Federal Court of Appeal

Cour d'appel fédérale

**Date: 20240823**

**Docket: A-220-23**

**Citation: 2024 FCA 136**

**CORAM:** **RENNIE J.A.**
**GLEASON J.A.**
**LOCKE J.A.**

**BETWEEN:**

**CANADIAN PACIFIC RAILWAY COMPANY**

**Appellant**

**and**

**TEAMSTERS CANADA RAIL CONFERENCE**

**Respondent**

Heard at Toronto, Ontario, on April 17, 2024.

Judgment delivered at Ottawa, Ontario, on August 23, 2024.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LOCKE J.A.

Federal Court of Appeal

Cour d'appel fédérale

**Date: 20240823**

**Docket: A-220-23**

**Citation: 2024 FCA 136**

**CORAM:** RENNIE J.A.
GLEASON J.A.
LOCKE J.A.

**BETWEEN:**

**CANADIAN PACIFIC RAILWAY COMPANY**

**Appellant**

**and**

**TEAMSTERS CANADA RAIL CONFERENCE**

**Respondent**

## REASONS FOR JUDGMENT

**RENNIE J.A.**

***Overview***

[1] Teamsters Canada Rail Conference (Teamsters) alleged that the Canadian Pacific Railway Company (CP) was in contempt of court for failing to comply with a labour arbitration award which had been registered with the Federal Court. The Federal Court agreed and found CP in contempt for some, but not all, of the asserted violations (*Teamsters Canada Rail Conference*

*v. Canadian Pacific Railway Company*, 2023 FC 796, 2023 CarswellNat 2187). CP appeals the decision.

[2] I would allow the appeal. The Federal Court misdirected itself as to the law of civil contempt. It is sufficient at this point to say that the Court erred in finding contempt in the absence of intent, effectively treating contempt as a strict or absolute liability offence. The Court erred in jettisoning the directing mind principle, which guides the inquiry into the guilt or responsibility of a corporation facing quasi-criminal or criminal charges, and in excluding due diligence or reasonable efforts defences from the contempt analysis. This conflicts with established case law, including that of the Supreme Court.

[3] None of the facts as found by the Federal Court judge are in dispute, and for reasons which I will explain, it is impossible to rationalize a finding of contempt with the facts as found. In light of these findings of fact there is only one outcome possible, which is to set aside the finding of contempt and substitute a decision dismissing the motion for contempt.

***Factual Background***

[4] Provisions in the collective agreement between CP and Teamsters address the circumstances under which CP is required to relieve a train crew from duty (the rest provisions). With some exceptions, a train crew must be relieved within 10 or 12 hours, depending on whether rest is in fact requested by the crew.

[5] Train movement between terminals is managed by CP through its Crew Management Centre. The Crew Management Centre manages the train's trip, ensures compliance with regulatory requirements, orders relief crews and arranges for transportation if a crew is pulled off the train in order to comply with the rest provisions. Each train terminal also has a local management team that assists in managing train crews. CP has approximately 250,000 train crew starts each year.

[6] In March 2018, a labour arbitrator found that CP violated the rest provisions (the Award). The Award explained that "[b]eyond [certain] negotiated situations, and subject perhaps to arguments of force majeure [as distinct from unforeseen circumstances]… [the parties] have agreed that employees may exercise a right to be off duty within 10 hours" and that "the parties have included no wording in the collective agreement that employees lose their right to be off within 10 hours whenever something unexpected comes up during their tour of duty" (Federal Court decision at paras. 20-26 and 101, citing the Award at paras. 105 and 220).

[7] CP did not seek judicial review of the Award. The Award was filed with the Federal Court later that month, making it an order of the Federal Court pursuant to subsection 66(2) of the *Canada Labour Code*, R.S.C., 1985, c. L-2.

[8] In June 2019, Teamsters filed a show cause motion pursuant to the contempt rules of the *Federal Courts Rules*, SOR/98-106 (rules 466-472), alleging that there had been 38 violations of the Award.

***Decision Below***

[9] The Federal Court found CP guilty of contempt with respect to 22 of the 38 incidents.

[10] The Court first reviewed the evidence, including the testimony of the witnesses for the parties, but noted that it preferred the documentary evidence before it. The Court concluded that "CP took significant and meaningful steps to comply with the [] Award", including reporting multiple times a week on its performance and holding bi-weekly calls with Teamsters to discuss any deviations from the rest provisions (Federal Court decision at paras. 34-58).

[11] The Court then turned to the test for civil contempt, citing *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79 at paras. 32-35 [*Carey*]. The party alleging contempt must prove beyond a reasonable doubt that: the order or judgment at issue clearly and unequivocally states what should be done or should not be done; the alleged contemnor had actual knowledge of the order or judgment; and the alleged contemnor intentionally did or omitted to do the act compelled by the order or judgment.

