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

In the Provincial Court of British Columbia

REGINA

v.

CANADIAN NATIONAL RAILWAY COMPANY

REASONS FOR JUDGMENT
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:	**June 2, 2016**

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[1] THE COURT: These are my reasons for judgment in *R. v. Canadian National Railway Company*, British Columbia Provincial Court file number 29612, Fort St. John Registry.

[2] These decisions are being delivered orally. Accordingly, I reserve the right to make editorial corrections and changes as such to any formal transcript that might be ordered. I will, for example, paraphrase the counts in the Information and in addition I will not in my oral reasons be giving full case citations. The transcript, of course, would include the full formal reference to the wording of the counts and the case citations. I have also used caption headings to assist the transcriber.

BACKGROUND

[3] The trial of this matter commenced on April 27, 2015. Following the closing of the Crown's case, the defendant made a no-evidence motion whereby it sought a directed verdict of acquittal with respects to Counts 2, 3 and 4.

[4] The Information as laid charges the defendant as follows:

> Count 1: Canadian National Railway Company, on or about November 28, 2012, at or near Gutah Camp on the CN Fort Nelson Subdivision Line, approximately 160 kilometres north of Fort St. John, British Columbia, being an employer, did fail to ensure the health and safety of every person employed by it, namely: Bryan Johannes Giesbrecht, was protected, in violation of section 124 of the *Canada Labour Code*, and did thereby commit and offence contrary to subsection 148(1) of the *Canada Labour Code*.

Count 2: Canadian National Railway Company, on or about November 28, 2012, at or near Gutah Camp on the CN Fort Nelson Subdivision Line, approximately 160 kilometres north of Fort St. John, British Columbia, being an employer, did fail to ensure the health and safety of every person employed by it, namely: Bryan Johannes Giesbrecht, was protected, in violation of section 124 of the *Canada Labour Code*, which directly resulted in the death of Bryan Johannes Giesbrecht, and did thereby commit an offence contrary to subsection 148(2) of the *Canada Labour Code*.

Count 3: Canadian National Railway Company, on or about November 28, 2012, at or near Gutah Camp on the CN Fort Nelson Subdivision Line, approximately 160 kilometres north of Fort St. John, British Columbia, being an employer, did fail to ensure that its employee Bryan Johannes Giesbrecht was made aware of every known or foreseeable health or safety hazard in the area where the employee works, in violation of paragraph 125(1)(s) of the *Canada Labour Code*, to wit: the existence on the north end of the siding at Gutah Camp of a second derail device approximately 734 feet south of the switch to the mainline, and did thereby commit an offence contrary to subsection 148(1) of the *Canada Labour Code*.

Count 4: Canadian National Railway Company, on or about November 28, 2012, at or near Gutah Camp on the CN Fort Nelson Subdivision Line, approximately 160 kilometres north of Fort St. John, British Columbia, being an employer, did fail to ensure that its employee Bryan Johannes Giesbrecht was made aware of every known or foreseeable health or safety hazard in the area where the employee works, in violation of paragraph 125(1)(s) of the *Canada Labour Code*, to wit: the existence on the north end of the siding at Gutah Camp of a second derail device approximately 734 feet south of the switch to the mainline, which directly resulted in the death of Bryan Johannes Giesbrecht, and did thereby commit an offence contrary to subsection 148(2) of the *Canada Labour Code*.

[5] The court's ruling on the no-evidence motion was delivered orally on June 8, 2015. The court ruled in favour of the no-evidence motion with respect to Count 2 and the court directed a verdict of acquittal be entered on Count 2.

[6] The trial resumed and the defendant presented its case. The last day of trial was August 4, 2015. The court received lengthy written submissions, complemented by oral submissions. The last oral submissions were entertained on December 29, 2015.

[7] The court heard 17 days of trial, 77 exhibits were submitted to the court, and the court reserved its decision to today's date.

OVERVIEW

[8] The defendant is a large corporate entity whose operations include a rail line between Fort St. John and Fort Nelson in the northeastern corner of British Columbia. The rail line proceeds north from Fort St. John, and approximately 160 kilometres north of Fort St. John there is a siding called Gutah.

[9] The train owned and operated by the defendant stopped at Gutah to execute a specified task. The train had two employees on board, Joseph Michael Lucas, the locomotive engineer, and Bryan Johannes Giesbrecht, the conductor.

[10] The train crew, Mr. Lucas and Mr. Giesbrecht, were tasked with setting off a fully loaded fuel car to replace an empty fuel car. The fuel was required to supply the work camp which is at Gutah. The workers live in railcars which are located on the track siding. The siding is a length of track well in excess of fifteen hundred feet that runs parallel to the main track and joins the main track at either end of the siding.

[11] In the course of doing their job, the train stopped on the main track and Mr. Giesbrecht separated the rail cars. The fuel car was in the front group of rail cars which were attached to the engine car operated by Mr. Lucas.

[12] Mr. Lucas and Mr. Giesbrecht were operating in conditions of darkness. Mr. Lucas was in the engine car at the front end and Mr. Giesbrecht was at the rear of the line of rail cars. They could not see each other but were in constant radio communication.

[13] In order to accomplish the task, Mr. Lucas, as locomotive engineer, would shove the front group of rail cars onto the siding. Mr. Lucas, as per established job protocol, relied on Mr. Giesbrecht's radio-transmitted instructions prior to setting the train in motion. Mr. Giesbrecht informed Mr. Lucas, *inter alia*, that the railway -- that the derail device located close to the clearance point was off.

[14] The clearance point refers to where the siding joins the main track and is located on the siding just before it curves to join the main track.

[15] A derail device is a safety feature to prevent the rail car or engine located on the siding from rolling onto the main track and causing a catastrophic accident. The derail device is always in the "on" position, and must be deactivated to prevent a derailment. Unless it has been deactivated, a derail device is intended, and in fact designed, to cause or result in a derailment.

[16] Mr. Lucas, upon being given a formal instruction by Mr. Giesbrecht, then shoved rail cars a certain distance. I will delve into more detail in my summary of the evidence as to the exact words and exact sequence of events.

[17] Suffice to say, for the purposes of this overview, that there was a second derail device which was left in the "on" position. The second derail device was approximately 515 feet south of the first derail device. The rail cars were shoved over the second derail and a rail car derailed. This rail car fell and killed Mr. Giesbrecht.

CROWN THEORY

[18] The Crown maintains in Count 1 that the defendant failed in its statutory duty to ensure Mr. Giesbrecht's health and

safety because the derail sign, in close proximity to the second derail, was deficient and provided insufficient warning. The most significant deficiency, Crown submits, is that the sign was non-reflective.

[19] In Count 3, the Crown says that the defendant failed in its statutory duty to ensure that Mr. Giesbrecht was made aware of the existence of the second derail, and in Count 4, the Crown says it was this very failure to ensure Mr. Giesbrecht knew of the second derail which directly resulted in his death.

POSITION OF DEFENDANT

[20] The defendant concedes with respect to Count 1 that the derail sign was not reflective. Conversely, the defendant maintains that the sign was visible for more than ample time to fulfill its function of alerting a railroader as to the existence of the second derail.

[21] As regards Counts 3 and 4, the defendant says that the Crown has not discharged the onus upon it to prove beyond a reasonable doubt that Mr. Giesbrecht did not know there was a second derail device.

[22] In the alternative, the defendant submits that if the court is satisfied that the *actus reus* is established, in other words that the defendant has failed to ensure

Mr. Giesbrecht's safety and has failed to ensure that Mr. Giesbrecht was made aware of the second derail, then the defendant submits it can succeed in a due diligence defence by proving on a balance of probabilities that it took all reasonable care in establishing a proper system to protect Mr. Giesbrecht from harm.

SUMMARY OF EVIDENCE

Crown Witnesses

Evidence of Todd Wallace

[23] Mr. Wallace testified in his capacity as a health and safety officer and railway inspector who was assigned to investigate the incident of November 28, 2012, involving the death of Mr. Giesbrecht.

[24] Mr. Wallace attended the scene of the incident at about 8:00 p.m. on November 29, 2012.

[25] Mr. Wallace's testimony included his own observations and his conclusions and his observations after reviewing a copious number of documents, many which were internal to CN. Mr. Wallace also interviewed the locomotive engineer, Mr. Lucas, and other CN employees who were at the site of the accident.

[26] The documents reviewed by Mr. Wallace include, but are not limited to, the following: CN General Operating

Instructions (Exhibit 3); CN Timetable 20, effective August 1, 2012 (Exhibit 12); Train Journal Excerpts (Exhibit 20); Event Recorder (Exhibit 23); as well as Mr. Giesbrecht's personal CN Operating Manual (Exhibits 40 and 41).

[27] Mr. Wallace also took photographs (Exhibit 16), and prepared a detailed diagram (Exhibit 24), of the Gutah siding, which incorporates the information from the event recorder and various other exhibits.

[28] I have summarized Mr. Wallace's evidence as follows:

- On November 28, 2012, the deceased Mr. Giesbrecht was working in his capacity as a conductor employed by CN. Mr. Giesbrecht was approximately 30 years old at the time, and had been employed by CN for approximately 18 months.
- The locomotive engineer was Michael Lucas, who had been employed with CN and its predecessor for over 29 years at that time.
- Mr. Giesbrecht and Mr. Lucas were to proceed north from Fort St. John on CN's main track, and were to stop at Gutah, which was about 160 kilometres north of Fort St. John.
- Upon arriving at Gutah, the train crew, consisting of Mr. Giesbrecht and Mr. Lucas, were to replace an empty

fuel tanker located on the siding at Gutah.

- The siding consisted of a train track parallel to the main track. The siding at Gutah included a number of rail cars that were used to house and feed the CN employees who maintained the main line.
- The train arrived at Gutah at approximately 4:50 p.m., and its speed was eight miles per hour.
- It was dark when the train arrived at Gutah.
- About two minutes after its arrival, the train reached the north switch which was the location where the siding joined the main track. The train's speed was then 10 miles per hour.
- At approximately 4:54 p.m., the train stopped for 20 seconds and Mr. Giesbrecht separated the train as a preparatory step to positioning the now-separated front section of the train so as to be pushed onto the Gutah siding. This movement required the front separated portion of the train to be reversed onto the siding.
- Mr. Giesbrecht and Mr. Lucas could not see each other. They were however in almost constant communication by radio, and Mr. Lucas's testimony in this regard will be detailed below. Mr. Giesbrecht and Mr. Lucas,

based on the number of rail cars, were by my estimate approximately one thousand feet apart from each other.

