

TRANSPORTATION & LOGISTICS GROUP NEWSLETTER

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In the May issue:

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Truck Trailer Liability: A Cautionary Tale – Nuclear and Thermonuclear Verdicts

By Rui M. Fernandes

Page 2

Geographical Deviation Does Not Defeat the One Year Time Bar in the Hague-Visby Rules

By Rui M. Fernandes

Page 4

Freight Brokers Take Note: Pending Amendments to the Freight Broker Regulations in the United States

By M. Gordon Hearn

Page 6

Federal Court of Appeal Finds Facebook (Meta) in Breach of PIPEDA

By Jamal Rehman

Page 10

The Trump Administration and FMSCA Increase Enforcement of English Proficiency Requirements for Commercial Motor Vehicle Drivers

By Tyler O'Henly

Page 12

Truck Trailer Liability: A Cautionary Tale – Nuclear and Thermonuclear Verdicts

By Rui M. Fernandes

Canadian trucking companies operating in the United States should take note of the most recent U.S. court decision awarding \$462 million to the families of two men for their deaths when they crashed into the back of a trailer.

In *Perkins et. al. v. Wabash National Corp.*¹ a St. Louis jury awarded \$6 million each in compensatory damages to the families of decedents Taron Tailor and Nicholas Perkins, who died in 2019 when their Volkswagen sedan slammed into the back of a trailer manufactured by Wabash National and slid underneath the trailer. An additional \$450 million was awarded in punitive damages. The claimants' lawsuit accused Wabash of using a rear impact guard they knew to provide inadequate protection against so-called "underride impacts." The company maintained they complied with federal safety standards, and that the crash occurred at a speed impossible for the men in the car to survive. The case is expected to be appealed.

The claimants' legal team argued that Wabash never performed effective crash testing on the two-post guard despite using it for nearly 30 years, and despite evidence from other similar accidents, that they posed a serious safety risk. They also argued that a 1998 federal safety standard for rear impact guards did not go far enough and its limitations were known to manufacturers. Some manufacturers had upgraded to a more modern four-post design.

The Wabash defence team stressed, with support from expert testimony, that the accident which occurred at 55 miles per hour would have resulted in fatalities even if the rig employed the most modern four-post rear impact guards. The defense team placed the blame squarely on the driver, who they said, "drove into the back of a trailer in broad daylight" on a clear sunny day. They argued that the human body cannot survive a deceleration from 55 miles per hour to zero "in the same amount of time it takes you to blink your eyes."

This "thermonuclear verdict" highlights three important considerations:

- a) Canadian trucking companies and equipment manufacturers must be adequately insured², have proper safety policies in place, and be properly set up corporately to withstand such a verdict³;
- b) "Nuclear" and "thermonuclear verdicts" are on the rise in the U.S. and claimants' counsel are targeting the trucking industry; and
- c) Trailer operations can give rise to liability for operators, manufacturers, shippers and lenders.

In the U.S. legal context, "thermonuclear verdicts" refer to jury awards exceeding \$100 million, while "nuclear verdicts" are those exceeding \$10 million, and these large verdicts are increasing in both size and frequency, impacting the trucking and insurance industries.

In 2023, the number of nuclear verdicts against companies increased by 27% compared to 2022, and thermonuclear verdicts jumped by 35%.⁴ In 2023, there were 27 verdicts of more than \$100 million.⁵

¹ Released September 5th, 2024 case number 2022-CC00495 in Missouri's 22nd Circuit Court in the City of St. Louis.

² Although getting sufficient insurance may be impossible.

³ This requires isolating the U.S. business from Canadian business and assets.

⁴ [Nuclear Verdicts Drive Rising US Liability Claims - Risk & Insurance : Risk & Insurance](#)

⁵ [Nuclear verdicts are on the rise: How can you minimize your risks? | Marsh](#)

In any truck accident investigation, it is important to evaluate the condition of both the cab and the trailer, as well as the load that the rig was hauling. Multiple parties may be at fault in a tractor trailer accident claim including:

1. The Truck Driver

The driver can cause the trailer to operate independently of the truck, and includes jackknife accidents, wide turn accidents, rollover accidents and override accidents (when the truck driver fails to see another vehicle in the blind spots on the side of the rig. The trailer may collide with the top of a smaller vehicle which becomes trapped underneath the trailer.