[12] CP conceded that the first two elements of the test were met, and the Court agreed based on the evidence before it (Federal Court decision at paras. 62-63).

[13] Turning to the third criterion of *Carey*, the Court rejected CP's argument that reasonable efforts to comply with the Award constituted evidence that CP lacked the necessary intention to be found in contempt (Federal Court decision at paras. 65-67 and 71 and following). The Court

concluded that there was not "a distinctive category" of contempt for corporate defendants, holding that CP's arguments were but "nuances" in the *Carey* test (Federal Court decision at para. 71). The cases relied on by CP, which pointed to a requirement of intention and a defence of reasonable efforts, were all distinguishable, according to the judge.

[14] The Court distinguished *Envacon Inc v. 829693 Alberta Ltd.*, 2018 ABCA 313, 426 D.L.R. (4th) 472 [*Envacon*] as it was decided under specific language in the *Alberta Rules of Court*, Alta. Reg. 124/2010. *Doucette v. Morin*, 2015 SKQB 259, [2016] 2 W.W.R. 709 [*Doucette*] was distinguishable as individual third parties frustrated the compliance efforts of the party subject to the order. The Court noted that the third-party relationships in the cases relied upon by CP were "fundamentally different from an employer-employee relationship where the employer is a party to the order" (Federal Court decision at paras. 72-77).

[15] I will return to these cases later in these reasons and explain why the decisions in *Envacon* and *Doucette,* of the Alberta Court of Appeal and Saskatchewan Court of Queen's Bench, together with *Carey*, were directly on point and provided clear guidance on the questions before the Federal Court.

[16] The Court also rejected CP's argument that the Court should consider whether CP's directing minds intended for there to be a breach of the Award, as there is "no such 'exemption' in the relevant case law." The Court cited *Tele-Direct (Publications) Inc. v. Canadian Business Online Inc.*, 1998 CanLII 8528 (FC), 151 F.T.R. 271 [*Tele-Direct*], and *Baxter Travenol Laboratories v. Cutter (Canada) Ltd.*, 1984 CanLII 5316 (FC), [1986] 1 F.C. 497 [*Baxter*],

which held that the vicarious liability principle applies in corporate civil contempt cases (Federal Court decision at paras. 78-80).

[17] In declining to find contempt for 16 of the 38 incidents, the Court pointed to various factors: for some incidents external factors caused the violation (such as issues with the taxis hired to transport train crews, a lack of control over foreign territory, and unexpected mechanical failures); for other incidents there was a lack of evidence. Specifically, four alleged yarding (parking and securing a train) breaches suffered from a lack of evidence, as yarding practices were subject to specific requirements under the Award (Federal Court decision at paras. 7 and 85-89). However, two other yarding incidents—incidents 31 and 33—were found to be contemptuous, without explanation (Federal Court decision at para. 90; Agreed Statement of Facts, Appeal Book at pp. 862 and 864).

[18] The Court found that the evidence for the remaining 22 incidents established that the violations were within CP's control, and thus found CP in contempt for those incidents. Eleven of those violations occurred on a single day, "due to a series of bad decisions by inexperienced managers" who did not follow established protocol (Federal Court decision at paras. 90-96). The other 11 incidents also resulted from poor operations management or errors of judgment by CP employees responsible for managing train crews (Federal Court decision at paras. 98-100).

[19] The Court acknowledged that full compliance with the Award was a "complex undertaking". However, as the parties negotiated and agreed upon the rules in the collective agreements, CP could not claim that compliance was impossible as this would undercut the

collective agreement. Additionally, the evidence demonstrated that compliance with the Award was possible, even if difficult; compliance with the Award was at one point as high as 99% (Federal Court decision at paras. 101-106).

[20] The Court did not exercise its discretion to not make a finding of contempt. Later in these reasons I will return to the adequacy of the Federal Court's reasons given for this decision. The Court left the questions of penalty and costs for a later day. In a subsequent proceeding (*Teamsters Canada Rail Conference v. Canadian Pacific Railway Company*, 2024 FC 125, 2024 W.C.B. 124, or the Federal Court sentencing decision), the Court directed CP to pay $200,000 to a registered charity.

***Issues and the Parties' Positions***

[21] The questions raised by this appeal engage several interrelated concepts: the requirement of intent in civil contempt, how intent is established in respect of corporations, the concept of strict or vicarious liability on the part of contemptuous corporations, defences to charges of contempt, and the use of discretion not to make a finding of contempt.

[22] I note at the outset that the sanctions for contempt, whether arising in the civil or criminal context, are potentially significant: they include public opprobrium, imprisonment, and fines. This has both substantive and procedural implications, including the requirement for proof beyond a reasonable doubt to make out the offence (see rules 469 and 472 of the *Federal Courts Rules*). The onus, which never shifts, is on the moving party to establish all three elements of the

offence. The Supreme Court has cautioned against finding contempt too quickly: "[i]t is an enforcement power of last rather than first resort" (*Carey* at para. 36).

