The Carrier Must Get Paid—Fact or Fiction

*M. Gordon Hearn**

*Jeff Simmons***

*Michael Tauscher****

Introduction

"The bedrock rule of carriage cases is that … the carrier gets paid."[1] This article explores whether that rule is absolute, or whether the right to recover freight charges and the obligation to pay are not black and white. When seeking payment of freight charges, the carrier potentially has three sources from which to seek payment: (1) the consignor who shipped the goods, (2) the consignee who received the goods, and/or (3) a "bill to" third-party, such as a broker. The right to recover freight charges against these parties involves competing interests and potent defenses such as estoppel. As a result, the carrier does not always get paid.

This article will help practitioners find their way through this challenging maze of competing interests and, at times, inconsistent case law. Specifically, this article will address:

- The general rule (*i.e.*, the carrier gets paid).
- If a carrier does not get paid, who is liable?
- What defenses exist to the carrier's claim for payment?
- Who wins in double payment scenarios?
- When and where can these freight charge actions be filed?
- What affect does bankruptcy filing have on a carrier's right to collect from others?
- How does the law compare in Canada for carriers?

The General Rule: Carrier Gets Paid

A frequently cited case for the general rule is *Excel Transportation Services, Inc. v. CSX Lines, LLC.*[2] There, the court declared: "[t]he bedrock of rule of carriage cases is that, absent malfeasance, **the carrier gets paid**."[3]

The *Excel* case involves a typical scenario: shipper pays intermediary, but intermediary does not pay the carrier. Specifically, the shipper, Marriott International, hired Excel, a freight forwarder, to arrange multiple cargo shipments to Hawaii for a hotel renovation. Excel then contracted with a second freight forwarder, Cab Logistics, which hired CSX Lines to transport the cargo. Excel paid Cab, but Cab did not forward payments to the carrier, CSX. CSX billed Marriott directly until Marriott complained to Excel, which contacted CSX and told it to bill Cab directly. Cab stopped paying and CSX was owed almost $300,000 in shipping charges. CSX's tariff made the shipper, consignee and owner of the goods jointly and severally liable for payment.

Relying on CSX's tariff, the court found: (1) Marriott was not released from liability when CSX started billing Cab directly; (2) CSX's delay in notifying Excel of Cab's mispayments was not a representation that Cab's payments were satisfactory; (3) the bill of lading and CSX's tariff made the shipper and consignee liable even if no privity of contract; and (4) Excel, Marriott and Cab were jointly and severally liable for the charges.

Besides the court's bold declaration that the "carrier gets paid," the court explained the policy reasons supporting this common law rule:

> It is superficially unfair that Excel and Marriott must pay for the shipments twice. However, allowing them the benefit of the carriage without compensating the carrier would eventually cripple the shipping industry, and the economy generally, as carriers devoted their time investigating potential customers. The entire point of the tariff regime—promoting commerce by removing

*Fernandes Hearn, LLP, Toronto, Ontario, Canada
**Ryley Carlock & Applewhite, Phoenix, Arizona
***Scopelitis Garvin Light Hanson & Feary, PLC, Detroit, Michigan

shippers' credit-worthiness from a carrier's list of concerns—would be eviscerated.[4]

For carrier's counsel, *Excel's* favorable language—both as to the general rule and policy reasons supporting it—should be included in any brief seeking collection of freight charges.

Who is Liable?

Generally, the bill of lading determines who is liable.[5] A party's bill of lading, however, can be modified by a prior written contract between the shipper and the carrier. If parties enter into a contract before preparing a bill of lading, and there is an irreconcilable difference between the two agreements, the prior written agreement controls.[6]

If the bill of lading controls, the courts look to the abbreviated notations found on uniform bills of lading to determine who is liable:

- "Prepaid" means the shipper/consignor is obligated to pay the carrier.
- "Collect" means the consignee is obligated to pay the carrier.
- "Nonrecourse" (also referred to as "section 7" language) means a consignor must sign the "nonrecourse" box to be free of liability for freight charges.
- "Bill to Third Party" notation notifies a carrier that a third party will be paying but does not relieve the consignor from liability unless the consignor has also signed the "nonrecourse" box.

Under the uniform bill of lading terms, the shipper/consignor is liable unless the bill of lading is marked "nonrecourse."[7] In contrast, the consignee is liable for freight charges unless the bill of lading is marked "prepaid" and the consignee has already paid its bill to the consignor.[8]

Occasionally, courts are faced with interpreting inconsistent notations on bills of lading, such as when both the "prepaid" and "nonrecourse" are marked. In *Jones Motor Co. v. Teledyne*,[9] the court found the shipper liable in that situation. There, the court held that a bill of lading marked both "prepaid" and "nonrecourse" binds the shipper to pay for the "line haul" freight charges but not to pay for the accessorial charges.[10] The court relied on the carrier's tariff to resolve the conflict. The applicable tariff required the shipper to guarantee payment of the shipping charges if the third party failed to do so.[11] Therefore, the tariff prohibited a third-party billing situation because the shipper signed the nonrecourse provision (which was the case there).

The court reached a different result in *Gaines Motor Lines, Inc. v. Klaussner Furniture Industries, Inc.*[12] There, the court looked beyond the bill of lading to determine the responsible party because of the conflicting notations. In *Gaines*, the plaintiff carriers had been advised by shipper that the third-party logistics company would be the third-party payer.[13] In fact, the most recent course of dealing showed that plaintiff carriers sent invoices to, and were paid by, the third-party logistics company, not the shipper.[14] In reaching its decision that the shipper was not liable, the court distinguished its case from *Jones Motor Co.*, because plaintiff carriers did not contend a tariff similar to the one in *Jones Motor Co.* applied to their action.[15]

The common law rule of carriage liability applies even if no contract of carriage exists.[16] In other words, the uniform bill of lading terms are consistent with common law rules (*i.e.*, while the consignor is primarily liable for payment of freight charges, a consignee who accepts delivery is also liable for freight charges).