The driver must also inspect the trailer over the course of the transit. These include the brakes, tires and coupling devices.

2. The Trucking Company

All motor carriers are responsible for the systematic inspection, repair, and maintenance of the equipment they operate. If the company owns the trailer, it is responsible to perform these duties. If the trailer is owned by a third party, the trucking company must ensure that the owner has carried out those duties. It must also have policies in place with respect to the duties of the driver. These policies should include random inspections, audit of driver records and enforcement, especially after accidents. The company should also consider upgrading equipment (such as rear guards), if there is evidence that accidents related to that part have occurred.

3. Trailer Manufacturer

Motor vehicle equipment manufacturers must comply with legislation that deals with registration and safety standard certification. Manufacturers

must consider whether compliance with the minimum statutory requirements is sufficient. Best practices may require the manufacturer to exceed those standards.

4. Equipment Lessors

Large trailer leasing companies often lease trailers to operating motor carriers. A trailer leasing agreement establishes key points such as which party is responsible for maintenance and insurance of the trailer. A lease agreement that is too specific on the duties may attract liability. A lease agreement that has minimal requirements may also attract liability to the lessor.

5. The Shipper

The company that loads a trailer has a duty to ensure that the cargo is properly positioned and secured on or within the trailer. Improperly loaded or improperly secured cargo can result in rollover accidents⁶, jackknife accidents, cargo spill accidents, tire blowout accidents and brake failure accidents.

6. Interchange Situations

A motor carrier that receives a trailer of cargo from another motor carrier (by interchanging the trailer on a through bill of lading) is also at risk. Many carriers accepting such trailers will do so utilizing an interchange agreement. The agreement will set out when, where, and how possession and use of the trailer transfers and the responsibilities that follow for damage, vehicle accidents and cargo loss or damage.

Motor carriers should ensure that, at a minimum, they carry liability coverage for the trailer, if the trailer causes damage or injury to someone else.

⁶ The shipper is the party most knowledgeable about the center of gravity of the load.

At a minimum, such coverage will at least pay for the costs of defending an action.

Thermonuclear verdicts are here. If operating in the U.S., all parties involved in the transportation of goods must be aware of the risks and take appropriate actions to protect themselves.

It will be interesting to see what the appeals court does in the *Wabash* case.

Geographical Deviation Does Not Defeat the One Year Time Bar in the Hague-Visby Rules

By Rui M. Fernandes

In *ETG Commodities Inc. v. Hapag-Lloyd (Canada) Inc.*, [2025 FC 474](#), the Federal Court of Canada had to consider two issues:

- a) Did a geographical deviation defeat the one-year time bar in the Hague-Visby Rules; and
- b) Was the agent of a carrier entitled to the protection of the terms of the bill of lading issued by the carrier.

ETG Commodities Inc. (“ETG”) sold a cargo of lentils in a number of containers to a buyer in Kolkata, India. It arranged the shipment with the ocean carrier, Hapag Lloyd Akitengesellschaft (“Hapag Lloyd Lines”) through Hapag Lloyd lines’ agent Hapag-Lloyd (Canada) Inc. (“Hapag Canada”).

The port of discharge was subsequently changed to Karachi, Pakistan on agreement, as the transaction with the initial buyer in India fell through. ETG found a new buyer in Pakistan.

The cargo arrived in Kolkata, India on September

24, 2020, and was not delivered to Karachi, Pakistan, the final port of discharge. At the hearing, the representative of Hapag Canada testified by affidavit that the cargo could not be reloaded for carriage to Karachi, due to the failure of ETG or its customers to comply with documentary requirements made by the Indian customs authorities. ETG alleged that as a result of non-delivery it lost the sale of the cargo. ETG’s new buyer terminated the contract of purchase on April 27, 2021.

