File No: 29612-1
Registry: Fort St. John

In the Provincial Court of British Columbia

REGINA

v.

CANADIAN NATIONAL RAILWAY COMPANY

REASONS FOR SENTENCE
OF
THE HONOURABLE JUDGE B. A. DALEY

COPY

Crown Counsel:	**C. Hough**
Defence Counsel:	**M. Rowan**
Place of Hearing:	**Fort St. John, B.C.**
Date of Judgment:	**March 24, 2017**

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[1] THE COURT: These are my reasons on sentence in *R. v. Canadian National Railway Company*, Fort St. John Registry, File 29612. These are oral reasons for sentence, as such I reserve the normal editorial privileges. In the event of a transcript, I have used point headings to assist the transcriber.

OVERVIEW

[2] Following a lengthy trial, the defendant was convicted on one of four counts, that is Count 1, and the defendant was convicted of failing to ensure the health and safety of its employees, and specifically, the health and safety of Bryan Giesbrecht.

[3] The charges against the defendant arose following a tragic incident on the early evening of November 28, 2012. On that evening, Mr. Giesbrecht was working as a conductor in the employ of the defendant. Mr. Giesbrecht was positioned at the rear of a number of rail cars that were being pushed on to a siding at Gutah, some distance north of Fort St. John. Mr. Giesbrecht was in radio communication with the locomotive engineer and he was in the process of directing the locomotive engineer when the incident occurred that cost Mr. Giesbrecht his life.

[4] As the rail cars were being pushed onto the siding, it

was necessary that the two derail devices, located on the siding, be deactivated. This task, deactivating the derails, was part of Mr. Giesbrecht's responsibilities. For whatever reason, Mr. Giesbrecht failed to deactivate the second derail and one of the rail cars derailed and fell on Mr. Giesbrecht, causing his death.

[5] The defendant was charged with two very serious offences alleging that the defendant's failures had directly resulted in Mr. Giesbrecht's death, and two less serious offences. The defendant was acquitted on one of the most serious offences at the conclusion of the trial, and this court directed a dismissal on the second of the most serious offences following a no evidence motion at the close of the Crown's case. The court acquitted the defendant on the second less serious charge at the conclusion of trial.

[6] With respect to the conviction on Count 1, the specific failure of the defendant was determined by this court to be that the sign located next to the second derail was not retroreflective. My reasons for judgment set out the court's analyses, and it is not necessary to repeat those reasons here.

[7] We are now at the sentencing phase of the trial. The *Canada Labour Code* provides s. 148(1)(b) for a maximum fine of

$100,000. There is no minimum fine. In addition to a fine, this court has the discretion to impose a term of probation that includes various optional conditions upon the defendant pursuant to s. 732.1(3.1) of the *Code*.

CROWN SENTENCING POSITION

[8] The Crown seeks the maximum fine of $100,000 and a probation order to be in place for two years. The terms proposed by the Crown would impose a positive obligation on the defendant to *inter alia* obtain the written approval of an independent safety auditor with respect to the defendant's signage inspection policy. The proposed probation terms would also include deadlines for both the creation of an approved signage inspection policy and a full implementation of such newly approved policy.

DEFENDANT'S SENTENCING POSITION

[9] The defendant recommends a fine in the mid-range. The defendant is strongly opposed to a probation order.

[10] By way of background the sentencing hearing commenced on August 26, 2016 and concluded on February 17th, 2017. Both Crown and the defendant have submitted written briefs, as well as books of authorities, in addition to their able oral submissions.

PURPOSE AND PRINCIPLES OF SENTENCING

[11] The fundamental purpose of sentencing is to protect society, s. 718 of the *Code*. The objectives of sentencing include the denouncement of unlawful conduct and the deterrence of the offender. Other objectives include promoting a sense of responsibility in the offender, and acknowledgement of the harm done to victims or to the community.

[12] The fundamental principle of sentencing, s. 718.1 of the *Code*, is that the sentence must be proportionate to the gravity of the offence, and the degree of responsibility of the offender.

