Freight Broker Framework

DOING BUSINESS IN CANADA

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Table of Contents

I. Disclaimer

This paper is intended to provide the reader with a survey of the legal framework for freight intermediaries in Canada. It is intended to update and supplement the "*Doing Business as a Freight Broker in Canada*" white paper jointly published in 2016 by the Transportation Intermediaries Association and the Canadian International Freight Forwarders Association.

The focus is on the road carriage of goods – both domestically within Canada as well as "cross-border" from Canada into the United States, or vice versa. The predominant surface transport brokering activity in Canada relates to the trucking mode. Brokers may also be involved in the provision of intermodal (truck + rail) arrangements as what is commonly referred to as an "intermodal trucking company." Reference will be made herein, where specific considerations may apply in the making of such arrangements.

The paper focuses on the regulatory regime concerning brokerage operations, and reviews areas of potential legal liability and possible steps to mitigate that exposure. This paper will address "freight brokers," "load brokers," and "freight forwarders" collectively as "freight brokers," there being no legal distinction between those titles in Canada. Of course, the common ground concerning these entities, resting with our use of the term "freight broker," concerns the activity whereby one arranges with a carrier to carry the goods of another person for compensation. The reference to "freight broker" in Canada tends to reference the transportation of goods by commercial motor vehicle, while "freight forwarders" tend to operate in the multi-modal or straight ocean or air modes of carriage.

This white paper is not intended to be exhaustive as to any topic addressed, and is not intended to be legal, specific insurance or risk management advice. The intent is to provide a survey as to the regulation of freight brokers and the risk exposure and contracting climate in Canada.

This document is not intended to be "pro-broker", "pro-shipper" or "pro-carrier" in terms of how to negotiate or deal with one another. Granted, the context of any discussion herein may for the sake of emphasis or illustration be taken from the point of view of one of these players in the logistics chain.

This document does not provide business, insurance or tax advice as to whether or how an operation might want to start up in Canada. It does not address what the advantages might be between a U.S. company incorporating a Canadian subsidiary or opening a "brick and mortar" branch office, or simply engaging local sales agents to conduct business. Such advice is beyond the intended scope of this paper and remains the domain of corporate counsel and tax advisors.

This white paper does not intend to recommend any one business model over another. Each case presents its own unique circumstances, with presumably each company choosing and bearing its own unique business model and appetite for risk versus reward.

While this paper identifies certain exposure evident through the case law, the regulatory climate, and/or contracting trends, it does not purportedly intend to exhaustively list what insurance or related risk management tools exist in the market. In this regard there is no substitute for a properly qualified insurance professional.

Finally, this Framework does not address the areas of logistics specialties and the layering of services beyond that of the conventional freight broker by way of "3PL," "4PL," customs brokers, or the like.

II. Introduction

Generally, the freight brokerage industry in Canada is less regulated than it is in the United States. As in the United States, there is a "freedom of contract" whereby shippers, freight brokers and carriers may negotiate contract terms particularly in the trucking mode[1]. Where contracting involves the arrangement of intermodal services, a rail carrier will invariably prove to be less flexible in terms of its terms of service, usually insisting on the incorporation by reference of published tariffs. There is an increasing focus and a premium in the marketplace on the negotiation of "shipper-broker" and "broker-carrier" contract terms, in addition to "shipper-carrier" contract wording. Experience suggests that the larger the "enterprise" of the shipper, the greater frequency by which express brokerage services and/or carriage terms may be imposed by it. This is, however, not to suggest that a shipper of any scale may not engage a contract negotiation process in introducing detailed terms. Freight brokers must be deliberate – and contractually articulate - as to their business model, their risk assessment, and their management of exactly what obligations they are prepared to undertake. As shippers increasingly expect brokers to take on certain exposures (such as assuming liability for cargo loss or damage) the freight broker may prudently seek to pass the same exposure or responsibility down to the performing carrier to the extent possible.

In Canada, we still frequently see more casual, conventional scenarios not involving written "pre-shipment" contracts whereby:

> The shipper at the front end solicits a freight quote from a broker; and
>
> If the freight quote is accepted, the broker then engages a carrier by way of a "carrier dispatch" or "carrier confirmation form."

As will be thoroughly addressed, there is regulation of freight brokers in Canada, to the extent that the relevant freight brokerage operation is based either in the provinces of Ontario or Quebec. Freight brokerage operations are not regulated in the other Canadian provinces. This is a significant difference from the American regulatory regime, where the Federal Motor Carrier Safety Administration (FMCSA) operates as a central, federalized regulatory authority in all 50 states.

It has hopefully now been made clear, that the goal is to introduce the reader to the business of the freight broker in Canada in arranging the carriage of a shipper's goods by a third-party commercial motor vehicle carrier.

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[1] To the extent that Canadian law will govern a contract in question, "freedom of contract," that is, the ability for the parties to craft the terms of a contract has certain limits. In the rare case a contract term might be ignored or "read down" by a court on the basis of being contrary to a compulsorily applicable law or as being considered unenforceable on the basis that it is "unconscionable". A helpful overview on the circumstances by which a court may not give effect to a contract term as being unconscionable is found in the Supreme Court of Canada decision of *Uber Technologies Inc. v. Heller* 2020 SCC 16. In that case, the court held that "Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain." As the parties to the contracts being the subject of this paper will, as a general rule, be commercial parties with certain industry knowledge and the freedom to select service providers or to accept a service mandate as the case may be judicial intervention on the basis of "unconscionability" will likely be reserved to rare cases involving unique facts.

III. Defining the Players

A. Freight Brokers

As previously mentioned, the term "freight broker" in Canada is typically defined as one who arranges the transportation of goods by road carriage from a shipper to a consignee, for compensation. A helpful working definition can be found in the Ontario Highway Traffic Act,[2] as being "a person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle…" As such, the freight broker historically did not "pure and simple" assume care, custody or control of the goods, as it would not issue a bill of lading or other transportation contract document resulting in it assuming (1) a carrier-like function or (2) cargo delivery responsibility.

It follows that, at least generally speaking, the freight broker does not conventionally assume responsibility for the safe delivery of goods to destination.[3] The freight broker has historically been responsible only as an agent in representing its principal (the shipper customer) in setting up a third-party carrier to perform the move. The freight broker's role has come to be redefined in an increasing number of cases in one of two ways: First, the shipper and freight broker may willingly contract on terms that the latter is responsible for cargo loss or damage in transit. Alternatively, a court may impose carrier-like liability on a broker for cargo loss or damage where on the particular facts of a case the freight broker is seen to have undertaken a carrier mandate, in turn sub-contracting the actual carriage to a third-party carrier. In this regard a court might find that through the generation of a bill of lading or some other document – and/or in the dissemination of other information (perhaps a statement on a website) the freight broker has, whether unwittingly or deliberately held itself out as being a carrier. This relates to the issue of "double-brokering" as defined in the United States in the Moving Ahead for Progress in the 21st Century Act (MAP-21).

This historical model of the broker's services being merely of an agency nature called for the broker to introduce a carrier to the shipper. This involved two discrete contractual relationships. At the outset there is an agency arrangement between the shipper and the broker. In turn, there is the separate contract of carriage between the shipper and the dispatched carrier, usually evidenced by the issuance by the latter of a bill of lading at the point of origin.

We have seen in the freight forwarding industry for decades now the distinction between the conventional agency structure (i.e., broker as mere arranger of carriage services) from a principal undertaking (i.e., broker hiring carrier as sub-contractor for its own account, assuming carrier-like liability). Over time, such logistics entities came to see advantages in branding themselves as a "one stop shop" with shipper customers who were not so much concerned with the detail of exactly which entity would be performing the actual carriage: they wanted the simplicity of only having to choose one logistics entity. We have thus seen the advent of the

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2 R.S.O. 1990, c. H.8, § 191.0.1(3)

3 The court in the case of *Nolar v. Freight Transportation Association* 2005 CarswellONT 5197, ON SC provided a helpful illustration of the "carrier" versus "mere agent" distinction with a "cargo travel agent" analogy. Essentially, if you hire a travel agent to get you a ticket on an airplane to travel to a destination, you expect the agent to competently follow your instructions, know their business, perhaps get the best deal in the process, and get you a seat on the flight of your choice. If you do not obtain an effective ticket for the purpose, you blame the agent. However, if the flight is cancelled on account of an equipment malfunction, your grievance would of course be with the "asset based" airline that actually maintains and operates the aircraft. Stated otherwise, freight brokers who wish to avoid the perception of assuming a carriage function will point out that they are only *"buying and selling space on a truck."*

Canadian equivalent of the American notion of the Non-Vessel Operating Common Carrier (NVOCC) and the growing prevalence of "non-asset-based" entities assuming carrier-like responsibility.

The freight broker's refrain (as a putative carrier) of "But I don't even own a truck" will not be a defense to a cargo claim by a shipper if on the particular facts of the case the former is seen to have assumed a carriage mandate. The question is essentially one of analyzing the contractual setting and what the mutual objective intention was of the shipper (customer) and the broker entity: Was the former an "arranger" or was it effectively a "performer?"

A broker may offer services for the intermodal (road + rail) carriage of goods. Various scenarios may then unfold. The broker may assume carrier-like cargo liability for both legs of carriage vis-à-vis the shipper, or it may act as a pure broker agent throughout. Dealing with two modal regimes will call for further business model study, implementation and risk management on the broker's part.

As mentioned, there are different "shades" of the freight broker's undertaking, with some freight brokers unwittingly assuming carrier-like liability by publishing and distributing a bill of lading template with their name and coordinates listed. This raises the suggestion (perhaps subsequently by a cargo claim attorney) that the broker issued the bill of lading and assumed a carriage mandate[4]. The distinction in any given case as to whether the freight broker in fact arranged a carrier only as an agent, as opposed to the freight broker assuming the carrier role is fact and circumstance driven. An exhaustive listing of the various scenarios is beyond the scope of this paper.

B. Freight Forwarders

Freight forwarders also facilitate the movement of cargo, as mentioned previously, in the ocean, air or multi-modal context. Sometimes they act as a carrier vis-à-vis the shipper (i.e., as a NVOCC), in turn acting as a shipper vis-à-vis the subcontracted carrier. Historically, certain factors have been identified in the characterization of the function being performed[5],

[4] Carrier liability is regulated at the provincial level in Canada. Most provinces prescribe minimum substance and contents of bills of lading (Ontario regulations pertain to the "contract of carriage"). Such regulation contemplates the listing of the name of the originating carrier, amongst other items. Too often, this step is not attended to and, when documents are scrutinized in the context of a cargo claim at the end of the day, all that remains is an illegible driver signature. This scenario is one in which a freight broker may be scrutinized for cargo loss or damage liability. Certain provinces deem or assume the application of certain standard terms of carriage between a carrier and a shipper (i.e., Ontario, Quebec, Alberta and Nova Scotia). Certain other provinces in turn call for the application of carriage terms on the condition that they actually be incorporated into a prescribed form of bill of lading (British Columbia, Manitoba and New Brunswick). It should be noted that the provinces of Newfoundland and Prince Edward Island do not regulate in this area, with shipper-carrier relations simply being left to common law principles of carrier liability and the negotiated terms of a carriage contract.

[5] Hallmarks of a freight forwarder undertaking a carriage obligation – similar to the case of the freight broker - may include the issuance of a bill of lading, or statement (express or implied) concerning its acting on its own account in sub-contracting a carrier. Historically, the taking of goods into its own possession, for packing, consolidation, and/or storage this may also indicate a carriage function on the part of a freight forwarder.

Whether acting as a mere agent intermediary, or as a de facto carrier, freight forwarders and freight brokers may impose contractual conditions [6] If acting only as an agent, the freight forwarder then undertakes responsibility for arranging the transportation of the cargo from origin to destination. A freight forwarding agent needs only to obey and perform his instructions with due care and skill, whereas if acting as a principal, it is responsible for the performance of the carriage and other services, unless by contract or the applicable law he is able to limit his responsibility.

C. Intermodal Trucking Companies

As alluded to above, a broker may offer intermodal logistics services to a shipper. This is increasingly offered on a "door to door" basis for a shipper. In this fashion, the broker may then:

> Engage a third-party road carrier and separately engage a rail carrier, perhaps offering the shipper two different contracts for each leg or one "door to door" contract;
>
> Engage a rail carrier who itself acts as an "intermodal trucking company." The rail carrier may have a truck asset division such that it offers its own "door-to-door" services to a shipper through the broker. (Note that in Canada, our "Class 1" railways also offer such a combined transport "door-to-door" service directly to sectors of the shipping public.)
>
> Engage a third party broker entity who offers "Intermodal Logistics Services" who itself has a sales contract relationship with the railway. That third party broker – for Canadian purposes, in effect acting like the "Intermodal Marketing Company" as it known in the United States trade – then books the rail carriage and possibly the road carriage legs as well.

Tracking the discussion under "A. Freight Broker" above, we could thus see different contracting combinations, both as to the legal capacities assumed by a broker as well as in the number of players in the chain. Accordingly, the intermodal services area presents its own form of contracting dynamics and considerations. There will invariably be limited, if any, flexibility offer to a broker by a rail carrier or by a third party intermodal logistics company, as may be the case.

IV. Defining the Canadian Regulatory Regime

Inter-provincial and cross border motor truck transport matters come within the constitutional purview of Canada's federal government. However, unlike with the United States Government's Federal Motor Carrier

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[6] In the multimodal, air and/or ocean carriage context, a member freight forwarder may rely upon and invoke the CIFFA [Canadian International Freight Forwarders Association] Standard Trading Conditions and terms in contractual dealings with a shipper. (See, for example: *Crompton Saage Enterprises Inc.* v. *LEP International Inc.,* [1994] B.C.J. No. 333, *Locher Evers International v. Canada Garlic Distribution Inc.,* 2008 CarswellNat 1025 and *Labrador-Link et al v. Panalpina Inc. et al* 2019 F.C. 740) The reader should note that the utility and benefit of these Standard Trading Conditions is not limited to the 'non-surface transport' modes: A CIFFA member acting as a freight broker may rely upon these Conditions in the motor carriage context. Where incorporated, the CIFFA Standard Trading Conditions elegantly provide a set of liability rules governing services provided by member freight forwarders, not least of which includes the indication as to whether a forwarder acted as mere agent (as opposed to a principal) to a contract of carriage with related liability for the safe delivery of cargo at a destination.