ETG filed a statement of claim on August 24, 2022.

Hapag Canada brought a summary judgment application in the Federal Court on the basis that the claim was time barred as the action was commenced more than one year after the cargo should have been delivered.

The bills of lading identified Hapag-Lloyd Lines as the carrier and Hapag Canada as the agent (pursuant to a booking confirmation).

Hapag Canada relied on clause 6 of the bills of lading which provided a one-year time limit for commencement of an action.

Hapag Canada also relied on the [Marine Liability Act, S.C. 2001, c. 6](#) which incorporates the Hague-Visby Rules as Schedule III. Article III (6) of those Rules imposes a one-year time limit for the commencement of an action as follows:

Subject to paragraph *6bis* the carrier and the ship shall **in any event** be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen. [Emphasis added]

Hapag Canada also pled that it was an agent of the carrier, and that Hapag Lloyd Lines should

have been a party to the action. Further, Article IV bis (2) provides that all defences under the Rules apply to the servants and agents of the carrier:

2 If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

ETG argued that the geographical deviation (the goods being delivered to Kolkata rather than to Karachi) amounted to a breach of contract, resulting in a repudiation of the contract, such that it was not bound by the time bar relating to the commencement of the action.

Hapag Canada argued that two UK decisions were instructive and should be followed. In *Parsons Corporation and Others v. C.V. Scheepvaartonderneming ("The Happy Ranger")* [2002] 2 Lloyd's Reports 357 (EWCA, Civ.) the England and Wales Court of Appeal interpreted the words "in any event" found in Article III (6) of the Hague-Visby Rules to "mean what they say. They are unlimited in scope, and I can see no reason for giving them anything other than their natural meaning."

With respect to the second decision, *Fimbank Plc v. KVH Shipping Co Ltd*, [2024] UKSC 38, Hapag Canada argued that the Supreme Court of the United Kingdom found the language of Article III (6) of the Hague Visby Rules was clear and that the one-year time limitation to commence an action for non-delivery of goods applies "no matter the extent of or type of breach of contract or tort". It further submitted that no exception was made for cases involving geographic deviations.

Hapag Canada also relied on Clause 4 of the bills of lading and that as an agent of the carrier

it was entitled to the "forbearance of suit" clause which provides:

4. Sub-Contracting and Indemnity

(1) Carrier shall be entitled to sub-contract on any terms whatsoever the whole or any part of the Carriage, including but not limited to loading, unloading, storing and warehousing.

(2) Merchant hereby agrees that no Servants or Agents are or shall be deemed to be liable with respect to the Goods or the Carriage as Carrier, bailee or otherwise, and agrees not to file any claim against any Servant or Agent seeking to impose liability in connection with the Carriage. If any claim is made against any of the Servants or Agents, Merchant shall indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, all rights, exemptions, defenses, and limitations of and exoneration from liability provided by law or by these Terms and Conditions, including the jurisdiction clause, shall be available to every Servant or Agent and Vessel which shall be entitled to enforce same against Merchant.

(3) The provisions of Clause 4(2) shall extend to claims of whatsoever nature against other persons chartering space on the carrying Vessel.

In dealing with the time bar issue, the Court recognized that the estimated sailing time between Kolkata, India and Karachi, Pakistan was 26 days. The cargo should have arrived on or about 26 days after September 24, 2020.

The Court found that the action was time-barred. At issue was whether the time bar was defeated by the geographic deviation from Karachi to Kolkata. The Court found that there was a geographical deviation. The question was then the legal effect of that deviation upon the time bar defence.

The Court noted that geographic deviation as a defence has not been definitively recognized in Canada. It noted “No Canadian court has recognized geographic deviation as a defence to a time limitation in respect of a contract of carriage by water.”