[13] When the offender is an organization, such as the case at bar, s. 718.21 of the *Code* sets out additional factors the court may consider. These include any advantage realized by the organization as a result of the offence, the cost of the investigation and prosecution of the offence, and any measures taken by the organization to reduce the likelihood of it committing a subsequent offence.

[14] s. 732.1(3.1) of the *Code* sets out a number of optional conditions of probation that this court may prescribe. These include requiring the offender to establish a policy with standards and procedures to lessen the likelihood of a later offence, communicating same to its representatives, and

reporting back to the court on the implementation of those policies, standards and procedures.

[15] This court may also impose on the defendant a term that the defendant provide information to the public concerning the offence of which it was convicted, the sentence imposed by the court, and, as well, any measures the defendant is taking to reduce the likelihood of re-offending. Section 732.1(3.2) of the *Code* requires this court, before imposing a term of probation requiring the defendant to establish policy standards and procedures to reduce the likelihood of the defendant committing a subsequent offence, to first consider whether it will be more appropriate for another regulatory body to supervise the development or implementation of such policy standards and procedures.

[16] In addition to the purpose and principles of sentencing as set out above, and the factors this court may consider, there is also case law to assist and direct this court.

SENTENCING PRINCIPLES FROM THE CASE LAW

[17] The classic case on the sentencing of offenders under public welfare statutes is *R. v. Cotton Felts Ltd.* [1982] Carswell 1235 ONCA. In *Cotton Felts* the Ontario Court of Appeal held at paragraph 19 that the penalty imposed for breach of a public welfare statute, such as the Ontario

Workers Safety Legislation at issue in *Cotton Felts*, is determined by a complex of considerations:

1. The actual and potential harm to workers or other members of the public in relation to the safety breaches;
2. The degree of blameworthiness attributed to the offender;
3. The size and net worth of the offender;
4. The scope of the economic activity at issue;
5. The financial ability of the offender to pay a fine;
6. The prior safety record of the offender; and
7. Whether the offender took steps to prevent a recurrence of injuries and death in the workplace.

[18] That same decision held at Paragraph 20 that above all, the penalty should be determined by the need to enforce regulatory standards by deterrence. Where a public welfare statute is breached, deterrence is of paramount importance.

[19] One of the considerations that arises, in many cases, is when the defendant enters an early guilty plea, the court deems the early guilty plea to be an admission of responsibility and an expression of remorse, and this is treated as a factor in mitigation of sentence. The converse,

however, is not true. A defendant who exercises its right to a trial is not punished, in the event of a conviction, for having exercised its right to a trial. In other words, the maintenance of a right to trial is not an aggravating, but a neutral factor.

THE AMOUNT OF THE FINE - ANALYSES AND DISCUSSION

[20] It is settled law that a maximum fine is not reserved for the worst potential case or the worst potential offender. The amount of the fine is one that requires the sentencing judge to exercise her or his judicial discretion in considering the entire matrix of sentencing factors. Counsel have provided numerous cases in their respective briefs and books of authorities, that in carefully considering those cases, I distil from them the following propositions:

1. Public welfare statutes are intended to protect the public, including the employees of an offender from harm;
2. A fit and just fine is one that reflects the legislative intention of the statute in question in a practical way, namely, the need to enforce regulatory standards by deterrence; and
3. Each case is unique and the ultimate amount of the fine should represent a tailored and reasoned analyses

of the specific offence for which the offender is being sentenced.

FACTORS TO BE CONSIDERED

Defendant's Degree of Blameworthiness or Culpability

[21] The defendant is a large publically traded company with approximately 21,000 employees and over 32,000 kilometres of track. Its shares are traded on the Toronto Stock Exchange with a market capitalization of almost sixty-five billion dollars. The defendant has a presence in almost every province and territory in Canada.

[22] In my reasons for judgment pronounced June 2, 2016, this court said the following -- at paragraph 108, this court said that the derail sign at the second derail was "grossly deficient in doing the job it was supposed to do". At paragraph 115 this court found "CN has no specific procedure in place to check the reflectivity of its signage, especially those signs alerting employees to such high hazard items as derail devices".