- At approximately 4:56 p.m., Mr. Lucas began to reverse the front portion of the train onto the siding. Mr. Lucas was in the engine car and Mr. Giesbrecht at the opposite end, and it was Mr. Giesbrecht's job to direct Mr. Lucas as to the train's reverse movement onto the siding.
- Mr. Giesbrecht deactivated a derail device which was about 220 feet south of the switch.
- The derail device which Mr. Giesbrecht deactivated was marked by a sign which is marked "derail" on both sides, and is retroreflective.
- Mr. Lucas, who was in almost constant contact with Mr. Giesbrecht by radio, continued to reverse and did not exceed a reverse speed of five miles per hour.
- Mr. Giesbrecht and Mr. Lucas followed a strict communication protocol, sometimes referred to as peer-to-peer communication. This protocol required Mr. Giesbrecht to inform Mr. Lucas at prescribed intervals as to the distance remaining between the rail card to be joined and the end of the train. That distance was expressed in the number of cars, each car

representing a specific length.

- The last clear communication from Mr. Giesbrecht to Mr. Lucas, as recorded in Mr. Wallace's diagram (Exhibit 24 at page 8) was "four cars to the join", and the rear of the train where Mr. Giesbrecht was located was then approximately 45 feet from the second derail device.
- Within seconds of the last clear radio communication between Mr. Giesbrecht and Mr. Lucas, the train derailed. This occurred at precisely 4 hours, 58 minutes and 34 seconds in the p.m.
- The train's speed at the time of derailment was approximately three miles per hour.
- Mr. Giesbrecht was struck by a derailing fuel car.
- Mr. Wallace personally observed the scene of the fatality on the following day. He observed Mr. Giesbrecht's toque and his conductor's lantern, which was still illuminated. He also described what he said were blood stains in the snow next to the toque. The lantern and toque were located adjacent to the derailed car.
- The second derail was left in its "on" position. In other words, Mr. Giesbrecht had not deactivated the

second derail, and this is what caused the derailment resulting in Mr. Giesbrecht's death.

- The second derail was also marked by a sign. This sign was the same physical size or dimensions as the first derail sign, but it was different in two respects.
- The second derail sign was non-retroreflective, and the word "derail" was on one side only, the side facing north, which would have been the side facing Mr. Giesbrecht.
- Mr. Wallace said that in his experience, all the railroad signs he had seen in his 30-year-plus tenure in the railway field, had been retroreflective. The only exception he said were the occasional aging wooden station signs simply stating the name of the station.
- Mr. Wallace confirmed that all CP Rail signing must be retroreflective. Please note that I use the terms "reflective" and "retroreflective" to mean the same thing.
- Mr. Wallace spoke with CN's chief safety officer, John Orr. Mr. Orr was once responsible for the former BC Rail territory in southern British Columbia. CN

had assumed ownership and operation of BC Rail's track in 2004.

- Mr. Orr told Mr. Wallace that he had replaced the old BC Rail signs with CN Rail signs during his tenure in southern British Columbia.
- Mr. Orr also told Mr. Wallace that he was surprised to learn that Gutah had two derails on the north end of the siding.
- Mr. Wallace said that the second derail, the site of the derailment, had no apparent utility or function or, in other words, had no reason to be in that location.
- Mr. Wallace agreed under cross-examination that it is not possible to say with certitude where exactly Mr. Giesbrecht was at the moment of derailment, i.e. whether Mr. Giesbrecht was on the train or on the ground alongside the train.
- Mr. Wallace explained that CN's internal documents, Timetable 20 at page 44 (Exhibit 12) and the CN Operating Manual (Exhibit 41), only mentioned one derail on the north portion of the siding at Gutah.
- Mr. Wallace explained that not all derails are required to be identified in the timetable. He also

confirmed that the derail mentioned in Exhibit 12 is the second derail where the derailment occurred. The first derail, which was deactivated by Mr. Giesbrecht, was over 500 feet north of the second derail and is not mentioned or referenced in the CN documents, such as the timetable.

- Mr. Wallace, based on Mr. Giesbrecht's work evaluations as well as the extensive highlighting and personal annotations to Mr. Giesbrecht's CN Operating Manual, including Timetable 20, deduced Mr. Giesbrecht to be a diligent and conscientious employee.
- As I understood his testimony, Mr. Wallace also testified that November 28, 2012 was the first time that Mr. Giesbrecht was involved in moving rail cars from the main track onto the siding to Gutah. On those previous occasions, Mr. Giesbrecht, when at Gutah, would have stopped either to conduct a roll-by inspection or to consume a hot meal.
- Mr. Wallace agreed with defence counsel that the derail sign may have been covered in snow, and if so the sign would not be visible even if it was retroreflective.

Evidence of Joseph Michael Lucas

[29] -Mr. Lucas began his railroading career in 1983 when he was 20 years old. Mr. Lucas worked his way up the job ladder, becoming a conductor, and in 1994 he became a locomotive engineer. Most of his railroading career has been in the local area, which would include the Gutah siding.

[30] As of November 28, 2012, Mr. Lucas had spent the previous 18 years as a locomotive engineer. He had worked for BC Rail until the Canadian National Railway Company assumed ownership in 2004.

[31] Mr. Lucas has only worked with Mr. Giesbrecht on one or two occasions prior to November 28, 2012. That was however enough time to allow Mr. Lucas to have formed a positive opinion of Mr. Giesbrecht as a capable conductor and an individual who readily accepted responsibility. In Mr. Lucas's words, Mr. Lucas was happy to have the opportunity to work with Mr. Giesbrecht on that day.

[32] I have summarized Mr. Lucas's testimony as follows:

- Consistent with CN's policy, Mr. Lucas had a meeting with Mr. Giesbrecht prior to departing Fort St. John on November 28, 2012. This might be better described as a job briefing, and would consist of Mr. Giesbrecht and Mr. Lucas agreeing on how they would accomplish

their assigned task.

- The job briefing would have included how they would perform their assigned tasks at Gutah, namely to remove an empty fuel car and to replace it with a full fuel car.
- As further job briefing, Mr. Giesbrecht separated the rail cars during the approximately 20 seconds that the train stopped at Gutah on the main track, and communicated this to Mr. Lucas.
- At this point, it was dark with a light dusting of snow and there was also falling snow.
- Mr. Giesbrecht then proceeded to the switch and then radioed Mr. Lucas "derails off", which Mr. Lucas understood to refer to the first derail, just over 200 feet onto the siding on the main switch.
- Mr. Lucas testified that he and Mr. Giesbrecht followed strict radio protocol at all times as Mr. Lucas began to reverse the cars onto the siding.
- The last clear communication from Mr. Giesbrecht to Mr. Lucas was "four cars to a join" and Mr. Lucas, as per radio communication protocol, repeated those words.
- After repeating "four cars to a join", in his direct

testimony, Mr. Lucas heard almost immediately a muffled sound over the radio and he stopped the train as quickly as possible.

- Mr. Lucas did so because the muffled sound was not a clear instruction and because he was not receiving any coherent response from Mr. Giesbrecht.
- Mr. Lucas spoke with a fellow employee, Ruben Da Costa, who was listening in on the radio communication between Mr. Giesbrecht and Mr. Lucas.
- Mr. Da Costa, who was closer to Mr. Giesbrecht, went to locate Mr. Giesbrecht, and Mr. Da Costa informed Mr. Lucas of the derailment and that Mr. Ginsberg was fatally injured.
- Mr. Lucas then alerted CN Traffic Control and was told to wait for help to come.
- As I understood his evidence, Mr. Lucas directed that Mr. Giesbrecht's body be removed from where Mr. Da Costa had found the body because Mr. Lucas did not want Mr. Giesbrecht's body to stay lying in the snow.
- Under cross-examination, Mr. Lucas agreed that the last coherent communication from Mr. Giesbrecht was "four cars", and not "four cars to a join" or "four

cars to the joint".

- Mr. Lucas agreed also under cross-examination it that it was common for signs to be snow-covered, and he also agreed that this incident may have been a sheer accident and that neither Mr. Lucas nor CN were necessarily at fault.
- Mr. Lucas testified under cross-examination that a rail crew member on the main track would not be paying attention to signs on a siding.

Evidence of Timothy Leggett

[33] Mr. Leggett is a professional engineer and his CV is Exhibit 48. The Crown, however, did not seek to qualify Mr. Leggett as an expert. As I understood his testimony, Mr. Leggett was tendered by the Crown as an individual who has extensive experience in testing the visibility of persons and objects at night.

[34] Mr. Leggett replicated the lighting conditions that existed at the time of the derailment, and then compared the reflective properties of the second derail sign that was at the scene and proxies of retroreflective signs, including ones similar to the first derail sign.

[35] Mr. Leggett's testimony highlighted the differences in the following ways:

(1) the flanger sign at the location of the derailment had the word "derail" on only one side, the side facing north, and the sign used vinyl electrical tape and was not a retroreflective sign;

(2) a retroreflective CN derail sign; and

(3) a retroreflective BC Rail derail sign.

[36] Mr. Leggett testified that the retroreflective signs were, at a minimum, four times more visible than the non-retroreflective signs.

[37] Mr. Leggett testified that, assuming a speed of three miles per hour, the retroreflective derail sign would have been clearly illuminated by Mr. Giesbrecht's conductor's lantern at a distance of 328 feet. Mr. Leggett then converted this distance -- 328 feet -- and an assumed speed of three miles per hour to conclude that Mr. Giesbrecht would have had 75 seconds approximately from the point when the retroreflective derail sign was clearly visible to him until he reached the derail sign.

[38] Conversely, Mr. Leggett testified that Mr. Giesbrecht would have had at most 18 to 22 seconds from the time the non-retroreflective sign was visible until he reached that sign.

[39] Mr. Leggett also testified under cross-examination that if a retroreflective sign was covered by snow, then that sign

would not be visible.