[23] The essence of the appellant's argument is that the Federal Court erred by effectively treating civil contempt as a strict liability offence. Even if the *actus reus* of contempt (the failure to comply with the order in question) had been proven, the mental element—which requires subjective intention—was not made out. To the contrary, the Court found that CP's subjective intention was the opposite: it intended to comply. CP asserts that while an intention to do the act that breaches the order can be inferred from the fact of non-compliance, this can only be done where that is the only reasonable inference that may be drawn (see *Doucette* at paras. 37-38; *Amalgamated Transit Union, Local No. 569 v. Edmonton (City)*, 2015 ABQB 620, [2016] 5 W.W.R. 767 at para. 31 [*Amalgamated Transit Union*]; and *Grain Workers' Union (ILWU, Local 333) v. Viterra Inc.* 2022 FC 796 at paras. 138-139 [*Viterra*]).

[24] More specifically, the appellant asserts that the Federal Court erred by not examining whether CP's directing minds had a subjective intention to commit the violations. *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662, 1985 CanLII 32 (SCC) [*Canadian Dredge*] requires that quasi-criminal intent must be found in the directing minds of the corporation. The *obiter* in *Tele-Direct*, relied on by the Federal Court for the proposition that vicarious liability applies in corporate contempt, is distinguishable as it pre-dates *Carey*.

[25] The respondent submits that the Federal Court explicitly acknowledged that contempt is not a strict liability offence and only found contempt established for certain violations of the

Award. Knowing disobedience or commission of the act of non-compliance alone on the part of a corporate defendant can ground a finding of subjective intention. The Court explicitly noted at paragraph 70 of its decision that simply establishing a violation of the rest provisions is insufficient to prove contempt, and from that the respondent argues that it can be inferred the judge necessarily imposed a requirement of intent and also made a finding of subjective intent.

[26] The respondent also argues that the Federal Court did not err in holding that intent is not determined on the basis of directing mind principle. The mental element in contempt is distinct from the directing mind doctrine where the *actus reus* of the offence provides the necessary evidentiary foundation to find intention.

***Standard of review***

[27] The standards from *Housen v. Nikolaisen*, 2002 SCC 33, 2 S.C.R. 235 govern this appeal. The facts in this appeal are not at issue. With the exception of the finding of contempt for the two yarding incidents noted, the appeal raises discrete questions of law.

***Analysis***

*Strict liability, absolute liability, and mens rea offences*

[28] The point of departure for the analysis begins with an understanding of the differences between *mens rea* offences (or “true criminal offences”), strict liability offences, and absolute liability offences. The guiding authority on this remains: *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 1978 CanLII 11 (SCC) at 1325-1326 [*Sault Ste. Marie*]:

(i) *true criminal offences*, "in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution";

(ii) *strict liability offences*, "in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care";

(iii) *absolute liability offences*, in which "it is not open to the accused to exculpate himself by showing that he was free of fault".

[29] It is readily apparent that the analysis of the Federal Court cannot be rationalized with *Sault Ste. Marie* or any orthodox understanding of civil contempt. Contempt is not a strict liability offence. Contempt is not an absolute liability offence. As *Carey* makes clear, the mental element in civil contempt is "required" (at para. 43). The reason for this lies in the penalties and consequences of a finding of contempt.

[30] While the Federal Court stated that contempt was not a strict liability offence, it simultaneously discarded the directing mind inquiry and rejected reasonable excuse or due diligence as defences. In effect, the Federal Court treated contempt as an offence of absolute liability. This error is sufficient to warrant the granting of the appeal: an alleged contemnor's reasonable efforts (or due diligence, understood broadly) forms part of the evidentiary inquiry into intent. Here, the reasons and factual findings of the Federal Court do not reveal any

evidentiary pathway which leads to a conclusion of intent. In fact, the Federal Court's findings lead to the opposite conclusion—that CP had no intent.

[31] I note, parenthetically, that absolute liability offences cannot include imprisonment as a potential consequence, as this would offend section 7 of the *Canadian Charter of Rights and Freedoms* (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 1985 CanLII 81 (SCC) at 515). Therefore, as noted by the Federal Court in *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2009 FC 800, 349 F.T.R. 303 [*Fuzion Technology*], civil contempt under the *Federal Courts Rules*, when brought against individuals, cannot constitutionally create an absolute liability offence (at para. 57). This reasoning applies to the offence at large, but not to a corporate defendant, since a corporation cannot be imprisoned; see, *e.g., Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 (SCC) at 1002. The directing minds, can, however.

