

Canadian Law Update: You've paid your customer's cargo claim. will you be able to recover from the responsible carrier?

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The recent case of the Ontario Superior Court in *Conrad Refrigerated Trucking Inc. v. Etlas Freight* (2023 ONSC 5433) is a cautionary tale reminding freight brokers in Canada to "not be so fast" paying a customer's claim for cargo loss or damage. While the case involves Canadian facts and laws, there may well be important takeaways for freight brokers in the United States.

Introduction

You're a freight broker. A customer tenders a load to you to arrange a third party motor carrier to carry its goods. The goods are lost or damaged in transit. Commercial considerations may motivate you pay the claim, with the intention being that in turn you look to the responsible carrier to make you "whole". Is this a safe and a reliable strategy? Absent a contractual duty to compensate your customer the answer is that *"it depends"*.

Prior to the discussion that follows on the above, it should be noted that this decision also raises – at least for Canadian legal precedent purposes – a potential qualification on the freight broker's ability to rely on a "Carrier Confirmation Sheet" (or other similar dispatch document) to *introduce* terms of carriage intended to be binding on the carrier: will terms sent to a carrier *after* the agreement has been made on the freight rate and the key service terms actually be enforceable on the carrier?

The Facts

1. Conrad Refrigerated Trucking ("CRT") acted as a load broker and agent for Goodmark Poultry (Toronto) Inc. ("Goodmark").
2. Goodmark needed to import approximately 40,000 pounds of frozen chicken from Sanderson Farms in Hammond, Louisiana, U.S.A. The importation of frozen chicken into Canada is regulated in accordance with *Canada's Export and Import Permits Act*, RSC 1985, c E-19 ("EIPA") and subject to a quota, which allows for the goods to be imported without payment of a duty which would otherwise be required.
3. Goodmark engaged CRT to make the necessary transportation arrangements with a third party carrier. This engagement of CRT did not include a contract term holding CRT liable for cargo loss or damage.
4. CRT in turn contracted with Etlas Freight ("Etlas") for the transportation of the frozen chicken from Louisiana to Goodmark's facilities in Canada. There was no written broker-carrier agreement between CRT and Etlas. Their business dealings were arranged on a "one off by one off" or shipment by shipment arrangement. Consistent with this arrangement, after a match was made on "Loadlink", a phone discussion took place between representatives of CRT and Etlas. A verbal agreement was then made, concerning the freight rate, point of origin, destination, commodity of the freight as well as a pickup number that Etlas was to provide to the shipper at the point of origin.
5. CRT then later e-mailed a Carrier Confirmation Sheet to Etlas. The Carrier Confirmation Sheet ("Confirmation Sheet") set out that Etlas would be fully responsible for any claims including theft of the goods. It also made it clear that Etlas would be fully responsible for all "quota costs" in the event that the load was stolen upon arrival into Canada.

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6. The key portions of the Confirmation sheet, as far as the lawsuit was concerned, were as follows:

IF SHIPMENT IS STOLEN UPON ARRIVAL INTO CANADA YOU WILL BE FULLY RESPONSIBLE FOR ALL QUOTA COSTS OF BRINGING THE PRODUCT INTO CANADA

Acceptance of this order is a binding contract. The carrier accepts full responsibility for any claims relating to theft, damaged goods, late delivery.

...

I HAVE READ AND AGREE TO THE ABOVE INSTRUCTIONS SIGNED:

7. The above noted terms were not discussed during the above noted conversation between Etlas and CRT. Moreover, the body of the e-mail did not indicate that additional terms beyond those discussed on the phone call were included in the confirmation sheet.
8. The Carrier Confirmation Sheet was not signed and returned by Etlas to CRT.
9. Etlas picked up the shipment from its point of origin in the U.S.A. and transported it into Canada.
10. Once in Canada, Etlas' driver left the truck and trailer that contained the frozen chicken unattended, and the truck, trailer and its contents were stolen. While the truck and trailer were both recovered, the frozen chicken was not.
11. Because the frozen chicken was imported into Canada, Goodmark's quota proportionate to the amount of product imported was consumed.
12. CRT paid Goodmark an amount of money that reflected Goodmark's claimed loss for the stolen product and the ensuing loss of related quota. This payment was made, in the words of the President of CRT, "to make a good customer happy". CRT did not take a legal "assignment" of Goodmark's claim for its loss.

The Court Action

CRT sued Etlas to recover its payment to Goodmark. CRT then brought a motion for summary judgment in the action, seeking an order that Etlas not only pay for the stolen frozen chicken but also for Goodmark's lost quota. Etlas denied liability to CRT, taking the position on the court application that CRT had no standing to sue.