Evidence of Cory Myer

[40] I have summarized Mr. Myer's evidence as follows:

- Mr. Myer has worked in the railroading industry since 1974.
- He retired from CN in 2009.
- He owns his own consulting business and contracts himself to various companies, including CN, to provide training and educational services.
- His railroading career has included working as a switchman, conductor, locomotive engineer and yardmaster.
- He was the instructor for Mr. Giesbrecht from April 18, 2011 until June 10, 2011, at Surrey, British Columbia, for what was described as the New Conductor Training Program, or boot camp, which lasted for approximately eight weeks.
- He described the training in detail on a day-to-day and week-to-week basis.
- He testified that there was a constant emphasis on safety.
- He confirmed that the footnotes in Timetable 20 are special instructions.

- He explained that pull-by inspections are accomplished by the conductor standing on the ground in a safe place, and inspecting both sides of the train, which would require the conductor to move from one side of the train to the other.
- He discussed at length and explained the function of various documents, including General Bulletin Orders (GBOs), Tabular General Bulletin Orders (TGBOs), General Operating Instructions (GOIs), and the Timetable.
- He observed that Mr. Giesbrecht showed great diligence throughout the eight-week course.
- The training acquainted Mr. Giesbrecht with the safety briefings and job briefings which were often conducted at the same time.
- He confirmed that all students were instructed not to detrain or get off the train unless it was moving at less than four miles per hour.
- The New Conductor Course included an intensive two-week block when the students were required to simulate actual switching operations.
- Upon completion of the eight-week boot camp, Mr. Giesbrecht had a mentoring period.

- On cross-examination, Mr. Myer acknowledged that he was not aware that BC Rail signs were still being used in Northern British Columbia as of November 2012.
- Mr. Myer agreed that effective railroading signs would include fulfilling a need, commanding attention and respect, conveying a clear and simple message, and allowing sufficient time for a proper response.
- Mr. Myer also agreed that such signs should be of uniform shape, have consistent placement, be inspected frequently, relate to relevant conditions, be recognizable at a glance, be clean and legible, and that such signs should be replaced as soon as possible if they lacked the retroreflective coating.

Evidence of Donald Penny

[41] I have summarized Mr. Penny's testimony as follows:

- Mr. Penny was the Senior Manager of Risk Management for Western Canada for CN from April 1990 until December 31, 2014, when he retired.
- He spent his entire railroading career with CN, from approximately 1977.
- Mr. Penny identified the most accident-prone tasks as when shoving or pushing a train in a reversing movement, the use of hand-operated switches, and the

use of hand-operated derails.

- At the time of this accident in November 2012, and in the months leading up to November 2012, Mr. Penny confirmed that there was a heavy emphasis on peer-to-peer communication.
- Mr. Penny was adamant that footnote 1 on page 44 in Timetable 20 was not confusing or misleading in the slightest.
- Mr. Penny testified that usual derails are not mentioned in the Timetable because every railroader would expect to see a derail just beyond every clearance point.
- Accordingly, Mr. Penny testified, that there was no reason to list the obvious in the Timetable, and by listing the obvious, this would only clutter up the Timetable and crowd out the really important information, such as the presence of an unusual derail.
- Mr. Penny testified that the purpose of the second derail was to protect persons in the occupied service cars, notwithstanding their position uphill from the north switch. Persons in the occupied service cars would be injured by an unintended movement associated

with a switching manoeuvre and involving a defective rail car.

- Likewise, Mr. Penny testified, persons in the occupied service cars could be injured if the rail cars were pushed or shoved too far.
- Mr. Penny testified that footnote 1 in Timetable 20 was in the nature of a special instruction, and was intended to alert railroaders to an unusual item, namely the second derail.
- Gutah is a prescribed inspection point, and is used to set off defective rail cars. The second derail provided positive protection to persons in the occupied service cars.
- Following the accident at Gutah, CN removed a portion of track north of the occupied service cars and installed a stop block. The stop block which was then installed after the accident, served, according to Mr. Penny, the same function as the second derail, namely it also provided positive protection to persons in the occupied service cars.
- Mr. Penny explained how the health and safety committees were set up and in particular he described at length the Fort St. John Health and Safety

Committee, which included a member from Fort Nelson.

- Mr. Penny testified that a review of the minutes of the Fort St. John Health and Safety Committee indicates that it was diligent in monitoring signs in the Fort Nelson Subdivision.
- Mr. Penny testified that if the Health and Safety Committee had a safety concern that was not being addressed in a timely and meaningful manner, there was a process in place that would allow the Health and Safety Committee to fast-track the safety concern and it would be sent to the most senior level of management at CN.
- Mr. Penny reviewed Exhibit 23, the Event Recorder, and concluded that Mr. Lucas had reversed the engine as the train was still moving forward, and this an improper action.
- Mr. Penny personally attended the accident site on November 30, 2012, and spoke with the Camp Foreman, Ruben Da Costa, who was present on site at the time of the accident.
- Mr. Penny testified that he spoke with and shared information with other investigators who were on site as well.

- Mr. Penny observed that the rail cars which had been left on the main track had not been properly secured and that Mr. Lucas had failed to apply handbrakes as required.
- Mr. Penny testified that, in his experience, the root cause of most accidents is complaisance, which sets in when individuals are required to perform a routine task over and over.
- Mr. Penny also testified that he detected some evidence of rushing on the part of the train crew, consisting of Mr. Lucas and Mr. Giesbrecht. *Indicia* of rushing, according to Mr. Penny, included Mr. Lucas having failed to apply a handbrake on the rail cars left on the main track, and this omission Mr. Penny described as a serious oversight. Mr. Giesbrecht detrained when the train was moving well in excess of four miles per hour, and Mr. Lucas put the engine in reverse when the train was still moving forward.
- Mr. Penny also reviewed Mr. Lucas's discipline history. Based on a hypothetical question, Mr. Penny testified that Mr. Giesbrecht's verbal instructions would have required Mr. Lucas to shove the cars not more than six railway car lengths, or 300 feet. However, given that the last rail car was shoved onto

the secondary rail, Mr. Lucas, according to Mr. Penny, must have reversed too far.

- Under cross-examination, Mr. Penny confirmed that the Health and Safety Committee was required to inspect the entire workplace at last once per year.
- Mr. Penny testified that part of the track inspection included replacement of badly worded signs, but Mr. Penny acknowledged that there were no specific requirements or instructions to the inspectors to check for whether or not signs were reflective or whether or not any reflective material had degraded and needed to be replaced.
- Most track inspections occurred during daylight hours. If a track inspector saw a degraded reflective sign or a non-reflective sign, Mr. Penny testified he would expect it to be reported and rectified immediately.
- Visibility of rail signs is important, Mr. Penny testified. As well, he said that Tabular General Bulletin Orders are special instructions and are unique to that day's job requirements and part of that day's job briefing.
- The Crown's proposed wording of the derail footnote was, according to Mr. Penny, too verbose and in

addition Mr. Penny maintained it makes confusing mention about unusual derails with usual derails.

- Mr. Penny concluded his testimony that defence in depth is a good philosophy, and a company requires multiple layers of safety as well as redundancy in safety procedures.
- And finally, Mr. Penny indicated he did not know the cost of replacing signs in the Fort Nelson Subdivision.

Evidence of Guy Bouillon

[42] I have summarized Mr. Bouillon's testimony as follows:

- He is a train master with CN.
- In November 2012, he was the Supervisor of the Chetwynd area.
- He has 37 years' experience in the railroading industry.
- Mr. Giesbrecht came to work under him in Chetwynd after Mr. Giesbrecht has completed the New Conductor's boot camp eight-week training program in Surrey, B.C.
- Mr. Giesbrecht was very smart. He was way ahead of his co-workers, and according to Mr. Bouillon, he was one of the quickest learners he had ever worked alongside.

- Mr. Giesbrecht was tested exhaustively to ensure that he was working both properly and safely.
- Mr. Bouillon administered most of those tests himself.
- All of Mr. Giesbrecht's evaluations and tests were very positive.
- Mr. Bouillon was confident that Mr. Giesbrecht was ready to assume the position of conductor.
- Reviewing Mr. Giesbrecht's CN Operating Manual (Exhibit 41), what the extensive annotations and cross-referencing reflects, in Mr. Bouillon's opinion, how well Mr. Giesbrecht understood the various rules and demonstrated good insight and good understanding on Mr. Giesbrecht's part.

Evidence of Joseph Richard Herbert Barry

[43] I have summarized Mr. Barry's testimony as follows:

- He has worked in the railroading industry since April 1980.
- He has worked with both CN and BC Rail.
- He has worked in numerous positions, including conductor, yardmaster and locomotive engineer.
- He also has experience working in the USA and has been as well on a six-month tour in Kosovo in late 2002.

- Since 2008, he has worked with CN as a train master.
- He reviewed Exhibit 23, the Event Recorder or Engine Download.
- Mr. Giesbrecht should not have detrained when the train was travelling in excess of four miles per hour, and even detraining at less than four miles per hour is possibly too fast if the conditions are themselves dark or slippery.
- There were nine rail cars left on the main track after Mr. Giesbrecht had separated them. Those nine cars should have had hand brakes applied. Mr. Lucas should have tested the hand brakes by pushing the rail cars.
- Mr. Lucas, according to Mr. Barry, both failed to apply the hand brakes and failed to conduct the shove test.
- Mr. Lucas also made an error when he reversed the train while the train was still moving forward.
- Mr. Lucas had not properly warmed up the brakes, according to Mr. Barry, as it approached the north switch at Gutah, and it was this failure to warm up the brakes that likely caused the train to overshoot the north switch.
- Mr. Lucas should have used a buffer car when was

pushing the rail cars onto the siding.

- Under cross-examination, Mr. Barry agreed that reflective signs are important at night, and reflective signs should be inspected.
- Mr. Barry agreed that it was not uncommon for employees to detrain when a train is moving in excess of four miles per hour, and he has done so himself on many occasions.
- Mr. Barry also agreed that it was very important to warn about the derail devices.

