

CITATION: Canadian Pacific Railway Company v Canadian National Railway Company
2025 ONSC 6886

COURT FILE NO.: CV-20-639457

MOTION HEARD: 20251201

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Canadian Pacific Railway Company, Plaintiff

AND:

Canadian National Railway Company, Procor Limited and Glencore Canada Corporation dba NorFalco Sales, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Rita Benjamin, counsel for the moving party defendant Canadian National Railway Company

Stephanie Kolla, counsel for the moving party defendant Procor Limited, with student at law Thaar Sethunathan

Zachary Pringle, counsel for the moving party defendant Glencore Canada dba NorFalco Sales (“NorFalco”)

Ian Thompson, counsel for the responding party plaintiff

HEARD: 1 December 2025

REASONS FOR DECISION

[1] Each defendant brings a motion for an order compelling the plaintiff (“CP”) to answers refused on its examination for discovery. The action relates to the derailment of a CP freight train that took place near Sultan, Ontario on 20 March 2020. The incident caused 26 railcars to derail, starting with a tanker car carrying sulfuric acid. This tanker car, identified as PROX15199, was owned by the defendant Procor, contained wheelsets that were manufactured by the defendant Canadian National Railway Company (“CN”) (the “Transcona wheelset”), and was being transported by CP as private equipment pursuant to a contract of carriage with the defendant Glencore dba as NorFalco (“NorFalco”).

[2] CP has sued CN and Procor in negligence and NorFalco in contract. As against CN, CP alleges that the modified boring process it used to manufacture the Transcona wheelsets caused them to regularly fail. Eventually, an industry early warning as well as a Transport Canada warning was issued which required a number of these Transcona wheelsets to be removed and replaced. CP alleges that CN negligently manufactured the Transcona wheelset in question and then negligently installed that Transcona wheelset in 2005 after a

number of early warnings had been issued. CP alleges that CN owed it a duty of care and breached that duty and was negligent in its manufacture of the Transcona wheelset and in failing to properly inspect the railcars, including PROX15199, in failing to identify and replace the faulty Transcona wheelset and generally in failing to ensure that PROX15199 was suitable for its intended use.

- [3] As against Procor, CP pleads, as the owner of PROX15199, Procor had a duty of care to maintain, monitor and repair PROX15199 and breached that duty in the manner enumerated in the statement of claim.
- [4] As against NorFalco, CP pleads that Procor supplied NorFalco with PROX15199 which it used as a private container to ship sulfuric acid. CP pleads that it was a term of its bill of lading between NorFalco and CP for this private shipment that NorFalco was responsible for ensuring the car was free of mechanical defects and failures, was compliant with industry standards and otherwise suitable for safe rail transportation. Further, the bill of lading required NorFalco to indemnify CP for any losses or damage it incurred arising from any defects in or failure of the private equipment.
- [5] All parties agreed on the law governing proper questions to be answered on discovery and I do not repeat those principles here. The defendants argue generally that the questions refused are relevant as they tend to increase or diminish the probability of a fact in issue. The plaintiff argues that the questions it refused are not relevant and, in some cases, the principle of proportionality militates against the questions being ordered answered.

A. CN Motion

(i) Undertakings

- [6] CP undertook to provide information about the training of its employees. It has provided the applicable training records but otherwise advised on the motion that it has no information whether these courses constitute the required or applicable training. CP is to provide this answer in writing so that CN may rely upon it, as needed.

(ii) Refusals

Group 1 – CP’s Investigation of the Derailment

- [7] CP alleges that it investigated the derailment and determined that a wheel on the right side of wheelset #4 of PROX15199 had demounted and caused the train to derail. CP alleges that the wheelset was defectively manufactured by CN at its Transcona wheel shop. CN denies that any acts or omissions on its part, including the manufacturing of the Transcona wheelset, caused or contributed to the derailment, and alleges that CP caused or contributed to the derailment by using locomotives and railcars which were in an inadequate state of repair, by operating the train at unsafe speeds, and by permitting the train to be operated by persons with insufficient experience and competence.