Safety Administration, this Canadian government delegates regulation and enforcement of the federal laws to the provinces.[7]

In turn, intra-provincial transportation matters are also regulated by the provinces and territories, who have direct constitutional governance over carriage mandates wholly taking place between points within their jurisdiction.

Accordingly, the Canadian provinces are free to legislate the terms of carrier liability and transportation issues for inter- provincial, cross-border and intra-provincial carriage. Several provinces have enacted uniform "conditions of carriage" governing carrier liability, which are essentially identical (giving rise to their general reference in Canada as the "uniform bill of lading").[8]

The uniform bill of lading governs the terms of a carrier's defenses to liability, the right for a carrier to limit liability, claim notice requirements, and more. Specifically, as concerns carrier liability and claims, a unique feature of Canadian law is the presumptive ability of a carrier (absent a declaration of a value by a shipper) to limit liability for cargo loss or damage to $2 per pound of the weight of the cargo. What is important to note here is that the "uniform bill of lading" and its enabling legislation only address carrier liability. There is no mention of any deemed or presumed terms of freight broker liability. With this, comes the fact that the freight broker does not have a presumptive limitation of liability. This potential disconnect – between possible full unlimited liability that a freight broker might assume vis-à-vis a shipper, and a possible limited liability defense that a carrier might raise vis-à-vis a freight broker, is an important item of concern that must be addressed when drafting written contracts.

As mentioned above, to the extent that certain provinces do prescribe carrier liability, they also prescribe the form of bills of lading, information required thereon, and the form and content of the contract of carriage. Beyond those prescriptions, the two significant regulations at the provincial level that are specific to freight brokers are:

- The Province of Ontario imposes a statutory trust obligation on freight brokers (and, by extension, freight forwarders) who arrange truck transportation on behalf of others. Money received from a shipper that is intended as a freight payment for a carrier must be held by the freight broker in trust for the carrier.
- People who act as intermediaries in the road carriage of goods in the Province of Quebec are required to be registered with the provincial transportation ministry.
- Otherwise, freight brokers and freight forwarders (acting as such) are not regulated and do not require licenses.

Freight brokers and freight forwarders may also be regulated incidentally, as a function of undertaking a specific activity. For example, an "intermodal trucking company" might offer and perform road carriage services through an asset division while brokering out rail carriage services for a shipper. That entity would then have to be licensed in the usual way for its road carriage activities as a carrier. Further, Ontario and other provinces have established legislation on liability for warehousemen, which may be a service offered by

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[7] See: *Motor Vehicle Transport Act*, R.S.C. 1985, c. 39 (3rd Supp.)

[8] See discussion at footnote 4 above.

a freight broker or freight forwarder.[9] Similarly, there are federal and provincial laws in Canada that govern the documentation, preparation and offering of dangerous goods for carriage.[10] Laws in Alberta require an intermediary selling cargo insurance for shippers to hold a "restricted insurance agent" license.[11] These are but a few examples of how freight brokers or freight forwarders must be aware of the law and comply with regulations for all activities they offer to their clients.

Once a freight broker or freight forwarder is determined to have carrier-like liability as a principal in a given case for cargo loss or damage they might benefit from or be affected by the rules of carrier liability governing the mode of carriage in question. However, a full consideration of the possible contingencies in that scenario is a lengthy discussion of its own. At minimum, for a broker or a forwarder to seek the benefits of a carrier's presumptive limitation of liability, (independent of what they may have provided for in a contract with their shipper) there would need to be an analysis of the work performed and a review of the applicable regulations governing the relevant contract of carriage.

A. The Ontario Deemed Statutory Trust Obligation

Section 191.0.1(3) of the Ontario Highway Traffic Act R.S.O. c. H-8 provides as follows:

- Money for contract of carriage held in trust: A person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator until the money is paid to the operator.

The reference in this statute to "person" includes either an individual or a company. As will be quickly discussed in detail, there are significant potential consequences to individuals, including officers and directors of freight broker operations, who do not abide by this trust fund requirement.[12]

Case law holds that the trust obligation applies to (1) any person who is based in Ontario who (2) arranges carriers to haul loads for another – regardless of whether the routing in question be in Ontario, through Ontario or any other location. Significantly, the location of the brokerage operation triggers this obligation.[13] In the reverse scenario, where a freight broker is based outside of Ontario and arranges a shipment in or through the province of Ontario, a strict interpretation of the above legislation would not subject the broker to this requirement. The principle in that scenario is that the Ontario legislature would not have the jurisdiction to impose laws beyond its provincial borders.

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9 See: Ontario *Warehouse Receipts Act* R.S.O. 1990, C W.3 and other equivalent legislation governing warehouseman liability.

10 The federal *Transportation of Dangerous Goods Act,* S.C. 1992 c. 34 regulates inter-provincial undertakings involving the offering for transport, or transport of dangerous goods as defined. At the provincial level, such as in Ontario with the Dangerous Goods Transportation Act, R.S.O. 1990, c. D.1, there is the "local" regulation of the transportation of dangerous goods in a vehicle on a highway.

11 See: *Insurance Act* R.S.A. 2000 c.I-3, s. 454

12 This is a "substance over form" discussion: if the function being conducted triggers the legislation on point, then compliance is necessary. Whether an entity has historically fashioned itself as a freight forwarder as opposed to freight broker will be no defense.

13 *Canadian Imperial Bank of Commerce v. Nadiscorp Logistics Group Inc.,* 2010 ONCA 397 (CanLII).

This said, the prudent approach is always "if in doubt, comply."[14] The location of the brokerage operation is an important consideration for any brokerage entity that in any way does business with the province of Ontario. A broker needs to clearly identify whether it is subject to the trust fund obligation and to govern itself accordingly.

- *Trust Obligations and the Issue of Multiple Offices, Multiple Services, and Multiple Locations*: A diligent broker seeking to ensure compliance with the deemed statutory trust requirement may need to carefully differentiate its business aspects which broker freight in Ontario from other services. For example, a company may employ a freight broker who works in a province other than Ontario, and who would normally be exempt from complying with Ontario law. However, that company may have an operational presence in Ontario, whether that presence be other freight broker employees, "asset-backed" physical services, a "bricks and mortar" terminal or office, or a sales office. The risk in this scenario is that the line is blurred on whether the brokerage is subject to the trust obligation. In this scenario, a company may be best advised to clarify whether its brokerage operation is entirely outside of Ontario, or whether the brokerage operation is properly differentiated at a corporate level from other operations.

If the broker does not place the different job functions into segregated corporate entities, and instead has just one corporation that carries on different lines of business in Ontario; i.e., it has a place of business, a sale agent or employees in Ontario and maintains a cross-dock operation or any office in this province, then it may well be liable for the trust obligation, despite the earnest argument that a specific aspect of the brokerage operation(s) are located outside of Ontario. In the age of online communication, a company with an "Ontario presence" may not be able to sufficiently prove that no aspect of brokerage or dispatch occurred in Ontario, culminating in a finding that Ontario law applies.

The policy underpinning here protects the rights of trucking companies. If there are any indicators that could lead a trucking company to conclude that it was negotiating with an Ontario-based business, then there may not be too much scrutiny of the finer details about "who does what and where" within the broker organization, and where they were sitting at the precise moment when the brokerage was coordinated.

This discussion is more than academic or suggesting best practices for the sake of it. As canvassed in the next paragraph, there is significant risk to those individuals who do not comply of being found personally liable for money owed to carriers.[15]

- *Trust Obligation and Interlining*: An Ontario based carrier who dispatches or gives a load to an interlining carrier will likely be considered to be a freight broker, in respect of the interlining partner, for the purpose of the above discussion. The consensus is that given (1) the generality of the prior trust obligation language and (2) the absence of any "carve out" for a pure interlining situation,[16] a carrier who "interlines" will be liable under the trust obligation. The writer is, however, unaware of this issue ever being

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[14] Whether a Canada-based broker or freight forwarder is subject to U.S. law such as the MAP 21is discussed in section (VII) (A).

[15] Of course, the issue here will usually arise in the case of a failed load brokerage. There may be insufficient money in the company to pay the carriers, or there may be a priority dispute between the unpaid carriers seeking trust beneficiary status and a secured creditor who had the operation's book debts as collateral: see, for example, *Re Norame Inc.* 2008 ONCA 319 (CanLII).

[16] By contrast, in the United States, under MAP-21, entities that interline must be aware that there is a $10,000 penalty for brokering cargo if the entity is not properly registered and licensed with the Federal Motor Carrier Safety Administration.

addressed in a court ruling. The application of the trust obligation to interlining situations is consistent with much of the commentary that preceded the 2008 adoption of the present statutory requirement, which eliminated the defined term "load broker" and replaced it with the broader "person who arranges" language.

The current law in Ontario no longer includes the highlighted exemption shown below for interline operations between licensed carriers. Accordingly, the repeal of this exemption implies that interline operations were intended to be captured within the wider net of the current trust fund obligation.

In this regard, note that the former Load Brokers Regulation, enacted under Ontario's former Truck Transportation Act (Ontario), repealed some time ago, used to have the following two definitions (emphasis added):

- "*Load Broker*" means a person who arranges, for compensation, for goods owned by one person to be carried by another person who is a carrier
- "*Load Brokerage Service*" means the service of arranging for goods owned by one person to be carried by another person who is a carrier, but does not include such service if it is, arranged by one carrier with another carrier under a certificate of intercorporate exemption, arranged by one licensed carrier with another licensed carrier utilizing services that are commonly known as interline, arranged by one licensed carrier with another licensed carrier, both operating under an interchange authority as defined in Regulation 1091 of the Revised Regulations of Ontario, 1990, or arranged by one carrier with an affiliated carrier, for the carriage of used household goods as defined in Regulation 1091 of the Revised Regulations of Ontario, 1990.
- *The Potential Consequences of Non-Compliance*: Officers and directors of non-compliant freight brokerage companies have been found personally liable for their company's breach of the Ontario trust fund requirement.[17] These cases found personal liability on the part of individuals who were actually responsible for money from shippers not being protected in trust for carriers. In these cases, the court found that the individuals had substantial involvement in the corporation's affairs relating to the payment of carrier freight bills. Directors and officers of load brokers will however not be automatically personally liable for their company's failure to pay performing carriers; they must have been involved in the diversion of the money.[18]

  Case Study: The issue of the degree of individual involvement was addressed in *4 Star Courier & Logistics Inc. v. Domino's Pizza Canadian Distribution ULC*[19]. The Plaintiff, an unpaid courier company, brought an action against a director of a freight broker citing the Ontario statutory trust. The action was ultimately dismissed as the director was found to have been only a silent

[17] See, for example: *Sager Transport Ltd. v. Varga Trucking Ltd.* [2004] O.J. No. 4923 [On. S.C.], *Baltic Freightlines Inc. v. Camlane Group Inc.* (May 16, 2010, Ont. Sm. Cl. Ct; unreported) and *Tripar Transportation LP v. U.S. Consolidators Inc.* court file SC-1100001987-0000 (Brampton, ON).

[18] In *Sunbelt Transport Inc. v. Bonair Logistics Inc.* (2006) CanLII 5460 (ON SC) a corporate director of a load broker was absolved from personal liability where the evidence indicated that he was not in fact involved with the running of the financial affairs of the business. He was not involved in the misapplication of a shipper's monies towards the brokerage business operations.

[19] 2012 CarswellONT 9988 (Ontario Superior Court).

partner in the brokerage who did not take part in running the corporate finances. However, the case provided the opportunity for the court to assess the operative legal principles upon how an individual might end up being liable for the "sins" of a corporation, as regards load brokers and the statutory trust obligation. The court accepted that *"it is obvious from the language of the section and it is common ground between the parties that the section does not in itself make directors liable for breach of the statutory trust it mandates be kept."*[20] The court went on to identify the important Supreme Court of Canada case of *Air Canada v. M & L Travel Ltd.*[21] as setting the governing test for determining personal liability.

In *Air Canada v. M & L Travel Ltd*., the issue related to the personal liability of two corporate directors for the failure of a corporation to remit trust funds to which an airline was entitled. While the trust in that case did not arise by statute, the issue was framed as "under what circumstances can the directors of a corporation be held personally liable for breach of trust by the corporation?" The court noted that a distinction should not be drawn between statutory and non-statutory trusts as concerns officers and director liability.

Air Canada v. M & L Travel Ltd. was followed by the Ontario Superior Court in the 2011 case of *Travelers Transportation v. 1415557 Ontario Inc. c.o.b.* as Platinum Express Worldwide.[22] The court determined that, under the (then) Ontario Truck Transportation Act trust fund obligation regime, the directors and officers of a load broker corporation would not be personally liable merely on proof that the carrier was not paid. The court set a test that unpaid carriers must satisfy in order for the court to hold directors and officers of a brokerage liable for the unpaid freight charges.

In Travelers Transportation the unpaid carrier alleged that an officer and director of a brokerage corporation was personally liable for a breach of the trust provisions imposed upon it. The court followed *Air Canada v. M & L Travel Ltd.*, confirming the certain scenarios under which a director and officer would be liable, finding that none had been established in this case. A director or freight broker is only liable for an unpaid trust if they: (1) knowingly assisting in the breach of trust; and (2) knowingly receiving trust property.