[23] The reasons for judgment also noted that a stop block would have accomplished the same purpose as the second derail and would represent a far lesser hazard. The reasons also expressed concern that had the defendant conducted a comprehensive risk assessment upon assuming control of the

former BC Rail track, and a stop block could have been installed and the hazard posed by the second derail obviated.

[24] Following my reasons for judgment of June 2, 2016, the court was made aware that the defendant has, in fact, had standards in place since at least 2005 that requires derail signs to be retroreflective. [See defendant's submissions on sentence, paragraphs 17, 60 and 63]. The Crown was only informed of this by letter dated August 16th, 2016. That letter informed the Crown that CN has had, since at least 1995, internal engineering standards requiring that all its derail signs be reflective. [See Crown submissions on sentence, paragraph 9].

[25] The defendant's position at trial, robustly argued by its counsel, was that the second derail sign was satisfactory, i.e. it was of sufficient visibility to provide adequate notice to a railroader as to the existence of the second derail. To put it another way, the defendant's position at trial was that there was no requirement that its derail signs be retroreflective, moreover, the defendant submitted that the second derail sign, consisting of black vinyl non-reflective tape spelling D-E-R-A-I-L, afforded sufficient visibility to alert a railroader of the existence of the second derail.

[26] The defendant, as a federally regulated employer, is

under a stringent responsibility to ensure the safety of its employees. In my reasons for judgment I was critical of the defendant's argument that the second derail was satisfactory. I expressed my opinion that this kind of narrow and technical interpretation would only frustrate the salutary objectives of this kind of public welfare legislation.

[27] Given the court's current knowledge that the defendant's own internal engineering standards, in existence for years prior to the death of Mr. Giesbrecht, requiring that all its derail signs be reflective, causes this court grave concern. To put it bluntly, the defendant's own internal standard that its derail signs be reflective necessarily and logically implies that any non-reflective derail sign is not satisfactory. The defendant's position at trial that the second derail sign was satisfactory is, in my respectful opinion, in direct contradiction to its own internal policy.

[28] The *Canada Labour Code* imposes a solemn obligation upon the defendant to ensure the health and safety of the employees. When the defendant argued at trial that the second derail was satisfactory, it must be assumed, or at the very least deemed to have known, that the second derail was not compliant with its own internal standards.

[29] The other issue which the pre-existing policy raises is

why there was no evidence as to what efforts the defendant made to implement its own policy that all derail signs be reflective. There were, in fact, three non-reflective derail signs in the former BC Rail territory over which the defendant assumed control. The defendant only informed the Crown, and latterly this court, of its pre-existing policy in an effort to persuade the court that a probation order was not necessary. I simply note that in this portion of my decision and I will address it further when the Crown's recommendation with respect to a probation order is discussed.

[30] The defendant also relies on an amendment that came into force on September 12th, 2016. That amendment requires the track supervisor, assistant track supervisor, or track inspector, or other qualified inspector to note on a monthly basis that its derail signs are in place, retroreflective, and visible. There is no requirement, however, that there be nighttime inspections. The evidence at trial, from the defendant's own witnesses, was that all inspections took place during daylight hours. Indeed, as I recall, none of the defendant's witnesses disagreed with the proposition that only a nighttime inspection could disclose whether or not a derail sign was not reflective, or had lost its reflectivity.

[31] Brian McCurdy, who was the defendant's track supervisor

in 2012, testified that he had a specific recall of having seen the second derail prior to Mr. Giesbrecht's death, but had only observed the sign during daylight hours. In other words, even an experienced railroader, like Mr. McCurdy, was unable to determine that Exhibit 17, the danger sign, lacked reflectivity.

[32] The amended inspection policy does not require a nighttime inspection, notwithstanding that CN's own witnesses testified that only a nighttime inspection would suffice to check for reflectivity. In my respectful opinion, even if the amended policy had been in place in November 2012, it would, absent any requirement for nighttime inspections, have done little to ensure that the second derail sign was, in fact, reflective.