Defenses

1. Contract Modification

The shipper or consignee may raise the defense that the bill of lading terms do not apply because they have a prior written contract with the carrier. The parties are free to assign liability for payment of freight charges through a contract separate and different from the bill of lading.[17] Such a contract may provide: (1) only the shipper is liable, (2) the shipper pays only if consignee does not pay, (3) only the consignee is liable, or (4) both shipper and consignee are liable.[18]

Any contract to modify a bill of lading must be between the shipper and carrier. A contract with a broker (who is not a party to the bill of lading) cannot modify the liability provisions of a bill of lading.[19]

2. Estoppel

It is far too common where a shipper or consignee pays another party (such as an intermediary) and that party fails to pay the carrier for the freight charges. In those cases, the carrier looks to the shipper and/or the consignee for payment, despite the fact they may have already paid the third party. Shippers or consignees argue they are an "innocent party" and should not be required to pay twice. Shippers and consignees, where they have already paid, raise estoppel as a defense.[20] Double payment alone is not enough to establish estoppel. Specifically, estoppel applies where: (1) the carrier's misrepresentation exists, such as a false assertion of prepayment on the bill of lading, and (2) detrimental reliance.[21] The battleground is proving detrimental reliance.

Based on case law, it appears shippers, as compared to consignees, have a more difficult time proving estoppel. Courts find a shipper should bear the risk of double payment because it is generally not "an innocent party." As a court aptly noted:

> [T]he shipper, and not the carrier, is in the best position to avoid liability for double payment by dealing with a reputable freight forwarder, by contracting with the carrier to eliminate the shipper's liability, or by simply paying the carrier directly.[22]

On the other hand, it appears easier for consignees to show estoppel when they have previously paid. For example, in *C.F. Arrowhead Services, Inc. v. AMCEC Corporation*,[23] the Court held that the consignee does not have to make payment to the consignor *after* delivery to prove detrimental reliance. The court noted that "accepting delivery is obviously a detriment to a consignee since it then is liable for the freight charges."[24] The court then reasoned the consignee would not want to pay twice and would not have accepted delivery if it had known the consignor, contrary to the "prepaid" representation on the bill of lading, had not prepaid the freight charges.[25] As a result, the court held the consignee changed its position detrimentally in reliance on the carrier's misrepresentation on the bill of lading.[26]

For consignee's counsel, the *C.F. Arrowhead* case supports detrimental reliance in cases where the consignee prepays.

The court reached a different result in *Hilt Truck Lines v. House of Wines, Inc.*[27] There, the court did not find detrimental reliance where the consignee made payments to shipper *prior* to receipt of the goods and bills of lading.[28] Under such circumstances, the Court found there could not be any reliance on the "prepaid" notations on the bill of lading as a matter of law.[29]

Statute of Limitations

An 18-month statute of limitations applies to freight charge claims. Specifically, 49 U.S.C. § 14705(a) provides:

> A carrier providing transportation or service … must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.

This statute of limitations is also applicable to a broker when it seeks to recover unpaid costs of services.[30]

Jurisdiction

In which court does a carrier file a claim to recover unpaid freight charges: state or federal? Unfortunately, the answer is not so black and white—a split of authority exists as to whether federal jurisdiction exists for recovery of freight charges for general freight.[31]

Some recent cases support a finding of no jurisdiction. In *Central Transport International v. Sterling Seatng, Inc.*[32] and *Transit Homes of America v. Homes of Legend, Inc.*,[33] the courts determined no federal jurisdiction existed in an action to recover payment due for interstate freight transportation services. Specifically, in *Central Transport*, the court found no jurisdiction because the carrier "has not alleged that it [is] seeking amounts due under a filed tariff."[34] Likewise, in *Transit Homes*, the court determined no further federal jurisdiction existed merely "because there is no applicable tariff in this action, the filed rate doctrine has no application, and there is no reason that federal law creates an interest or obligation for carriers to collect particular rates from all shippers."[35] In a recent decision, *GMG Transwest Corp. v. PDK Labs, Inc.*, the court followed *Central Transport* and *Transit Homes* and held that "because Plaintiff has not alleged that it is seeking recovery under a filed tariff, its right to recover unpaid freight charges is not founded upon any federally-required tariff."[36]

In short, these cases rely solely on filed tariffs as a requisite for federal jurisdiction. This one-dimensional analysis represents "form over substance" because the disclosure requirement under 49 U.S.C. § 13710(a)(1) directly replaced the requirements provided pursuant to the "filed" tariff provisions. Specifically, although ICCTA voided tariffs previously filed with the ICC, 49 U.S.C. § 13710(a)(4), and eliminated the need for filing tariffs, except for "noncontiguous domestic trade" and "the movement of household goods," 49 U.S.C. § 13702(a), motor carriers (not involved in noncontiguous domestic deliveries and/or household goods) must now "provide to the shipper, on the request of the shipper, a written or electronic copy of the rate, classification, rules and practices, upon which any rate applicable to its shipment are agreed to between the shipper and carrier is based," 49 U.S.C. § 13710(a)(1). Thus, the fact that not all carriers are required to file tariffs is irrelevant to a jurisdictional determination because the information disclosed under § 13710(a)(1) constitutes the same information previously provided with respect to "filed" tariffs.[37] Moreover, *Central Transport* and *Transit Homes* ignored the fact that ICCTA preserves "private causes of action" with regard to disputed rates between carrier and shipper with an eighteen-month statute of limitations discussed above.