The Court found that the one-year time limitation set out in Article III, Rule 6 of the Hague-Visby Rules is to be interpreted broadly and applied generally. The Court found that “[i]n my opinion, the geographic deviation here falls within the meaning of the words ‘in any event’. The geographic deviation does not defeat the time bar limitation raised by [Hapag Canada].”

The Court then dealt with the agency issue. The Court found that:

[107] The forbearance of suit clause is clear. It is not uncommon. This Court and the Federal Court of Appeal have upheld such clauses. I see no reason to depart from the jurisprudence of this Court concerning such clauses.

[108] The named Defendant [Hapag Canada] is an agent of [Hapag Lloyd lines]. I agree with the submissions of the Defendant that in these circumstances, Hapag-Lloyd (Canada) Inc. is protected against suit.

The summary judgment was granted and ETG’s action was dismissed with costs to Hapag Canada.

Freight Brokers Take Note: Pending Amendments to the Freight Broker Regulations in the United States

By M. Gordon Hearn

Introduction

Canadian freight brokers who arrange the carriage of goods over United States routes have long been advised to comply with American laws. Some time ago, the United States Congress enacted the “[Moving Ahead for Progress in the 21st Century Act](#)” (known as “MAP-21”) which imposes requirements for freight brokers to hold an authority from the Federal Motor Carrier Safety Administration (the “FMCSA”) and to obtain and maintain a surety bond for U.S. \$75,000.

On November 28, 2013, the Canadian Trucking Alliance (the “CTA”) 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 who broker shipments between the United States and Canada. Would an entity domiciled in Canada brokering cross-border or interstate freight require the MAP-21 authority and surety bond?

The CTA thereafter announced on April 9, 2014 that it had received confirmation from counsel for the FMCSA that motor carriers who engage in the brokering of freight between the United States and Canada were in fact required to comply with the MAP-21 requirements. (Note that there is an “interline” exception to the MAP-21 requirements: a motor carrier engaging the services of an interline motor carrier partner to perform a portion of the former’s bill of lading scope of carriage mandate is not considered to be a brokering exercise so as to invoke the application of MAP-21).

The considered “best practice” has been for Canadian domiciled motor carriers and freight brokers who tender cross-border freight to third party motor carriers to comply with the MAP-21 requirements. Compliance would avoid regulatory infraction proceedings and could be marketed as a “value add” or a selling feature for freight brokers to advertise to potential or existing

shipping customers as well as motor carriers. It would then follow that entities brokering cross border freight will need to take note and be current with certain pending amendments to other current freight broker regulations in the United States.

Pending Changes to the “*Transparency in Broker Transactions*” Regulations in the United States - 49 CFR 371.3 “*Records to be Kept by Brokers*”

The FMCSA has proposed amendments to its freight broker rules in response to petitions from the Owner-Operator Independent Drivers Association (the “OOIDA”) and the Small Business in Transportation Coalition (the “SBTC”).

Brokers are regulated by United States Regulation [49 CFR 371](#). Under this Regulation, the motor carrier who receives brokered freight for carriage has the right to review the referring broker’s record of the transaction, which stakeholders often refer to as “broker transparency”.

The existing broker transparency requirements in the above Regulation came about as a result of the concern that while brokers provide a service in matching motor carriers with shippers (which benefits carriers) that there could be an “asymmetry” of information between the parties which could “affect the contracting process by limiting parties’ ability to negotiate for their desired terms”. These risks could lead to market inefficiencies, such as decreased freight capacity or decreased market competition, which could arise when parties lack material information about the transaction. Accordingly, the FMCSA has attempted to address these concerns by requiring freight brokers to keep certain records of their transactions and to make them available to motor carriers and shippers involved in those transactions. Making the records available to the transacting parties – “broker transparency” – is meant to inform business decisions and enable

self-policing of abuses that may arise. Examples of situations calling for better broker transparency concern the practice of brokers assessing “charge backs” to carriers, or charging “accessorial fees” and “surcharges” to their shipper customers.

