then considered the defendant's use of a specialized device which monitored wheel separation as trains travelled past a location near Mission, British Columbia, which the defendant contended was a sufficient measure to establish due diligence. The train in question, in fact, passed this device approximately 2 hours before the derailment without any defect being noted in the separation of the wheel sets. However, the type of failure which was found to cause this derailment can happen almost immediately before an accident results. The failure, therefore, would have to have occurred almost contemporaneously to passing this device before it would have been useful to detect the problem. Accordingly, use of the device was judged insufficient to meet the requirements of due diligence.

[14] The appellant says that the standard employed by the trial judge was one of perfection and not one based on reasonable care or due diligence. The appellant argued that the identification plate associated with the suspect wheels could easily have been lost when replaced on subsequent wheel maintenance occurring even before the bulletins were issued. Further, the wheel sets may have been disbursed over the combined trackage of the AAR at the time of the bulletins and therefore may not have been located had there been a complete CPR inspection of tank cars on its own tracks. As a result, in the appellant

submission, it may well have been impossible for the CPR to have detected this defect before it resulted in the derailment.

- [15] It is a distinct possibility that a complete inspection by the CPR might not have been successful in identifying the suspect wheel sets, but as found, it did not relieve the defendant from making all reasonable efforts in this regard and from providing evidence of its efforts in an attempt to satisfy the obligation incumbent to the defence of due diligence. In *R. v. Petro-Canada* (2003), 63 O.R. (3d) 219, 222 D.L.R. (4th) 601 (C.A.) the exact cause of the failure of a gasoline transfer pipe was never discovered, and yet the court judged the defendant's efforts to prevent and react to such a failure, on the basis of the sufficiency of preventative measures to meet the foreseeable risks of such events generally. Similarly, in my view, the fact that there was a distinct possibility that a particular defect might never have been detected does not relieve the defendant from satisfying the requirement that the risk be addressed through reasonable efforts to find those that could be identified. From para. 20 of *Petro-Canada*:

" I do not think that the law requires the accused to prove precisely how the discharge came about--in this case precisely why the pipe failed--in order to avail itself of the due diligence defence. On the other hand, in a case where the accused can do this, it may be able to narrow the range of preventative steps that it must show to establish that it took all reasonable care. However where, as here, the accused cannot prove the precise cause of the pipe failure the due diligence defence is not rendered unavailable as a result. That being said, it must be emphasized that to invoke the defence successfully in such circumstances, the accused must show that it took all reasonable care to avoid any foreseeable cause.

Here, the publication of the AAR bulletins gave specific notice of the risk of a failure of just the sort that caused this derailment. As found, such failures were foreseeable and reasonable care was required notwithstanding that some of the wheels might have been impossible to find.

APPEAL OF SENTENCE

- [16] The sentence imposed consisted of a \$25,000 fine and a payment of \$50,000 directed to be paid to the Environmental Protection Fund under s.79.2(f) of the Fisheries Act. Convictions under the particular sections of the Act infringed in this case are diverse in their circumstances. Further, the offenders may be large corporations or private individuals and different dispositions may be appropriate on this basis. Sentences on occasion follow joint submissions and the authoritative value of these sentences may be compromised. Accordingly, there isn't a well-defined range of penalty on examination of the authorities.

- [17] The trial judge recognized the priority of deterring the defendant and others from committing environmental offences in conjunction with the environmental impact of the spill. The leaked ethylene glycol actually had minimal impact, but there was a potential for greater damage. She also commented on the safety procedures of the railway generally, which she found extended beyond minimum requirements in the usual course of the railway's operations.
- [18] She also took into account the record of previous convictions. There were 8 of these, but considering their nature and the measures taken in response, along with the extent of the defendant's industrial operations, she held they were not an exacerbating element.
- [19] The deficiency in the clean-up effort was also given as a separate ground for conviction, but was not included as having a significant impact on sentence. In general the trial judge commented positively on the overall effort to deal with the spill once the tank cars had been ruptured.
- [20] Ultimately, the sentence imposed was within the range proposed by the defence in submissions at trial, and I find no error in principle in the trial judge's analysis of relevant circumstances or in the quantum assessment based on the authorities cited. Accordingly, both the appeal against conviction, and appeal against the sentence imposed are dismissed.

"W.G. Grist J."

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Prepared on 28 October 2026 · Esheria