To be sure, case law supports the extensive federal control intended by ICCTA. Although *Thurston Motor Lines v. Rand*[38] constitutes a pre-ICCTA ruling, it remains good law because the Supreme Court's decision looks to the pervasive scope of the federal interest in motor carrier transportation shipment, rather than narrowly focusing on the "filed" tariff requirement.[39] Following *Thurston*, courts, since the enactment of ICCTA, have held that federal control over motor carriers remains significant and federal jurisdiction exists over claims for the collection of interstate freight charges. Specifically, in *Old Dominion Freight Line v. Allou Distributors, Inc.*,[40] the court held that federal jurisdiction existed for freight charges allegedly owing for interstate transportation services provided by an interstate motor carrier. *Old Dominion* asserts, in *Thurston*, the Supreme Court "reiterated its position that 'The Interstate Commerce Act requires carrier[s] to collect and consignee to pay all lawful charges duly prescribed by tariff in respect of every shipment. Their duty and obligations grow out of and depend upon that act."[41] *Old Dominion* correctly reasons that pursuant to *Thurston* federal jurisdiction arises out of the duty and obligations of ICCTA—which remain the same as pre-ICCTA provisions pursuant to § 13710—rather than merely examining the form chosen to accomplish those same duties and obligations as incorrectly held in *Central Transport* and *Transit Homes*.

When one takes into consideration all of the federal provisions governing interstate freight charges, including an applicable statute of limitations, ICCTA establishes congressional intent to create, if not maintain, a federal cause of action for the collection in federal court of interstate freight charges because ICCTA expressly perceives such disputes as federal causes of action and maintains extensive requirements and regulations over the prices and practices of motor freight carriers.[42] Nevertheless, in light of the recent trend in cases, it may be safer to file in state court to avoid dismissal for lack of subject matter jurisdiction.

Bankruptcy Considerations

It is not unusual for freight charge collection matters to become impacted by bankruptcy considerations. While detailed discussion of the myriad of potential bankruptcy issues is beyond the scope of this article, some common scenarios and applicable principals are:

1. *Preferences and Ordinary Course Defense*

A not uncommon occurrence is where a shipper or consignee has paid the carrier but later gone into bankruptcy. Payments received by motor carriers in the 90 days preceding a shipper or consignee's bankruptcy can be claimed to be preferences which are subject to disgorgement and return to the bankruptcy estate. Oftentimes, however, these claims are not made until two or more years after the filing of the bankruptcy when the trustee is running up against the bankruptcy code statute of limitations for adversary actions for recovery of preferences, and multiple actions are filed shortly before the filing deadline, including claims against motor carriers for disgorgement of freight charges paid years before.

Such claims are typically subject to the defenses available under 11 U.S.C. § 547 of the Bankruptcy Code. One of the most common defenses, which is very fact specific to each situation, is payment during the ordinary course of business defense.[43] In *Yurika,* the court considered not only whether late payments were the ordinary practice between the debtor shipper and the carrier, but also looked to industry practices, in this instance the FMCSA motor carrier credit regulations. *Yurika* illustrates the success of an ordinary course defense is highly dependent upon the quality of the carrier's records showing billing and payment timelines both before and after the 90-day preference date preceding the bankruptcy filing. Good records showing little or no difference between the two can support a solid defense which protects retention of the previously paid freight charges. Major variations in payment may either negate the defense or, at best, only create material questions of fact which might lead to a reasonable settlement with the trustee.

2. *Freight Charges Subject to Trust Defenses*

Another common occurrence is where the motor carrier has not yet been paid for freight charges by either a shipper, consignee or third party intermediary (broker, 3PL, etc.) whose trustee or secured creditors (e.g., bank or other lender) claims the unpaid freight charges as either assets of the debtor's bankruptcy estate or sums due the secured creditor rather than the carrier.

The principal argument to defeat claims of the bankruptcy trustee and/or secured creditors and obtain payment is based upon trust principles. In *In re Penn Central Transp. Co.,*[44] the court recognized, based upon federal common law, monies collected by a bankrupt railroad for payment to other railroads that had handled interline[45] shipments were not the property of the estate but were held in trust for payment to the other railroads without whom the freight transportation, and thus the right to payment for same, would not have been accomplished.[46]

In *In re Columbia Gas Sys., Inc.*,[47] the Third Circuit Court of Appeals recognized that this federal common law interline payment trust concept was not restricted to railroads, but was applicable to any "entity [that] acts as a conduit, collecting money for one source and forwarding it to its intended recipient," in this instance, an interstate pipeline.[48]

In *In re Computrex,*[49] the trustee for the debtor third party intermediary/broker claimed payments made to a shipper's motor carrier were preferences that should be reimbursed by the shipper to the broker's bankruptcy estate. However, the broker was held to be a mere conduit for freight charges due the motor carriers. The payments were not preferential transfers because they never became part of the broker's bankruptcy estate since the broker was merely a disbursing agent without sufficient control and dominion over the funds to constitute part of its estate.[50] The court further noted the broker was in essentially the same position as a bailee in regard to the shipper/bailor with a contractual duty to take possession of the monies and disburse them to the shipper's motor carrier creditors.[51]

Resolution of alleged trust fund status claims cannot always be achieved through summary judgment motion practice; material questions of fact as to the parties' conduct or lack of conclusive evidence regarding the trust fund theory elements may result in denial of summary judgment and require further discovery or trial.[52]

A party claiming monies are trust funds is well advised to thoroughly understand the elements of the theory and marshal the facts and evidence to support the defense either before litigation begins or as soon thereafter as practicable so as to avoid a result as in *Jevic, supra*.[53]

In a similar, though non-bankruptcy context, an interline motor carrier prevailed over another interline motor carrier's secured lender in regard to freight charges which were deemed to be trust funds and, thus, not subject to the defendant bank's security interest.[54]