The Defendant's Prior Record

[33] The defendant has been convicted five times under the *Canada Labour Code* for failing to ensure its workers in relation to a workplace fatality. The defendant has been convicted eight times under the *Canada Labour Code* in relation to injury or death. The defendant has been convicted seven times for having breached the *Railway Safety Act* with one fine being $248,000 in relation to a derailment that spilled two hundred and fifty tons of sulphuric acid.

[34] A prior record indicates that an offender is more concerned about profit than compliance. It can be an aggravating factor. The defendant's most recent conviction was in 2003, almost thirteen years before the defendant's conviction on Count 1 in the case at bar.

[35] Defendant's counsel included several appendices to its written submissions on sentence as to the efforts CN has taken since 2003 to improve its safety performance. The material supplied include, a 2016 overview of CN safety management systems [see Appendix E to defendant's submissions on sentence]. The graphs on page 5 of Appendix E show that over the ten year period between 2005 and 2015 CN's number of main track accidents has been reduced by almost one-third. At page 11 of Appendix E, CN mentions that it is the only railroad in North America to measure its safety culture on an ongoing basis. On page 14 of Appendix E, there is mention of employee involvement as follows, and I quote from the document, under the heading Employee Involvement:

> Employee involvement is a fundamental part of CN safety management system and is strengthened through a number of initiatives.

And in a smaller subheading Prevent, the following:

> CN's policy, health and safety committee, in conjunction with St. Mary's University at Halifax, Nova Scotia, launched a confidential telephone safety hotline across most of its system to better

> understand the underlying causes of accidents and injuries. Called Prevent, the hotline provides a means for employees to confidentially report near miss events, incidents and other significant safety issues through a non-punitive process. Employees may share their experience by calling 1-855-323-4007.

[36] Appendix E suggests that the defendant is a company that invests significant time and resources in an effort to cultivate an emphasis on safety.

Acceptance of Responsibility and Remorse

[37] The defendant maintained its right to trial and this right is at the very root of our system of justice. I treat this as a neutral factor.

[38] Post-conduct changes, such as the installation of the stop block, can be seen as both a sign of remorse and as a sign that the offender has learned from the experience. This factor, however, can, in my respectful opinion, cut both ways. An offender is rightly expected to have safe practices in place before an incident occurs. The less obvious the safety defect, the greater the mitigation.

[39] In this case, I noted earlier in my reasons for judgment, that had the defendant conducted a risk assessment upon assuming control from BC Rail, then it would have been obvious that the second derail, a high risk hazard, could have been replaced with the far lesser hazard of a stop block. Had the

defendant installed a stop block upon assuming control over the former BC Rail track, then Mr. Giesbrecht would not have died.

[40] In this regard, post-conduct changes, I note that Mr. Giesbrecht died in November of 2012, but the amendment requiring monthly inspections of derail for reflectivity has only been in effect since September 2016. Given the timing of this amendment, I am inclined, with respect, to think that the amendment was inspired primarily by the defendant's efforts to avoid the imposition of a probation order.

[41] The remorseness implicit in the amendment would have a more sincere ring had the defendant taken steps to introduce the amendment immediately or shortly after Mr. Giesbrecht's death. The almost four year gap from November 2012 to September 2016 is in stark contrast to the speedy removal of the second derail by the installation of the stop block. The stop block solution, however, was prompted by the requirements imposed upon the defendant by the federal regulator, Transport Canada.

[42] One final consideration under the acceptance of responsibility and remorse is that CN maintained throughout the trial that it had done nothing wrong vis-à-vis the second derail. Beyond acknowledging that it was not reflective, CN

maintained the sign was satisfactory. I simply, and again, adopt my earlier remarks in this regard. The defendant's insistence that the second derail was satisfactory rings hollow, given that CN's own internal policies in place in November 2012 called for all derails to be reflective.