CRT argued that once Etlas accepted the order to pick up and transport the load in question, it accepted the terms set out in the confirmation sheet. Accordingly, CRT asserted that Etlas had to pay the value of the loss.

Etlas in turn argued the following:

1. It did not dispute that it was the carrier responsible for picking up and transporting the load from Louisiana U.S.A. to Goodmark's facility in Canada. It also did not dispute that upon arrival into Canada, Etlas' driver left the load unattended for a period of time and that during that period, the load was stolen.
2. Etlas however argued that CRT was acting only as an *agent* in introducing Goodmark to Etlas, which resulted in a contract of carriage being made between *Goodmark and Etlas*. Accordingly, CRT was not a party to that contract and CRT was seeking to be indemnified for losses that were not sustained by it but rather by Goodmark, without CRT having taken any steps to obtain an assignment of Goodmark's right to sue.
3. Etlas also argued that CRT's payment to Goodmark for the loss of product and quota was as a volunteer, motivated by wanting to "keep a good customer content". Etlas raised the fact that CRT did not have a contractual legal obligation to compensate Goodmark for the losses.

The Result

The Court found that CRT made its payment to Goodmark as a volunteer, CRT having acted only as an agent in the equation. Not having taken an assignment from Goodmark, and there having been no contractual obligation for CRT to have made the payment, the Court found that CRT lacked the necessary "standing" to advance the claim. Accordingly, CRT lost its motion for summary judgment, and Etlas was successful in its bid to have the case dismissed.

As mentioned above, there is a further takeaway, relating to the use and application of the Carrier Confirmation Sheet. The Court also ruled that while there was no doubt that Etlas accepted the mandate to transport and had transported the shipment in question, it could not find that Etlas had agreed to the above noted terms in the Carrier Confirmation Sheet, as evidenced by the lack of signature. The Court noted that if CRT wished to rely on the Confirmation Sheet that did more than merely *confirm* the agreement (already made over the telephone), but rather unilaterally include additional and significant terms, then CRT ought to have insisted on a signature as evidence of acceptance. In this regard the judge also noted that the e-mail forwarding the confirmation sheet did not alert anyone to the added terms. In that same e-mail, there was not so much as a request that it be returned with a signature.

Accordingly, the judge found that the only time that there was a clear agreement between CRT and Etlas was during the telephone conversation as concerned the terms then discussed. In light of the above finding that CRT lacked standing to advance the action, the Court's analysis as to the lack of enforceability of the terms

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first introduced in the Carrier Confirmation were thus academic. This said, at least for purposes of contracts governed by Canadian law this additional analysis may potentially have far reaching implications. As noted by the judge, the Supreme Court of Canada in the case of *Bhasin v Hrynew*, [2014] 3 S.C.R. 494 emphasized the importance of candour and forthrightness in contractual dealings. This duty pertains to the duty for parties to a contract to act "honestly and in good faith" in the their performance of a contract. The judge applied this reasoning. To quote the judge, "...had CRT been clear and forthright with Etas at the time the contract was formed on the phone, and advised Etas of what was later added to the Carrier Confirmation Sheet, the present difficulties may have been avoided". The takeaway here is that beyond the factual question as to whether the terms in a carrier confirmation or similar carrier dispatch sheet are enforceable as a matter of contract (were they sufficiently incorporated into the contract?) it may now be suggested that as a matter of the required good faith dealing between freight brokers and carriers, that the former should somehow introduce the terms to be included in a subsequently published confirmation sheet at the outset, putting the carrier on fair notice of same. Otherwise, the broker should obtain evidence that the carrier accepted the "later imposition" of same by its signature.

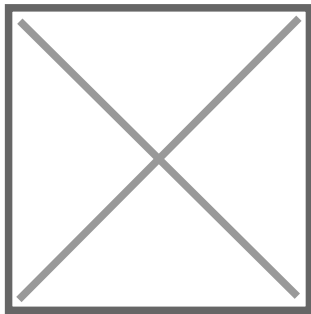
Conclusion

In Canada – and it may be a recommended practice in the United States (I will defer to my American attorney colleagues) – freight brokers should give consideration to the two key takeaways from this case:

1. Absent a contractual obligation to pay a cargo claim to a shipper as a means to acquire standing to sue, the broker should consider taking an assignment of rights from its indemnified customer so as to be able to claim against the carrier.
2. In a given fact situation a carrier may assert that it is not bound by the terms of a carrier confirmation sheet which were not earlier introduced into the contract formation. Accordingly, a freight broker should consider an approach where the carrier is either timely advised of same or the carrier is required to confirm its agreement to the new terms by a signature on the carrier confirmation sheet.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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