Transportation Revenue Management d/b/a TRM v. Freight Peddlers, Inc.,[55] presented similar issues, again in a non-bankruptcy context. Transportation Revenue Management (TRM), a motor carrier factor and assignee of five motor carriers, sued Freight Peddlers, Inc., a federally licensed transportation broker, its owner and sole shareholder and the broker's bank, for monies paid to Freight Peddlers by shippers for transportation service provided by the motor carriers. TRM's principal claim was that the freight charges were held in constructive trust by Freight Peddlers and its owner for the benefit of the motor carriers. The broker's owner and the broker's bank denied the freight charges were subject to any type of trust. TRM pointed out federal broker regulations, including 49 C.F.R. § 371.3 and 371.13, imposed duties upon brokers regarding monies collected for freight charges. Furthermore, the contracts between the broker and the motor carriers defined the broker's billing and payment obligations. As posed by the court, the question was "whether the federal regulations or the contract warrant a ruling that Freight Peddlers held in trust any payments it received from its customers or shippers for the carriers' services."[56] The *Freight Peddlers* court reviewed the trust and conduit theories of *In re Columbia Gas Systems* and *In re Penn Central*, *supra*, and further noted federal regulations 49 U.S.C. §§ 371.3(a)(4) and (6) clearly contemplate a broker such as Freight Peddlers may act as a conduit by collecting freight charges owed to the motor carriers, making appropriate payment to the carrier, less any brokerage charges.[57] The court, however, noted the concept of being a mere conduit for payment depended in part upon whether the broker bore the risk of non-payment of the shippers.[58] If Freight Peddlers merely passed on monies collected from shippers, it would be a conduit, whereas if it paid the motor carriers from its own funds before receiving the shippers' payments, rather than simply forwarding the shippers' payments, it would bear the risk of non-payment from the shippers, and imposition of a trust might not be warranted.[59] In the instant case, the court found there was no conclusive evidence regarding Freight Peddler's payment practices and an issue of fact existed on this point, further noting other issues of fact which precluded the court from ruling at that stage as to whether the freight charges were held in trust for the carriers.[60]

Whether in the bankruptcy context or scenarios involving claims by secured lenders or others in the supply chain, particularly in the modern era of multi modal shipments and transportation intermediaries, a motor carrier's freight charges are subject to many hands and competing claims before they ever reach the carrier's bank account. An astute carrier recognizes and plans for the many contingencies that can arise, whether by maintaining good records (*e.g., In re Yurika Foods*) or utilizing agreements that establish express trusts concerning freight charges handled by third parties (*e.g., Summit Financial*) or otherwise.

Canadian Law

1. *Introduction – Who is Liable?*

In Canada, the shipper who engages or dispatches the carrier has the 'primary' obligation to pay freight charges. This is, of course, a trite concept given the direct relationship with the carrier. A consignee may be liable for payment of freight charges through statutorily imposed liability. The federal *Bills of Lading Act*[61] provides as follows:

> 2. 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? These aspects are also addressed below. Before delving further into this discussion it may be instructive to put into a practical context why Canadian law on freight charge liability might be of relevance to carriers or attorneys south of the border.

2. *What if the Law of Canada is Different? Does this Matter?*

The concept of 'conflicts of law' was mentioned above. If the unpaid carrier has moved cargo across the U.S.-Canadian border, it should be aware of basic legal principles in effect in both countries. It might have more in its arsenal for recovery having regard to the different remedies available under the different legal systems. Perhaps the U.S.-based attorney or carrier will have an interest in the application of s. 2 of the *Bills of Lading Act* if it can be asserted Canadian law is applicable on a cross border movement of goods.

While the 'primary' liability on the part of the shipper would seem to be enforced the same way on either side of the border – as a matter of privity of contract what of the 'secondary' liability on the part of a consignee under the Canadian legislation? The author can only speak on the application of conflicts of law rules from the perspective of a Canadian lawyer witnessing events unfolding in a Canadian courtroom seized of the case. In Canada, the treatment of the conflicts of law as to *what* law will apply falls to be determined by our local or domestic conflicts of law 'rules': what will our courts say as to *what* law should apply? Deference is owed to the U.S. attorney to identify what the approach might be in the determination of the governing law should a cross-border freight claim dispute be referred to an American court. The point here is that Canadian law might apply. It might come to the aid of the unpaid carrier in some fashion where there is no corresponding relief under American law.

To the extent there is a substantive difference in the law—for example, it is understood there is no U.S. statutory codification in the nature of s. 2 of Canada's *Bills of Lading Act*—what are the indications then of when might Canadian law govern? In our system, there has historically been a presumption as regards shipments moving from the United States into Canada that American law would apply for the duration of the through carriage (e.g., the *Carmack Amendment* as concerns carrier liability for loss or damage to goods). This would be by virtue of the deemed or manifested *contractual* intention of the parties [which, if established, would be honoured by a Canadian court] as opposed to the existence of any legislative domain beyond the U.S. border. Canadian courts have long looked for a manifestation of what the parties intended as the binding set of legal rules in a cross-border contractual context. Where there is no overt choice of law clause [in the standard bill of lading there is rarely anything inserted on point] the court would look to the facts of the case to see which country had the "closest connection" to the transaction with a view to determining a 'proper law' so as to govern the contract.