There have been concerns expressed in cases where a carrier has delivered a load, obtained a clean bill of lading from the consignee and then received a claim or a “charge back” on the load from the broker despite the clean bill of lading. Motor carriers often contend that these claims lack sufficient explanation or description of the reason for the charge back and they often find it difficult to contest them, particularly when the payment for the freight charge is withheld pending resolution of the claim.

Concerns have also been expressed with detention charges and fuel charges, where the rates and conditions of the fees that brokers charge shippers are different than the rates and conditions of payment remitted to the carrier, despite the fees being premised on the carrier’s operating costs. As an example, fees for detention time are premised on the operating costs of keeping a truck idle while waiting to load or unload, including a driver’s time. Brokers have been known to charge the shipper for detention time at higher rates than they have had to pay to the carrier. Similar concerns have been raised concerning a motor carrier’s fuel surcharges.

The “Proposed Rule”

In light of the foregoing, the FMCSA has published a “Proposed Rule” Amendment to Regulation 371. While said to be responsive to the petitions received to better enforce the broker transparency requirement, the proposed provisions differ from those requested by the OOIDA and the SBTC. The Proposed Rule would revise the regulatory language to make clear that

brokers have a regulatory obligation to provide transaction records to the transacting parties on request. The Proposed Rule would also make changes to the format and content of the records and to better tailor the required contents of the records for the purpose of broker transparency.

The Proposed Rule amendments involve the following four elements:

1. The first proposed provision would require freight brokers to keep their records in an electronic format. The goal is to make their records more accessible to motor carriers and shippers on request – as opposed to the current practice where records might only be made physically available at a broker’s business address.
2. The second proposed provision would modernize and tailor the required contents of the records to better achieve broker transparency. The current requirement distinguishes between brokerage and non-brokerage services, which is rooted in a previous regulatory approach. The FMCSA proposes eliminating this distinction, instead requiring that the records contain, for each shipment in the transaction, all charges and payments connected to the shipment, including a description, amount and date. This is substantially similar to the current requirement but removes the outdated distinction. The record would also be required to include any claims connected to the shipment, such as a shipper’s claims for damage or delay. This amendment would ensure that the parties have full visibility into the payments, fees and charges associated with the transaction so they can resolve issues and disputes among themselves without resorting to costlier remedies.
3. The third proposed provision would clarify

the obligation imposed on brokers to respond to requests for transaction records and the process parties must follow when requesting and supplying such records. The current regulation frames the broker transparency requirement as a right, given to the transacting parties to review records. The proposed amendment would reframe broker transparency as a regulatory duty imposed on brokers to provide records to the transacting parties.

4. The fourth proposed provision would require brokers to provide the records (that are required to be maintained) within 48 hours of when a party to the transaction requests those records. This provision is intended to ensure that the requesting party receives the records in a timely manner and to support the resolution of issues around service or payment.

Can the Parties to a Transaction Waive the Broker’s Record Keeping and Transparency Requirements by a Term in a Broker-Carrier Contract?

Parties who broker freight may wish to contract out of a transparency requirement. The broker may not want a carrier to learn what the broker’s “mark up” or profit margin is between the carrier’s freight charge and the amount invoiced by the broker to the shipper. This information in the hands of the carrier may pose a “moral hazard” in terms of being an inducement to the carrier seeking to directly solicit future business from the broker’s shipper customer. No doubt this places a premium on the insertion of enforceable “confidentiality of information” clauses and language prohibiting a carrier from “back soliciting” shippers directly for business.

Contracts between brokers and carriers frequently contain a waiver of this right, using language such as:

Free and Voluntary Waiver of § 371.3(c); Inspection Rights. CARRIER hereby freely and voluntarily waives its rights to inspection of broker records, found under Federal Statute section 371.3 subsection (c). CARRIER hereby acknowledges that the waiver of its inspection rights is free and voluntary, was not coerced in any manner, and is not a requirement or precondition to doing business with BROKER. BROKER acknowledges that CARRIER entering this waiver of its rights under section 371.3(c) is not a precondition or requirement to doing business.