With regard to the first ground, "knowingly assisting in the breach of trust," the unpaid carrier needed to establish that (a) the director had actual knowledge of the underlying breach of trust or was reckless or willfully blind to that breach of trust; and (b) that the underlying breach was part of the trustee's fraudulent and dishonest design.

With regard to the second ground, "knowingly receiving trust property," the plaintiff needed to establish that the director in question took trust funds for himself and knew or was reckless or willfully blind that he was taking trust funds.

The unpaid carrier plaintiff, however, could not establish its case under either of these two grounds. Its claim was defeated by the fact that there was no evidence that the broker had actually been paid by the shipper in the first place. As mentioned, the court found that the trust obligation did not create a stand-alone obligation to pay outstanding invoices. The trust obligation merely created an obligation to keep separate any funds

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[20] See also *Travelers Transportation v. 1415557 Ontario Inc. c.o.b. as Platinum Express Worldwide*, 2011 ONSC 44.

[21] [1993] 3 S.C.R. 787 (S.C.C.).

[22] See footnote 20.

received as payment and to hold them in reserve for the motor carrier. Since there was no evidence that the broker was ever paid, there could not be any finding that it breached the trust obligation. The court in any event determined that there was insufficient evidence to determine that the individual in question knowingly assisted in the breach or knowingly took trust funds. The unpaid carrier failed to adduce any evidence on these points and merely attempted to rely on the fact that the trust obligation existed and the fact that the individual was a director of the failed brokerage. The court stated this was unsatisfactory, particularly in light of the fact that there were a number of other directors and officers throughout the relationship, making it impossible to presume that the particular individual had awareness of the status of the disputed trust funds.

Brokers should be alert to the fact that there is an enhanced risk of scrutiny resulting from case law precedent holding that as a general rule in Ontario that a shipper who has paid a broker freight money will be discharged of freight charge liability vis-à-vis a carrier.[23]

B. The Quebec Registration Requirement

Freight brokers doing business in the Province of Quebec are required to be registered. The relevant governing statute as relates to the transportation intermediary registration requirement is entitled "An Act Respecting Owners, Operators and Drivers of Heavy Vehicles" CQLR c P-30.3. The relevant provisions for our purposes are found at sections 15 and 16:

- The Commission shall establish and maintain a list of transport service intermediaries carrying on business in Québec. The list is public. The Commission shall also establish a file on each transport service intermediary who applies for registration.
- Only intermediaries entered on this list may provide such services. The expression "transport service intermediary" means any person who, for remuneration, acts directly or indirectly as an intermediary in a transaction between third persons, the object of which is the transportation of persons or property by a heavy vehicle.

The legislation further provides:

- Every transport service intermediary must register or renew registration by filing an application with the Commission, in the form and tenor determined by the Commission, together with payment of the fees fixed by regulation of the government.
- Where such a person fails to register or renew registration, any contract entered into by the person becomes without effect.

[23] Note the discussion below at VI(E) "The Possible Perils of Double Brokering." This rule is not absolute and is fact-specific. If a shipper hires a broker who hires a carrier, understanding that eventually the carrier will invoice and look to the broker only for payment, then the shipper's payment to the broker will as a general rule discharge any freight charge liability it may have had to the carrier (for example, with the carrier setting up an argument that the broker was really acting as the shipper's agent in the equation). This is on the basis that the carrier may be seen to have assumed the risk that the broker might fail after receipt of money from the shipper: See, as example cases: *C.P. Ships v. Les Industries Lyon Corduroys Ltee.* [1983] 1 F.C. 736 (T.D.) and *Algocen Transport Inc. v. Hinsbergers Poly Industries Ltd.* (1988) 64 O.R. (2d) 444.

- The reference to "person," of course, includes incorporated companies. The reference to "heavy vehicle" means, of course, commercial motor vehicles.

The Potential Consequences of Non-Compliance:

  - Of paramount importance is that, in Section 16, if a freight broker subject to this regulation does not register, "any contract entered into by the person becomes without effect." Accordingly, the non-compliant broker runs the risk of not being able to enforce contractual obligations against a party with whom it may have entered into a contract.

  - It remains a factual inquiry as to what triggers this registration obligation. If a broker does business in Quebec, a "bricks and mortar" presence will certainly trigger the obligation to register. If an agent or sales representative were domiciled in Quebec, then the active solicitation of business would qualify.

  - If a freight broker is located outside of Quebec, but occasionally arranges a move inside of, or to or from Quebec, additional considerations may apply when assessing the registration requirement. For example:

    - Did the business generate from contacts and marketing efforts wholly outside the province of Quebec?

    - Is the shipper customer located outside of that province, who happens to be purchasing product from, or selling it to a third party Quebec entity?

    - Did the freight broker pursue some type of marketing presence, listing for example, a Quebec contact phone number on a web site?

As mentioned previously, the prudent position for a freight broker for the registration requirement would be "when in doubt, comply." The process is neither difficult nor onerous, and permits are readily granted. The registration and associated steps of establishing a presence with the Quebec government is modest in both costs and the "shoe leather" cost such that this is a risk-prevention step well worth taking.

C. A Note on the Quebec Civil Code CQLR c. C-1991

A brief note is also required for the reader regarding the Quebec Civil Code CQLR c. C-1991. Generally, a contract might provide that it is to be governed by the laws of Quebec, or where the parties do not so stipulate, a court seized of a case involving the province of Quebec might determine through applicable "conflicts of law" rules that Quebec law was implicitly agreed to by the contracting parties as the governing law.[24]

Quebec's legal system is based on the Quebec Civil Code which is a body of rules and regulations that sets forth the law that applies to all of Quebec. This comprehensive code differs from the rest of Canada, the latter operating under the common law regime in the operation of both statute law as well as case law "precedent" based decisions. Simply put, the Quebec Civil Code is a much more comprehensive "stand alone" set of legal rules and principles than are found in the rest of Canada. It follows that in the preparation of, and negotiation

[24] A basic overview of "conflicts of law" in the cross border context is provided below at Section VII (C): In the event of a contractual dispute, when might the applicable provincial or federal law of Canada apply as opposed to the applicable law of the United States?

of, a contract involving the Province of Quebec, the prudent broker will take the necessary legal advice in determining the laws and contract terms that it is agreeing to be bound.[25]

V. Defining Exposure to Liability in Canada

A. Problems with a Lack of Regulation

While an unregulated field readily allows for new entrants, the absence of a statutory codification of the standard of care expected of the freight broker may prove to be problematic for the unwary freight broker who fails to implement a deliberate and consistent business model and method of operation.

Unlike the statutory governance of motor carriers, there is no liability protection offered to freight brokerage operations under the "uniform bill of lading," or other statutory provisions.[26] The freight broker is not "handed" either deemed or automatic specific liability guidelines or defenses. Rather, the freight broker fends for itself with the "freedom of contract" that comes with operating in what is essentially an unregulated regime.[27] Subject to the terms of any written shipper-broker contract as may exist, the liability of the freight broker is then assessed on the basis of common law agency principles where the broker acts solely as an agent. In this case, the freight broker undertakes responsibility for arranging the transportation of the cargo from origin to destination, and will be expected to obey and competently perform his instructions with due care and skill.

Where the freight broker is found to have undertaken a contractual mandate to be responsible for cargo loss or damage (acting as a principal, i.e., as a carrier) then its liability will be assessed based on the terms (express or implied) of such a contract and applicable modal liability regime rules. That contract may spell out terms of carrier-like liability and the legislation and/or common law may apply to fill any remaining contractual gaps.

In Canada, many established freight forwarders and freight brokers are members of the CIFFA. As a vital component of Canada's global supply chain, member firms of the CIFFA facilitate the movement of goods around the world. Freight forwarders/brokers of CIFFA provide a vital link in Canada's global supply chains, enhancing export capabilities and assisting in the delivery of competitive solutions to Canada's importing and exporting communities. CIFFA has for some time now published Standard Trading Conditions, the terms of which are commonly incorporated by CIFFA members into dealings with shippers. These terms, which may only be invoked by CIFFA members, serve as a nice example of the incorporation of terms of engagement and liability for the freight forwarder (or freight broker) member, including publishing the criteria to assess whether the forwarder/broker is acting as an agent or a principal (i.e., carrier) to a contract of carriage. These

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[25] This comment is not intended to suggest that legal advice is not important when contracts are otherwise being planned and negotiated that do not involve the province of Quebec. This comment is simply to highlight that the Quebec regime is novel and different in many ways from the rest of Canada.

[26] As mentioned above, in certain provinces there is a deemed application of the "uniform bill of lading:" See, for example, Regulation 643/05 under the Ontario *Highway Traffic Act* R.S.O. 1990 c.H.8., which gives effect to the "uniform bill of lading" and deems carriage terms to apply for the carriage of general freight, household goods and livestock.

[27] Increasingly, shipper-broker and broker-carrier contracts are being put into use to set out the specific terms of the broker's engagement.

terms provide that the capacity in which the forwarder/broker is acting is determined by whether it issues a carriage document covering the shipment of the goods.

The CIFFA Standard Trading Conditions codify the liability of the freight forwarder or broker in a given case and provides various contractual protections. It appears that in determining whether to incorporate CIFFA terms and conditions into a freight forwarding contract the courts will consider whether the customer had earlier experience with the standard terms, whether it had the opportunity to read the contract and its associated terms but choose not to do so, and whether the terms and conditions were sufficiently brought to its attention beforehand.[28] Note, in particular, the following clear language in the CIFFA Standard Trading Conditions:[29]

ROLE OF FORWARDER ("the COMPANY")

The Company offers its services on the basis of these conditions that apply to all activities of the Company in arranging transportation or providing related services, such as, but not limited to, warehousing and any other kind of logistics services. The Company may provide its services as either principal or agent. The Company acts as agent of the Customer, except

a) where it issues a transport document or electronic record evidencing its obligation for the delivery of goods, or

b) to the extent it physically handles goods by its own employees and equipment in the course of performing any service in which cases it acts as principal,

but whether acting as principal or as agent these conditions govern the rights and liabilities of the Customer and the Company.

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[28] The freight forwarder or load broker seeking to incorporate and rely on the terms of the CIFFA Standard Trading Conditions (or, for that matter, any other terms outside of a written contract) will have to establish that they were suitably brought to the notice of the other contracting party, that is, that they were sufficiently incorporated into the contract dealings so as to form a part of the contract. If this can be established, then the other party will generally be considered bound to the same: "… equity does not favor the relief of a party who fails to read the terms of an agreement:" *Lam v. Ernest & Twins Ventures (PP) Ltd.*, 2001 CarswellBC 1114. See also *LaSeta Import Export Ltd. v. SDVZ Logistics (Canada) Inc.*, 2002 CarswellONT 3718. Common methods by which website contract terms and conditions may be seen to have effectively been brought to a customer's attention, thus effectively being incorporated into a contract include one or more of the following:

i) A signed acknowledgement to that effect by a customer (i.e., Power of Attorney or a Credit Application document (i.e., "by its signature above," Customer acknowledges that the terms and conditions available at [website address] govern all services provided),

ii) Email footers on correspondence to the customer (i.e., "All services are provided subject to and in accordance with the terms and conditions available at [website address]" and/or,

iii) Reference to the same, on invoicing and other documents.

What is important is that it be demonstrated that the terms and conditions being relied on were incorporated into the contract prior to the formation of the contract, which will, of course, be a factual question in a given case.

[29] June 2020 Edition.

ROLE AS AGENT

When acting as an agent, the Company acts solely on behalf of the Customer in engaging the services of third parties on the usual terms and conditions on which the third parties offer such services for the carriage, storage, packing or handling of any goods, or for any other service in relation to them, thereby establishing a direct contract between the Customer and the provider of such services capable of being enforced by the Customer as *principal, whether or not the Customer is identified in the contract. The Company shall on demand by the Customer provide evidence of any contracts made on its behalf.*

ROLE AS PRINCIPAL

Where requested by the Customer the Company may:

a) issue a transport document or electronic record by which it as principal undertakes carriage of particular goods; or

b) guarantee in writing proper performance of the terms of any contract between the Customer and a third party whose services the Company has engaged on behalf of the Customer.

Where it issues a transport document or electronic record, or provides a guarantee, the rights and obligations of the Company will be governed by the special conditions therein in addition to these conditions, and in any event the Company is liable only to the same extent as the third party who performs the carriage or guaranteed service, as may be limited by the conditions on which that party customarily offers its services. In the event of any inconsistency with these provisions, the special conditions prevail.

For the purpose of this discussion the reader should recall the mention above that in Canadian practice the reference to a freight forwarder typically connotes an ocean or air carriage (or multi-modal) arrangement. This is distinct from the general understanding that freight brokers arrange the surface transport of cargoes by commercial motor vehicle carriers. Nonetheless, CIFFA members may rely on their Standard Trading Conditions (STCs) whether acting as a freight forwarder or a freight broker.

As concerns freight brokerage, Canadian members of the Transportation Intermediaries Association (TIA) have access to various model contracts including broker-carrier and broker-shipper contracts, which can be adapted to fit the purposes of the company doing business in Canada. Similarly, the National Transportation Brokers Association has promulgated a broker-carrier agreement that sets forth certain terms and conditions between brokers and carriers, however, there is no example contract form for shipper-broker relations.

In order to be contractually applicable, standard trading conditions must be adequately incorporated into a contract. As mentioned, members of CIFFA frequently incorporate the CIFFA Conditions into dealings with shippers (i.e., incorporation by reference in credit application materials, powers of attorney, and "footer" references in correspondence and invoices). The courts have given effect to these standard trading conditions where properly incorporated in a contract.[30] Courts are also prepared to give effect to a freight broker's own standard terms and conditions if they are specifically and timely incorporated into a contract.

[30] See for example: *Crompton Saage Enterprises Inc. v. LEP International Inc*. [1994] B.C.J. No. 333.