Historically, Canadian 'conflicts of law rules' presumed the law in place where the bill of lading was issued would govern on the basis that was the "place of performance" of the contract, as having the most substantial *connection*. As an illustration, the use of the U.S. 'short form bill of lading', with its section 7 'non-recourse' language, has tended to show a gravitation towards U.S. law as governing, from the perspective of the Canadian judge seized of the case. The point of this discussion is not to delve into conflicts of law issues. Presumptions are only presumptions. Rules develop. The point is, U.S. law will be of potential importance and application to the Canadian lawyer dealing with an unhappy unpaid carrier on an inbound shipment from the U.S. into Canada and Canadian law, will be of potential importance and application to the U.S. lawyer dealing with an unhappy carrier in respect of a shipment from Canada into the United States.[62]

3. *How Would Canadian Law Possibly Apply Against a U.S. Based Consignee?*

It will be difficult to "sell" the argument to a U.S.-based consignee that it is somehow bound by s. 2 of the *Bills of Lading Act* in respect of an unpaid freight bill for goods emanating from Canada. This does not mean it cannot be done. As mentioned above, the author would have to defer on the point of what an American court would do in terms of the discernment between American law and the Canadian law cited herein on freight charge liability and in the application of one or the other.

That said, it would seem, to be able to assert the *Bills of Lading Act* against a U.S. based consignee, the facts of the case would have to manifest the mutual intention the carriage contract was to be governed by Canadian law.[63] This presents an interesting legal and mental exercise. The author is unaware of any case law on point. How, exactly, can a carrier assert the application of a statute enacted by a foreign country against a consignee who, without the application of that statute, was not privy to the contract of carriage? Presumably, the carrier might assert various arguments, such as it being a term of the underlying sales contract fixing the shipper with the delivery obligation, that Canadian law will govern delivery of the goods and, with it, the obligations thereunder along with the benefit of receiving the goods. Another argument might adopt the theme that, in accepting the freight from the carrier, consignee ratified the arrangements entered into in first instance by shipper e.g., the application, by operation of law, of Canadian law. This might particularly be the case if it is seen that the carrier gave up the potential of exercising a lien by releasing the cargo out of its possession. The unpaid carrier at this point might simply then cite helpful and applicable U.S. law—and now I speculate. The point to register here, lest I get further lost in the weeds of getting off topic, is that Canadian law might be helpful, it might be found to be applicable, and is, therefore, perhaps more than something of passing interest by way of a comparison to U.S. law.

4. *"Freight Prepaid" Bills of Lading*

As mentioned above, this has been the subject of litigation in Canada and consignees have raised in defense the argument that the carrier should not be able to claim freight charges after having represented the same were paid. This necessarily opens up discussion on the concepts of 'waiver' and 'estoppel.' Carriers will agree that the designation of a shipment moving as 'freight prepaid' is not necessarily intended to be a statement the freight has been paid in advance. Rather, it tends to indicate some credit arrangement between the carrier and the shipper, with the carrier likely not intending to waive its right to look to the consignee for payment if the shipper defaults.

It appears, by itself, the reference to 'freight prepaid' in a bill of lading will not disentitle a carrier from looking to a consignee for payment where the conditions in Section 2 of the *Bills of Lading* are met. In *S.G.T. 2000 Inc. v. Molson Breweries of Canada*[64] the court had to deal with the usual quandary presented when a shipper fails to pay freight charges. Molson Breweries purchased beer bottles from Consumers Glass. Consumers Glass contracted a carrier, S.G.T. 2000 Inc., to deliver the glass bottles from its facility to various Molson plants located throughout Canada. Consumers Glass went bankrupt without paying the carrier in full for their services. The carrier sought to recover the unpaid freight charges from Molsons, citing s. 2 of the *Bills of Lading Act*. The goods were delivered against bills of lading marked 'freight prepaid'. Molson Breweries protested it was invoiced by Consumers Glass for the supply cost of the cargo (including a component for the freight charges) after taking delivery but before being met with the *Bills of Lading Act* argument for payment. The Quebec Court of Appeal found that Molson Breweries had become the owner of the cargo by virtue of same being tendered by Consumers Glass to the carrier for shipment. Being named on the bills of lading in question as 'consignee', it was, therefore, incumbent on Molson Breweries to show the statute did not apply by showing the carriers had, in fact, *waived* their entitlement to this protection. This required Molson Breweries to establish there was something both intentional and binding with reference to the 'prepaid' notation on the bills of lading. The Court of Appeal ruled the "prepaid" reference was not enough by itself to deprive the carrier of the protection of the statute. Rather, this only manifested the standard carrier intent to initially look to the shipper for freight payments, which would not, by itself, equate to a carrier choosing *not* to avail itself of this statutory 'fall back' position of being able to look to the consignee for payment if necessary.

It remains, however, that on certain facts a carrier might be seen to have waived its right to look to the consignee for payment. Something more than reference to 'freight prepaid' on the bill of lading would be required. Accordingly, the carrier was entitled to recover its freight charges from Molson Breweries.

The *S.G.T. 2000* decision was temporarily put in some doubt by the subsequent decision of the Federal Court of Canada in *H. Paulin & Co. Ltd. v. A Plus Freight Forwarder Co. Ltd.*[65] where insertion of the words 'freight prepaid' on a bill of lading was held to be a binding representation by the carrier that freight charges were, in fact, prepaid. This case might be distinguished as being an ocean carriage case, where reference to 'freight prepaid' might not have the same intent or meaning as in surface transportation, but the case can be read as being subject to the subsequent Ontario Superior Court decision in *Cassidy's Transfer & Storage Limited v. 1443736 Ontario Inc. o/a Canada One Sourcing and The Attorney General of Canada.*[66]