Damage and/or Harm

[43] In this case the court did not find that the non-reflective sign was a direct cause in Mr. Giesbrecht's death. However, it takes little imagination to consider how defective signage might well be a factor, directly or indirectly, in contributing to an injury or a fatality to an employee. The defendant contravened its own internal requirement that all its derail signs be reflective, but persisted in its position at trial that the second derail was satisfactory.

[44] The defendant, through its counsel's written submission on sentence, acknowledged that its internal policy that all the derails be reflective was in place since at least 2005. Mr. Giesbrecht died in November 2012.

[45] As I understand the evidence, the defendants are unable to say how long the defective second derail sign had been at that location. This, itself, is of concern in as much as the defendant has a positive obligation to implement its safety policies and I am unaware of any steps whatsoever to ensure

that all its derail signs were compliant with its own policy.

[46] Also, under the category of damage and/or harm is the defendant's failure to remove the second derail and replace it with a stop block. The defendant was not charged with this specific failure to ensure its employee safety, but I am satisfied that this court may properly consider this factor for the purposes of sentencing. The defendants allowed a far greater hazard, a derail, to be in place for many years when a risk assessment would have recognized that a stop block, a far lesser hazard, would have served the same purpose and function.

Deterrence

[47] Given the defendant's corporate size, whether the fine is fifty thousand or $100,000 is a factor that would have negligible impact upon the financial fortunes of the defendant. Certainly, it is appropriate that this court consider the size and profitability of the defendant, but that is but one factor.

[48] In my respectful opinion, and having reviewed the case law, those cases which attract a maximum fine are those in which the defendant has made informed decisions to act in a way or ways that are inimical to the legislative intention of the public welfare statute in question.

[49] Thus, in the case at bar, I note the following:

1. The defendant took the position at trial that the second derail was satisfactory, notwithstanding the defendant knew, or is deemed to know, that its own internal policy required all its derails to be reflective;
2. The defendant's internal policy was not disclosed at trial and the court has only learned of the policy as part of the defendant's efforts to avoid the imposition of a probation order;
3. The amended policy to mandate monthly inspections of the reflectivity of its derails was not implemented until almost four years after the death of Mr. Giesbrecht;
4. The timing of the amended policy appears more to be animated by the defendant's desire to avoid a probation order than to be a timely response to the incident of November 28, 2012;
5. The amended policy does not require nighttime inspections, notwithstanding that the defendant's own witnesses all agreed that only nighttime inspections could detect if a derail sign was reflective or had lost its reflectivity;

6. The second derail represented an extreme hazard that was unnecessary and ought to have been eliminated years before. The stop block accomplished the exact same purpose, namely positive protection for the occupied service cars.

[50] In all the circumstances and for the reason and analyses above, I find that this is an appropriate case to impose the maximum fine of $100,000.

[51] THE COURT: Counsel, we will take a brief, perhaps five, six minute break at this point.

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

IS A PROBATION ORDER APPROPRIATE?

[52] A probation order is not intended to be punitive in nature. In general terms a court should only impose a term of probation if the court is persuaded that the imposition of a probation order will have a positive impact upon the offender, so for example, a court sentencing a person for a simple possession of cocaine charge might impose a probation order including terms that the accused take part in counselling to help address their addiction issues.

[53] The defendant is a corporate offender. In those cases where a court has imposed a probation order upon such an

offender, the primary reason for so doing has been to act as a specific deterrent. One means of accomplishing this sentencing objective, the specific deterrence of that particular offender, is to require that corporate offender to provide to the public, at its own cost, information with respect to the offence it has been convicted, including the sentence imposed by the court. In this regard, one appeal court observed:

> This form of penalty also has the advantage of affecting the public image of the offender, especially when the offender is a large corporation with substantial resources, for which even a maximum penalty is not of great significance.

[54] *R. v. Terroco Industries Ltd.* [2005] ABCA, at page 141, and I have quoted from the earlier portion at paragraph 58. That same court continuing on in the same paragraph 58, continued:

> Whenever a corporate offender is being sentenced, the sentencing court should be made aware of the offender's general ability to pay. Individual deterrence in achieved at a much lesser cost when a small corporation of limited means is to be sentenced than when the corporation is large enough that maximum sentences have limited significance.