Evidence of Brian McCurdy

[44] I have summarized Mr. McCurdy's testimony as follows:

- He has been a railroader for 29 years, with both BC Rail and CN.
- In November 2012, he was Track Supervisor over the area, including Gutah.
- His duties included a weekly inspection of the main line and this would include sight lines for signage.
- All inspections were done during daylight hours.
- There was an annual inspection which was very detailed and which included specifically inspecting all derails.
- He was familiar with the siding at Gutah, and he had a

specific recall of seeing the sign in question, the second derail sign, but he had never checked this sign in nighttime conditions.

- CN took over the track from BC Rail in 2004 or 2005, and the old BC Rail derail signs were used in the Fort Nelson Subdivision until 2012.
- Mr. McCurdy said he never inspected the second derail sign at night.
- He is acquainted with Terry Collins, a railway safety inspector with Transport Canada.
- Mr. Collins, Mr. McCurdy testified, had conducted an inspection of the main line in June 2012, and Mr. McCurdy had taken remedial steps to address the deficiencies noted in Mr. Collins's report.
- Under cross-examination, Mr. McCurdy said that he could not recall his last inspection of Gutah, but that inspection, at most, would have been a visual inspection, and would not have involved a walking inspection.
- Mr. McCurdy acknowledged that he had not been trained by CN to assess the reflective property of signage, nor was he ever asked by CN to conduct such an assessment.

- Mr. McCurdy agreed that it was important that railway signs be reflective.
- After examining Exhibit 17, the flanger sign, Mr. McCurdy said that it was not obvious that it lacked reflective properties during a daylight inspection.
- Mr. McCurdy went to Gutah with the RCMP and a coroner on the same night as the accident occurred.

Final Witness Called in Rebuttal by the Crown

Evidence of Terry Collins

[45] I have summarized Mr. Collins's testimony as follows:

- Mr. Collins is a Railway Safety Inspector with Transport Canada.
- He worked with CN from 1978 until 2004.
- On June 25 and 26, 2012, Mr. Collins conducted an inspection of the Fort Nelson Subdivision, which included Gutah.
- The purpose of his inspection was to assess how CN was managing safety of its track infrastructure in the subdivision, and to monitor if CN was compliant with the regulatory requirements of Transport Canada and to identify any threats to safety.
- That inspection was part of the Transport Canada Track

Program.

- The primary focus, according to Mr. Collins, was on the visual inspection of the main track itself, and only cursory observations of bridges, crossings and natural hazards.
- Mr. Collins conducted the inspection by riding as a passenger in a full-sized SUV on a high railed vehicle with a computer to generate the measurements of the track geometry.
- Mr. Collins was a passenger in the vehicle because his focus and attention was to monitor the computer readouts, and to make visual observations.
- Mr. Collins said it was not part of his job to inspect signage *per se*, unless for example safety might be compromised by vegetation that would obscure the sign near a railway crossing.
- Mr. Collins testified that sidings were rarely inspected. The focus of his inspection is on the main track, but on occasion he may inspect a siding if, for example, he had to clear the main track to make room for a train. This however is a most rare occasion.
- Mr. Collins testified that he did not inspect the Gutah siding in June 2012, nor had Mr. Collins ever

inspected the Gutah siding since joining Transport Canada as a safety inspector in 2004.

- In cross-examination, Mr. Collins testified that in the course of his inspection of the main track, his focus is to monitor the computer readouts and to observe features with respect to the main track. Mr. Collins agreed however that his peripheral vision would take in some non-main track features.

THE LAW

[46] Sections 124 and 125(1)(s) of the *Canada Labour Code*, sometimes referred to as the CLC, state as follows:

> **Duties of Employers**
> *General duty of employer*
> [124] Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
>
> *Specific duties of employer*
> [125] (1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity, ...
> (s) ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works;

[47] The word "ensure" has been defined as synonymous with "to make certain". In *R. v. Wyssen*, [1992] O.J. No. 1917, at paragraph 14, I quote as follows:

> An "employer" is obliged by s. 14(1) to "ensure" that the "measures and procedures" prescribed by the Regulations are carried out in the "workplace". The relevant definition of "ensure" in the *Shorter Oxford English Dictionary*, (3rd ed.) is "make certain". Section 14(1), therefore, puts an "employer" virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.

[48] *Wyssen* addresses the Ontario workers safety legislation. The Crown submits there is no reason that the word "ensure" in the federal worker legislation should be any different than the word "ensure" in provincial worker safety legislation. Employees of federally-related employer, Crown respectfully submits, are entitled to be just as safe on the job as employees of provincially-regulated employers.

[49] The following comments of the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. City of Hamilton*, [2002] O.J. No. 283, appear, in my respectful opinion, to apply with equal force to the *Canada Labour Code:*

> [16] The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be

avoided.

[50] Sections 122.1 and 122.2 of the *Canada Labour Code* set out the purpose of Part II of the *Code*, which deals directly with workers' safety:

> *Purpose of Part*
> 122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> *Preventive Measures*
> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[51] Accordingly federally-regulated employers are required under s. 124 of the *Canada Labour Code* to make certain that the health and safety of their employees are protected.

[52] Parliament has imposed a stringent responsibility on federally-regulated employers to keep their employees safe. That responsibility has been rigorously applied in my review of the numerous authorities to which I have been referred.

[53] The Crown is required to prove beyond a reasonable doubt that CN failed to make certain that the health and safety of its employee, Mr. Giesbrecht, was protected under Count 1 as of November 28, 2012 at Gutah.

[54] Similarly, federally-regulated employers are required

under s. 125(1)(s) of the *Canada Labour Code* to make certain that their employees are made aware of every known or foreseeable safety hazard at work. The Crown is required to prove beyond a reasonable doubt that CN failed to ensure that its employee Mr. Giesbrecht was made aware of the second derail at Gutah, in other words the derail that killed him, as of November 28, 2012 at Gutah.

[55] Where the employer failed to make certain the health or safety of an employee, the employer has a defence under s. 148(4) of the *Canada Labour Code*, where the employer establishes on a balance of probabilities that it exercised due care and diligence to avoid the contravention:

> *Defence*
> 148 (4) On a prosecution of a person for a contravention of any provision of this Part, except paragraphs 125(1)(c), (z.10) and (z.11), it is a defence for the person to prove that the person exercised due care and diligence to avoid the contravention. However, no person is liable to imprisonment on conviction for an offence under any of paragraphs 125(1)(c), (z.10) and (z.11).

[56] The classic description of the due diligence defence which remains good law is that of Mr. Justice Dickson in *R. v. Sault Ste. Marie*, [1978] S.C.J. No. 59, at page 1326:

> 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. This involves consideration of what a

> reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

[57] And as Dickson J. said later in the judgment about what constitutes due diligence, at page 1331:

> ... whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[58] If the employer can prove on a balance of probabilities that he took all reasonable care in establishing a proper system to prevent a breach of the *Canada Labour Code*, then the employer will not be liable.

[59] The British Columbia courts addressed what constitutes due diligence in the case of *R. v. Gulf of Georgia Towing Co. Ltd.*, [1979] B.C.J. No. 2064. In that case, it determined at paragraph 15 that, for the accused only to show that he had hired and trained carefully will not be enough to establish due diligence. A close and continual scrutiny is required of the risk that materialized in harm.

[60] Now there was, the Crown submits, no close and continual scrutiny by CN to make certain that its derail signs in a

former BC Rail territory were reflective.

[61] CN demurs from the Crown's submission and the defendant submits that *R. v. Gulf of Georgia Towing Co. Ltd.* should be a case that is confined to the unique facts that are found to exist in that case.

[62] The British Columbia courts have also emphasized the importance of a backup system. That is why layers of protection are required. In the British Columbia Provincial Court case, *R. v. Island Industrial Chrome Co. Ltd.*, [2002] B.C.J. No. 630, the court states, at the bottom of paragraph 2: "In short, the company must have a back-up system for inevitable human error."

[63] Counsel, I am approximately half way through the delivery of the judgment, and I think for the sake of my voice, this is perhaps a good time to take our recess.

(PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
(PROCEEDINGS RECONVENED)

[64] I am going to resume the reading of my judgment.

[65] Whether the employees were at any way at fault is irrelevant to whether ss. 124 or 125(1)(s) of the *Canada Labour Code* were breached. This is illustrated by the Ontario Court of Appeal decision, *Ontario (Ministry of Labour) v. Dofasco Inc.* [2007] O.J. No. 4339, and the Saskatchewan Court

of Appeal decision, *R. v. Saskatchewan Wheat Pool*, [2000] S.J. No. 427.

[66] In *Dofasco*, the employer was charged under the Ontario Occupational Health and Safety Act with failing to install a guard in a piece of machinery to prevent an employee's hand or other body part from being injured by the machine while in operation. There was no guard rail, but Dofasco had some other procedures in place intended to reduce the risk of an employee being injured.

[67] At the time of the accident, the injured worker and the uninjured co-worker had said (at paragraph 21), "to hell with it, let's do it the way we used to". The employees deliberately flaunted the safety rules that their employer had in place. One of the employees was seriously injured by the machine that lacked a guard rail.

[68] Despite deliberate employee misconduct, the Ontario Court of Appeal found that the employer had breached the workers' safety legislation because employee misconduct was irrelevant. Workplace safety regulations are designed, not just for the prudent worker, but to prevent workplace accidents when workers make mistakes, are careless or even reckless.

> [22] On a plain reading of the Regulation, employee misconduct does not go to the actus reus of the offence. Rather, at least in relation to employees

carrying out their work, an employer is strictly liable if it fails to comply with its obligations and there is no suggestion that employee misconduct constitutes any form of defence.

[23] Further, Collins J. had this to say about the purpose of the OHSA in *R. v. Spanway Buildings Ltd.*, unreported, April 3, 1986 (Ont. Prov. Ct. (Crim. Div.)), at p. 4:

> ... one of the purposes of the act is to protect workers in this very hazardous industry from their own negligence. No one in any occupation can work 100 percent of the time without occasional carelessness. However, the potential for serious consequences of momentary negligence is much greater in the construction industry than in almost any other.

This admonition is particularly apposite in the context of the steel industry.

[24] Moreover, as was noted by Laskin J.A. in his decision granting leave to appeal in this case, "... workplace safety regulations are not designed just for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless". In our view, this principle also extends to deliberate acts of employees while performing their work.