B. A Note on Broker Liability in Canada

While the generally unregulated nature of freight brokerage in Canada is attractive to those occupying the field, brokers must be wary of their exposure to cargo claims and claims arising from casualty incidents (e.g., claims for personal injury or property damage suffered by third parties). On the cargo exposure side of things, whereas carriers bear the burden of the high "insurer standard" of liability, as mentioned, there are limited defenses and limits of liability that may benefit a carrier.[31] The deemed or presumptive limits of liability may, however, not apply in respect of a broker acting as such in a particular case.

The cautionary tale here is that, if liable to the shipper for cargo loss or damage, the unwary broker may have to underwrite the difference between the carrier's limitation amount at $2 per pound (per the uniform bill of lading) and the amount of the shipper's claim for lost or damaged cargo.

By way of illustration, assume the following set of facts, which shows how easily the freight broker could have exposure to a claim. A freight broker might be exposed to a shipper's assertion that there was an instruction that was not followed by the broker leading to the loss or damage:

- Someone at a freight brokerage company takes an inquiry from a shipper client, with a general description of cargo (i.e., "x" number of boxes, contents undisclosed) for carriage between certain points, accompanied by an instruction on time of pickup and delivery.
- The freight broker is required by the customer to pick up cargo at origin on Friday afternoon, and deliver on Monday morning. Geography dictates that the shipment will not always be in transit, and that it will be stationary overnight prior to final delivery.
- The freight broker does not have a standardized internal method for recording or memorializing verbal information or requests received by the shipper. The information may be written down initially, or maybe not.
- After the broker takes the details in bullet numbers 1 and 2 above from the shipper, the brokerage representative submits a freight rate quote to the shipper, which is accepted.
- The brokerage then issues the usual "carrier confirmation sheet" to a carrier listing the above pickup and delivery instructions.
- Upon pick-up at origin, the shipper customer does not declare a value for the cargo on the bill of lading issued by the carrier.
- During transit, the cargo and trailer is stored in a stationary location pending delivery. While being stored, the trailer is stolen by unknown third parties.
- A cargo claim is thereafter filed by the shipper customer against the broker. A claim may also be filed against the carrier.

[31] In the language of cargo claims: subject to the terms of a written contract of carriage, carriers may try to assert the limited defenses available to them in the uniform bill of lading or as set by the common law. Subject in turn to what, if any defenses, apply, the carrier is said to be liable on a "good in, bad out" basis: i.e., for any transit damage between origin and destination.

- The cargo is determined to have been of significant value, at any rate, more than the equivalent of $2 per pound. The carrier (or its insurance company), conceding responsibility, offers to pay its maximum liability of $2 per pound. The broker takes the position, naturally, that it is not a carrier. As the broker maintains that they acted properly, the broker looks to the carrier to pay, and even offers to advance the claim against the carrier on behalf of the shipper customer.
- The shipper asserts that on the first call to the brokerage salesperson the instruction was to store the goods INDOORS. This is news to both the broker and the carrier's dispatcher. There is no written evidence that that this instruction was received from the shipper and, as a matter of course, the instruction will not be found in any writing to the carrier.

In this scenario, the broker is faced with risk of being found liable in negligence or for the breach of the terms of the agency (broker) contract, with the related risk that it will ultimately have to vouch for the excess of the amount of the claim beyond the carrier's limitation of liability. The broker might also face a claim of liability as a principal (i.e., having assumed a carrier mandate) to a contract of carriage with the shipper.

Under the former scenario, the broker has no automatic terms of liability matching what the carrier's limits of liability will be. Under the latter, it is not clear whether as a principal the broker might be considered to be a "carrier" such that the broker can benefit from the same $2 per pound limit of liability.

Often the only writing in this equation is the "carrier dispatch sheet" to the carrier. This, of course, lists the origin and destination, relevant dates, equipment requirements and sometimes other basic instruction terms to the carrier; for example, that the load should not be "double brokered."[32]

The shipper will rarely (if ever) be provided a copy of the carrier confirmation sheet, as the broker does not want the shipper to see the lower amount the carrier is being paid. As a result, there is often no "writing" given to the shipper by the broker, confirming the former's instructions. Equally, the broker does not see what is given to the carrier by the shipper. This indicates a benefit with there being a shipper-broker contract, in clearly setting forth expectations.[33]

The freight broker has to be deliberate with its business model and the capacity in which it acts. Standard procedures should be adopted concerning memorializing the detail of instructions received at the front end by the shipper. Freight brokers should also take further protection in standardizing, internally, the method in which instructions are recorded from shippers. This will ensure that the broker can state with confidence that if questioned an instruction was "never given" by a shipper.

Certain leading freight brokers are now publishing their own "service conditions" for access and review on a website, which codify the nature of the services provided and the basis upon which rate quotations are provided. Such conditions might for example require the customer to advise the freight broker in writing if

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[32] The "carrier confirmation sheet" is an item that might be the source of disconnect between a broker and a carrier. The courts in Canada have not specifically wrestled with the question of its status as a "contractual" document. Is it in fact a contractual document with the carrier? Or is it a post-contract document merely confirming what the broker and carrier have already agreed to? For that matter, is it a mere post-contract "wish list of further items for consideration" by the broker to the carrier? Note, in this regard, the discussion at footnote 28 above.

[33] From the point of view of the broker there may be the detriment of it being asked to assume certain obligations or risks that it might not otherwise take on in the absence the specific negotiation of a contract.

there is anything by way of instruction, not specifically reflected in the rate quotation submitted to it. The idea is for the freight broker to be able to attempt to avoid liability for any alleged failure to communicate special handling, storage, security instructions, cargo needs or the value of a shipment to a carrier unless the customer has followed prescribed steps in advising the freight broker accordingly.

By implementing standard practices and putting the shipper to confirming details of needs in respect of the cargo in a uniform way, the broker will more readily avoid the credibility issue pitfalls that seem to surface following a loss, where for whatever reason liability does not flow for the full amount of a claim to the responsible carrier.

Additionally, the freight broker should be deliberate in laying the guidelines with a shipper as to the responsibility of declaring a value on a bill of lading. The classic broker function (and governing case law) would suggest that this is left to the shipper to attend to when the carrier issues a bill of lading at the loading dock at the point of origin. Where the broker gets involved in this regard it potentially does so at its peril. Even if not regarded as a carrier, this opens up a further liability exposure on the broker and calls for a credibility assessment. If no value was declared and there is a loss (with the limitation calculation being relevant), then the broker may have to defend itself against a suggestion by the shipper that it was responsible to address a declaration of valuation with the carrier. Presumptively, this is the shipper's, and not the broker's function. However, the broker should avoid casting any impression that it will be somehow protecting the shipper's interests in this regard unless this is a deliberate service or business model being offered by the broker.

As we see, for example, with the CIFFA STCs, service conditions may offer significant protection, featuring limitations of liability or outright exonerations from liability (i.e., in the case of delay or consequential damage claims brought against the freight broker). Most importantly, they provide guidelines for a shipper to understand the respective rights and obligations between it and the broker.

C. Freight Brokers and the Role of the Carrier

As mentioned above, the freight broker who assumes a carriage mandate might be subject to the same rigors of liability as a carrier, but enjoying the same defenses and the said $2 per pound of liability.

Certainly, this could be provided for in a shipper-broker contract. Absent such a contract, liability might be imposed pursuant to the governing carrier legislation.[34] Take Ontario for example: The governing motor carrier legislation in the Highway Traffic Act provides as follows: 191.0.1 (1) *Every contract of carriage for a person to carry the goods of another person by commercial motor vehicle for compensation shall contain the information required by the regulations and shall be deemed to include the terms and conditions set out in the regulations*.

It is not settled as to whether one must actually undertake to haul freight by its own commercial motor vehicle so as to come within the scope of the foregoing, or whether it merely require a promise by one to be responsible for the carriage of goods by another through sub-contracting a third party to perform the carriage. It should be noted, however, that (continuing with the Ontario setting) that there are requirements as to what must be in a "contract of carriage." Regulation 643/05 enacted under the Highway Traffic Act prescribes as follows:

[34] See footnote 4.

A contract of carriage must contain the name of the consignor; the name and address of the consignee; the originating point of the shipment; the destination of the shipment; the date of the shipment; the name of the originating carrier; the names of connecting carriers, if any; the particulars of the goods comprising the shipment; a space to show the declared valuation of the shipment, if any; information as to whether the charges are prepaid or collect; a space to show whether the C.O.D. fee is prepaid or collect; a space to show the amount to be collected by the carrier on a C.O.D. shipment; a space to note any special agreement between the consignor and carrier; a statement to indicate that the uniform conditions of carriage apply; an acknowledgment of receipt of the goods by the carrier or the intermediary indicating whether the goods were received in apparent good order and condition; an undertaking by the carrier or the intermediary to carry the goods for delivery to the consignee or the person entitled to receive the goods; the signed acceptance by, or on behalf of, the originating carrier or intermediary and the consignor of the conditions contained, or deemed to be contained, in the contract of carriage; a statement of the notice of claim requirements in the uniform conditions of carriage; and if applicable, a statement in conspicuous form) that the carrier's liability is limited by a term or condition of another agreement. O. Reg. 643/05, s. 4 (1)

The uniform conditions of carriage in Schedule 1 are deemed to be terms and conditions of every contract of carriage to which this section applies. O. Reg. 643/05, s. 4 (2).

The uniform bill of lading contemplated by the above language provides for the $2 per pound limitation of liability provision noted above.

D. Uniform Conditions of Carriage —General Freight

LIABILITY OF CARRIER

The carrier of the goods described in this contract is liable for any loss of or damage to goods accepted by the carrier or the carrier's agent except as provided in this Schedule.

VALUATION

Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not the loss or damage results from negligence, shall be the lesser of the value of the goods at the place and time of shipment, including the freight and other charges if paid, and $4.41 per kilogram computed on the total weight of the shipment.

DECLARED VALUE

If the consignor has declared a value of the goods on the face of the contract of carriage, the amount of any loss or damage for which the carrier is liable shall not exceed the declared value.

Accordingly, there is some uncertainty as to whether a freight broker who assumes carrier-like liability for cargo loss or damage can avail itself of the same defense as the carrier. The legislation does not state what the result or sanction is for a carrier (or, for that matter, a load broker contracting as a carrier) who does not comply with the form and substance requirements of a "contract of carriage" or bill of lading. Can a carrier (or a broker assuming liability as a carrier) take the benefit of the limitation of liability where it did not comply with the contracting formality requirements in the governing legislation? This is an open question that will have to be resolved based on the specific legislation governing the particular shipment. Any meaningful

discussion on this point is well beyond the scope of this paper.[35] For our present purposes, the broker should not assume that it would be able to benefit from the same limitation of liability that a responsible carrier might enjoy.

E. The Broker Offering Intermodal "Door-to-Door" Services to a Shipper

Where it contracts as a "principal," that is being liable for cargo loss or damage in respect of a rail carriage leg, the broker must take care in its business modeling and related risk assessment. Can it pass down the liability it faces to a shipper down to the "intermodal logistics company" and/or to the responsible rail carrier with whom it has made the arrangements for carriage? In Canada, rail carriers have the default or presumptive benefit of the application of the *Railway Traffic Liability Regulations* SOR/91-488, which provides the "carrier" (likely not to apply to the broker itself) with various defenses to a cargo claim. As mentioned above, the rail carrier invariably has also incorporated various tariff(s) into its dealings. What terms has the broker in the middle provided for with its shipper?

F. What Exactly is Expected of the Freight Broker for Carriage of Goods?

LIABILITY AS AN AGENT

An often-cited case outlining the general duty of the freight broker is the *Nolar Industries Ltd. v. Freight Transportation Assn.* decision from the Ontario Superior Court in 2005,[36] in which the court held that the liability of a load broker has been analogized to that of a travel agent in arranging the performance of services by another. If a person agrees to perform some service or work, he cannot escape contractual liability by delegating a performance to another, but if his contract is only to provide or arrange for the performance of services, then he has fulfilled his contract if he has exercised due care in the selection of a competent contractor.

Accordingly, it is clear, on the basis of agency principles that a broker will be liable for the incompetent dispatch of instructions to a carrier resulting in non-delivery or late delivery. Liability could also potentially extend to failing to timely place a claim against a carrier, in time, if this formed part of the expectation placed upon the freight broker in the circumstances.

In considering the expectations and obligations on the part of a load broker, it should be noted that there is a surprising lack of case law on the point in Canada. A polling of industry participants as concerns the scope of the duty of a freight broker suggests that absent an agreement to the contrary that the freight broker is (in addition to the competent conveyance of instructions) expected to ensure that the motor carrier being

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[35] There is an argument that, as far as Ontario law is concerned, a carrier should issue a "compliant" bill of lading in terms of its form and substance to be able to limit liability to $2 per pound under the "Uniform Bill of Lading": *National Refrigerator & Air Conditioning Canada Corp. v. Celadon Group Inc.* (2016) ONCA 339 (CanLII). This may not, however, be an absolute rule. The Ontario Court of Appeals appears to have noted the carrier's bill of lading issuance compliance more in passing than being considered to be a critical fact in ruling that the trucking company could limit its liability to $2 per pound under Ontario law. In any event, the parties to a written contract may expressly come to an agreement on the question of limitation of liability. There also remains the argument that in light of the legislation in effect in Ontario "deeming" the application of a carrier's liability to $2 per pound (absent a declaration of value by the shipper) that such limitation will "survive" a technical non-compliance in the form of bill of lading issued by a carrier. This remains a "grey" area calling for legal precedent to be made in the future.

[36] 2005 CanLII 38584

dispatched is licensed to perform the transportation service requested, and if advised of the value by the consignor or consignee, ensuring that the motor carrier has sufficient road haulers liability insurance to cover the value of the goods being carried.