While the *Cassidy* decision is a trial level decision, it nicely reconciles the findings in *SGT 2000* and the *H. Paulin* cases and would appear to provide 'go forward' guidance on consignee liability for freight charges. In this case, plaintiff carrier transported several million dollars of socks from North Carolina to Canadian Forces bases in Montreal and Edmonton with the majority of the bills of lading marked 'freight prepaid'. The shipper went bankrupt. Freight costs were included in the price of the product to be paid by the consignee—the Canadian government. The supply invoice was to be paid only *after* consignee confirmed safe delivery of the product shipped. This, therefore, put into stark relief the question of potential waiver or "estoppel" on the part of the carrier. As consignee was to pay the supply invoice known to have a freight component *after* receipt of the shipment and presumably after having had the opportunity to actually see the "freight prepaid" endorsement on the bills of lading in question, would this amount to a defense to consignee? The judge, in *Cassidy*, noted, with some caution, that the court in the *H. Paulin* decision did not appear to have heard evidence as to what reference to 'freight prepaid' in the subject bills of lading actually meant to consignee in that case. The judge also noted, in the *SGT 2000* case, the evidence before the court was that Molson Breweries did not interpret the notation 'freight prepaid' as literally meaning the shipper had already paid the freight. The *Cassidy* decision underscores the necessity of the inquiry in each case as to what consignee's understanding actually was on this point. Was there a representation and was it reasonably relied upon by the consignee and, therefore, legally binding on the carrier?

The judge in *Cassidy* ruled there is a <u>presumption</u> created by s.2 of the *Bills of Lading Act* that consignee is responsible for payment of freight charges. To avoid liability, consignee must rebut this presumption by proving the existence of a further arrangement by carrier that shipper alone would be responsible for freight charges *and* the carrier had waived the protection of the *Act*. The carrier's waiver in this regard may be express or implied, but may not be presumed from the silence of the parties nor, in and of itself, from the use of the phrase 'freight prepaid' on the bills of lading in question. The *Cassidy* decision leaves open the possibility the term 'freight prepaid' may, on the evidence, amount to a waiver by carrier of the application of s. 2 of the *Bills of Lading Act* if it is found to be a representation to consignee which is actually and reasonably relied upon or acted upon by consignee. However, if consignee's evidence is that it understood as a fact the freight charges had not been paid, or were not necessarily paid, this would not amount to a waiver. Equally, if the evidence of consignee is that it knew the term was understood in the industry to mean something other than its ordinary meaning – that is, this might only allude to some type of credit relationship between carrier and shipper –this would, likewise, not be found to constitute a waiver.

Accordingly, consignee can rebut the presumption of liability but it will have to prove *both* the existence of some arrangement by carrier whereby shipper alone would be responsible for the charges and the carrier had waived the protection of s. 2. In the result, the Government of Canada was ordered to pay the unpaid freight charges. This decision seems to put a premium on decisive, and early, communications between the carrier (who apprehends it may not be paid by shipper) and consignee. A carrier might also consider adding qualifying language to the simple 'freight prepaid' notation on a bill of lading, to the effect that perhaps all rights are being reserved or those words only evidence shipper having the initial obligation to pay.

5. *The Intermediary Interface*

The foregoing discussion addresses a conventional arrangement where three parties are involved: the shipper, carrier and consignee. What if, as is increasingly the case, a freight broker intermediary is involved in the equation? The usual protocol is the carrier will invoice the broker or intermediary who will, in turn, invoice the shipper for freight charges. The shipper then pays the intermediary, who pays the carrier. Where it can be said the intermediary acts as an agent, that is, the carrier might be able to enforce the obligation to pay freight against the shipper, this sets up what can be a problematic dynamic. What if the shipper pays the intermediary, who goes out of business before paying the carrier?[67] In Canadian law, 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:

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

2. The creditor held the third party out being so authorized;
3. The creditor, by his conduct or otherwise, induced the debtor to come to that conclusion; or
4. 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.[68]

Shippers generally cite the fourth scenario above in their defense as concerns the common billing practice cited above where payments are made to the intermediary. If, as happens all too frequently, the freight intermediary goes out of business without having paid the carrier, the debate wages as to whether payment by the shipper to the intermediary has, in fact, discharged the debt owing to the carrier. Depending on how the facts are determined, the carrier may be seen to have underwritten the risk of the default of the intermediary with the shipper being excused from any obligation to repay the monies. Where does the consignee stand, should the carrier prove unsuccessful in its pursuit of the shipper in light of s. 2 of the *Bills of Lading Act*? Can the consignee invoke a defense that the carrier assumed the risk such that it should not be forced to bear the burden? Based on the apparent clarity provided by the *Cassidy* and *SGT 2000* decisions it would appear the consignee would still be liable under s. 2 of the *Bills of Lading Act*. This view is based on the fact that s. 2 does not have any 'saving' provision relating to a case where it can be said that the shipper has actually paid the money [to the intermediary] with the carrier not being paid. The law will have to evolve here and over time it will. One wonders whether the consignee might argue that the carrier waived its right of claim against the consignee under the *Bills of Lading Act* by accepting the 'risk' of the default of the intermediary. After all, why should the consignee be in a worse position than the shipper who has the 'primary' obligation to pay freight charges? Presumably the difficulty the consignee will find itself in is the carrier's ratification the intermediary be paid by the shipper may not in and of itself amount to a satisfaction of the two part test set down in *Cassidy* for to avoid liability under the *Bills of Lading Act*.

The above said, with the involvement of an intermediary in the equation such that there may be two distinct billing and contracting regimes (shipper-broker and broker-carrier) there might be more of a factual matrix for the consignee to point to in order to assert the carrier was *only* looking to the intermediary for payment in addition to trying to establish the carrier had waived the protection of s. 2.

Conclusion

The common law rule in America is the carrier must get paid, primarily by the shipper, secondarily by the consignee. However, the contractual terms and/or conduct of the parties to a particular shipment can alter this rule. The presence of intermediaries and related agreements and conduct can also disrupt operation of the general rule, and even more turmoil can be generated by bankruptcy or the claims of secured parties. Shipments between North America's two largest trading partners, the United States and Canada, present yet other issues, but, in an appropriate circumstance, application of Canadian law can give new life to the common law rule.