[25] In our opinion, Dofasco's argument ignores common sense. Employees do not deliberately injure themselves. The requirement for guarding of machinery is to protect employees in the workplace from injuries due to both inadvertent and advertent acts. This is the reason for the requirement for physical guards. Employees encounter all variations of workplace hazards. Some are inadvertent -- for example, employees may slip, misjudge distances, lose their balance, their timing or dexterity may be off, lose concentration or simply be careless. Physical guards or their equivalent are obviously required to prevent against injury in these situations.

[69] In *Saskatchewan Wheat Pool*, one of the doors at the Moose Jaw Seed Cleaning Plant was not working properly. The door was 17 to 20 feet above floor level and operated by an electric motor. A device had been built for a worker to stand in to fix the door. This device was raised by a forklift.

[70] While the repairs were underway, the forklift operator wandered off and left the forklift unattended. The employee repairing the door forgot to turn off the power for the electric door. Someone, likely the employee who was repairing the door, hit the on button for the door. The door knocked the device from the forklift and the employee doing the repairs was seriously injured.

[71] The employer was charged under s. 124 of the *Canada Labour Code*, breach of the general duty to keep employees safe.

[72] At the Provincial Court, the employer was convicted. On the summary conviction appeal, the employer was acquitted by the Saskatchewan Queen's Bench on the basis that the accident was due to employee negligence. The summary conviction appeal, however, erred in its approach by treating a *Canada Labour Code* prosecution as a tort case.

[73] The question is whether the employer did everything it should have done to keep its employees safe. Employers need

to have systems in place so that even sloppy, inattentive or outright negligent employees do not get injured or killed.

[74] The Saskatchewan Court of Appeal reinstated the conviction, and held that the Provincial Court judge had been correct. The focus of the inquiry is whether the employer did everything required to ensure the safety of its employees. In this case, the employer did not.

> [10] On appeal to the Court of Queen's Bench, the summary conviction appeal court judge allowed the appeal and set aside the conviction. He began his analysis with the following comments:
>
> > ... [H]aving found that the accident was due to the negligence of the employee who was injured, the learned trial judge should have analysed the evidence to determine whether there was a connection between the employee's negligence and the potential liability of the Pool together with the evidence of the defence of due diligence. There was no such analysis made in the judgment, and I conclude, therefore, that the learned trial judge decided that the Pool was vicariously liable for the negligence of its employee, without regard to the defence of due diligence. I have drawn this inference with respect, but of necessity, because the judgment lacks reasons for connecting the negligence of the employee with the liability of the Pool and I am left with the inescapable conclusion that the learned trial judge imputed vicarious liability to the Pool. If the learned trial judge had considered the evidence in totality, including evidence of the defence of due diligence, the result would have been to leave a reasonable doubt that the Pool failed to repair the overhead door in a proper and workmanlike manner, and, ergo, a reasonable doubt that the Pool failed to protect the safety of the employee.

> Failure to consider the evidence of due diligence undertaken by the Pool deprived it of a consideration of a relevant legal issue which is a wrong direction on a question of law and the judgment of the learned trial judge should be set aside on that ground.

[11] We are of the opinion the summary conviction appeal judge erred in this portion of his analysis. The trial judge did not resort to any notion of vicarious liability. He found the defendant company had breached s. 124 by omitting to take reasonable steps to ensure the safety of its employees, particularly by failing to require or instruct or train forklift operators to remain at the controls of the machine during operations such as those in issue. Nor did the trial judge fail to consider the defence of due diligence or the evidence touching the matter. Indeed, he expressly declined to give effect to the defence in light of the evidence.

[12] Later in his analysis the summary conviction appeal court judge noted that the requirement that a forklift operator remain at the controls of the machine is not found in the Code. This suggests he may have been of the view the conduct of the company, as found by the trial judge, was incapable in law of constituting a violation of s. 124.

[13] Assuming he was of that view, we must say we cannot agree. We are of the opinion the offending conduct of the company was capable in law of constituting a breach of the section. There is nothing in the provisions of the Act or the regulations that of necessity dictates otherwise. As the trial judge said:

> The point which I make in ruling as I do about the responsibilities of the employers at the seed cleaning plant in this case rests on the fact that they had designed a unique piece of machinery, the lifting device, and that it followed from the nature and design of that lifting device that there must be an operator at the forklift controls at all times when the lifting device was in use, to live up to the

> standards of the federal legislation which does govern here and which mandates a duty to ensure the safety and health of the employee in the specific context in which his employment placed him.
>
> [14] We agree with these remarks.

[75] The issue under s. 148(2) of the *Canada Labour Code* is whether Mr. Giesbrecht's death was an immediate consequence of CN's failure to make certain that Mr. Giesbrecht was aware of the second derail as of November 28, 2012.

[76] The Crown has referred in its submissions to the changes at Gutah after the accident, and Mr. Orr's correspondence in this regard. Post-accident changes have been held admissible in a number of Canadian court decisions.

[77] In *Sandhu (Litigation guardian of) v. Wellington Place Apartments*, [2008] O.J. No. 1148, a two year old leaned against the screen on the window of a fifth-floor apartment. The screen gave way, the infant fell and suffered catastrophic injuries. The screen had a hole in it, and the window lacked a child safety lock. The guardian *ad litem* of the child sued the landlord of the apartment building for negligence. The jury found the landlord negligent and awarded damages in excess of $17 million. The landlord appealed on various grounds, including that the jury considered remedial measures after the accident.

[78] Immediately after the accident, the landlord replaced the screen in the child's apartment and in some other apartments, costing less than $150, and within five days of the accident, installed child safety locks on windows throughout the building for a cost under $2,000.

[79] Regarding whether the post-accident measures are relevant, the Ontario Court of Appeal stated:

> [56] Apart from any inference of an admission of liability, the fact that repairs to the screens were made quickly and inexpensively after the accident was relevant in other ways. It was evidence from which the jury could infer that the appellants had failed to meet a reasonable standard in keeping the building in good repair. The evidence of repairs could also be evidence of a failure to take reasonable care because it was capable of showing that the appellants' inspection of the building before the accident failed to meet a reasonable standard.

[80] The Ontario Court of Appeal went on to state that there are no valid policy reasons for not considering such evidence:

> [58] However, it is argued that even if such evidence is relevant, it should be excluded for policy reasons. The policy argument with respect to evidence of remedial measures is premised on the theory that defendants would be discouraged from taking necessary remedial measures if they knew that these measures would be admitted against them at trial as an admission of liability. Courts have tended to discount this policy argument. As Seaton J.A. said in *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 at 157 (C.A.):
>
> > No case binding on us supports an exclusionary rule based on policy and I am not inclined to

> introduce such a rule. In my view a defendant will not expose other persons to injury and himself to further lawsuits in order to avoid the rather tenuous argument that because he has changed something he has admitted fault. [Emphasis added.]
>
> [59] We agree with this statement. We also note that a similar view of the limited value of the policy reason for exclusion has been adopted by courts in this province: see e.g. *Algoma Central Railway v. Herb Fraser and Associates Ltd.* (1988), 66 O.R. (2d) 330 (Div. Ct.). In our view, the policy argument alone is not a basis for excluding evidence of subsequent remedial measures.

[81] The British Columbia courts have come to the same conclusion. Post-accident changes are not an admission of negligence but they can be taken into account. In *O'Leary v. Rupert*, [2010] B.C.J. No. 344, the B.C. Supreme Court stated:

> [47] It is noteworthy that the Ruperts have, since Mrs. O'Leary's accident, both taped the switch for the outside lights open and begun to apply salt to their driveway following a snowfall. It is clear that post-accident conduct cannot be viewed as an admission of negligence: *Anderson v. Maple Ridge (District)* (1992), 71 B.C.L.R. (2d) 68, 17 B.C.A.C. 172 (C.A.) at p. 75. Nevertheless, in *Anderson*, Wood J.A., as he then was, concluded that moving a stop sign after an accident was relevant to the question of whether it was difficult to see prior to the accident. Here the steps taken by the defendants post-accident are relevant to whether the driveway was dark and whether it remained slippery or icy after being shovelled.
>
> [48] Similarly, post-accident conduct can be used as an indication of the ease with which a risk might have been avoided: *Niblock v. Pac. Nat. Exhibition*. (1981), 30 B.C.L.R. 20 (S.C.) at p. 25.

[82] This approach has been found to apply with equal force in

workers' safety prosecution, and specifically *R. v. Dana Canada Corp.*, [2008] O.J. No. 4487:

> [4] That decision has been considered in the context of an Occupational Health and Safety Act prosecution in *R. v. Warren Bartram*, unreported decision of Justice Lane of the Ontario Court of Justice at Toronto delivered July 11, 2008. She found that these principles do apply to regulatory prosecutions and said at page three that,
>
> > Post-accident changes or improvements, standing by themselves, cannot be taken as an admission of liability or a basis for a finding of liability but evidence of subsequent repair is a circumstance that can be considered, along with other evidence of negligence to show prior knowledge of a hazard, control over the location of the accident or the feasibility of measures. These permitted uses become particularly relevant in determining the existence of reasonable care as part of the due diligence defence.
>
> [5] She found that the proposed evidence was relevant. Included at page four,
>
> > I'm also satisfied that a judge alone can instruct him or herself as to the permissible uses that can be made of the post-incident conduct (including the investigation report). At the conclusion of the trial after all of the evidence is before the Court, counsel will have an opportunity to make further submissions as to the weight if any that should be accorded to this evidence.

[83] The Crown seeks to rely upon post-accident changes to the Gutah siding in an effort to prove guilt. The defendant objects that the cases relied upon by the Crown have no application to the case at bar. The defendant respectfully

submits that the *Dana* case should be restricted to what it says:

> ... evidence of subsequent repair is a circumstance that can be considered, along with other evidence of negligence to show prior knowledge of a hazard, control over the location of the accident or the feasibility of measures.

[84] In this case, the defendant submits, there was no prior knowledge. It is not denied that CN had control over the location but, the defendant submits, that if CN did not reasonably know there was a problem with the sign, then it was simply not feasible to make any changes.

[85] As regards to the defendant's argument vis-à-vis the admissibility of post-accident changes, I respectfully disagree. The *R. v. Dana Canada Corp.* decision is not, as I read it, restricted exclusively to show prior knowledge of the defendant. The very next sentence following the sentence quoted by the defendant is as follows:

> These permitted uses become particularly relevant in determining the existence of reasonable care as part of the due diligence defence.