[55] Although *Terroco* is a case involving contravention of environmental legislation, I see no reason why the observations above should not apply in full measure to the case at bar.

[56] The factors which inform my decision as to whether or not the defendant should be ordered as part of a probation order to provide relevant information to the public are as follows:

1. The defendant had its own internal policy requiring all its derails to be reflective since at least 2005;
2. The court was not informed of the existence of this policy until post trial, and only as part of the defendant's argument opposing the imposition of a probation order;
3. The defendant argued at trial that the second derail was satisfactory vis-à-vis being of sufficient visibility, notwithstanding the defendant knew, or must be deemed to have known, that the second derail contravened CN's own standards for reflectivity and/or visibility;
4. There is no evidence that CN took any meaningful or effective steps to implement its own internal policy to ensure all its derails were reflective;
5. CN's failure to remove the second derail, a high risk hazard, and replace it with a much lesser hazard, namely a stop block, long before this tragic accident occurred;
6. In my respectful opinion, there can be an illusion of

safety when an organization has a policy in place, as was the case at bar, but there is a lack of or failure to effectively implement that policy, again as in the case at bar;

7. In the course of this trial, several witnesses observed that perhaps the single largest factor leading to industrial accidents is a sense of complacency. An employee who performs the same mundane task day in and day out. Again, in my respectful opinion, that same complacency can exist in its corporate form. CN had its policy in place that all its derails be reflective, but there is no evidence as to any effective or meaningful steps that CN took to implement that policy;

8. In that regard, I note the new policy requiring monthly inspections, fails to require a nighttime inspection, the only way according to the defendant's own witnesses that one can accurately test for reflectivity.

[57] Having presided over this lengthy trial, my strong sense is that what happened in this case is in the nature of a cautionary tale. As I observed in my reasons for judgment, there are many positive things that can be said about the

defendant's overall safety program, but the circumstances surrounding the second derail, including the fact that it was unnecessary and should have been eliminated and replaced by a stop block, can best be characterized as an instance of benign neglect.

[58] For the reasons set out above, I will impose a probation order to be in place for two years. The defendant is required under s. 732.1(3.1)(f) of the *Code* to provide on its official website, a summary of the offence of which it has been convicted, the sentence imposed by the court, and any measures the defendant has taken or is taking to reduce the likelihood of committing a subsequent offence.

[59] The court invites the parties to consider jointly submitting a proposed draft as to the wording of the summary and if the parties are unable to agree, then the court directs the defendant and the Crown to each submit its own respective proposed wording. The date for the court to review the draft or drafts of the summary will be scheduled before me for a one hour hearing as soon as possible, after April 30th, 2017.

[60] I will formally pronounce the terms of the probation order following the court's determination as to the contents of the summary as ordered under s. 732.1(3.1)(f). The defendant will also include in its summary reference to both

the reasons for judgment, and the reasons on sentence, and give the links to those locations.

[61] This court declines to require the defendant to establish policy, standards and procedures as provided for in s. 732.1(3.1)(d). My reason for so declining is that having considered the requirement in ss. (3.2) whether there was a more appropriate regulatory body to supervise the development or implementation of such policy, standards and procedures, I am satisfied that Transport Canada is the most appropriate body to act as such supervisor. Transport Canada is, in my respectful opinion, the preeminent regulatory authority with the mandate, obligation, resources, powers and expertise to address all issues of railroad safety.

[62] I will, however, as a term of probation require the defendant to forward to the most senior executive of Transport Canada a copy of the reasons for judgment, reasons on sentence, and the summary as per 732.1(3.1)(f).

[63] In summary, the court imposes a fine of $100,000 to be paid within sixty days and a two year probation order, whose terms will be finalized and pronounced as soon as possible after April 30th, 2017.

[64] These are my reasons on sentence.

(REASONS FOR SENTENCE CONCLUDED)