There is an argument that a contractual waiver in the nature of the foregoing is invalid and unenforceable. The Regulation does not include language permitting waiver by an agreement between the transacting parties and, moreover, FMCSA “guidance” suggests that attempts to contract around the Regulation would be considered invalid.

However, the Transportation Intermediaries Association (the “TIA”), on behalf of the brokerage industry, has submitted that it is in fact legal for brokers to contract out of Regulation 371.3. This position is based on somewhat intricate arguments that, with regulatory deregulation over recent years, “freedom of contract” should, and in fact does, remain for the transacting parties to contract freely on point. The TIA has expressed concern that the current regime presents actual or potential “regulatory overreach” over the brokerage profession.

The OOIDA requested that, in formulating the Proposed Rule, the FMCSA explicitly prohibit brokers from including any provision in their contracts requiring a motor carrier to waive its rights to access the transaction records. For its part, the SBTC requested the FMCSA to prohibit brokers from coercing or requiring parties to

broker’s transactions to waive their right to review the record of a transaction as a condition of doing business and to prohibit the use of clauses in the nature of the above example language.

This issue was not addressed by the FMCSA in the Proposed Rule. It appears that while, on the one hand, the FMCSA clearly desires that the “contracting playing field” be made more even for the transacting parties, on the other hand, it is not unaware of the compelling business interests in protecting proprietary and commercial information. It has been noted that the existing Regulation and the Proposed Rule do not require public disclosure of broker pricing or other records. Regulation 371.3 does not require the broker to disclose to the carrier *all* details of the transaction, but rather only the transaction specific details listed in 371.3(a):

§ 371.3 Records to be kept by brokers.

(a) A broker shall keep a record of each transaction. For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record shall show:

- (1) The name and address of the consignor;
- (2) The name, address, and registration number of the originating motor carrier
- (3) The bill of lading or freight bill number;
- (4) The amount of compensation received by the broker for the brokerage service performed and the name of the payer;
- (5) A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of

compensation received for the service, and the name of the payer; and

(6) The amount of any freight charges collected by the broker and the date of payment to the carrier.

(b) Brokers shall keep the records required by this section for a period of three years.

(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.

Above all, it is fair to say that the “jury is still out” on the issue as to whether a freight broker can “contract out” of the above record keeping and transparency requirements.

Status of the Proposed Rule

The time period for stakeholder submissions has now closed and we await word as to what extent the Proposed Rule will be adopted into law in the United States. In the meantime, freight brokers must continue to be duly diligent with regulatory compliance and in negotiating their contract terms with their shipper customers and the motor carriers to whom they broker freight.

Federal Court of Appeal Finds Facebook (Meta) in Breach of PIPEDA

By Jamal Rehman

The Federal Court of Appeal (“FCA”) released a landmark ruling on September 9, 2024 in its decision of *Privacy Commissioner of Canada v. Facebook, Inc.*, [2024 FCA 140](#).

In its decision, the FCA found that Facebook, Inc. (now, Meta Platforms, Inc.) breached its obligations under the federal [Personal Information Protection and Electronic Documents Act](#) (“PIPEDA”) when it was found to have shared user data with third-party applications hosted on its platform.

The complaint was initially investigated by the Office of the Privacy Commissioner of Canada (“OPC”) with respect to allegations that Facebook provided user data to third-party application, TYDL. TYDL, in turn, was found to have sold the said data to Cambridge Analytica, a company widely and infamously known for engaging in targeted political advertising directed at users of the Facebook platform, with a view of manipulating and influencing users’ votes during the lead up to the 2016 United States Presidential Election.

At the close of their investigation, the OPC found that Facebook was in breach of PIPEDA on two principal grounds:

1. TYDL did not receive meaningful consent from Facebook users with respect to the disclosure of their information to third party applications, such as Cambridge Analytica; and
2. Facebook failed to ensure that the user data was properly safeguarded.

Accordingly, the OPC filed a Notice of Application in Federal Court, where it sought an Order requiring that Facebook modify its policies and practices concerning the collection and use of personal information so as to bring the company into substantial compliance with PIPEDA, specifically on the issues raised above.