[86] In other words, the post-accident changes can be used as an indication of the ease with which a risk might have been avoided: see *Niblock v. Pacific National Exhibition*, [1982] B.C.J. No. 131.

[87] In as much as this is a judge alone case, I also note, as

did the judge in *Dana* at paragraph 5, that I can instruct myself in my capacity as trial judge as to the permissible uses that can be made of post-accident changes.

[88] My decision to admit the evidence of the post-accident changes at Gutah is also informed by what I see as the strong public policy reasons articulated in the case law. The *Canada Labour Code* is the product of Parliament's wish to pass protective legislation for the health and safety of workers.

[89] There should be no distinction between the quality and robustness of provincial or federal legislation designed to protect workers, and I fully adopt the characterization set out in *Ontario (Ministry of Labour) v. City of Hamilton*, above, at paragraph 16, and in particular the last sentence, "Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided", as applying in equal force and measure to the *Canada Labour Code*.

ANALYSIS AND DISCUSSION

Count 1

[90] Count 1 is charging CN with failure to ensure the health and safety of Mr. Giesbrecht.

[91] Has the Crown proven beyond a reasonable doubt that CN failed to ensure Mr. Giesbrecht's safety inasmuch as the sign

to designate the second derail was non-reflective and otherwise allegedly deficient. The Crown has also argued with respect to Count 1 that the second derail should itself have been eliminated.

[92] I will address the signage issue first.

[93] CN's assistant track supervisor, Mr. McCurdy, agreed that derail signs should be reflective and double-sided. Mr. McCurdy examined the impugned sign (Exhibit 17) in the course of his testimony and he agreed that the sign in question was a flanger sign with black vinyl letters stuck to the back. The sign was not double-sided, nor was it a proper CN or BC Rail derail sign.

[94] Mr. Wallace, the Transport Canada Health and Safety Officer, and the chief investigator with respect to the circumstances of Mr. Giesbrecht's death on November 28, 2012, testified that virtually all railroad signs are reflective. Over his railroading career of almost 30 years, Mr. Wallace had never seen a derail sign, either a CN or a BC Rail derail sign, that was not reflective. His testimony in this regard went unchallenged.

[95] Mr. Wallace also confirmed that the sign at the second derail was neither a CN derail sign nor a BC Rail derail sign. It was a flanger sign with the letters D-E-R-A-I-L stuck on

the north side only with black vinyl tape. Mr. Leggett testified as to the comparative reflective qualities between the flanger sign with black vinyl tape and the standard BC Rail derail sign and the standard CN derail sign.

[96] At 160 metres or 525 feet, Mr. Leggett could see the BC Rail and CN derail signs using the conductor's lantern. He could not yet see the letters on them, but the distinctive yellow shape of the CN derail sign was visible. Given the distinctive shape and appearance of the CN derail sign, it would be apparent at 525 feet, or two minutes away at three miles per hour, that this was a derail sign. The word DERAIL on the BC Rail derail sign was not visible until 100 metres or 328 feet away.

[97] In contrast to the proper derail signs used by CN and BC Rail, the back of the flanger sign was not visible until 30 metres or 98 feet away and the letters D-E-R-A-I-L not visible until about 24 metres or 78 feet, a little over one railway car length. At three miles per hour, the letters DERAIL on the back of the flanger sign would have been visible for about 18 to 22 seconds. This assumes that the conductor's lantern was pointing directly at the back of the flanger sign. Mr. Leggett testified that if the conductor's lantern was not pointed directly at the back of the flanger sign, this

significantly impacted its visibility. This also assumes the person knew the sign was there, and was specifically looking for it.

[98] Mr. Leggett explained that a key property of retroreflective material, the technical term for reflective, is that the angle of incidence does not matter. The same amount of light bounces off the sign and returns to the viewer if the light source is at an angle than pointed straight at the sign. In contrast, for non-retroreflective signs, the light that reaches the sign will be reflected into the darkness at the same angle as it hit the sign, thus the light returning to the viewer will be only a percentage of the light that reached the sign.

[99] The defendant's response to the Crown's submission as set out in paragraph 107, 108 and 110 of its reply submissions, and I can do no better than to repeat them verbatim here:

> [107] In their closing argument, the Crown has argued at length that Count 1 is proven simply by the fact that the derail sign at the second derail was not reflective. With respect, this argument must fail for the most logical of reasons. The non-reflective sign was visible at 30 metres according to Mr. Leggett. At 30 metres Mr. Giesbrecht would have had 22 seconds to react to the sign while travelling 3 mph. Mr. Leggett stated that a reflective sign may have been visible at up to 160 metres and legible at 100 meters. The track speed on the Fort Nelson Subdivision was 25 mph. At that speed a reflective sign on the mainline would have been visible for 14.3 seconds. A reflective

> railway sign would only be legible for 100 meters or 8.9 seconds at 25 mph. A reflective road sign would be visible for 7.15 seconds at 50 mph. It would be legible for 4.4 seconds.
>
> [108] In all the circumstances, it is submitted that 22 seconds of visual notice for the second derail is entirely adequate notice for a derail on a siding. The question is not whether or not the sign was reflective. The question is whether or not it was reasonable to have a sign that gave adequate notice of the derail. This non-reflective sign gave considerably more time notice of the derail than a reflective sign would give of an upcoming hazard or condition on the mainline at the prescribed track speed of 25 mph.
>
> ...
>
> [110] The Crown has endeavored to show that a non-reflective sign in and of itself is conclusive that the defendant did not do all that was reasonable to ensure the health and safety of Mr. Giesbrecht. It is the defendant's submission that in the circumstances of this case the Crown would have had to call an expert to explain why 22 seconds notice of hazard in a siding is inadequate when a 14.3 second notice of a hazard would be adequate on the main line.

[100] With respect, I disagree with the defendant's position that the Crown can only succeed by producing an expert who is able to persuade this court that 22 seconds' notice of a hazard in a siding was inadequate. Such an approach represents, in my very respectful opinion, the kind of narrow and technical interpretation that would frustrate the salutary objectives of the legislation.

[101] Apropos to this view, I will paraphrase

paragraphs 22 to 25 inclusive of *R. v. Dofasco*, *supra*. My understanding of this portion of the *Dofasco* is that the main purpose of this kind of legislation is to protect workers in very hazardous industries. It recognizes that no one, in any occupation, can work one hundred percent of the time without occasional carelessness.

[102] It also recognizes that this type of legislation is designed not only for prudent workers, but is intended to prevent workplace accidents that arise when workers make mistakes, or are careless, or even reckless. This very same principle applies an equal force to deliberate acts of employees in the course of performing their duties.

[103] As I understand the *Dofasco* decision, the court adopted the common sense view that employees do not deliberately injure themselves. Legislation designed to protect workers' safety is intended to protect workers from injuries due to advertent as well as inadvertent acts.

[104] Although the *Dofasco* decision was rendered in the context of the steel industry, I am satisfied that the railroad industry is no less hazardous than the steel industry. Mr. Giesbrecht was working in conditions of darkness. He was wearing a safety helmet over his toque. It was freezing. There was an accumulation of snow on the ground

and snow was falling lightly at the time of the derailment.

[105] Mr. Giesbrecht had to concentrate his attention on his radio communication with Mr. Lucas, who was at least 800 feet away and out of Mr. Giesbrecht's direct line of sight. All of this transpired as Mr. Giesbrecht and Mr. Lucas worked to coordinate the reversing moment of rail cars that collectively weighed hundreds of tons.

[106] Mr. Giesbrecht's only light was his conductor's lantern. If his lantern happened, by coincidence, to shine directly on the second derail sign, then in ideal conditions he could see the letters D-E-R-A-I-L distinctly 78 feet away or, at a train speed of three miles per hour, for as long as 22 seconds.

[107] By contrast, the BC Rail derail sign and the CN derail sign were both visible at 525 feet. This is over six times the distance that the second derail sign was visible. The proper CN and BC Rail derail signs had the added advantage that they were just as visible regardless of the angle that the light hit those signs. Conversely, the second derail sign was significantly less visible if the light source was at an angle to that sign.

[108] Given all the circumstances outlined above, I am satisfied beyond a reasonable doubt that the second derail

sign was grossly deficient in doing the job it was supposed to do, and accordingly that this gross deficiency constituted a failure on CN's part to ensure the health and safety of Mr. Giesbrecht pursuant to its statutory duty.

[109] Having made this finding, sometimes referred to as the Crown having proved beyond a reasonable doubt the *actus reus* of the defence, I must now consider whether the defendant has made out a due diligence defence, namely that it was reasonable in all the circumstances for the defendant not to know that the sign was deficient.

[110] The defendant has led considerable evidence with respect to its efforts to detect any hazards. The first line of defence is that all employees are required to report all hazards to the company. The evidence is undisputed that no concerns were ever brought forward to CN with respect to the second derail sign over the approximately eight year period since CN had taken over this portion of the track.

[111] In addition, the defendant has established a health and safety committee for the Fort St. John and for Nelson subdivision. This committee met regularly and the defence submits that a review of the minutes of the committee suggest the committee was both active and effective.

[112] The defendant had as a tertiary safety measure its

own track supervisors who conducted regular inspections of the rail line, including signings. Mr. McCurdy, for example, did a walking inspection of the north ridge at Gutah only two days before Mr. Giesbrecht's death. Mr. McCurdy testified that he had himself seen the second derail sign, albeit in daylight conditions. In daylight, he testified, it was impossible to tell that the sign was not reflective. Had he felt the sign was a safety issue, Mr. McCurdy testified that he would have reported it immediately.

[113] A fourth level of safety was provided by the inspections conducted by Transport Canada, such as that of Mr. Collins in June 2012, and discussed at some length in the course of his testimony.