- [8] CN argues that it is entitled to full particulars of the steps taken by CP to investigate the derailment and of the conclusions reached by the investigators, including whether any CP employees were found to have made mistakes in relation to the derailment. CN also argues that it is entitled to production of all documents generated in relation to the investigation or, if privilege is properly claimed over such documents, disclosure of the material facts contained in those documents.
- [9] CN moves on six questions in this category. Question 912 is refused. If it is asked, CP is required to disclose the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue, but this question is much broader, seeking “a list of evidence from the known attendees at the site”. This request would require CP to proactively generate evidence, which is beyond what is required. CP advised that it has already produced all the existing documents it has, including notes, containing its observations and findings.
- [10] For Question 946, CP has confirmed that the reference to privilege in document CPR0000871 is not a claim for privilege over the report, which has been produced, but only a claim for privilege over the 25 March 2020 email from CP’s in house counsel. CP will confirm in writing that the report referenced is its production CPR249.
- [11] Question 1011 is refused. CP has already stated that it has produced all emails involving Keith Creel (“Creel”) and that there are no further emails in the chain of emails dated 21 March 2020 included at B-1-748 of the record.
- [12] Question 1015 need not be answered but Question 1016 is to be answered. What is relevant is not whether any CP employees were disciplined as a result of the derailment (Q1015) but whether any employees were found to have made mistakes leading up to the derailment (Q1016), given the allegations of negligence on the part of CP pleaded in CN’s statement of defence.
- [13] Question 1034 is to be answered as the photographs do not speak for themselves. However, it makes more sense for the plaintiff to answer this question at its continued discovery, which the plaintiff has agreed to attend, when everyone can look at the photographs together.

Group 2 – CP’s Obligations to Inspect Railcars and Identify Wheelsets Manufactured at Transcona

- [14] In its claim, CP refers to certain Early Warnings issued by the Association of American Railroads (“AAR”) to member railroads (including both CN and CP) which called for the inspection and removal of Transcona wheelsets.
- [15] CN alleges that CP was aware of the Early Warnings and other information regarding Transcona wheelsets, and that CP was obliged to implement measures to inspect railcars and identify Transcona wheelsets and remove them from service. CN also alleges that Creel, CP’s President and CEO, was particularly aware of these obligations, as he was

previously an executive at CN and was responsible for developing CN's plan to identify and remove Transcona wheelsets from service.

- [16] CN argues that it is entitled to full particulars of the steps and policies implemented by CP to identify Transcona wheelsets, and CP's evidence regarding its obligations in this regard.
- [17] At question 847, CN requests all wheel profile detector reports from 2002 to 2020 where they identify that the PROX15199 passed. CN argues this timeframe is relevant because CP has pleaded in paragraph 15 that the AAR issued its first Early Warning calling for the replacement of certain of the Transcona wheelsets in late 2001. CN advises that these reports would identify every time a Transcona wheelset was on a CP track and that CP had an obligation each time the Transcona wheelset was on its track to identify it and remove it.
- [18] I find the request to be overly broad. CN pleads in its statement of defence that CP's obligation to identify Transcona wheelsets arose when it inspected, maintained or repaired railcars (paragraph 9), that it had "numerous opportunities to inspect the railcar at issue in this proceeding and remove its Wheelset" (paragraph 24) and was negligent in failing to do so. There is no allegation of a failure to monitor any time over 18 years when PROX15199 was on CP's tracks.
- [19] Question 890 does not require a legal conclusion and is to be answered. The obligation to inspect, if there is one, may arise from the Early Warnings or any other documents or notices that came to CP's attention concerning the Transcona wheelsets, or even its own internal policies.
- [20] Questions 1007 and 1008 are to be answered. While normally the knowledge of a specific member of the executive would not be relevant, CN has specifically pleaded the involvement of Creel, who was CN's executive vice president of operations before becoming chief executive officer at CP. Paragraph 17 of CN's statement of defence pleads that Creel was involved in the response taken by CN to the Transcona wheelsets and its plan to identify and remove them. At paragraph 19, CN pleads that "[Creel] and others at CP were personally aware of the risk associated with the Wheelsets, including the risk that not all of the Wheelsets had been removed from service, and the resulting need to continue working to identify and replace those Wheelsets still in service." Also importantly, at paragraph 23, CN pleads that Creel was aware of the specific changes taken by CN in relation to the Transcona wheelsets at Creel's direction. "Despite its knowledge, CP failed to implement adequate measures, or measures at all, in order to properly inspect railcars for Wheelsets." CN also relies on the knowledge of Creel to found a limitation period and estoppel argument in paragraph 26 of its defence.

Group 3 – Steps Taken by CN to Address any Alleged Defects Relating to Wheelsets Manufactured at Transcona

- [21] CP alleges that CN failed to follow industry directives set out in AAR Early Warnings and failed to remove Transcona wheelsets from service, including the wheelset that allegedly

caused the derailment. It also alleges that CN had a duty to identify all Transcona wheelsets and warn CP of same, and that CN breached that duty. CN denies that it breached any duty owed to CP and pleads that it complied with all industry directives and AAR Early Warnings. CN also alleges that Creel was responsible for creating CN's plan to identify and remove Transcona wheelsets from service, and that CN continued to implement that plan following Creel's departure from CN. CN argues that it is entitled to full particulars of whether anyone at CP, including Creel, expressed any concerns with the steps CN took to address the issues associated with Transcona wheelsets.

