

Date: 20080204

Docket: A-562-06

Citation: 2008 FCA 43

**CORAM: DÉCARY J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN:

ALLAN WOOLLARD

Appellant

and

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

Heard at Vancouver, British Columbia, on February 4, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on February 4, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

DÉCARY J.A.

Date: 20080204

Docket: A-562-06

Citation: 2008 FCA 43

**CORAM: DÉCARY J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN:

ALLAN WOOLLARD

Appellant

and

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Vancouver, British Columbia, on February 4, 2008)

DÉCARY J.A.

[1] On June 12, 2003, health safety officer Noel (Officer Noel) issued a direction to Canadian Pacific Railway (CPR) pursuant to subsection 145(1) of the *Canada Labour Code* (the Code). A complaint to the Human Resources Development Canada had been filed by Allan Woodward (the Appellant) with respect to an alleged failure by CPR to comply with the Clothing Storage provisions of the *Canada Occupational Health and Safety Regulations*, S.O.R./86-304 (the Regulations). Officer Noel had concluded that CPR had “failed to provide a change room and

separate storage area to ensure protection of employees exposed to wet or contaminated work clothing.”

[2] The Clothing Storage Provisions at issue are:

9.44 (1) A change room shall be provided by the employer where

(a) the nature of the work engaged in by an employee makes it necessary for that employee to change from street clothes to work clothes for health or safety reasons; or

(b) an employee is regularly engaged in work in which his work clothing becomes wet or contaminated by a hazardous substance.

(2) Where wet or contaminated work clothing referred to in paragraph (1)(b) is changed, it shall be stored in such a manner that it does not come in contact with clothing that is not wet or contaminated.

(3) No employee shall leave the work place wearing clothing contaminated by a hazardous substance.

9.44 (1) Un vestiaire doit être fourni par l’employeur dans les cas suivants :

a) lorsque le travail des employés les oblige à enlever leurs vêtements de ville et à revêtir une tenue de travail pour des raisons de santé ou de sécurité;

b) lorsqu’un employé exécute habituellement un travail au cours duquel sa tenue de travail devient mouillée ou contaminée par une substance dangereuse.

(2) Les vêtements de travail mouillés ou contaminés visés à l’alinéa (1)b) doivent, une fois enlevés, être conservés à l’écart des autres.

(3) Il est interdit à un employé de quitter les lieux de travail avec des vêtements contaminés par une substance dangereuse.

[3] CPR appealed the decision to Appeals Officer Malanka pursuant to subsection 146(1) of the Code. The Appeals Officer conducted a *de novo* hearing, (see *Martin v. Canada (Attorney General)*, 2005 FCA 156 at para. 8). He ended up confirming the direction noted and issued an additional

direction: in his view, CPR had also contravened section 10.4 of the Regulations in failing to appoint a qualified person to carry out the hazard investigation required by that section.

[4] CPR sought judicial review of the Appeals Officer's decision in the Federal Court. Beaudry J. granted the application (2006 FC 1332). In rendering his decision, the Judge held that CPR had been deprived of its right to procedural fairness in that the Appeals Officer had failed to provide CPR with an opportunity to make submissions regarding its alleged failure to carry out a hazard investigation pursuant to section 10.4 of the Regulations. Additionally, Beaudry J. found that the decision by the Appeals Officer upholding the direction of Officer Noel with respect to section 9.44 of the Regulations was patently unreasonable. As a result, Beaudry J. remitted the matter back to another Appeals Officer for redetermination.

[5] The Appellant Woollard appealed to this Court only that portion of the judgment of Beaudry J. setting aside the Appeals Officer's decision with respect to section 9.44.

[6] There being no appeal with respect to the additional direction of the Appeals Officer in relation to section 10.4, this appeal proceeds on the basis that there was a breach of CPR's right to procedural fairness with respect to the additional direction issued by the Appeals Officer.

[7] As a preliminary issue before us, CPR argues that it is not possible to isolate the portion of Beaudry J.'s decision dealing with the breach of procedural fairness and that ultimately the breach of procedural fairness permeated the entire decision of the Appeals Officer.

[8] We agree.

[9] Whatever the merits of the direction pertaining to section 9.44 of the Regulations, it appears clearly from the reasons of the Appeals Officer that in upholding Officer Noel's direction with respect to that section, he relied on CPR's alleged failure to conduct a proper hazard assessment as required by section 10.4: see, for example

[101] However, to interpret and apply paragraphs 9.44(1)(b) and 9.44(2) of the COHSR, it is necessary to consider these provisions in light of subsection 10.4(1) of the COHSR.

...

[109] CPR did not present evidence at the hearing of any other hazard assessment related to the work of machine operators and their exposure to hazardous substances. I can only conclude from this that CPR had not carried hazardous assessment pursuant to subsection 10.4(1) that accords with the definition of "hazardous substance" found in section 122(1) of the Code. Therefore, I conclude from this that CPR was not in a position to demonstrate that work clothing worn by its machine operators was not made unfit by diesel fuel, lubricating grease, antifreeze or hydraulic oils. To the contrary, CPR's past procedures of providing a separate room to store wet or contaminated work clothing tends to suggest that the employer regarded the wet or contaminated work clothing to be unfit to remain in the living quarters of employees.

...

[121] Given the facts of the present case and based on CPR's past practice of providing its machine operators working at remote locations with a separate change and storage, as well as the absence of the proper hazard assessment by CPR as required by section 10.4 of the COHSR and the definition of a hazardous substance in section 122(1) of the Code, I am confirming item 2 of the direction issued by HSO Noel to CPR on June 12, 2003 to comply with the requirements of paragraph 125.1(i) of the *Canada Labour Code*, Part II, and of subsections 9.44(1), (2) and (3) of the *Canada Occupational Safety and Health Requirements*.

[10] In the circumstances, the finding of the Appeals Officer with respect to section 9.44 is so closely linked to his finding with respect to section 10.4, that the setting aside of the latter for breach of procedural fairness puts in doubt the finding with respect to the former.

[11] The appeal will be dismissed with costs.

"Robert Décary"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-562-06

STYLE OF CAUSE: Allan Woollard v. Canadian Pacific Railway
Company

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 4, 2008

REASONS FOR JUDGMENT BY: DÉCARY J.A.
SHARLOW J.A.
TRUDEL J.A.

DELIVERED FROM THE BENCH BY: DÉCARY J.A.

DATED: February 4, 2008

APPEARANCES:

Mr. G. James Baugh FOR THE APPELLANT

Mr. Charles Harrison FOR THE RESPONDENT
Ms. Jennifer Walker

SOLICITORS OF RECORD:

McGrady & Company. FOR THE APPELLANT
Vancouver, B.C.

Fasken Martineau FOR THE RESPONDENT
Vancouver, B.C.