[114] The Crown's most withering criticism of CN's safety procedures is that there was no specific safety procedure in place to inspect the reflectivity of its signage. The Crown's argument is most forcefully set out in paragraphs 152 and 153 of the Crown's closing submission as follows:

> [152] The Uniform Code of Operating Rules (the "UCOR") was the predecessor of the CROR. By Order in Council titled Regulation No. 0-8, Uniform Code of Operating Rules, amendment, S.O.R./85-919, p. 4093 published in the Canada Gazette on October 2, 1985, paragraph 14 of the UCOR was amended to state (underlining in original):
>
> > Use of Reflectorized Materials
> > 14.(1) Every railway company that installs or

> replaces reflectorized signals shall ensure that its reflectorized signals are equipped with material of Reflectivity Level I as described in the Standard for Marking Material, Retroreflective Enclosed Lens, Adhesive Backing issue by the Canadian General Standards Board under number 62-GP-IIM and dated May 1978.
>
> (2) Every railway company shall, at least once a year, examine the material of its reflectorized signals to determine the reflectivity level.
>
> [153] The Canadian railroad industry underwent deregulation in the 1980's. Section 14 of the UCOR did not find its way into the modern CROR. But that does not mean that the railroad industry can just forget about and ignore the importance of using reflectorized signals and checking their signals at least once a year to determine reflectivity level. Safety standards should improve over the years and not go backwards. The safety standards today should be no worse than existed 30 years ago. CN cannot claim ignorance of the importance of using reflective material in signage and periodically checking that reflectivity as that was a feature of the predecessor to the CROR. The deregulation of the Canadian railroad industry provides no excuse for railway companies to forget about basic principles of safety.

[115] There is a compelling logic, in my respectful opinion, to the Crown's argument. A chain is only as strong as its weakest link and it is clear from the evidence that at least as of November 28, 2012, CN had 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.

[116] Mr. Penny testified that most inspections take place

during the day, but CN's other witnesses, especially its track inspector for the Fort Nelson Subdivision, Mr. McCurdy, were clear and unequivocal in testifying that all formal inspections take place during daylight hours.

[117] There is much to be said about CN's overall safety program that is positive. As regards its use of reflective signs, however, CN had no specific procedure or dedicated practice in place to assess whether a reflective sign was defective.

[118] All of the witnesses, including those testifying for CN, agreed that the only way to test for the effectiveness of reflectivity was to conduct an inspection at night. No nighttime inspections were ever conducted as of November 28, 2012, and it is clear from all of the evidence that there was never even a discussion nor a consideration as to the necessity of such nighttime inspections.

[119] Given the significance of the hazard and the obviousness necessity of assessing the effectiveness of reflective signs in nighttime conditions, the complete absence of any meaningful inspection practice is, in my respectful opinion, a glaring omission on the part of a sophisticated and otherwise safety-minded corporate entity such as the defendant.

[120] CN's own witnesses, especially Mr. McCurdy, agreed that the second derail sign should have been reflective. Similarly, no witnesses disagreed with the proposition that only a nighttime inspection could disclose whether or not a sign either lacked or had lost reflectivity.

[121] One does not require hindsight to see the importance and the necessity of nighttime inspections to assess the effectiveness, let alone the presence of reflective signs. The most one can say is that CN relied on casual observations from its employees to report problems or deficiencies with respect to its reflective signage.

[122] There is no evidence that the Health and Safety Committee conducted its own independent inspections and CN's own track inspections, as well as those of Transport Canada, were conducted exclusively in daylight hours.

[123] Based on the analyses above, I am satisfied that CN has failed to establish on the balance of probabilities that it exercised reasonable care. The failure to exercise reasonable care consisted of CN's failure to implement any meaningful program to assess the effectiveness of its reflective signs or indeed whether a reflective sign was even installed at a location where it should have been installed.

[124] The Crown has also argued that the second derail

should have been eliminated by its removal long before the accident. The defence objects that this is a brand new allegation of wrongdoing that never arose until after the Crown closed its case.

[125] With respect, I disagree with the defence characterization, namely that the second derail should have been eliminated as being a brand new allegation.

[126] The Crown raised this issue with Mr. Wallace in his examination-in-chief. Mr. Wallace was unequivocal in his opinion that the second derail served no railroading purpose. The Crown had also alerted counsel for CN by letter dated July 23, 2014 (see Appendix A to Crown's submissions) that, *inter alia*, and I quote:

> I would also be interested to know what purpose the two derails served. I can await CN Rail's due diligence defense at trial for the answers to these questions, but if you would like to have a dialogue about this case, these are the questions I have.

[127] By virtue of this letter, CN was put on notice that the Crown questioned the purpose to be served by two derails, and invited CN to respond.

[128] The Crown declined to provide particulars requested by CN. It was open to CN to apply for particulars, but CN, a sophisticated litigant with experienced counsel, chose not to make such an application for particulars.

[129] In addition, as part of its opening, the Crown raised the issue as to what if any purpose was served by the second derail. Accordingly, for the reasons set out above, I am satisfied that the issue as to whether or not the second derail should have been eliminated is properly before this court.

[130] Section 122.2 of the *Canada Labour Code* mandates that hazards should be eliminated. The Crown maintains that the second derail should not have been in that location. The Crown's points are set out in paragraphs 76 to 79, inclusive, of his written submission, and from which I quote as follows:

> [76] We know from CN's former senior manager Mr. Myer that "derails protect people and operations from free rolling and uncontrolled rail cars and equipment".
>
> [77] The derail near the north switch (the first derail) made sense. If a fuel car or other rail car came loose and started rolling down the siding, it would derail before fouling the main track. Trains can travel up to 25 mph on the main track in the Fort Nelson Subdivision (see page 45, footnote 4 of the Timetable and the Operating Manual at Exhibit 41).
>
> [78] The second derail 227 feet north of the occupied service equipment served no purpose. The grade of the siding is uphill from the north switch to the occupied service equipment. If a rail car came loose it would roll downhill not uphill. In theory a railway car can roll uphill from its own momentum but it will slow down, come to a stop and then start rolling downhill. That is the effect of gravity. Trains travel at low speeds on sidings. When Mr. Lucas reversed the train onto the siding he

> did not go beyond 6 mph - a little faster than walking speed of 4 mph. As the train got closer to the fuel tanks he reduced his speed to 3 mph.
>
> [79] When a train is reversing onto a siding this is controlled by the train crew. The conductor will be riding the point to monitor where the train is at when it backs up. The conductor has a radio to communicate with the locomotive engineer in the front of the train. Derails are not necessary for trains that are controlled. It is difficult to imagine a situation where uncontrolled railway equipment would be rolling uphill.

[131] The only scenario that applies with respect to a derail device located uphill to rail cars is one, in my respectful opinion, where the locomotive engineer shoves the rail cars too far through human error. In such an instance, it was Mr. Penny's evidence that the derail device provided "positive protection" to the persons in the occupied service Cars.

[132] Following the incident of November 28, 2012, CN removed a portion of track and installed a stop block approximately where the second derail device had been located. Mr. Penny testified that the stop block provided the "same" positive protection as the second derail.

[133] In other words, the stop block, as I understood Mr. Penny's evidence, was every bit as effective as the second derail. In a worst case scenario, the rail cars, moving at a speed slower than a walking pace of four miles per hour, would

strike the stop block and engage the emergency brakes of the train.

[134] The difference, in my respectful opinion, is that the stop block is a much lesser hazard than a derail device. The derail is, by design, intended to run the rail car off the track with the attendant risk that entails, including the possibility that the rail car will be thrown on its side. This is in fact what happened at Gutah, resulting in Mr. Giesbrecht's death.

[135] The use of a stop block would have obviated the need for a derail device at the location under discussion.

[136] Accordingly, I am satisfied that the Crown has established beyond a reasonable doubt that the second derail device, given my findings of a stop block would have served as equally effective, constituted an unnecessary hazard to Mr. Giesbrecht's safety.

Has CN Made Out a Due Diligence Defence?

[137] The only justification for a derail device at this location was that afforded by Mr. Penny as set out above.

[138] The very *raison d'être* of Part II of the *Canada Labour Code* is to prevent accidents to or injury to workers. The employer must, firstly, eliminate hazards and, secondly, reduce any hazards and, thirdly, if the hazard can be neither

eliminated nor further reduced, then the employer must take such remedial measures, such as equipment, clothing, devices and materials to ensure the safety of employees.

[139] A derail device is a hazard of the highest order. Any derailment is a real and potential threat to the lives and safety of any worker in close proximity to the derailment. Conversely, a rail car impacting a stop block at very slow speed is a hazard of much lesser magnitude.

[140] Given that a stop block is just as effective as a derail in the circumstances of this case, given that a stop block is a far lesser hazard than a derail, given no evidentiary basis to find that CN conducted any type of hazard assessment vis-à-vis the necessity of the second derail, and given what I deem to be a statutory duty to identify and to eliminate or to reduce hazards, I find that CN has failed on a balance of probabilities to establish and exercise reasonable care towards Mr. Giesbrecht.

[141] I wish to make one final observation in this regard. CN had the opportunity to assess this specific hazard when it assumed control from BC Rail in 2004. The fact that CN elected to make no mention of any derails whatsoever in its Tabular General Bulletin Orders was a marked departure from the former BC Rail practice. The TGBO which Mr. Giesbrecht

signed on November 28, 2012 (Exhibit 56) fails to warn of any derails at Gutah. CN made a deliberate decision to not make mention of derails on sidings in its TGBOs.

[142] The assumption of control from BC Rail by CN was a logical time for CN to assess whether the second derail should have been replaced for a lesser hazard, the stop block.

[143] I do not think that this places an undue onus on CN. The *Canada Labour Code*, in my respectful opinion, contemplates a proactive and dynamic system of ongoing scrutiny of any job hazard. Anything less, in my respectful opinion, would be to vitiate the generous interpretation to which such remedial public welfare legislation is entitled.

Count 3

[144] Again, Count 3 is the section that charges CN with failing to ensure that Mr. Giesbrecht was made known of every known and foreseeable hazard, specifically the second derail.

