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August 31, 2023			
31 août 2023			
Josephine Chan			
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Court File No. A -

-23

FEDERAL COURT OF APPEAL

B E T W E E N:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

TEAMSTERS CANADA RAIL CONFERENCE

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 below.

THIS APPEAL will be heard by the 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 at 180 Queen Street West, Toronto, Ontario, M5V 3L6.

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 after 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: _____

Address of local office: Federal Court of Appeal
180 Queen Street West, Suite 200,
Toronto ON M5V 3L6

TO: THE ADMINISTRATOR
Federal Court of Appeal
180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

AND TO: CALEYWRAY
Barristers and Solicitors
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Solicitors for the Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Madam Justice McDonald dated June 6, 2023 by which she found the defendant, Canadian Pacific Railway Company (“**CP**”) guilty of 22 counts of civil contempt of court.

THE APPELLANT ASKS that:

1. The finding of guilt on the part of CP be set aside;
2. The allegations of the plaintiff, the Teamsters Canada Rail Conference (“**TCRC**”), that CP is guilty of civil contempt of court be dismissed; and
3. CP be awarded its costs of the proceedings below and this appeal.

THE GROUNDS OF APPEAL are as follows:

1. The appellant, CP, operates a railway network across Canada.
2. The respondent, TCRC, is a trade union as defined in the *Canada Labour Code*, RSC 1985, c L-2, which represents employees in the railway sector, including certain employees of CP. At the material time, CP and TCRC were parties to collective agreements governing the employment relationship between CP’s conductors and engineers (i.e. the employees who operate CP’s freight trains in Canada) (referred to hereinafter collectively as the “**Collective Agreements**”).
3. The Collective Agreements include “rest provisions” entitling employees operating trains (engineers and conductors) to be relieved of duty in certain circumstances. In summary, train crews may, within the first five hours of a tour of duty, request to be relieved after 10 hours, in which event CP is obligated

to make arrangements to ensure that such employees are relieved before reaching 10 hours on duty.

4. The obligation to provide rest is subject to certain exceptions including instances in which the delay is attributable to ‘Acts of God’ and unexpected circumstances wholly outside of CP’s control. In addition, if a train reaches the “outer main track switch” (OMTS) boundary at the destination terminal prior to 10 hours, CP can, in certain circumstances, require the train crew to “yard” (that is, park and secure) their own train even if this results in the employees being on duty for more 10 hours.
5. The evidence tendered in the proceedings below confirmed that managing a crew’s tour of duty, and arranging for relief, is a complex exercise that happens in real time across CP’s vast rail network, often in remote locations and in a challenging operating environment. It is an exercise managed by human beings who must take into account a myriad of factors to ensure compliance with the Collective Agreements. Despite having been issued clear and repeated directions by the directing minds of CP to comply with the Collective Agreement provisions, from time to time, the CP employees tasked with managing a crew’s tour of duty make mistakes or fail to make the correct subjective judgment calls.
6. In April 2017, TCRC initiated a grievance alleging that CP was not abiding by the rest provisions of the Collective Agreements. On March 23, 2018, a labour arbitrator, Graham Clarke, issued an award finding that CP had violated the

Collective Agreements in certain respects (the “**Clarke Award**”). The Clarke Award included a term that CP cease and desist further such contraventions. TCRC filed the Clarke Award with the Federal Court on March 28, 2018; pursuant to subsection 66(2) of the *Canada Labour Code*, the Clarke Award became an Order of the Court.

7. On June 25, 2019, TCRC filed a show cause motion pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106, alleging that CP was guilty of civil contempt of court on the grounds that it had, on numerous occasions, failed to comply with the Clarke Award. On June 26, 2019, Prothonotary Milczynski (as she was then) issued an *ex parte* show cause order requiring CP to appear to hear proof of the allegations of contempt.
8. The contempt trial (styled a “motion” under the *Federal Court Rules*) was heard on various dates between November 8, 2021 and January 17, 2023. TCRC ultimately pursued 38 instances in which it alleged that CP had contravened the Clarke Award and thus was guilty of contempt of court. On June 6, 2023, Madam Justice McDonald released her reasons for decision, finding that in respect of 22 of the 38 incidents, the evidence established beyond a reasonable doubt that CP was guilty of civil contempt of court.
9. In finding that CP was guilty of contempt of court McDonald J. erred in law, in mixed law and fact, and committed palpable and overriding errors of fact.
10. McDonald J. erred in law by treating contempt of court as a strict liability offence, rather than an offence that is only established upon proof beyond a

reasonable doubt that the accused, in this case, the corporation CP, intended for the acts leading to a breach to occur. McDonald J. erred in distinguishing cases holding that, in the case of a mandatory order of the court, contempt is only proven where the evidence establishes beyond a reasonable doubt that the accused has not taken all reasonable steps to ensure compliance.