The broker faces exposure to a claim if it is seen to be negligent in the selection of a carrier. Increasingly, brokers log onto and make use of internet services (such as Loadlink™) for introductions to carriers. The freight broker should be prepared to defend its selection of a carrier. The limited case law on the point would suggest that the duty extends to the "reasonable" selection of a carrier ensuring that the carrier is properly licensed, and where the value of the cargo in question is known, adequately insured.

Another articulation of this point was set out in the Ontario Superior Court of Justice case of *Highway Freight Systems Ltd. v. EMO Trans (Canada) Freight Ltd.*[37]

The obligation(s) of freight forwarder are set out by Labrosse J. in *J. Morgan Forwarding v. Jupiter Developments* where he adopts the following passage from the decision of Rowlett L.J. in *Jones v. European & General Express Co.* (1920), 90 L.J.K.B. 159 at p. 160:

It must be clearly understood that a forwarding agent is not a carrier; he does not obtain possession of the goods; he does not undertake the delivery of them at the other end; all he does is act as agent for the owner of the goods, make arrangements with the people who carry (steamships, railways and more), and make other necessary arrangements for the immediate steps between ship or rail, Customs, or anything else, so that the liability of the defendants, if there is any, depends on their failing — if they fail — to carry out those duties which have been described.

Thus, the duty of the freight broker or freight forwarder is to make arrangements on behalf of the shipper for the carriage of goods. Included within this responsibility are any additional duties found to have been assumed.

LIABILITY AS A PRINCIPAL

With or without a written contract, a court might fix carrier-like liability on a freight broker simply based on website promises and assurances, or representations given to a shipper. Whether deliberately or inadvertently, freight brokers often run the risk of "crossing the line" into assuming carrier responsibility:

- By acting or "looking" like a carrier to a shipper as part of the contractual setting. For example, in providing published bills of lading (often provided to their customers in "sets"), brokers risk being regarded as carriers if the form features their name and/or logo.
- By failing to explicitly inform the shipper that the freight broker only arranges a carrier, but does not perform the carriage itself.[38]

Separate invoicing and accounting between the broker and shipper on one hand and between the broker and the carrier on the other hand could suggest a principal (carrier) type obligation on the broker. While

[37] 2007 CarswellONT 2101

[38] A court might not ultimately find that a freight broker assumed a carriage obligation, however, a cargo claims attorney may have asserted this as a fact having named the broker as a defendant in a cargo claim lawsuit. Unfortunately, the broker will by then have incurred legal fees in the exercise of vindicating itself from carrier liability.

classic agency theory and practice held that an intermediary would report to the (shipper) principal both the costs of a third party performer (the carrier) and the service charges of the intermediary, this is, of course, less frequent in the modern marketplace. This emphasizes the importance of the broker who does not want to assume principal or carrier-like liability making it clear in the contract language that it is merely an arranger of transportation services.

As mentioned previously, whether a freight broker is considered as having acted in the capacity of agent as opposed to principal is a question of case-specific fact. A list of indicators has been developed through case law precedent of when the broker may be regarded to have actually assumed a carriage mandate. The scope of this paper does not permit a detailed listing. However, the following discussion cites some examples (being in addition to the considerations listed immediately above).

A recent example of the "arranger vs. performer" analysis comes by way of the recent *Western Honda v. Ferreira* decision of the Saskatchewan Provincial Court,[39] where on the specific facts of that case, the court found the broker assumed a principal mandate, there being no indication in the contract documents that anyone other than the broker would be acting as the carrier.

The British Columbia Supreme Court decision of *Dan Gamache Trucking Inc. v. Encore Metals Inc.*[40] lists certain factors to be considered when determining whether a freight broker was acting as an agent or a principal:

- *There are no hard rules for determining whether the freight forwarder is acting as agent or as principal contractor. The forwarder's role will depend on the facts of each case. There are, however, several useful criteria which can assist in making that determination:*
    - *The manner in which the forwarder characterizes its obligations in the contract documents*
    - *The manner in which the parties have dealt with each other in the past*
    - *Whether a bill of lading was issued*
    - *Whether the shipper knew which carrier would actually carry the goods*
    - *The mode of payment: Did the forwarder charge an amount calculated upon the freight and other expenses and then charge a further amount or a percentage as its fee? Or did the forwarder charge an all-inclusive figure?*

As stated by the *Cour supérieure du Québec* in the case of Chubb, *cie d'assurances du Canada* v. *Logistique Trans Pro Inc.*:[41] Whether the freight forwarder is an agent, or a principal contractor will depend on the facts of each case and on the law in the particular jurisdiction in question. The court must look at all the

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[39] 2015 SKPC 182. The court decisions on point tend to be from the small claims court jurisdictions in Canada, on account of the modest cargo values often involved in disputes. Like the United States, Canada works on a "precedent" system. While such small claims court decisions thus tend to have less value from a precedent standpoint then those of higher courts, these cases are still very instructive on how a court may come to regard the nature of the services being provided by a broker.

[40] 2008 BCSC 343. See also: *Bertex Fashions Inc. v. Cargonaut Canada Inc.*, [1995] F.C.J. No. 827 (Fed. T.D.) at 25, adopted the factors enumerated in *W. Tetley, Marine Cargo Claims, 3rd ed.,* (Montreal: Editions Yvon Blais, 1988) at 694-5

[41] 2006 QCCS 4001

circumstances of the arrangements between the freight forwarder and the client, the contract, the telephone calls, the correspondence, the tariff, any bill of lading issued, previous dealings, etc.

In the 2007 Ontario Superior Court of Justice decision of *Gamlane Group Inc. v. Marco Enterprise Inc.*[42] the court found that there was a legally binding contract of carriage between the shipper and the freight broker on the basis of there being confirmation of a rate quote and a broker/carrier agreement. The court found that when the defendant called the plaintiff and the plaintiff agreed to haul the loads, a contract of carriage was formed between the parties.

Interestingly, the court noted that: "... the parties would have done themselves better by having a more formal agreement setting forth all of the particulars and prices in one document. I say this without having received any evidence as to what the industry's standards are and perhaps this is the way the trucking industry conducts its affairs."

The fact is, the defendant contracted with the plaintiff for the plaintiff to use its own trucks to perform the services and not a third party carrier."

THE IDENTITY THEFT SCENARIO

Although Canada has not yet seen a precedent set in court on this topic, it is just a matter of time until the court weighs in on a case arising from an "identity theft" caused by a "rogue" carrier said to have been facilitated by a broker's lack of due diligence in the selection of a carrier.

Based on the experiences of different identity theft and cargo scams in operation, it is safe to suggest that the freight broker will be expected to use due diligence in identifying and verifying a carrier during the carrier selection process. This is now especially the case as brokers increasingly engage carriers that they have not used in the past. While a laudable and efficient way of matching assets with shipping needs, online broker-carrier matching sites pose a potential avenue for fraudsters wishing to impersonate carriers, as one possible example.

The Transportation Intermediaries Association (TIA) offers its members free resources such as the Carrier Selection Framework and the Framework to Combat Fraud. Similar to this document, those publications offer insights on how companies can begin working with new motor carriers. In the case of the Framework to Combat Fraud, readers can glean insight on how to improve internal processes, limit exposure to fraud and theft, and to improve responsiveness when events occur. While each case involves its own criteria for due diligence and risk management, the following are a non-exhaustive list of considerations when working with new motor carriers:

- Call the published phone number for the carrier. Is it different than the number contact person has provided?
- If so, ask the carrier to explain the difference.

[42] 2007 CarswellONT 2009

- Be leery of the "we are moving offices; so we are using personal cell phones for the time being" explanation. Check if the number(s) are landlines or cell phones. Prepaid cell phones can easily be obtained with cash and no credit check.
- Verify DOT and MC numbers for the United States.
- Check the internet, the relevant provincial transportation authority (such as the Ministry of Transportation in Ontario or the Federal Motor Carrier Safety Administration (FMCSA) for a different number/address for the carrier. Use that number to contact the carrier.
- Call the head office of the carrier to ensure that the person you are speaking with represents the carrier.
- Do not solely accept insurance documents from the carrier, or limit yourself to contacting insurance individuals whose contact information is provided by the carrier. Follow up with the insurance agent.
- Look for gaps in carrier authority history
- Require the operative bill of lading to identify the attending carrier, with number to call if "anyone else attends to receive the cargo."
- Advise the shipper who the carrier will be at the point of pick-up, and ask the shipper to check the identification of the carrier. If they are not comfortable, then they should not release cargo.
- Fraudulent carriers tend to offer lower rates to move freight. If the freight rate looks too good to be true, it very well may be.
- Check company addresses using Google Maps or a similar service. Verify that they exist.
- If you are using a load board, confirm membership and verify contact names and phone numbers. If you do not see the company on there, or the numbers do not match, contact the load board officials.
- Review the paperwork you receive from a carrier to ensure its validity. Check that the documents are clear and that there are no variations in font types or any other obvious signs of tampering.
- If a company claims that they are a secondary office of a United States-based company (or other large company), call the primary office to confirm the phone numbers and location of the secondary office. If it is a United States-based carrier, ensure you receive their Canadian authorities.
- Talk to your shippers. Ensure they write down the license plate of both the tractor and trailer and possibly the driver's license when a carrier arrives to pick up a shipment. Ensure they do not simply write down the name from the door of the truck.
- Ask for carrier references and check them. Ensure you know who the references are and that they are legitimate companies. (In other words, the broker might not just rely on the standard "Carrier Information Package" of pre-selected documents.)
- If you have been a victim of fraud or theft, report it.

THE ASSESSMENT OF DAMAGES FOR CARGO LOSS OR DAMAGE

The usual measure of damages for cargo loss or damage is the "Arrived Sound Market Value" (typically, the invoice value, plus freight charges as applicable) less the "Arrived Damaged Market Value" (the salvage value of the freight). Of course, the cost of repairs as applicable may be the applicable standard.

Cases where a claimant claims damages for late delivery of a shipment tend to be more problematic. Cargo might be "show freight," or said to have been shipped with the intent (and commitment) for timely delivery to a specific market (i.e., Christmas trees meant for delivery in early December, or summer fashions meant for delivery to retail outlets in the spring). The freight broker may have exposure to such damage claims if it fails to carry out its agency function (i.e., failing to instruct a carrier on urgent shipping needs, or failing to properly vet a carrier allowing a transit loss or theft to occur). The broker may also have exposure to such damage claims if it assumes a carrier mandate for not meeting a prescribed delivery deadline (if one was agreed upon) or acting with "due dispatch." In those situations, the shipper or consignee may recover damages for delay.

In Canada, subject to the terms of a written contract between a shipper and a broker[43] such "consequential damages" are generally awarded if the conditions set forth in the old case of *Hadley v. Baxendale* are satisfied.[44]

In *Hadley v. Baxendale*, the court ruled that damages levied over a breach of contract (for our purpose, from either an agency mandate or a carriage mandate) should be such as were reasonably contemplated by the parties when they made the contract that would naturally flow from a breach.

As concerns the loss or damage to cargo, this assessment is easy: the parties to a transportation contract naturally see the nature and extent of damage if the cargo itself is not properly cared for. However, for a loss of opportunity, loss of revenue, or other consequential damages suffered by late arrival of cargo, the damages are generally recoverable only if (at the time of formation of the contract for the arranging of transportation) special circumstances were communicated by the shipper to the broker about the adverse effect that the delayed delivery would have on the shipper.

G. As Concerns Third Party Claims Arising from a Transit Casualty

The scope of this paper does not permit a detailed discussion on the law of negligence in Canada.

By way of brief discussion, however, it will not take a quantum leap to picture a case where a freight broker might be alleged to have liability exposure to third parties in the case of a transit accident involving a truck. The broker might be seen to have recklessly entrusted cargo to an unqualified road carrier.

Citing basic negligence or tort law principles, it is clear that a load broker must be duly diligent in its carrier selection criteria.

Juries in the United States have entered staggering awards against freight brokers in personal injury actions arising out of motor carrier accidents in recent years. For example, see *Sperl v. C.H. Robinson Worldwide, Inc.,*

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[43] Who might, for example, contract on terms that neither of them will be liable to the other for "consequential" or "indirect" damages?

[44] (1854) 9 Exch. 341

946 N.E. 2d 463 (Ill. App. 3d 2011) (awarding $23,775,000.00 for a double fatality); *Hoffman v. Crane, Cook County, Illinois,* Case No. 2007-L-11406 (award of $27,672,152.12 to a severely injured party); *Linhart v. Heyl, U.S. Dist. Court Oregon,* Case No. 1:10-cv03100-PA (award of $5,200,000.00 for a single fatality). Likewise, courts have also found freight brokers liable for damage to or loss of high value cargo. For example, see *Richwell Group, Inc. v. Seneca Logistics Group, LLC,* 2019 WL 3816890 (D. Mass. Aug. 14, 2019) (award of nearly $300,000 against a freight broker for the theft of lobster). Plaintiffs typically advance a variety of theories against freight brokers, ranging from claims that are based upon vicarious liability (arising from alleged control being exercised over the motor carrier) to claims sounding in negligence (in the selection of or retention of a given motor carrier).[45]

Although no precedent is yet established in Canada in respect of casualty claims on these theories, a Canadian-based freight broker nevertheless potentially faces this exposure. First, a Canadian-based freight broker may tender a load to a motor carrier that is involved in an accident in the United States, injuring a United States resident or citizen resulting in a lawsuit in the United States. The United States court may then apply the principles and legal precedents set forth in the above paragraph. Second, a lawsuit may be brought in Canada involving the same facts, with a Canadian court applying the same principles and precedents. Such an analysis may evolve from established Canadian legal precedent holding that an entity who employs an independent contractor will generally not be liable for the latter's negligence. There may, however, be liability if there was some form of negligence on the part of the former in the selection process.