[145] The Crown's arguments are effectively laid out in paragraphs 50, 53 and 54 of its closing submissions, from which I quote as follows:

> [50] The fundamental flaw in the wording of the Timetable at the time of the accident is that it indicates there was only one derail on either end of the occupied service equipment when in fact there were two (Footnote 1 on page 44 of the Timetable in Exhibit 41):

> 1. GUTAH
>
> Derails located 120 feet from north and south ends of occupied service equipment in siding.
>
> ...
>
> [53] After the accident, the derails near the occupied service equipment were eliminated and a portion of the rails north of the occupied service equipment were removed. New wording of the Timetable was implemented in an Operating Bulletin issued December 21, 2012 (Exhibit 37)
>
> 1. GUTAH SIDING
>
> Occupied Service Equipment located on siding.
>
> South switch lined and locked for the main track with special lock. Employee in charge of occupied service equipment must be contacted if required to operate switch.
>
> **ONE** derail between south switch and service equipment: **DERAIL LOCATED IMMEDIATELY SOUTH, IMMEDIATELY BEYOND SOUTH SWITCH.**
>
> **ONE** derail between north switch and stop block: **DERAIL LOCATED IMMEDIATELY BEYOND NORTH SWITCH. STOP BLOCK LOCATED NORTH OF SERVICE EQUIPMENT.**
>
> [54] The new wording emphasizes the importance of communicating clearly and emphatically the number of the derails at Gutah: **"ONE"** near each switch after the accident. The derail that killed Mr. Giesbrecht was taken out as was the derail to the south of the occupied service equipment. The derails near the north and south switches were kept in place.

[146] The Crown argues that the Timetable should have expressly mentioned two derails. This, the Crown says, would avoid any possibility of misunderstandings or confusion. CN, on the other hand, defended its practice to omit specific

mention in its Timetable of the usual derails found at every clearance point on the following basis:

- To mention every derail at every clearance point would simply clutter up the timetable.
- Every railroader expects to see a derail device at every clearance point, such as at a switch.
- The intention of the timetable is to alert the employee to those unusual or unexpected derail locations.
- All of the highly experienced railroaders who testified had no difficulty in understanding footnote 1 from Fort Nelson Subdivision Timetable 20, i.e. all witnesses agreed that the footnote meant there was a derail device approximately 120 feet north of the occupied service cars, which all witnesses agreed was the second derail.

[147] At first blush, the defendant's argument has a certain appeal. Every railroader would expect the derail device near every clearance point, and it is sufficient to simply point out the unusual derails.

[148] The difficulty, as I see it, is that this approach presumes that every railroader will automatically read the Timetable, factoring in that there may be more derails than

those mentioned in the Timetable. The defendant is correct in noting that all eight witnesses who were qualified to comment testified that they did not find the wording in footnote 1 of the Timetable to be confusing or misleading.

[149] Not all railroad employees, however, would be as experienced as those who testified in this trial. Mr. Giesbrecht by contrast had a total of 18 months' experience in railroading, and was on a steep learning curve. Mr. Giesbrecht was responsible for mastering a daunting amount of detail, as even a cursory look at the CN Operating Manual will attest.

[150] The CN Operating Manual is in excess of seven hundred pages. The largest section is Timetable 20, which alone accounts for 180 pages. Every page in the Timetable is densely packed with information.

[151] I take it as a given that all warnings of hazards should be communicated in the clearest possible language. The wording, to paraphrase the cases referred to above, should be designed to avoid, as much as one possibly can, any misunderstanding or any confusion.

[152] The wording chosen should account for inevitable human error. The wording should be as clear and unambiguous as possible. The wording is not just for the prudent worker

but to protect the tired worker, the careless worker, or even the reckless worker.

[153] A plain reading of footnote 1 is that there is one derail north of the occupied service equipment in the siding. There were in fact two derails. By omitting any reference to the first derail, located just beyond the clearance point, I find that CN's chosen wording is capable of misunderstanding or confusion. CN's philosophy or understanding as articulated by Mr. Penny that mention of a derail at a clearance would just clutter up the Timetable, does not, with the greatest of respect, stand up to scrutiny.

[154] The addition of a simple line, such as "one derail located immediately beyond south switch and one derail located immediately beyond north switch" would, in combination with the existing wording, have captured all four derails and avoided any possibility of misunderstanding or confusion. Accordingly, for the reasons above, I am satisfied that CN's intentional decision to make no mention of the first derail means footnote 1 was a failure to meaningfully and effectively communicate the existence of two derails which constituted two hazards on the siding north of the occupied service cars.

[155] As a new conductor, with limited experience, working in conditions of darkness, compounded by freezing temperatures

and falling snow, performing a derailing procedure for the first time at Gutah, I am satisfied that Mr. Giesbrecht could well have found the existing wording of footnote 1 confusing.

[156] In my respectful opinion, all hazards should be explicitly mentioned and identified. Footnote 1 makes mention only of the derails located 120 feet from either end of the occupied services cars. CN's practice requires an implicit understanding that there may be more derails at the clearance points.

[157] Grave hazards, such as derail devices, should always be explicitly identified. It is, again in my respectful opinion, a misleading and potentially dangerous practice to proceed on the assumption that all railroaders, regardless of experience or expertise, would automatically and invariably know that here are other derails at the same location.

[158] Having said the above, however, the Crown must now prove beyond a reasonable doubt that Mr. Giesbrecht was not aware of the second derail. There is no direct evidence of Mr. Giesbrecht's actual state of knowledge.

[159] The Crown has martialed several pieces of circumstantial evidence to support its position. Those are as follows:

- The opinion of those experienced railroaders who had

either worked with or trained Mr. Giesbrecht, or who had reviewed his heavily annotated and cross-referenced Operation Manual were universally positive.

- Mr. Giesbrecht was described as a quick learner and a diligent and conscientious employee.
- Mr. Giesbrecht had thoroughly marked and highlighted portions of his Operations Manual with respect to the Gutah siding.
- Mr. Giesbrecht did not deactivate the second derail.
- Common sense and common experience tell us that Mr. Giesbrecht would not deliberately place himself in harm's way.

[160] The combination of circumstantial evidence set out above constitutes, in the Crown's submission, a compelling chain of facts that leads to but one logical conclusion, namely that Mr. Giesbrecht must not have been aware of the second derail.

[161] Or to put it in other words, if Mr. Giesbrecht had known of the second derail, then his training and his diligence would have ensured that he would have deactivated the second derail by putting it into a non-derailing position.

[162] Conversely, CN submits that the Crown's argument invites a leap of logic that is not supported by the available

facts. Not only is the court deprived of Mr. Giesbrecht's direct testimony, CN submits, but there is indeed circumstantial evidence that is equally consistent with a finding that Mr. Giesbrecht did in fact know of the existence of the second derail.

[163] These facts relied upon by CN are as follows:

- It is possible that Mr. Giesbrecht had just detrained with the intent to deactivate the second derail.
- Mr. Giesbrecht was trained to read and to understand the Timetable.
- Every indication is that Mr. Giesbrecht was considered highly intelligent and a quick learner.
- Mr. Giesbrecht's Timetable is well marked and the entries on the Gutah page, page 44, show a comprehensive understanding of how the Timetable works.
- All eight of the witnesses who were qualified to comment on the point agreed that they did not find footnote 1 to be confusing or misleading.
- The evidence as to the instructions communicated to Mr. Lucas by Mr. Giesbrecht are consistent with instructions that should have stopped the train before it reached the second derail.

[164] The last point mentioned is worthy of further consideration. The second derail is 514.5 feet south of the first derail. Mr. Lucas was invited during his cross-examination to read a one-page statement in his own handwriting. His handwritten statement was drafted by Mr. Lucas some seven to eight hours following the accident.

[165] As I understood his testimony, Mr. Lucas agreed that Mr. Giesbrecht told him over the radio, "good for eight, derail's off". Mr. Lucas then shoved the train one-half of eight rail car lengths as per CN protocol. Mr. Lucas agreed that Mr. Giesbrecht next communicated to him, "four cars", and that shortly after that instruction, Mr. Lucas heard Mr. Giesbrecht say something, but Mr. Lucas found it unclear or indistinct.

[166] In his testimony-in-chief, Mr. Lucas explained that because what Mr. Giesbrecht had said was a muffled sound, Mr. Lucas, not perceiving a clear instruction, immediately activated the emergency braking system.

[167] In terms of distance travelled, Mr. Lucas should have shoved the train, at most, six rail car lengths. A rail car length is deemed to be 50 feet long. Accordingly this would translate to six times 50, or 300 feet, from the first derail located just beyond the clearance point at the north

switch.

[168] If the train was shoved six rail car lengths, or 300 feet, the train would still be over 200 feet away from the second derail. This assumes that the shoving movement commenced in close proximity to the first derail. If one factors in another rail car length to allow time for the train to stop, the train should have been at least 150 feet from the second derail.

[169] The Crown objects to the court placing any weight on this evidence vis-à-vis the statement of Mr. Lucas written some seven to eight hours post-accident. The Crown objects that Mr. Lucas was never asked whether the note was accurate. Accordingly Crown submits Mr. Lucas never formally adopted the contents of this statement and as such the statement should be treated as inadmissible hearsay.

[170] With great respect I disagree. The Crown made no objection at the time the statement was put to Mr. Lucas in the course of this trial. Moreover in the transcript, Day 6, page 32, lines 1-15, Mr. Lucas testified that the portions of the statement put to him by counsel were correct.

[171] Inasmuch as Mr. Lucas, in the course of his testimony, had no current, independent recollection of being instructed "good for eight, derail's off", the very best he

could do was to confirm that this is what he had written within seven to eight hours of the accident. Accordingly I rule that testimony admissible in its entirety.

[172] Absent any direct evidence as to whether Mr. Giesbrecht knew of the existence of the second derail, this court is forced to rely upon circumstantial evidence. The circumstantial evidence that is available is, in my very respectful opinion, equivocal at best. In other words, I am unable to exclude beyond a reasonable doubt the possibility that Mr. Giesbrecht knew of the existence of the second derail. Accordingly I am left with a reasonable doubt as to whether Mr. Giesbrecht knew of the existence of the second derail.

[173] Having made this finding, it is not necessary to canvass the due diligence defence advanced by the defendant.

[174] The last portion of my judgment addresses Count 4, and I simply conclude that, given my findings on Count 3, there is no basis upon which the defendant could be convicted on Count 4.

[175] So briefly, to summarize, the defendant is convicted on Count 1.

[176] The defendant is found not guilty on Count 3 and not guilty on Count 4.

[177] These are my reasons for judgment.

[REASONS FOR JUDGMENT CONCLUDED]