11. By finding that CP was in contempt of court without considering whether the violations of the Clarke Award were intentionally committed by CP *qua* corporation, McDonald J. erred in law by:

- (a) effectively converting the offence of contempt into a strict liability offence (that is, finding that contraventions of the Clarke Award constituted contempt of court *per se*, unless attributable to factors entirely extrinsic and external to CP's operations); and
- (b) misapplying the evidentiary burden borne by TCRC as prosecutor, particularly since TCRC had the onus of establishing that CP intentionally committed acts leading to a breach of the order—presumably by failing to take reasonable steps that could have been taken to avoid those violations—TCRC bore the onus of demonstrating what those steps should have been. No such evidence of reasonably available measures was tendered.

12. McDonald J. erred in law in distinguishing cases recognizing that where compliance with a court order requires the accused to control the actions of third parties, intent to disobey the court order is not proven where those third

parties (in the present case, CP employees) engage in unauthorized conduct resulting in non-compliance. McDonald J. erred in law in holding that because CP had the *legal* right to control the actions of its employees, it was irrelevant that CP had no *practical* ability to prevent those employees from committing errors and mistakes that resulted in a violation of the Clarke Award.

13. McDonald J. erred in law by failing to apply the “corporate identification doctrine”. Under that doctrine a corporation can *only* be found to be criminally liable where it is proven that a “directing mind” of the corporation—that is, an officer or sufficiently senior managerial level employee found to be to be a vital organ of the company in respect of the matters in issue—had the requisite intent to commit the offence. In the present case, there was no evidence before the court demonstrating that anyone from CP – let alone a directing mind of the company – intended for any of the acts resulting in contraventions of the Clarke Award to occur. To the contrary, the evidence tendered confirmed CP’s directing minds issued clear and repeated directions mandating compliance with the Clarke Award.
14. McDonald J. erred in law in holding that CP was guilty of contempt of court through the unauthorized errors committed by its front-line employees, because the law did not recognize an “exemption” for the acts of corporate accused’s employees or agents. In reaching this conclusion McDonald J. misapplied case law holding that a person subject to a court order will be in breach of that order whether by personally contravening the order, or by directing or permitting another person to commit such a contravention. As set out above, there was no

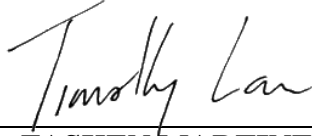
evidence before McDonald J. that CP directed or permitted its employees to contravene the Clarke Award. To the contrary, the evidence established clearly that CP's directing minds expressly mandated compliance with the Clarke Award and repeatedly emphasized that message to its employees.

15. By holding that CP was guilty of contempt of court by reason of the acts and omissions of the corporation's employees regardless of whether CP directed or authorized those acts and omissions, McDonald J. applied the strict liability principles of vicarious liability. This constituted an error of law as vicarious liability has no application in criminal proceedings generally, or contempt of court prosecutions specifically.
16. The Supreme Court of Canada has made it clear that, even where the requisite elements of civil contempt of court have been proven beyond a reasonable doubt, the decision as to whether the accused should be convicted remains a matter of judicial discretion. McDonald J. erred in law in failing to address the question of how this residual discretion should be exercised on the facts of the case before her. This error was particularly significant in light of the fact that McDonald J. implicitly rejected case law holding that the accused's reasonable efforts to comply with the court order are relevant to the question of intent.
17. McDonald J. committed a palpable and overriding error of fact with respect to two of the 22 incidents that she held constituted contempt of court (identified as #31 and #33 of the 38 incidents alleged by TCRC). Those incidents involved "yarding"; that is, instances in which the train reached the OMTS marker before

the crew had been on duty for 10 hours, but the crew remained on duty past the 10-hour mark in completing the process of parking and securing the train. The Clarke Award held that whether such incidents constituted a breach of the Collective Agreements depended upon a consideration of several factors. McDonald J. herself held that the evidence before the court did not allow her to evaluate those factors, such that she could not find beyond a reasonable doubt that CP was in contempt of court in respect of any of “yarding” incidents that were before her.

18. The evidence clearly demonstrated that incidents #31 and #33 involved yarding. McDonald J. committed a palpable and overriding error in finding otherwise, and in holding that CP was in contempt of court in respect of these incidents, despite having already found that the evidence did not allow her to evaluate whether the requirements of the Clarke Award were, or were not, satisfied in connection with any of the yarding incidents.
19. CP also relies on such further and other grounds as counsel may advise and this Honourable Court may permit.

August 31, 2023



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