*The mental element of civil contempt*

[32] In criminal contempt, the *mens rea* rests on the "element of public defiance", such as flaunting disobedience or disrespect for the authority of the courts (*Carey* at para. 31). In civil contempt, on the other hand, the alleged contemnor must only have intentionally done the act that breached the order at issue; no element of public defiance is required (*Carey* at para. 35). In short, criminal contempt requires certain attributes of contumacious intent; civil contempt does not. I note, parenthetically, that the words "*mens rea*" were not used by Cromwell J. in *Carey*, likely so as to not confuse the mental elements in civil and criminal contempt.

[33] In *Carey,* Cromwell J. was also careful to note that there are two discrete types of intentional acts that can ground a finding of civil contempt; one where the alleged contemnor has "*intentionally* done the act that the order prohibits", the other where the alleged contemnor "*intentionally* failed to do the act that the order compels" (*Carey* at para. 35, emphasis added). As will be discussed below, the distinction between the two types of actions or orders (whether the action or order is prohibitory or mandatory) is reflected in the jurisprudence of civil contempt and guides its application. (For a further discussion of the difference between the two types of orders see *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196.)

[34] To summarize, the fact that an order has been breached does not establish the offence. The mental element of intent must still be made out. However, as I will explain, and as the case law demonstrates, depending on the nature of the order and the act that breaches it, the breach of the order itself may provide an evidentiary springboard to support a conclusion on intent.

[35] Intent in civil contempt, like in many criminal offences, can sometimes be inferred from the contemnor's conduct, without direct evidence of the contemnor's state of mind (*Viterra* at paras. 132-133). Intent in civil contempt can also be satisfied by evidence of deliberateness, recklessness, or wilful blindness (*Doucette* at para. 30; *Fuzion Technology* at para. 63; see also *Sakab Saudi Holding Company et al. v. Al Jabri et al.*, 2024 ONSC 1347, 2024 CarswellOnt 3027 at para. 93). I note, parenthetically, that the Federal Court judge found no such conduct on the part of CP and in fact made findings to the contrary. I will return to this point later in these reasons.

[36] As *Carey* indicates, the intention analysis may take different shape when dealing with a mandatory order as compared to a prohibitory order.

[37] Since a prohibitory order requires the person or party to refrain from doing something, when the prohibited act is committed, a compelling inference arises that the person intended to commit the act. Put another way, the nature of the breach or the act itself provides an evidentiary foundation for a finding of intention. This was the type of order at issue in *Carey*. The contemnor in *Carey* was subject to an order enjoining him from returning money held in trust to a client. The contemnor nevertheless returned the money. The prohibitory nature of this order allowed the Court to find that he "decid[ed] to give the money back" and therefore intended the act, without much analysis on the point (*Carey* at para. 60).

[38] Similar inferences were drawn in other cases dealing with contempt of prohibitory orders: *Bell Canada v. Red Rhino Entertainment Inc.*, 2019 FC 1460, 161 W.C.B. (2d) 507 at para. 18 [*Red Rhino*]; *Boutin v. Boutin*, 2022 ONSC 3229, 2022 W.C.B. 639 at paras. 122-124; *XY, LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2629, 124 W.C.B. (2d) 246 at para. 20; *Alston v. the Municipal District of Foothills No. 31*, 2021 ABQB 951, [2022] A.W.L.D. 3262 at para. 12; and *Slater Vecchio LLP v. Arvanitis*, 2021 BCSC 428, 172 W.C.B. (2d) 103 at para. 33. In all of these cases, the requirement of intent was satisfied as a logical, evidentiary inference from the commission of the prohibited act. While the onus is on the moving party to establish all three elements of the offence, in cases of prohibitory orders, proof of the *actus reus* may cause a tactical burden to arise on the part of the defendant.

[39] Therefore, a finding that the *actus reus* has been made out for contempt of prohibitory orders will often allow the court to find that the mental element for the offence has also been made out. However, this is not an automatic finding of liability: it is an evidentiary inference that arises from the nature of the order and conduct in question. Intent remains a requirement, but the requirement can be discharged as a matter of evidence. Here, the Federal Court conflated proof of the *actus reus* with proof of the necessary intent. This was in error. The offence of civil contempt is not, and cannot be, an offence of strict or absolute liability.