Lower Court Decision

In 2023, the Federal Court ruled in favour of Facebook and dismissed the OPC’s application.

In its reasons, the Federal Court held that the OPC failed to meet its burden of proof on both of the above-listed points.

With respect to the allegation that Facebook failed to obtain “meaningful consent” from its users, the Federal Court held that a so-called “evidentiary vacuum” proved fatal to the OPC’s case. More particularly, the Court found that the OPC failed to properly compel the production of evidence from Facebook via the appropriate channel being section 12.1 of PIPEDA. Moreover, the Court held that the OPC failed to tender any expert evidence in respect of what Facebook could have done differently in the specific circumstance.

Absent the requisite subjective and expert evidence, the Court found that the claims of the OPC were meritless speculations.

In dealing with the secondary allegation that Facebook failed to safeguard user data, the Court held that a data breach did not in and of itself equate to inadequate safeguards. The Court further held that any safeguarding obligations that did belong to Facebook would be ceased upon the disclosure of data to third-party applications.

Ultimately, in the absence of the OPC meeting its evidentiary burden, the Court was unable to conclude that Facebook’s contractual agreements and privacy policies failed to provide adequate protections for data belonging to its users.

Federal Court of Appeal

The Federal Court of Appeal reversed the decision of its lower court.

In its reasons, the FCA determined that Facebook failed to obtain “meaningful consent” from its users whose data and information had been shared with TYDL and subsequently

Cambridge Analytica. The FCA also rejected the lower court’s requirement for subjective and expert evidence as it related to the analysis and determination of whether meaningful consent had been obtained. The FCA held that the standard as it relates to the obtaining of meaningful consent is that of a reasonable person, so as to be consistent with the pith and substance of PIPEDA as a whole.

As the preeminent piece of Canadian private sector privacy legislation, PIPEDA requires organizations to obtain “meaningful consent” from individuals before the organization can collect, use, or disclose said information. Consent, here, is construed against an objective standard, and is only considered to be valid if it can be said that a “reasonable person” would understand the nature, purpose, and consequences of the use and/or disclosure of their personal information.

The Federal Court of Appeal also found that the safeguarding of data requirement as set out in clause 4.7 of PIPEDA was similarly breached by Facebook. The Court acknowledged that organizational compliance with PIPEDA did not offer absolute immunity against data breaches, but clarified that the cause of the subject breach was more related to policy and user design decisions made by the company. In this instance, Facebook was found to have violated its obligation to safeguard its users’ data by inviting users to their platform and subsequently failing to supervise the users’ compliance with the terms and conditions of third-party applications like TYDL - who also used their platform.

Facebook countered this specific charge by arguing that it would be nearly impossible to review and approve the privacy policies of all third-party applications which were hosted on its platform. The Court did not

grant much weight to this contention, and ruled that an organization like Facebook could not avoid its various statutory responsibilities under PIPEDA by claiming that they had too many platformed third-party applications to review and manage. The Court rejected Facebook's contention, i.e. difficulty in respect of compliance does not extinguish organizational compliance requirements insofar as PIPEDA is concerned.

Key Takeaways

This decision stands for the proposition that private sector organizations will not be able to rely on their privacy statements alone to establish meaningful consent and that contractual provisions as set out in privacy policies alone are not sufficient to ensure safeguarding of personal information.

Organizations would be well advised to analyze this decision and make a more concerted effort to conduct routine privacy audits, simplify their privacy policies so as to make them more accessible and therefore digestible to ordinary users (i.e., avoid "legalese" and use plain language), and where possible, implement third-party oversight mechanisms specifically with respect to safeguarding user data.

Lastly, the Federal Court of Appeal warned that consent under PIPEDA ought to be obtained via an "active process" and not be obtained by default via default privacy settings. Organizations would be wise to implement settings which avoid the assumption of consent for data sharing and instead create a positive obligation on the part of the user - otherwise known as an "opt-in" method - to affirm their consent for data sharing.