The following considerations may be said to include best practices for carrier vetting by brokers in Canada:[46]

A load Broker should ask the Carrier for its "information package" which typically would include:

- Name, address and telephone numbers for the Carrier
- Copy of current insurance certificate
- Copy of various provincial safety fitness certificates, and, if applicable, U.S. operating authorities issued by the Federal Motor Carrier Safety Administration.
- Copy of applicable workers compensation coverage

The "information package" should be vetted to confirm that the entity that the broker is communicating with is in fact the actual carrier rather than being a potential "identity thief" setting up the theft of cargo. This information should then be verified (i.e., insurance broker being consulted, phone numbers and email addresses checked for authenticity, etc.).

Operating authorities are not required for motor carriers in Canada. The key vetting item from a third party risk management standpoint is the safety fitness certificate and the carrier's profile, including its Safety Rating.

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[45] The writer acknowledges the helpful input on this topic from attorney Marc Blubaugh of the Benesch Freidlander Coplan & Aronoff LLP firm in Columbus, Ohio.

[46] I am very deliberate with the use of the word "may" in this context. The writer's experience, matched with anecdotal observations of certain commentators on the one hand and certain established Canadian freight brokerage policies on the other suggests that this is a "good" list to at least start with. Slavish reliance to any one particular checklist may however be dangerous as each individual case may present its own unique "red flags" suggesting that a proposed carrier may not be up to task.

This said, if a shipment is intra-U.S. or cross-border, then regard must be had for any required U.S. operating authorities and safety ratings.

As mentioned, a Canadian based carrier's safety fitness certificate is a critical consideration. The same should be at least "satisfactory" as determined from the relevant provincial safety rating regulatory authority. "Unsatisfactory" or "Conditional" ratings pose serious "red flags" in the selection of a carrier based in Canada. A Safety Fitness Certificate, issued by the province in which the carrier's vehicles are base plated, is required in order for a carrier to operate a commercial motor vehicle. This rating takes into consideration the carrier's safety record which is a summary of all on-the-road events, facility audits, sanctions, and other safety related information.

Each province issues their own form of Safety Fitness Certificate for those vehicles base plated in the particular province. In Ontario, it is the Commercial Vehicle Operator's Registration (CVOR) being issued by the Ontario Ministry of Transportation. In Quebec, this is the *Numero d'identification au register* (NIR) issued by the *Commission des Transports du Quebec*. Other Canadian provinces tend to refer to this registration as the "Safety Fitness Certificate."

A broker vetting a potential carrier partner will need to take into consideration the carrier's "base plate" jurisdiction relative to the intended routing for a shipment to determine whether a CVOR, NIR or other provincial Safety Fitness Certificate is required and to then follow up on the particular rating. Of course, a broker will need to be "live" to the relevant regulatory safety ratings that may come into play if the intended routing involves the United States. Commentary on the United States regulatory regime in that regard is beyond the scope of this paper.

Brokers must ensure that carriers are legally compliant with certain minimum coverage in third party liability insurance. They cannot be oblivious to a carrier's safety record.

General Canadian Legal Principles that may influence a court on the issue of the "reasonable" selection of a carrier:

As mentioned above, there is no Canadian legal precedent specifically outlining what a "reasonable" freight broker is to do to avoid criticism, and with that, potential resulting liability in respect of the vetting and selection of carriers. There are, however, guiding principles that may well influence a Canadian court if, and when, a lawsuit should arise on point. The tort of "negligent hire" has been generally addressed (outside of the transportation context) in *Lewis v. British Columbia.*[47] In this case, the Supreme Court of Canada considered the liability of the federal government for the failure of its independent contractor to remove dangerous rocks near a highway. By way of a side comment (not disposing of the case), consistent with the earlier observation above the court stated that one exception to the general rule at common law that a

[47] [1997] 3 S.C.R. 1145

person who employs an independent contractor will not be liable for loss flowing from the contractor's negligence is "where the employer was negligent in hiring the contractor."[48]

A survey of Canadian law indicates the following general principles:

> The general rule in Canada is that a person who engages an independent contractor will not be liable for the contractor's negligence.[49]
>
> A person who employs an independent contractor will generally not be liable for that person's negligence unless the principal is under a duty to act, retains the contractor to do that work and the contractor does not do the work or does it improperly; or the principal is required to supervise the work and fails to do so properly. Liability under this general theory arises from the contractor's misfeasance in the course of doing the contracted work or because the principal's duty cannot be delegated.[50]
>
> There can also be "vicarious liability," that is, automatic liability, on a party hiring an independent contractor for the latter's negligence where the work contracted for posed an unusual risk that called for special precautions: *Wilby v. Savage*.[51] As noted by the court in this case, "Vicarious liability arises where the danger of injurious consequences to others from the work to be done is so inherent in it that any reasonably informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions be taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable." Accordingly, in order to hold a party vicariously liable for the actions of an independent contractor on the basis of this principle, it is necessary to establish that (1) the work contracted for created a special danger to harm to another, and (2) that the party failed to take special precautions to prevent such harm.[52]
>
> The question of a contractual "duty to indemnify" looms large in the negotiation of shipper-broker and broker-carrier contracts, just as it does in the United States. The freight broker will want to contract on what terms it can with a carrier, and to ensure that the latter is adequately and properly insured, in respect of it indemnifying the broker for legal costs and any resulting liability from a law suit bought by a third party in connection with a transportation casualty.[53]

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[48] In a case involving facts unrelated to freight logistics, a travel agent was found liable for damages when a customer suffered a loss on account of a questionable travel wholesaler. The travel agent was found to have been negligent in not using due diligence in the appointment of the wholesaler: *Pitzel v. Saskatchewan Motor Club Travel Agency Ltd.* (May 12, 1986), Doc. 8249 (Sask. C.A.). In *Craven v. Strand Holidays (Can.) Ltd.* 1982 CarswellONT 779 ON CA a tour operator was sued for claims for personal injuries from a bus accident. The cause of the accident was the negligence of the bus driver. The Ontario Court of Appeal confirmed that the tour company would be considered liable if it could be established that it was negligent in terms of its selection of the driver.

[49] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983

[50] *Weston v. T.D. Bank* 2019 BCPC 147

[51] [1954] S.C.R. 376

[52] *Sickel Estate v. Gordy* 2008 SKCA 100

[53] See the discussion in Section (VI) (B) and (VI) (C) below concerning contract negotiations.

> In Canada, there is an emphasis in shipper-broker and broker-carrier contracts in asserting that the service provider in each case is an independent contractor. In Canada, a broker will not generally be liable as a matter of 'vicarious' or automatic liability for the negligent conduct of a carrier that it dispatches with a load. However, as noted, the broker might be liable for its actual or 'personal' liability in the negligent selection of a carrier, should that be established as a matter of fact.

Accordingly, brokers should be careful in not exercising too much control over trucking companies; the more one exercises control over a trucking company as a broker, the more the court will ask whether the freight broker is actually employing the trucker as opposed to sub-contracting the same as an independent contractor. This discussion on what specific contracting terms a broker should adopt with a carrier, as for that matter, any discussion on what a broker might best do in terms of purchasing liability insurance, calls for a case-by-case and a broker-by-broker scrutiny and an appreciation of each individual situation which is beyond the scope of this paper.

> As mentioned above, in extraordinary cases it might be said that a carriage undertaking involves "special danger" to the public. While not yet tested in the transportation context, it is submitted that the engagement of a carrier who operates a standard tractor and trailer, or dray or cartage van is not a "special danger." Might it be suggested that a novel, "dimensional" load presenting unique circumstances of danger somehow presents enhanced duties and expectations on how a broker vets a carrier? Only time will tell. The prudent take-away here is that a broker engaging a carrier take into consideration all prevailing circumstances including the nature of the cargo in terms of carrier engagement.
>
> The prudent broker may consider imposing restrictions on its engaged carrier about it having to perform the task and not double brokering the load to another carrier. While there is no precedent on point in Canada, the argument might be made that a broker somehow failed to control the exercise in permitting (or least not prohibiting) a carrier from "double brokering" a load. This could, on unique facts, lead to a suggestion that the original broker did not act reasonably. The take-away here is that this is always a consideration in the engagement of a carrier.[54]

VI. Business and Contractual Considerations

A. Assignment from Shipper Before Paying for Lost or Damaged Cargo

Consider this scenario: A freight broker is asked by a customer to arrange for a shipment to be delivered to a destination. The trucking company that is hired by the broker fails to deliver the load, or perhaps the load is delivered spoiled, or thawed, or in some state other than intended. The shipper customer (or, depending on the terms of the underlying sales transaction, the consignee customer of the shipper) wants the broker to pay for the loss. The customer is very important to the broker, and the broker considers paying the amount of the

[54] See the discussion at VI(E) "Possible Perils of Double Brokering" below. At minimum, the practice of "double brokering" enhances the risk of a performing carrier filing claims for unpaid freight bills: the more participants in the chain, the greater the chance of a payment failure somewhere in the "chain."

loss independent of there being a clearly defined contractual obligation for it to do so. While it still might then be possible to recover the money from the responsible carrier, there must be care and diligence in assessing the legal position of the freight broker in this situation, so as to fully preserve its ability to try to recover the claim amount from the carrier.

Freight brokers must be wary in paying out claims to their customers. If they are not legally liable to do so (i.e.. being obligated to make good losses either as a contracting carrier, or where they in any event promised to indemnify the customer) the broker should consider taking an "assignment" from the shipper or cargo claimant of it's/their right of claim against a carrier. If legally liable, the law will presume a basis to seek "contribution and indemnity" from the carrier. Absent this, there should be the "assignment" by the shipper of the right to claim for cargo damages which is simply a transfer of legal rights on the contract (i.e., that evidenced by a bill of lading between the shipper and the carrier) to the freight broker. Sufficient legal "consideration" for such an assignment would, of course, be by way of the broker's payment of the loss to the shipper. The failure to secure such an assignment may prove fatal to an eventual recovery by the freight broker who otherwise does not have the legal standing to claim from a carrier.[55]

At any rate, freight brokers are recommended to get legal advice for any particular situation because facts and circumstances are case-specific. The purpose of this document is to raise awareness as to the considerations and possibilities at play and is not to give fixed advice to be applied in a particular situation.

As in the United States, there is an increased use of "shipper friendly" shipper-broker contracts and with that the inherent need for the broker to consider "pushing down" liability to the carrier to ensure equilibrium and protection for its own affairs. The equilibrium between these two layers of contract (i.e., shipper-broker and broker-carrier) is critical, and the broker will need to be adequately positioned to pass what exposure it can down to the carrier.[56]

The lists below are not intended to be advice in the drafting of contracts. They are intended to provoke thought and awareness on what are some common contracting issues and considerations. Both the TIA and the CIFFA offer resources to members to help with STC and model contracts.

B. Drafting Considerations for Shipper-Broker Contracts

The following is a non-exhaustive list of factors that brokers need to consider when they negotiate contracts with shippers – and for that matter, perhaps more fundamentally, in assessing whether they should or would want to negotiate a written contract with a shipper:

Avoiding the "pinch:" The shipper customer might insist that the broker bear responsibility for cargo loss, or damage or delay, but without the benefit of a limit of liability or the same defenses that the performing carrier might be able to rely on. As mentioned previously, the broker may not have access to the deemed $2 per pound limit of liability available to carriers in most of the Canadian provinces under the Canadian "uniform bill of lading" (absent a declaration of value by the shipper). For that matter, as also mentioned above, the broker may be offering intermodal logistics services and the unique issue of trying to match whatever liabilities it is

[55] See, for example: *2020494 Ontario Inc. v. Day & Ross Inc.* 2015 ONSC 1855

[56] Not only as a matter of cargo loss or damage liability exposure, but in terms of ensuring that the carrier is a viable entity and has adequate insurance so as to satisfy its contractual indemnity obligations.

assuming vis-à-vis the shipper relative to what liabilities the rail carrier has in the event of cargo loss, damage or delay.

The broker will have to address one of alternative prevalent business models concerning cargo loss or damage and what responsibility it will accept to the shipper,. For example:

- "We are not liable for cargo damage."
- "We will not be responsible for cargo loss or damage, but we will facilitate your claim with a carrier at our cost."
- "We will be responsible for cargo loss or damage, but only up to (as an example) $2 a pound."
- "We will be responsible for full actual value Carmack-like liability for cargo loss or damage."

In the event that the services related to intermodal carriage, "What if any leg of transit will we assume liability for cargo damage, as opposed to what leg we will not assume liability for."

- Rules concerning the presentation of cargo claims.
    - Indemnity obligations in favor of the shipper: the broker has to be very careful, and deliberate, in what responsibilities it accepts to indemnify the shipper. For example, will it agree to indemnify the shipper for losses and claims caused by the carrier? A common negotiating position often rests with a broker agreeing to assume liability for losses caused only by its own negligence.
    - There is a trend towards shippers asking brokers to warrant that the latter will only contract carriers on specific terms, as set out by the shipper. This obviously presents a concern: How will the broker be able to know that the carrier will agree to any such terms and will any carrier engaged agree to any such terms? Might the broker not already have negotiated contract terms with various carriers? Will the broker not want the ability to source a carrier as a "one-off" from a message board, or will they be able to service the shipper through a dedicated stable of carriers who can agree to such terms?
    - Cargo claims offset: of course, many shippers look for this in the event of an unresolved cargo claim.
    - Brokers must heed and abide by any "double-brokering" prohibition as concerns securing the dispatched carrier's commitment that it will itself perform the carriage mandate.
    - As noted earlier, if a broker wishes to rely on its own terms and conditions (whether in print or on a website), it will have to demonstrate the notorious and clear notice of the same in a timely way to the shipper customer.
    - Confirmation as to what exactly forms the contract, or "entire agreement clauses."
    - The applicable law, method of dispute resolution, and forum for disputes.[57]

[57] There is a discussion below on the "conflicts of law" element of cross border trade between Canada and the United States.