Attention to details, whether in drafting pre-shipment terms and conditions or post-shipment analysis of the facts and potential theories of recovery, can be critical in determining whether the bedrock rule of carriage cases, payment of the carrier, prevails.

Endnotes

1. *Excel Transportation Services, Inc. vs. CSX Lines, LLC*, 280 F.2d 617, 619 (S.D. Tex. 2003).
2. 280 F. Supp. 2d 617.
3. *Id.* at 619 (Emphasis added).
4. *Id.*
5. *Oak Harbor Freight Lines, Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 954 (9th Cir. 2008).
6. *Toyo Kisen Kaisha v. W.R. Grace & Co.*, 53 F.2d 740, 742 (9th Cir. 1931) ("[If there is] an irreconcilable repugnancy between the prior written contract and the bills of lading, that conflict would have to be resolved in favor of the former.")
7. *Oak Harbor,* 513 F.3d at 955; *Bestway Systems, Inc. v. Gulf Forge Co.,* 100 F.3d 31, 34 (5th Cir. 1996).
8. *Oak Harbor*, 513 F.3d at 955; *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 479 (9th Cir. 2000).
9. 732 F. Supp. 490 (D. Del. 1990).
10. *Id.* at 492.
11. *Id.* at 493.
12. 2011 WL 1230811 (M.D. N.C. 2011).
13. *Id.* at *3.
14. *Id*, at *4.
15. *Id.* at *3-4.
16. *Harms Farms Trucking v. Woodland Container*, 2006 WL 3483920 at *3 (D. Neb. 2006) (holding that, by operation of law, a consignee can be held liable for freight charges when it accepts delivery of shipments, even in the absence of a contract).
17. *Oak Harbor*, 513 F.3d at 956.

18. *C.A.R. Transport,*, 203 F.3d at 479.
19. *Oak Harbor*, 513 F.3d at 956-57 (holding that an agreement between a broker and carrier did not absolve the shipper of liability under the bills of lading even where the broker expressly agreed to be liable for the shipper's freight charges).
20. A split in the federal circuits exists as to whether a shipper may avoid liability by means of the estoppel defense or whether it, having a choice of who to pay, assumes the risk of double payment by paying someone other than the carrier. *See Hawkspere Shipping Co., Ltd v. Intamex,* 330 F.3d 225, 236-238 (4th Cir. 2003).
21. *Oak Harbor,* 513 F.3d at 959-60.
22. *National Shipping Co. of Saudi Arabia v. Omni Lines*, 106 F.3d 1544, 1547 (11th Cir. 1997).
23. 614 F. Supp. 1384, 1388 (N.D. Ill. 1985).
24. *Id.*
25. *Id.*
26. *Id.*
27. 299 N.W. 2d 767, 770-71 (Neb. 1980).
28. *Id.* at 770-71.
29. *Id.* at 771.
30. *Emmert Industrial Corp. v. Artisan Associates, Inc.*, 497 F.3d 982 (9th Cir. 1987).
31. Courts generally do not dispute federal jurisdiction in cases arising out of the interstate transport of household goods because household goods carriers must "file with the [Surface Transportation] Board tariffs containing the rates established for such transportation or service." 49 U.S.C. § 13702(b)(1). *See also Coughlin v. United Van Lines*, 362 F. Supp. 2d 1170 (C.D. Cal. 2005) (holding that plaintiff's demand for refund of transportation charges is exclusively governed by ICCTA irrespective of the amount in controversy).
32. 356 F. Supp. 2d 786, (E.D. Mich. 2005).
33. 173 F. Supp. 2d 1185, (N.D. Ala. 2001).
34. *Central Transport*, 356 F. Supp. 2d at 791.
35. *Transit Homes*, 173 F. Supp. 2d at 1191.
36. 2010 WL 3718888 (E.D. N.Y. 2010).
37. *See, e.g, Jackson v. Brook Ledge, Inc.*, 991 F. Supp. 640, 645 (E.D. Ky. 1997) ("Congress replaced the tariff requirement with the following mandate: …49 U.S.C. § 13710(a)(1)"). Moreover, ICCTA continues to assert broad authority by regulating prices and practices of motor freight carriers, despite *Central Transport's* and *Transit Homes*' statements to the contrary. Specifically, in addition to carrier requirements to disclose rates to shippers under 49 U.S.C. § 13710(a)(1), ICCTA also: (1) assigns liability for payment of rates, (49 U.S.C. § 13706); (2) mandates the transfer of possession of the transported property upon payment, (49 U.S.C. § 13707(a)); (3) regulates the billing and collection of transportation charges, (49 U.S.C. § 13708); (4) provides procedures for resolving undercharge disputes, (49 U.S.C. §§ 14709 and 14711); (5) grants the Surface Transportation Board ("STB") jurisdiction to resolve rate applicability disputes, (49 U.S.C. § 13710(a)(2); and (6) requires carriers and shippers to notify each other concerning rate disputes within 180 days, (49 U.S.C. § 13710(a)(3)). In fact, the STB finds that compliance with the one hundred eighty (180) day rule is a precondition for pursuing a claim whether before the STB or in court. *See Carolina Traffic Services of Gastonia, Inc.,* 1996 WL 303722, 3 (S.T.B.), Fed. Carr. Cas. P. 38, 285. In addition to these statutory requirements, the Federal Motor Carrier Safety Administration ("FMCSA") has promulgated regulations defining the requirements for extension of credit to shippers by freight carriers. Pursuant to 49 CFR § 377.203, the FMCSA regulates, among other things: (1) when the credit period begins; (2) the length of the credit period; (3) applicable service charges; (4) discounts; (5) collection expense charges; and (6) unreasonable discrimination against shippers. The FMCSA also imposes requirements regarding the presentation and payment of freight bills, (49 CFR §§ 377.205 and 377.207), and the extension of credit to additional shipping charges, (49 CFR § 377.209). (This statutory analysis was adapted in part from a presentation made by Mark J. Andrews to the June 2002 meeting of the Conference of Freight Counsel.)
38. 460 U.S. 533 (1983).
39. *Harms Farms*, 2006 WL 3483920 at *4, held: "Harms Farms' claim for recovery of freight charges arises under federal law. *See Cincinnati, N.O. & T.P. Ry. Co. v. Rankin,* 241 U.S. 319, 326-327 (1916)." In *Rankin*, a cargo loss case rather than a freight charge claim, the court held that: "The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common law rules accepted in Federal tribunals. (Citations omitted). We cannot assent to the theory … that the interpretation and effect of a bill of lading issued by a [carrier] in connection with an interstate shipment present no Federal question… ."
40. 86 F. Supp. 2d 92 (E.D. N.Y. 2000).
41. *Old Dominion*, 86 F. Supp. 2d at 93-94 (citing *Thurston*, 460 U.S. at 534).
42. Jeffrey R. Simmons & Julie E. Maurer, *Collection of Interstate Freight Charges: A Case for Federal Jurisdiction*, The Transportation Lawyer, 27 (Dec. 2006).
43. *See In re Yurika Foods,* 888 F.3d 42, 45 (6th Cir. 1989) ("Because there is no readily applicable test of what constitutes an "ordinary
44. 486 F.2d 519 (3rd Cir. 1973).
45. "Interline transportation or services" refers to the practice whereby a shipper or receiver pays one carrier for carriage of an entire shipment although the shipment may be transported by many carriers. 486 F.2d at 521. *See also Parker Motor Freight, Inc. v. Fifth Third Bank,* 116 F3d 1137, 1138 (6th Cir. 1997).
46. *In re Penn Central Transp.*, 486 F.2d at 524. *See also In re Ann Arbor Railroad Co.*, 623 F2d 480, 482 (6th Cir. 1980) and *Missouri Pacific Railroad co. v. Escanaba & Lake Superior Railroad Co.*, 897 F2d 210 (6th Cir. 1990).
47. 997 F.2d 1039 (3rd Cir. 1993).
48. *Id.* at 1056.
49. 403 F.3d 807 (6th Cir. 2005).
50. *Id.* at 810.
51. *Id.* at 812.