The Trump Administration and FMCSA Increase Enforcement of English Proficiency Requirements for Commercial Motor Vehicle Drivers

By Tyler O'Henly

The New (Old) Law

On April 28, 2025, U.S. President Donald J. Trump issued an Executive Order entitled "[Enforcing Commonsense Rules of the Road for America's Truck Drivers](#)." The stated purpose of this Executive Order is to improve the safety, reliability and efficiency of America's motor carrier industry, by emphasizing and enforcing existing Federal regulations that impose a threshold for English Language Proficiency ("ELP") on commercial motor vehicle drivers.

Specifically, the Executive Order required the Secretary of Transportation to rescind existing guidance from the Federal Motor Carrier Safety Administration ("FMCSA") on ELP testing and enforcement, and to, "...issue new guidance to FMCSA personnel outlining revised inspection procedures..." that would ensure compliance with the following regulation prescribed under the *U.S. Code of Federal Regulations*, at [49 C.F.R. § 391.11](#) (the "Regulation"):

(a) A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. Except as provided in § 391.63, a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.

(b) Except as provided in subpart G of this part, a person is qualified to drive a motor vehicle if he/she—

...

(2) Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;

...

[emphasis added]

The New Test

On May 20, 2025, U.S. Secretary of Transportation Sean P. Duffy signed an order announcing [new guidelines for all FMCSA enforcement personnel pursuant](#) to President Trump’s Executive Order. The revised guidance is effective immediately, and prescribes a new ELP assessment that should be applied in roadside inspections by FMCSA personnel on commercial motor vehicle drivers entering and operating in the United States.

If an inspector’s initial contact with a driver “indicates that the driver may not understand the inspector’s initial instructions,” the officer should administer a new two-step ELP assessment, consisting of:

1. A Driver Interview; and
2. A Highway Traffic Sign Recognition Assessment.

During the Driver Interview, the inspector will evaluate the driver’s ability to respond sufficiently to official inquiries and directions in English, as required by the Regulation. Drivers should be informed by inspectors that they


should respond to the inspector’s inquiries in English, and tools to facilitate communication in English will not be permitted. If a driver demonstrates during the Driver Interview that they cannot respond to official inquiries, the inspector may cite the driver for a breach of the Regulation after Step 1.

If a driver responds to official inquiries in satisfaction of the Regulation, or further inquiries are needed to determine a driver’s proficiency in English, the inspector will proceed to step 2 of the ELP assessment. At this stage, the inspector should conduct a Highway Traffic Sign Assessment, where the driver will be asked to identify highway traffic signs and electronic display message signs that they may encounter while operating a commercial motor vehicle. If a driver demonstrates that they cannot understand highway traffic signs and signals in the English language in accordance with the Regulation, they should be cited by the inspector for a breach.

Penalties for breaches of the Regulation are significant for drivers and motor carriers alike. The FMCSA’s new guidelines contain the Administration’s position that an inspector who cites a driver for a breach of the Regulation should take follow-on action, which may include:

1. placing the driver immediately out-of-service, once a breach of the Regulation is incorporated into the Commercial Vehicle Safety Alliance’s Out-of-Service Criteria; and
2. when warranted, initiating an action to disqualify the driver from operating commercial motor vehicles in interstate commerce.

In addition to the above penalties in the revised guidelines, a breach of the Regulation may necessarily result in a roadside arrest of a commercial motor vehicle that was being operated by an unqualified driver. Moreover,



as the Regulation additionally requires motor carriers to ensure its drivers are qualified, any compliance failure(s) could invite further sanctions against a carrier itself.

Motor carriers who are conducting, or considering, operations within the United States should therefore review the FMCSA's newly-minted revised guidelines, and implement internal policies and procedures to ensure compliance.

Contact us

If you have a Transportation & Logistics Group matter and are in need of legal advice, please do not hesitate to contact the authors or [Rui M. Fernandes](#), at 416.203.9505 or rfernandes@grllp.com.

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