[40] Mandatory orders are different in kind: there are myriad circumstances that might preclude or limit compliance with a mandatory order. The *actus reus* alone does not, generally, give rise to the same evidentiary inference. The point was made clearly in *Doucette* at paragraphs 36-37:

> To use analogies from criminal law, contempt is not an absolute, or even a strict liability offence. […]
>
> Where the contempt alleged is failure to comply with a court order, it is not enough to prove that the respondents were aware of an order and failed to comply. The law is clear that where the complainant is unable to prove the requisite intent beyond a reasonable doubt, the offence is not made out. Where the contempt in question relates to the more common prohibitory order, proof of knowledge and breach of the order may well be sufficient to permit the Court to draw the inference or conclusion that the breach was deliberate or reckless. That same inference is not so easily drawn when the contempt alleged is of a mandatory order. Where an individual or organization is ordered to perform a specific duty or act, a myriad of circumstances might prevent a person or organization from doing what they have been ordered to do. I have concluded above that evidence of frustration of efforts to comply or impossibility of compliance is properly to be considered when deciding whether the alleged contemnor(s) intentionally or deliberately failed to do as ordered.

[41] In *Envacon* the Alberta Court of Appeal agreed with the reasoning in *Doucette* and wrote at paragraphs 36-39:

> We do not read *Carey* as changing the law that requires courts to look at reasonable excuse as an aspect of the test for finding contempt. […] We also reject the suggestion that *Carey* changed this approach and that reasonable excuse is only to be considered with respect to the penalty after a finding of contempt.
>
> […]
>
> Indeed, Cromwell J, writing for the Court in *Carey* at para 37, acknowledged that in some cases, an alleged contemnor who tries diligently to obey an order but fails may avoid a finding of contempt (citations omitted and emphasis added):
>
> > [W]here an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a *finding* of contempt .... While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion *to decline to impose a contempt finding* where it would work an injustice in the circumstances of the case.
>
> In such cases, the alleged contemnor in effect has a reasonable excuse for failing to comply. That excuse goes to the finding of contempt, and not to the remedy or penalty.

[42] *Envacon* and *Doucette* articulate the correct analytical pathway to finding the requisite intent in civil contempt. In those cases, the Courts acknowledge that for prohibitory orders, the inference of intent may be readily drawn where proof of knowledge and breach of the order have been made out. For mandatory orders, the analysis includes consideration of factors that may have prevented an alleged contemnor from doing what they had been ordered to do.

[43] The Federal Court did not distinguish between the types of orders and the implications for how the requirement of intent is fulfilled. To the contrary, the Federal Court took pains to distinguish the cases. The judge found that *Envacon* did not apply because it was decided under the *Alberta Rules of Court*, which allow a court to make a finding of contempt where the alleged contemnor has failed to comply with an order “without reasonable excuse”. Since no such

language appears in the *Federal Courts Rules*, the judge considered *Envacon* irrelevant. However, *Carey* was decided under Ontario law, which also lacks express “without reasonable excuse” language, and the Court in *Envacon* concluded that the words “without reasonable excuse” did not create a different test than that described in *Carey* or efface the requirement for intent.

[44] It is of no consequence whether an alleged contemnor’s reasonable efforts to comply are considered as tactical “defences” that can negate a *prima facie* finding of intent, or as factors to consider in assessing whether or not there is sufficient evidence to find intent beyond a reasonable doubt. In addition, reasonable efforts to comply are factors that may allow a court to exercise its discretion to decline to find contempt, despite all factors being made out (as highlighted in *Carey* at paras. 36-37). I agree with the Alberta Court of Appeal in *Envacon* that efforts to comply bear on the finding of guilt and are not discretionary factors speaking only to remedy.

[45] To conclude, the distinction between prohibitory and mandatory orders is important. The distinction guides the analysis of the evidence and how a finding of intent is to be established. However, the point in this appeal is that intent must, in all cases, be found. Here the judge found none, but still entered a conviction for contempt.

*The findings of the Federal Court*

[46] The burden to prove contempt is always on the party alleging contempt, even where that party attempts to make out its case based on the alleged contemnor’s recklessness or insufficient

discipline in implementing a mandatory order. The alleged contemnor is never obliged to put forward any evidence. However, if sufficient evidence is put forward that the order was intentionally or recklessly breached, then the alleged contemnor may tactically wish to bring evidence forward of its diligence or reasonable efforts to avoid the breach (*Envacon* at paras. 44-45 and 48-50). Teamsters led no evidence of deliberateness, wilful blindness, recklessness or serious indifference on the part of CP, and there is no suggestion in the reasons of the Federal Court that this was the case.

[47] The Court found the opposite: it noted CP's "significant and meaningful steps" towards compliance and noted that the breaches mainly resulted from "error[s] of judgment" and "bad decisions" (Federal Court decision at paras. 58, 92 and 99). In its sentencing decision, the Federal Court stated that there was "no evidence of deliberate conduct on the part of CP management or employees" and that the breaches of the Award "arose as a result of CP operational failures" (Federal Court sentencing decision at para. 25).