- Depending on the circumstances, possibly language as to the steps to be taken when shipper wishes to declare a value for carriage.

C. Drafting Considerations for Broker-Carrier Contracts

The increased prevalence of "shipper friendly" written shipper-broker contracts puts a premium on the broker determining what it wants to (or can) "push down" to the carrier in terms of risk management and apportionment. The following is a non-exhaustive list of factors that brokers need to consider when negotiating contracts with carriers and, perhaps more fundamentally, when assessing whether they want to negotiate a broker-carrier contract.

As mentioned earlier, avoid the "pinch," and appropriately pass down risk exposure to the carrier. As previously discussed, this may be more difficult to achieve with an intermodal logistics company or a rail carrier in the intermodal logistics service area.

Be aware of the contents of carrier confirmation sheets: The contracting effect of these documents is not entirely clear. Some brokers seek to add other requirements (i.e., no double brokering, remittance of invoices only to broker, etc.) on these documents. There is no automatic or general rule as to whether this document will be accepted by a court as being a contract document with a carrier to the extent that it might be said that the bargain was already formed at the time of the agreement to the freight rate. The broker should be clear from the outset with the carrier on the essential terms of the contract.

Set specific terms of agreement, exclusivity, and termination clauses (for cause or otherwise).

- Brokers will want to maximize representations and warranties by the carrier as to:
    - Carrier operations and equipment
    - Safety ratings and operations, (e.g., "Carrier does not have unsatisfactory safety rating issued by FMCSA, U.S. DOT or any provincial regulatory authority")
    - Use of drivers and equipment being in full compliance with applicable laws including the holding of all required operating authorities
- Ensure clarity that broker will not be monitoring carrier safety ratings, controlling, or dispatching the carrier or any drivers in connection with the actual carriage of goods.
- The basis and amount of carrier liability for cargo loss, damage or delay should be set out in the agreement.
- Set rules concerning the presentation of cargo claims.
- Possibly include a waiver of lien or detention of property provision.
- Determine insurance requirements and levels and carrier's manner of proof of insurance.
- Determine indemnity obligations on the part of carrier for its breach of performance or non-performance of its mandate; will the indemnity to be for the broker and the shipper customer?

- The broker may only want the carrier to seek payment of freight charges from it rather than ever looking to the shipper customer or its customer (i.e., the consignee) for payment.
- Include prohibitions on double brokering, and on back soliciting absent consent in writing.
- Consider including notification requirements if the carrier's safety rating or profile changes or is adversely affected in any way.
- Ensure that carriers provide representations and warranties that it is in all material respects in compliance with applicable laws.
- Language confirming an "independent contractor" relationship.
- Consider confirming what exactly forms the contract. For example, "entire agreement clauses," such as the bill of lading only being a receipt for the goods, but not a carriage contract if it contradicts written terms of a contract of carriage.
- Agreement on the applicable law, method of dispute resolution and forum for disputes.

D. Insurance Considerations – A High Level Review

A detailed review of insurance products that may be available to a freight broker, let alone what are specifically needed or recommended are not only well beyond the scope of this paper, but will also be a function of the broker's specific business model, risk appetite and the scope and nature of its dealings. It is always recommended that a freight broker have its "insurance representative" at the table in the course of building a business model, negotiating contracts and the placement of insurance coverage. It is also, of course, important that the freight broker provide its contract forms (both on the shipper-broker and on the broker-carrier side) to the insurance broker or insurer, as may be the case for comment and review.

The above said, the question of insurance coverage does come into play in the contracting stage and as such certain common questions or observations are worth noting:

Do the circumstances and/or the freight broker's risk appetite call for the placement of:

a. Errors and Omissions coverage?
b. Contingent Cargo coverage?
c. Contingent Auto liability coverage?
d. Freight Broker Liability coverage?
e. Excess/umbrella coverage?
f. Workers Compensation or Employers Liability coverage?

A shipper may impose obligations on a freight broker to take out certain insurance coverages that it cannot obtain. Can a freight broker, for example, obtain the same Motor Truck Cargo Legal Liability coverage that an asset-based carrier can acquire? The broker will have to be "live" to what insurance it is being asked to obtain relative to what it can or cannot obtain in the insurance market. An insurance broker's input and advise is critical in this regard.

Some shippers contractually require freight brokers to hire carriers on terms that the latter have certain coverages. This creates a contractual "due diligence" obligation on the broker in addition to the general "negligence" law expectations noted above. The freight broker must take note of what it is expected to impose on a carrier in this regard.

Some shippers require that brokers or carrier coverage contain waivers of subrogation. As is the case with any insured, an insured freight broker must be very delicate and have all authority and blessing in this regard to compromise any of the rights of its insurance company.

Some shippers also require that broker and carrier insurance coverages name the shipper as an additional named insured. This may or may not be possible. The insurance broker again figures prominently in advising the freight broker as to what shipper requests can be met. For example, it may be possible for the insurance broker to arrange for a shipper to be named as such on its Errors and Omissions insurance policy, as that is a liability policy. This, however, may not be possible with other lines of insurance. Might the shipper be content with the standard undertaking that it be provided with insurance certification as to the freight broker's insurance, and that the same will be kept current with timely notification provided of any cancellation?

Some shippers purport to require the placement of insurance that do not have certain exclusions. If a prohibition on any coverages is suggested this is one more reason as to why the freight broker needs the hand of its insurance broker in the contracting phase.

Of course, if the freight broker is assuming carrier-like liability for cargo loss and damage it will need to ensure that it is properly insured.

a. Is it insured even though it may be said to have delegated the care, custody and control of cargo to the carrier?

b. Does it need contingent cargo insurance coverage?

c. Is the amount of the insurance sufficient

d. Is the liability for full value as under the United States carriage liability regime, which might be assumed or expected by a shipper?

e. Is this matched by the relevant insurance coverage, or is its insurance limited to the standard truck carrier cargo liability in Canada of $2 per pound where there is no declaration of value by a shipper?

The key take-away here is that the freight broker must obtain sustainable insurance coverage to protect its interests and not overshoot in terms of commitments made to a shipper. By the same token the freight broker needs to know what to ask of a carrier. If the freight broker has undertaken to a shipper that it will only engage carriers with certain prescribed coverages on certain prescribed conditions, is this viable and sustainable in how the freight broker can on-board carriers?

E. The Possible Perils of "Double-Brokering"

As mentioned above, the freight broker may face cargo liability claims (as a matter of how it contracts with a shipper) and casualty liability claims (as a function of the applicable laws of negligence as pertain to carrier

selection and vetting). There is yet a further potential dynamic of a negative nature that must be reckoned with: is the freight broker subjecting its shipper customer, or a consignee (often the freight broker's customer's own customer) to a claim for unpaid freight charges?

This dynamic occurs, with the exponential risk of strained commercial relationships, with the following common dynamic:

> A shipper (the broker's customer) enters into a sale contract with a buyer (consignee) for the delivery of freight. Let's assume that the purchase price paid by the buyer consignee includes a freight component. That is, the shipper is responsible for the goods being delivered to the buyer:
>
> a. The shipper accordingly engages the freight broker to arrange a shipment with a carrier.
>
> b. The freight broker then engages a carrier who then performs the delivery. It then follows that the carrier in term invoices the broker with a delivery receipt. The freight broker then invoices the shipper, with its mark-up. The shipper then pays the broker, who then pays the carrier.
>
> c. What if a further "step" is introduced in the equation – which we see every day. The engaged carrier might determine that it cannot perform the move or for any other reason delegates it to another third party carrier who performs the move. Or for that matter, the freight broker might enter into a "co-broker" arrangement, tendering the shipment to another freight broker who in turn engages the performing carrier.

With each new step in the equation there will be the risk that a payment mechanism will fail. Frequently, we see the case where the shipper pays the freight broker, who pays the first assigned carrier, but who fails to pay the performing carrier. What are the performing carrier's rights in terms of getting paid?

The reality is that the claim for the payment of freight charges that then follows puts a serious strain on the freight broker's commercial interests. The carrier might demand payment from the shipper who tendered the cargo at origin. The carrier might demand payment from the buyer consignee that it delivered the cargo to. The shipper may complain to the freight broker that it not only paid the freight broker, but that it expected the freight broker to arrange seamless delivery. Why didn't it? Perhaps an even worse strain might develop: The freight broker's own customer complaints to the shipper that "it was not supposed to pay for the freight," or perhaps that it had already paid the same with the purchase price. The shipper then comes down hard on the freight broker on account of the former being made to "look bad" in the eyes of its customer. How does this sort out under Canadian law?

One preliminary point to register as to why and how these problems occur and continue to fester in the province of Ontario; it comes with the fact that too many freight brokers do not abide by the trust fund obligation noted in the discussion under section IV (A) above. Note that by the terms of that trust fund requirement, any Ontario-based intermediary in the equation has to abide by this requirement. Accordingly, a "carrier side" co-broker would have to comply. An Ontario-based carrier who double brokers a load to another carrier will itself have to comply. Assuming that for the purposes of our analysis that there has not been compliance, that is, with the failure of any link in the chain that monies paid by the shipper in first

instance are not available for payment to the carrier, we then find ourselves in the midst of the performing carrier's claim for payment.

IS THE SHIPPER LIABLE TO PAY A SECOND TIME?

Applying first principles of agency law, it can be said that the failure of an agent to pay a third party contracted for the benefit of the agent's principal comes back to the feet of the principal. That is, if a shipper, as a principal, hires a freight broker as its agent, and that freight broker fails to pay a third party service provider in connection with a contract entered into by the broker as agent for the shipper, then the shipper would have to pay twice.[58] This scenario sees the unpaid carrier seeking payment from the shipper directly citing the standard primary obligation on the contract of carriage for the shipper to pay freight. For example, "We had a contract, through your agent. It doesn't matter that you paid the agent. We were not paid." If on the particular facts of the case it can be said that the broker did not act as the agent of the shipper, but was acting purely for its own account, then this argument may not apply.[59]

Help, however, may be on its way for the shipper who has paid the first freight broker in the equation, or for the first freight broker who paid the next party in the chain. There are certain principles that have been articulated in Canadian law that might come to the aid of the shipper or a broker that is "caught in the middle." In Canada, where a debtor, instead of paying his creditor, chooses to pay a third party, he does so at his peril. That is, where the money is not turned over to the creditor, the onus is then on the debtor to establish either:

a. The creditor actually authorized the third party to receive the money on his behalf

b. The creditor held the third party out being so authorized

c. The creditor, by his conduct or otherwise, induced the debtor to come to that conclusion

d. A custom of the trade exists to the effect that, in that particular trade and in those particular circumstances, both the creditor and debtor normally would expect payment to be made to the third party.[60]

Accordingly, it may be said that in a brokered situation that a payment to a broker is considered to be a payment to the carrier. It follows that the standard situation that will trigger this result for our purposes is the 4th scenario: carriers bill brokers and not the shipper as there is an expectation of confidentiality between the carrier and the broker that the carrier's price will not be disclosed to the shipper. As such, the carrier bills the broker, who separately bills the shipper, with payment then following in reverse sequence. This billing practice has usually been interpreted by the courts as one in which the carrier has induced the shipper to believe that the freight charges should be paid to the broker. This is, however, not to suggest that

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[58] Recall that if the setting is in Ontario, that the principal(s) of the failed freight brokerage may have personal liability for the reasons articulated at section IV(A) above.

[59] The scope of this paper does not permit a review of Canadian agency law. For the purposes of the present discussion the goal is to canvass the scenario where an unpaid carrier is requesting payment from an entity "upstream" from the broker or entity with whom it would have ordinarily looked to for payment.

[60] *C.P. Ships v. Industries Lyon Corduroys Ltee.* [1983] 1 F.C. 736 (T.D.)

there is a universal rule on point: there may be unique facts in a given situation where an intention was clear that the shipper would be billed, perhaps via the freight broker, or the carrier may have reserved the right to invoice the shipper. Any such finding(s) could potentially disturb the application of the above mitigating circumstances working in favor of the shipper or broker who did make payment to the next "player" in the chain.

CAN THE CARRIER PURSUE THE CONSIGNEE FOR PAYMENT?

A consignee may be liable for payment of freight charges through statutorily imposed liability. The Canadian federal *Bills of Lading Act* R.S.C. 1985 c. B-5 provides as follows:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

Accordingly, not every consignee may attract liability for the payment of freight charges—only the consignee who is named in the bill of lading to whom property in the cargo passes by virtue of the transfer of the cargo from the shipper. This statutorily deemed 'privity of contract' approach affects many consignees—given the standard presumption in Canadian Sale of Goods law and in the surface transport of goods by road that property passes to the consignee once goods are tendered to the carrier for carriage. With this "burden" comes an associated benefit: the consignee may sue the carrier, in contract, for loss or damage to cargo or for delay in delivery.

It is important to discern between the "primary" liability for the payment of freight charges on the part of the shipper (it hired the carrier) and this "secondary" or deemed liability on the part of a consignee for payment. The statutory imposition of liability on a consignee is considered "secondary" as the carrier would intuitively look to its shipper first for payment. These "primary" and "secondary" exposures co-exist; they are not mutually exclusive. The Bills of Lading Act provision cited does not contain a requirement that a carrier first exhaust its remedies against the shipper before it pursues avenues of recovery against a consignee—regardless of how loud, or sympathetic the protest by the consignee might be.

All things equal, the carrier would initially pursue the shipper for payment as a matter of practicality: the concept of secondary or statutory liability on the part of the consignee 'takes some explaining' and usually borders on the offensive, if not the scandalous, in the mind of the consignee who considers the carrier a perfect stranger and who may have already paid the shipper's invoice for the goods containing a freight component. Perhaps the terms of sale were that the shipper (seller) was to have delivered the goods to the consignee (buyer). If the carrier performed a cross-border mandate, this renders the pursuit of the consignee even more cumbersome as possibly invoking "conflicts of law" principles. The carrier's legal basis for asserting its rights might be "foreign" (literally and figuratively) to the consignee. The carrier may simply have no option but to channel its energies against the consignees if the shipper no longer carries on business or is impecunious. Perhaps the shipper has paid the freight charges to an intermediary in circumstances where that payment is seen to have discharged the debt owed to the carrier. These "conflicts of law" and "payment to the intermediary" nuances are addressed later in this discussion.