52. *See, e.g., In re Jevic Holding Corp.*, 432 B.R. 162, 167-169 (Bankr. D. Del Jul. 14, 2010).
53. *See also Summit Financial Resources L.P. v. Big Dog Enterprises Logistics, LLC,* 2009 WL 901159 at *8 (S.D. Ill. Apr. 1, 2009) (The Broker/Carrier Agreement between one motor carrier and the debtor broker created an express trust as to freight charges due the carrier, however, where four other carriers did not have agreements establishing an express trust, evidence as to payment practices and conduct of the parties was insufficient to demonstrate an intent that the monies were to be held in trust and genuine issues of material fact existed with respect to whether a trust should be imposed, precluding summary judgment in favor of the carriers).
54. *Parker Motor Freight v. Fifth Third Bank,* 116 F3d 1137, 1140 (6th Cir. 1997) (Holding, in a case of first impression, that the federal common law trust principles recognized in *In re Penn Central, In re Columbia Gas System* and *In re Ann Arbor Railroad* applied to motor carriers).
55. 2000 WL 33399885 (D. S.C. Sept. 7, 2000).
56. *Id.* at *4.
57. *Id.* at *5.
58. *Id.* at *5-6.
59. *See Delta Pride Catfish, Inc. v. Marine Midland Business Loans, Inc.,* 767 F. Supp 951, 955, 960-961 (E.D. Ark. 1991) (where the broker paid the carriers before receiving payment from the shippers, benefiting the carriers who got their money up front rather than waiting until the shipper paid the broker, and the broker bore the risk of the shipper default, the funds were not held in trust).
60. *Id.* at *5-6.
61. R.S.C. 1985, c. B-5.
62. I do not purport to offer hard rules as to when one body of law will apply as opposed to the other from a Canadian 'conflicts of law' perspective. The rules on point, and judicial treatment continue to evolve. One always has to look for a master transportation agreement and a 'choice of law' and a 'jurisdiction clause' which may dispose of the questions of what law governs, and where the dispute is to be adjudicated. As one example how rules and presumptions as to the 'governing law' change, one leading Canadian author suggests that that when a contract of carriage is concluded by telephone, it may be presumed to be governed by the law of the jurisdiction where the carrier who issued a freight quotation is based. See: *Motor Carrier Cargo Claims*, 5th ed., John McNeil, 2007 at p. 258
63. For example, as an indication in this regard, the parties might have employed the Canadian form of "uniform bill of lading" citing the application of Canadian regulation governing carrier liability.
64. 2007 Q.C.C.A. 1364 (Can. LII).
65. [2009] F.C. 727 (It should be noted that this is a trial level decision, being of 'persuasive' but not 'binding' precedent effect on the trial level courts elsewhere in Canada).
66. [2011] ONSC 2871 (CanLII).
67. The province of Ontario imposes a trust fund obligation on freight intermediaries receiving money from shippers being freight payments intended for carriers: *Highway Traffic Act,* R.S.O. 1990 c. H.8 s. 191.0.1(3).
68. *Canadian Pacific Ships v. Industries Lyon Corduroys Ltee.* [1983] 1 F.C. 736 at 738.