- [22] Unlike the questions directed at Creel in Group 2, above, I find these questions are not relevant. The steps Creel directed CP to take or didn't direct it to take might be relevant, but his personal views communicated internally about CN's actions do not narrow the issues or tend to increase or diminish the probability of a fact in issue. Questions 799 and 1010 need not be answered.

B. Procor motion on refusals

Group 1 – Contributory Negligence - CP's knowledge and inspection of Transcona Wheelsets on railcars in CP's possession

- [23] Question 296 need not be answered for two reasons. First, the period requested from 1998 to 2020 is overly broad. While Procor reduced its request on the motion to 2009 to 2020, motion hearings are not the time to limit those requests in an attempt to make the question relevant. The question generally must be taken as asked.
- [24] Second, the paragraphs in its statement of defence and crossclaim upon which Procor grounds its claim for relevance deal with CP's possession of PROX15199 in June 2009, in June 2012 and in January 2018 and its alleged failure to properly inspect and remove the Transcona wheelset at those times. I was not taken to any argument that would make relevant the circumstances in which CP removed "thousands of" Transcona wheelsets (according to the CP discovery representative) from cars in other circumstances over 22 years.
- [25] For these same reasons, Questions 408-412 need not be answered. Looking at the questions through the lens of the pleadings, which focus on the instances PROX15199 was in CP's possession, I find that the number of incidents that CP recorded since 1998 in the industry Damaged and Defective Car Tracking System ("DDCT") involving defective Transcona wheelsets on all railcars on its tracks is not relevant.
- [26] For Question 417, I was advised that CP has already produced a list of derailments related to the Transcona wheelsets for the five years preceding the 2020 derailment in issue in this action. It is not clear what else would be gained by requiring production back to 1998. The refusal is upheld.

Group 2 – Contributory Negligence/Causation - rail line maintenance, train handling, alternate railcar

[27] Procor sought all track and roadway maintenance records at the site of the accident and from distances of six kilometres in each direction for the past ten years. Shortly before the motion, it limited its request to three years before the derailment. While CP concedes that conditions of the rails at the time of the derailment may be relevant, it is that timeframe which is to be considered, not ten years prior. I am advised that CP has already produced all its documentation around the rail conditions at the time in a “derailment package” production. Question 567 need not be answered.

[28] Question 572 is limited in time to the operation of the train that derailed. CP has agreed to provide the hot box detector reports if they have not already been produced as part of the derailment package.

C. NorFalco refusals

[29] CP has already partially answered Question 1074 that it “did not believe” it asked a shipper whether it was a member of AAR. It is fair that CP simply confirm that answer so that NorFalco can rely on it.

[30] Question 1363 is to be answered, as any version of the customer safety handbook subsequent to the incident may speak to NorFalco’s allegation that CP failed at the time to communicate to customers the risk that the Transcona wheelsets posed.

[31] Question 1179 is too broad to be relevant and need not be answered. The request for other work that CP did on NorFalco cars is not even limited to identification or replacement of Transcona wheelsets.

[32] CP is to confirm in relation to Question 1038 that, to the best of its knowledge, NorFalco did not get an information session. It will also confirm that, to the best of its knowledge, it did not collect the information referenced in the Exhibit 1 checklist from NorFalco.

D. Costs

[33] There was divided success on the motions. For the purposes of fixing costs, I do not take into account the questions that CP agreed to answer outside the motions process as I have no evidence whether the questions would have been found relevant or whether CP determined that they were not “the hill to die on” and was attempting, as requested, to compromise in an attempt to shorten the time spent arguing the three motions.

[34] I ordered CP to answer four of the twelve questions on which CN moved. Considering all the circumstances, each party shall bear its own costs of that motion.

[35] I ordered CP to answer one of the nine questions on which Procor moved. Procor shall pay CP \$5,000 as a contribution to that portion of its partial indemnity costs related to responding to the Procor motion.

[36] I ordered CP to answer three of the four questions on which NorFalco moved. CP shall pay NorFalco \$7,500 for costs of that motion, an amount I find to be fair and reasonable considering all the circumstances.

E. Next Steps

[37] The parties agreed that the plaintiff's representative would re-attend for discovery on the answers to these questions ordered answered as well as those undertakings it answered or will answer or refusals it subsequently chose to answer. The parties shall work cooperatively to find a date.

[38] The plaintiff shall answer the questions ordered answered as well as those it agreed to answer by 13 February 2026.

Associate Justice Jolley

Date: 9 December 2025