[48] The "significant and meaningful steps" taken by CP to ensure compliance with the Award included issuing clear communications to the organization regarding its obligations, adopting compliance reporting requirements, generating performance reports, and holding calls with relevant parties to discuss compliance (Federal Court decision at paras. 51 and 58). Additionally, the judge found that many breaches of the Award were occasioned by "bad decisions by inexperienced managers" or "errors in judgment". There was no evidence of deliberate conduct, but rather the breaches arose only by reason of operational failures. (Federal Court decision at paras. 92 and 95; Federal Court sentencing decision at para. 25). The Federal

Court therefore found no intention on the part of CP's high-level management, nor on the part of CP's on-the-ground managers and decision-makers.

[49] The judge also noted that while CP initially achieved over 99 percent compliance with the Award, CP's obligation was to continuously manage ongoing compliance (Federal Court decision at paras. 104-106). In other words, any drop in compliance without excuse would be contempt, even in the absence of intent, recklessness or wilful blindness. The judge effectively treated contempt as a strict or absolute liability offence.

[50] Notwithstanding its findings of fact, the Court nevertheless ruled that CP's breaches were contemptuous because they were "within CP's control" (Federal Court decision at para. 90). Control does not amount to intent. It is therefore impossible to reconcile the Federal Court's findings of fact with the legal conclusion reached. While this is sufficient to allow the appeal, I will turn to the second issue, and whether the judge erred in setting aside the directing mind doctrine.

*Intent of corporations in civil contempt*

[51] Ascribing intent to a corporation, especially a large one, is a difficult task. The directing mind doctrine provides a middle ground between vicarious liability (imposing blanket liability on corporations for the criminal acts of their employees acting in the scope of their employment), and criminal liability only attaching to a corporation if its board of directors directs the criminal act (*Canadian Dredge* at 675 and 692-693).

[52] The directing mind doctrine has been applied to corporations in the context of civil contempt, usually in the context of closely held corporations: see, for example, *Caledon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 807, 2022 W.C.B. 1886 at paras. 1-2; *College of Optometrists of Ontario v. SHS Optical Ltd.*, 2006 CanLII 39463 (ONSC), [2006] O.J. No. 4708 at paras. 2 and 19, aff'd 2008 ONCA 685, [2008] O.J. No. 3933; *Red Rhino* at para. 28; *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2021 FC 770, 186 C.P.R. (4th) 102 at paras. 58-59 and 66; *Roynat Inc. v. 1664092 Ontario Inc.*, 2014 ONSC 2778, 114 W.C.B. (2d) 286 at paras. 32-33; *Peach Films Pty. Ltd. v. Cinemavault Releasing Inc.*, 2008 CanLII 48815 (ONSC), 79 W.C.B. (2d) 32 at para. 25; and *Trans-High Corp. v. Hightimes Smokeshop and Gifts Inc.*, 2015 FC 919, 134 C.P.R. (4th) 222 at paras. 3 and 6.

[53] For closely held corporations, intent is simple to establish. The person who committed the act that breached the order will often necessarily be the directing mind of the corporation. In such cases, the intent analysis is typically perfunctory, as a conclusion regarding intention is self-evident from the actions of the senior officers.

[54] Unsurprisingly, there are few examples of large, publicly held corporations being held in contempt. Nevertheless, the directing mind test still applies, and the judge's refusal to apply it is unsupported by the jurisprudence.

[55] The judge relied on *Baxter* and *Tele-Direct* to support the contention that there was no directing mind "exemption" available to CP in this case.

[56] The law of civil contempt itself has evolved significantly since *Baxter* such that it is no longer good law and ought not to have been followed. *Baxter* predates *Canadian Dredge* and predicates its conclusion on liability for contempt on the doctrine of vicarious liability (*Baxter* at 509). The Court in *Baxter* also found that “it is no defence [to contempt] for a company to show that its officers were unaware of the terms of a court order” (at 509). However, and to the contrary, *Carey* holds that knowledge of the order is a mandatory element of contempt (*Carey* at para. 34).

[57] The second case relied on by the judge to avoid finding a corporate intent was *Tele-Direct*. *Tele-Direct* does not hold that the directing mind doctrine is unavailable to large corporations subject to a contempt allegation. *Tele-Direct* notes that an injunction enjoins both a corporation and its employees, agents, and all those over whom the corporation exercises control, and that the corporation will be in breach of the injunction if persons acting for it breach the order (at para. 81). However, the simple fact that a corporation is in breach of an order does not speak to whether the corporation can be found in contempt for that breach, given the required mental element in contempt.

[58] Finally, on a principled basis, failing to recognize the directing mind’s application in the law of civil contempt effectively converts the charge into one of vicarious liability. As the Supreme Court held in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217, 1990 CanLII 120 (SCC), “liability in contempt is essentially criminal liability”, and “in general, vicarious liability is unknown to the criminal law” (at 229).