Of course, where a consignee purchases goods from another party and instructs them to act as it's "shipping agent" in engaging a carrier with the goods being delivered on a "collect" basis, the consignee then becomes liable for payment of freight charges.

As a general rule, once the shipper is identified – save and except the "collect" endorsement on a bill of lading – it is primarily liable for payment of freight charges. The prescribed "uniform bill of lading" in use in Canada does not contain a shipper's "non-recourse" [section 7] provision or election.

While the foregoing provides general rules of thumb, there has been discussion in the case law in Canada on the concept of a carrier waiving rights or being estopped from pursuing the consignee for payment. For example, what is the effect of the common reference to "freight prepaid" on a bill of lading in the hands of the consignee?

In *Cassidy's Transfer & Storage Limited v. 1443736 Ontario Inc., operating as Canada One Sourcing, et al.,*[61] the Ontario Superior Court summarized the relevant principles that emerge from the authorities concerning the Bills of Lading Act, supra, s. 2:

a. The section was enacted to create a statutory privity of contract so as to eliminate the need for a finding of privity of contract between the carrier and the consignee in order to permit the carrier to recover its freight charges. There is a presumption that the consignee is responsible for the freight charges. It is not required that the consignee know the terms of the freight agreement to be bound by it.

b. To avoid liability, the consignee must rebut the presumption by proving
(i) the existence of another arrangement that the shipper alone would be responsible for the freight charges; and
(ii) the carrier had not waived the protection of the Act.

c. The carrier's waiver may be express or implied, but it may not be presumed from the silence of the parties.

d. The term "freight prepaid" may on the evidence amount to a waiver if it is found to be a representation to the consignee that the carrier charges had been paid. However, if the evidence of the consignee were that it understood as a fact that the freight charges had not been paid, then it would not amount to a waiver. Alternatively, if the evidence of the consignee were that it knew that the term was understood in the industry to mean something other than its ordinary meaning, then it may be found not to constitute a waiver.

[61] 2011 ONSC 2871 (CanLII)

VII. Cross Border Transportation Considerations

This paper has thus far focused on brokerage operations from a Canadian point of view. There are implications and practical considerations relating to any contract involving brokerage services with a U.S. element.

A. FMCSA Application of the "Moving Ahead for Progress in the 21st Century Act" (MAP-21) to Canadian-Domiciled Brokers

The (MAP-21) legislation in the United States provides requirements for brokers of property and freight forwarders to register with FMCSA. MAP-21 also requires that any entity that arranges for the movement of freight, including motor carriers, obtain and maintain a surety bond security for $75,000. On November 28, 2013, the Canadian Trucking Alliance announced in a press release that it was seeking clarification from the FMCSA on the applicability of the MAP-21 requirements to Canadian motor carriers and the various brokered freight movements that they might arrange (e.g., involving Canada-to-United States, United States-to-United States, United States-to-Canada routing) and whether a carrier's brokerage operation must carry a separate registration number.

The Canadian Trucking Alliance thereafter announced on April 9, 2014, that it received confirmation from counsel for the FMCSA that carriers who engage solely in the brokering of freight from Canada to the United States, between points within the United States and from the United States to Canada are, in fact, required to register with FMCSA and to comply with the surety bond or trust fund requirement of $75,000. Presumably, the same position applies to non-asset backed brokers who broker freight to motor carriers.

October 1, 2013, was the implementation date for the subject registration and surety bond provisions of MAP-21. As a result of the Agency's interpretation, Canadian freight brokerage operations, and motor carriers who perform brokerage (i.e., "non-asset backed") operations in the United States are to comply with the registration and surety requirements. The largest significant changes in MAP-21 were that all freight brokers and forwarders under FMCSA jurisdiction had an increased financial security requirement, raised from $10,000 USD previously to $75,000 USD thereafter.

The legislation defines a 'broker' as a person or an entity that, for compensation, arranges or offers to arrange for the transportation of property by a motor carrier. A broker does not transport the property and does not assume responsibility for the property.

"Non-asset backed" brokers are not the only entities caught by the U.S. legislation: as mentioned, MAP-21 prohibits motor carriers from brokering transportation services unless they are registered as a broker and meet the surety bond requirements. Accordingly, "asset backed" entities, who either operate incidentally as brokers, or who on a "one off" basis "broker out" a load needs to hold a broker authority to be compliant.

One important distinction concerns the true "interline" situation. To "interline" a shipment is to transfer the property between two or more carriers for movement to its final destination under one carriage mandate. The origin carrier hauls the freight to an intermediate location, with the interline delivery partner completing the carriage to destination. A motor carrier that is performing a part of a single continuous transportation movement as an interline operation may perform that service under either its own operating authority or the authority of the originating carrier and accordingly will not be caught by the new MAP 21 regime.

Accordingly, when one carrier hands cargo off to another in an interline situation, after having hauled the freight part way, it will not be considered to be brokering the cargo to the delivering carrier and as such a broker registration will not be required. However, a truckload shipment that is moved from origin to destination by a subcontracted carrier will be considered to involve a "brokered out" operations.

Conclusion – the "Take Away:" Canadian-based operations engaged in the brokering of shipments involving at least in part a U.S. "leg" need to take notice. While it remains a question as to what if any regulatory "teeth" the U.S. government may have respecting the non-compliant broker/motor carrier in Canada, any Canadian enterprise coming within the scope of MAP-21 must tread carefully. MAP-21 provides for a civil penalty for a broker or freight forwarder who engages in operations without the required registration: A broker who knowingly engages in interstate brokerage operations without the required registration is liable to the United States for a civil penalty not to exceed $10,000 and can be held liable to any "injured third party" for a valid claim, without limitation. The penalties and liability to injured parties apply jointly and severally to all corporations or partnerships involved in the transportation and individually to all officers, directors and principals of those business forms. (Note that a broker of household goods who engages in interstate operations without the required operating authority is subject to a civil penalty to the United States government of not less than $25,000 for each violation).

An anecdotal review of certain American transportation lawyers suggests that there have been threats of administrative penalties being levied, but without any established case law precedent being set on point. There is also the indication that private lawsuits have been commenced by an "affected party" which have settled out of court. As such there is similarly a lack of precedent or an indication as to what specific types of fact patterns may arise to invoke related liability on the part of a non-compliant broker. The risk accordingly remains that a civil proceeding might be brought in the United States which, if culminating in a judgment against the Canadian broker, might eventually be the subject of recognition and enforcement proceedings in Canada against the broker. Of course, a Canadian "broker" with operations and assets located in the United States may be more directly exposed to such a day of reckoning.

B. Note on the United States-Mexico-Canada Agreement ("USMCA")

The marketplace for freight brokers is, subject to a few exceptions (see the discussion at Section IV above) largely unregulated in Canada. This has not changed with the introduction of the USMCA. While there are not any regulations in the USMCA that will directly regulate the non-asset based freight intermediary, there may well be indirect business or economic effects. Time will tell to what degree.

The USMCA has been touted as providing a positive overall impact on the trucking industry. Any facilitation on the flow of goods should reap some benefit and opportunity for the freight brokerage industry. Chapter 7 of the USMCA (Customs and Trade Facilitation) contains several innovations likely to reduce administrative delays in cross-border trade and minimize transaction costs. For example, there are new procedures for the expedited release of goods, including provision for the advance submission and processing of electronic documentation prior to a good's arrival at the border, as well as specific rules for the expedited handling of express shipments.

The USMCA agreement places new emphasis on production across many industries in the United States. The automotive industry will be free to produce more vehicles. More U.S. agricultural products will be shipped to both Canada and Mexico. Targeted industries, such as cheese and wine, will be able to reach distributors throughout North America without certain previous restrictions that were in place.

In broad terms it is said that the trucking industry as a whole should see direct growth as a result of relaxed trade restrictions between Canada, Mexico, and the United States. With an increased emphasis on domestic production and manufacturing, there will be greater demand placed on trucking companies to move those products, which should spur growth across the industry, and with that, the logistics industry.

With an increased amount of freight transportation expected with the new deal, innovations such as customs and trade facilitation should make for quicker delivery windows and fewer administrative tasks for logistics companies. As logistics providers take advantage of some of the benefits of the agreement, there might be more improvement to infrastructure to come, which would translate into "FAST" lanes along the United States-Canada border.

C. "Conflicts of Law"

Consider that a freight broker might be involved in any one of the following scenarios:

- A Canadian shipper has a contract with an American freight broker.
- An American shipper has a contract with a Canadian freight broker.
- A Canadian freight broker has a contract with an American carrier.
- An American freight broker has a contract with a Canadian carrier.
- A Canadian broker is engaged to arrange the carriage of freight point-to-point in the United States.
- An American broker is engaged to arrange the carriage of freight point-to-point in Canada.
- A broker (whether Canadian or American) is engaged to arrange the cross-border carriage of freight.

Any one of these scenarios can give rise to what lawyers refer to as a "conflicts of law," where as, its unclear which law governs in the event of a dispute. This is something that the careful broker will turn its mind to at the contracting stage.

Shipments of cargo do not, of course, just go "east-west" (or vice versa), staying in Canada. Of course, there is an incredible amount of "north–south" (or vice versa) surface transportation of goods between Canada and the United States. Freight brokers, carriers and shippers alike must be aware of the fact that any contract involving cross-border interests might bring about issues concerning this "conflict of law:" What law will apply to govern the contract in the event of a dispute? How can a party avoid surprises or unintended results on how a dispute might be resolved? The answer is to take a proactive approach at the point of contracting in being deliberate what law will govern, and that the applicable law, and with it, the prescribed location and manner of adjudication of any dispute, can coexist with the broker's business model or risk appetite.

In this regard, with the "freedom of contract" that comes with shippers, brokers and carriers being able to contract on terms as they wish, the parties should not only be deliberate in stipulating the applicable law but also the forum (or court venue) where disputes must be brought as well as method of dispute resolution.

In addressing the above, we increasingly see the use of "cross-border" contracts. Shipper, brokers and carriers may like the benefit of uniform contract terms being used regardless of whether the place of origin is in Canada or in the United States. This "one size fits all" approach does away with the need for a United States form coexisting with a different Canadian form of contract. By drafting the terms of a cross-border

contract accordingly, the parties might agree on what law governs and personnel responsible for filing cargo claims thus need to concern themselves with only one set of claim filing requirements on the contracting party they wish to claim against. In this regard some contracts provide, as one example, for the application of United States law (for example, presumptive full actual value carrier liability under the Carmack Amendment (49 US Code §14706) for all shipments even if they emanate from a Canadian origin point, or the features of Canadian law (i.e., carrier per pound limitation of liability). Some cross-border contracts provide a hybrid (i.e., United States law governing border shipments occurring within the United States and from the United States into Canada, and Canadian law governing shipments withing Canada and from Canada into the United States. As any "cross border dispute" lawyer will tell you, there are often contradictory agendas at work in one side trying to argue the application of one set of laws when the other asserts the application of another.[62]

D. Canadian Courts: When Do Canadian Courts Accept Jurisdiction?

This paper will now very briefly address the approach taken when a suit is brought in a Canadian courtroom and there is an issue as to the applicable law. For a Canadian court to assume jurisdiction there must be a "clear and substantial connection" linking the subject matter of the case to the forum. The following are presumptive connecting factors entitling a Canadian court to assume jurisdiction over a dispute:

- The defendant is domiciled or resident in the province where suit is filed;
- The defendant carries on business in that province;
- A tort was committed in that province, and
- The relevant contract was made in that province.

If the plaintiff's choice of court jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings upon the application of a defendant to remove the case elsewhere on the basis that it can be demonstrated that there exists another court venue that is clearly more appropriate and efficient to try the case.[63]

E. Canadian Courts: If there is a case … what next?

Assuming that the Canadian court has jurisdiction; what law applies in respect of a cargo claim arising in the context of a cross border shipment? Will it be the United States law or the Canadian law? Under the conflicts of law rules applied in Canadian courts, the parties' express choice of law (and for that matter, the choice of a forum) will generally be given effect.

Where the parties have not explicitly selected the governing law, the courts will look to see if there is an implied agreement in the wording of the contract and in the party's dealings prior to and at the time of the formation of the contract. Where the court cannot find an implied agreement on point, it will apply the law

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[62] This is not just academic. Consider, for example, a cross border cargo claim dispute pitting the Canadian "uniform bill of lading" regime against the United States' Carmack Amendment regime. If there is no declared value on the contract of carriage or bill of lading, and the cargo is light relative to its value, the carrier might assert the application of Canadian law with the $2 per pound limit of liability. The claimant may not be too happy with this; it may try to assert the application of Carmack with the presumed full actual valuation liability exposure.

[63] See: *Club Resorts Ltd. v. Van Breda* [2012] 1 SCR 752.

with which the transaction has its "closest and most real connection" as being the "proper law" of the contract.

If the parties have agreed that the courts of a particular place shall have jurisdiction over the contract, there is a strong inference that the law of that place is the governing and applicable law if the parties have not specifically provided for that. Other factors from which the courts have been prepared to infer the intentions of the parties as to the applicable law are the legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and location of the subject matter of the contract, and the residence of the parties.

The courts of both Canada and the United States are, generally speaking, prepared to give effect to the express intentions of the parties as to governing law. The benefits of a negotiated contract are obvious in terms of the certainty that comes with a broker and its contracting partner proactively contemplating the governing law and the venue and manner in which a dispute is to be resolved.

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