[59] I close on two cases relied on by Teamsters in support of the judge's analysis of contempt: *Amalgamated Transit Union* and *Viterra.* They are instructive cases, but do not support the argument that a finding of intention was unnecessary. Both involved mandatory orders, but illustrate how evidence of intent can be established in those circumstances.

[60] In *Amalgamated Transit Union,* an arbitration award directed that an employee be reinstated. The defendant city had not reinstated the employee, and the Court was able to infer that the non-reinstatement was intentional. Given the simplicity of the order, the length of time that had passed, the city's control over its implementation and the absence of any intervening factors, the only reasonable inference that could be drawn was that the city did not intend to comply with the order. There was no reasonable possibility that the failure to reinstate the employee was the result of "a slip or a mistake or some sort of oversight" (at para. 31).

[61] Similarly, in *Viterra*, Viterra was found in contempt of an order directing that it stop employees from working more than 48 hours per week. The evidence established that employees had been allowed to work, had been paid hours in excess of the proscribed 48 hour maximum and that the corporation had made little or no effort to comply for more than two years. In these circumstances the Court readily inferred that Viterra's management never intended to comply with the order. To ensure compliance, all Viterra needed to do was tell its employees that they were not permitted to work more than 48 hours and would not be paid for any hours beyond the maximum. Presumably, had that occurred, employees would not have worked more than the maximum hours permitted since they would not be paid. In those circumstances, the breach could not have occurred had Viterra not intended for it to occur.

[62] Two points arise from these cases; first, in each case, the Court found, as a matter of evidence, that the management of the corporations never intended to comply with the order. Second, the conclusion as to intention arose as a logical evidentiary inference from the factual matrix. The cases bear no resemblance to the facts as found by the judge in this appeal.

[63] The offence of contempt is an intent-based offence. The Federal Court erred in finding contempt in the absence of a finding of intent on the part of CP. As detailed above, the Federal Court found that CP's high-level management made significant efforts to comply with the Award (Federal Court decision at paras. 51-58). This ought to have ended the inquiry.

***Residual Issues***

[64] I conclude by addressing three issues which, while of no consequence in light of my conclusion, nevertheless warrant brief comment.

[65] The judge made a palpable and overriding error of fact in finding that incidents 31 and 33 were contemptuous. The reasons, read generously and in light of the record, do not allow for the conclusion that incidents 31 and 33 constituted a breach of the Award.

[66] These incidents were yarding incidents. The judge had acknowledged earlier in her reasons that in order to determine whether a yarding incident was a breach of the Award, it was not sufficient to point to the amount of time on duty: other conditions must be met, including whether CP made arrangements to expedite the yarding of the train, and whether other crews were on duty and available to yard the crew's train (Federal Court decision at para. 23; Award,

Appeal Book at p. 806). The judge declined to find contempt for four other yarding incidents on this basis, noting "insufficient evidence as to whether the yarding directive outlined in the [] Award was followed" (Federal Court decision at para. 89). The judge does not explain why yarding incidents 31 and 33 were still found to be contemptuous, given this overarching lack of necessary evidence.

[67] As noted, in light of my conclusion that the appeal should be allowed, this is an error of no consequence.

[68] The Federal Court's reasons also do not adequately consider the discretion to find, or not find, contempt.

[69] Even if all of the criteria in support of a finding of contempt are met, judges retain discretion in finding contempt (*Carey* at paras. 36-37), and the failure of a court to consider its discretion in exercising its contempt power is an error of law (*Chong v. Donnelly*, 2019 ONCA 799, [2019] O.J. No. 5048 at para. 12). Here, the Federal Court mentioned its discretion in its reasons (Federal Court decision at paras. 61 and 81-82) but went no further. Reasons cannot simply make note of the correct legal test, then fail to apply it (*R v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405 at para. 13). The judge's reasoning with respect to discretion was purely conclusory and does not allow this Court to understand why the judge chose to exercise her discretion or not.

[70] Contempt is a power that must be exercised lightly. It is a remedy of last resort, and it should not be used as a means to enforce judgments (*Carey* at para. 36). Judges entertaining

contempt motions must seriously consider their overriding discretion in light of the purpose of contempt, and all other relevant circumstances, including the behaviour of the contemnor and the nature of the order.

[71] The third residual issue concerns penalty.

[72] The Federal Court issued its reasons on the penalty against CP for its contempt in January 2024. The Federal Court imposed a fine of $200,000 on CP and ordered that it be paid to Canada’s Children’s Hospital Foundations, on the agreement of the parties (Federal Court sentencing decision at paras. 41-42).

[73] While the issue was not argued before us, I simply flag my reservation about allowing parties to discharge a contempt violation by making a charitable contribution. While I understand the motivation, the practice arguably effaces both the gravity of the offence and the public opprobrium that is to be reflected by the penalty. To date, the appropriateness of such payments has been discussed in the context of criminal prosecutions and the practice across Canada is not uniform (see the Public Prosecution Service of Canada Deskbook, Part VI, ch. 6.6, “Charitable Donations”, updated November 28, 2017, for a review of the jurisprudence and policy considerations). Nevertheless, even where permitted, a link must exist between the offence and the penalty—a contribution to a conservation organization in consequence of a breach of an environmental regulation, for example. Here, even if it were appropriate to order a payment to a charity, there is no such link between the offence and the penalty.

[74] Allowing a corporate party to characterize a criminal penalty as a charitable contribution undermines both accountability for the conduct and the principles of general and specific deterrence that underlie sentencing. I make no decision on this, of course, and leave it for another day where the point can be argued in a factual context.

**Disposition**

[75] In light of the judge's findings of fact there is no basis on which a judge, properly instructed to the law, could find contempt. This Court may make the judgment a trial court should have made based on the evidentiary record as found, or where "the review required by the grounds of appeal consists of drawing conclusions from facts which are uncontested" (*Canada v. Piot*, 2019 FCA 53, 437 D.L.R. (4th) 706 at para. 115; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, [2016] 4 F.C.R. D-13 at para. 153 [*Pfizer*]; see also Donald J.M. Brown, *Civil Appeals* (Toronto: Thomson Reuters, 2009), ch. 6 at 6:19). That is the case here.

[76] To remit the matter for re-hearing before the Federal Court on the expectation that a different judge might come to a different conclusion on the same evidence would raise concerns ringing of *res judicata*, issue estoppel and abuse of process. While arising in the context of a criminal appeal, the Supreme Court's reasoning in *R. Pittiman*, 2006 SCC 9, [2006] 1 SCR 381 at para. 14 is apposite:

> Where a conviction is set aside on the ground that the verdict is unsupported by the evidence, the court of appeal, absent legal errors in respect of the admissibility of evidence, will usually enter an acquittal. As noted by Doherty J.A. in *R. v. Harvey* (2001), 160 C.C.C. (3d) 52 (Ont. C.A.), at para. 30, "[a]n acquittal is the appropriate order because it would be unfair to order a new trial and give the Crown a second opportunity to present a case on which a reasonable trier of fact could convict."

[77] A new trial is often ordered where there has been an error in the admissibility of evidence, such that the jury or judge made a determination on a faulty evidentiary foundation, or where there has been an error in the conduct of the trial itself (*Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721 at para. 147; see Sopinka, *The Conduct of an Appeal*, 5th ed., (Toronto: LexisNexis, 2022), at pp. 296-297). A redetermination is often ordered where the case is factually complex, dependent on the testimony of witnesses, and the result is factually suffused and uncertain (*Pfizer* at para. 157). That is not the case here. The facts are not in issue, and the conduct of the trial is not in issue.

[78] A new trial or redetermination may also be ordered where there has been a change in the law (*Pfizer* at para. 160). That is also not the case here. The law did not change; it was misunderstood.

[79] Intent is a question of fact (*Schuldt v. The Queen*, [1985] 2 S.C.R. 592, 1985 CanLII 20 (SCC) at 599-600). However, where a trial judge errs as to the legal effect of settled facts, this becomes a question of law and an appellate court can "disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge" (*R. v. Morin*, [1992] 3 S.C.R. 286, 1992 CanLII 40 (SCC) at 294). Applying the law to the facts as found by the Federal Court, I would allow the appeal and enter an acquittal. The appellant is entitled to costs in this Court and below.

"Donald J. Rennie"
J.A.

"I agree.
Mary J.L. Gleason J.A."

"I agree.
George R. Locke J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-220-23 |
| **STYLE OF CAUSE:** | CANADIAN PACIFIC RAILWAY COMPANY v. TEAMSTERS CANADA RAIL CONFERENCE |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 17, 2024 |
| **REASONS FOR JUDGMENT BY:** | RENNIE J.A. |
| **CONCURRED IN BY:** | GLEASON J.A.<br>LOCKE J.A. |
| **DATED:** | AUGUST 23 2024 |

**APPEARANCES:**

| | |
|---|---|
| Ian Campbell<br>Christopher J. Rae<br>Tom Macintosh Zheng | FOR THE APPELLANT<br>CANADIAN PACIFIC RAILWAY COMPANY |
| Douglas Wray<br>Robert Church<br>Erin Carr | FOR THE RESPONDENT<br>TEAMSTERS CANADA RAIL CONFERENCE |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Fasken Martineau DuMoulin LLP<br>Toronto, Ontario | FOR THE APPELLANT<br>CANADIAN PACIFIC RAILWAY COMPANY |
| CaleyWray<br>Toronto, Ontario | FOR THE RESPONDENT<br>TEAMSTERS CANADA RAIL CONFERENCE |