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TRANSPORTATION & LOGISTICS GROUP NEWSLETTER

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CN Failure to Meet Service Obligations under the *Canada Transportation Act* Results in Multimillion Damages for Lost Profits and Vessel Demurrage

By Rui M. Fernandes

In the recent decision of the Federal Court of Canada in *Louis Dreyfus Company Canada ULC v. Canadian National Railway Company*, 2025 FC 1868, the court was asked to determine the damages resulting from CN's breach of its service obligations pursuant to section 116(5) of the *Canada Transportation Act*, S.C. 1996, c 10 (the "Act").

A railway company owes a statutory level of service obligations to shippers as stipulated in subsection 113(1) of the Act. Due to this statute, CN was under an obligation to supply railcars to Louis Dreyfus Company ("LDC"), and to transport its goods without delay.

Section 113(1) of the Act provides:

A railway company shall, according to its powers, in respect of a railway owned or operated by it,

> (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;
> (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
> (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;
> (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and
> (e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

The Act also allows shippers to enter into private contracts with railway companies which can set out the manner in which the railway company is to fulfil its statutory obligations. In any investigation into a statutory breach, the Canadian Transportation Agency ("Agency") is bound by the terms of the contract in any determination it must make as to whether a railway has fulfilled its service obligations.

In a decision rendered on October 3, 2014, the Agency determined that CN failed to fulfil the statutory service obligations it owed to LDC for weeks 13-35 of the 2013-2014 crop year. The Federal Court of Canada was asked to determine what, if any, damages LDC incurred as a result of CN's breach of its statutory level of service obligations to LDC.

In the Federal Court action, LDC claimed damages in the amount of (1) CAD $21,641,943 for lost profit or opportunity, (2) USD $3,715,726.60 and CAD $335,978.90 for vessel demurrage charges, and (3) CAD $3,500,000 for reputational harm.

The 2013-2014 crop year was the largest crop in Canadian history, with grain being harvested in abundance. CN asserted that two factors led to the service breach: the (i) unprecedented demand due to the record harvest; and (ii) extremely harsh winter. The Court set out CN's position in paragraphs 12 and 13:

> [12] On the first factor, CN notes that the unprecedented 2013-2014 crop year strained

the entire grain handling and transportation system. When CN recognized that the yearly crop would be significantly larger than had been previously forecasted, it pre-positioned railcars at elevator facilities, including LDC's, to prepare for the predicted large harvest. CN reported that it performed at a record pace in late September through November 2013 when demand spiked, having "spotted" (meaning, delivered) over 5,000 cars a week. Nonetheless, its capacity did not satisfy the large demand surge.

[13] As to the second factor, CN asserts that the Prairies experienced the worst Winter in decades during the 2013-2014 crop year, which it stated had a "devastating impact" on its operations. In the second trimester, CN emphasizes that the extremely cold weather in the Prairies slowed down the performance of CN's network, causing an inability to spot all of the planned 4,000 weekly cars for January, February, and March. In its slowest month of February, CN spotted approximately 2,700 cars weekly, explaining that in extreme cold weather, operational constraints that occurred included corridor restrictions, speed limitations, infrastructure and switch failures, and train length reductions, which collectively resulted in fewer empty cars than planned for spotting at shippers, including grain transportation companies.

The court heard a number of witnesses and a number of experts including Mr. John De Pape, a grain industry expert who estimated the profit lost by LDC due to the service failures of CN. CN countered with Mr. Dean Das, a loss valuation expert. The court found both experts to be even-handed and impartial in their approach to the evidence, "albeit firmly anchored in their own positions" (paragraph 48). The court found Mr. De Pape's evidence highly persuasive.

CN set out the steps it took to increase capacity. It argued that argued that despite the significant challenges in the relevant period, it nonetheless provided exceptional performance over the course of the full 2013-2014 crop year: CN set new records for grain movement, including record grain throughput levels during that year.

The court noted however, that as pointed out in the Agency decision, there was a shortfall of 3,376 railcars that LDC was supposed to receive during the relevant period, and which CN did not provide, while providing these railcars to other customers.

The court reviewed the procedural history of the dispute:

a. CN's appeal of the Agency decision to the Federal Court of Appeal – which was denied.
b. CN's contested jurisdiction that the Federal Court lacked jurisdiction to hear LDC's action for damages – which was denied.
c. CN's appeal to the Federal Court of Canada on the contested jurisdiction – which was denied.

The issues before the court in this action were: (i) objections by CN to the content of opening statements; (ii) CN's objection to LDC's written submissions; (iii) adverse inference in LDC's failure to call witnesses; and (iv) breach of the rule in *Brown v. Dunn* (i.e., failure to put assertions to witnesses).

The court noted that the key evaluation was the quantification of damages under the three heads of damages:

a. LDC's lost profit and opportunity
b. LDC's claim for vessel demurrage
c. LDC's claim for reputational harm.

The court found that the statutory scheme set out in section 116 of Act required the court to

take a tort approach to the analysis of damages, rather than a contract law approach (paragraph 126). The court noted that [s]ubsection 116(5) stipulates that every person aggrieved by a railway company's "neglect or refusal" to fulfil its service obligations – which in these circumstances was CN's failure to supply railcars – has an action for the neglect or refusal against the company" (paragraph 131).

The court also noted that there was little precedent to guide the court about how to assess damages under the jurisprudence that considers section 116 of the Act, and indeed, the parties both acknowledged that the jurisprudence on the assessment of damages for sections 113-116 of the Act was scant.

The court summarized the applicable test at paragraph 153 (citations omitted):

> To warrant damages, a plaintiff holds the burden of proving, on a balance of probabilities, what would have happened without the breach... However, if a defendant posits an alternative "but for" world, the defendant must prove its version of the "but for" world on a balance of probabilities...

The test for assessing the remoteness of damages under a tort law test rather than a contract law approach is whether the plaintiff's injury or loss, at the time that the wrong took place, was the reasonably foreseeable result of the defendant's wrongful conduct. The loss would only need to reach the threshold of being a "real risk" that would occur in the mind of a reasonable person in the position of the defendant.

The court found that it was reasonably foreseeable that LDC would lose profits due to CN's neglect or refusal to provide additional railcars – a real risk that would occur in the mind of a reasonable person in CN's position.

The court also found that a lost profits approach should be taken to the damages assessment as opposed to a loss opportunity approach.

The court found that in a "but for" world where CN supplied an additional 3,376 railcars to LDC on a hypothetical basis, LDC could and would have sold an additional 3,376 railcars of grain for a profit. The court accepted a calculation of damages for lost profit by CN's expert, Mr. De Pape, of $21,641,943 using a lost profits analysis.

LDC's claim for vessel demurrage resulting from CN's level of service breach was discussed by the court commencing at paragraph 335 stating:

> "Vessel demurrage" is a penalty fee accumulated on vessels for breaching laytime. "Laytime" is the time normally required to load the vessel at the terminal. Generally, when vessels arrive at the port terminal, their contract provides for a specific amount of time at the terminal for loading, during which no extra charges are assessed. If the stipulated loading times are exceeded, additional charges are incurred, known as vessel demurrage fees. For every hour vessels are delayed in loading beyond their permitted time, vessel demurrage fees are charged to the company responsible for providing the grain to load them. In this case, the responsible party was LDC.

In the 2013-2014 crop year, vessel demurrage fees were approximately USD $20,000 per day. There was no dispute that LDC incurred USD $5,308,180.85 and CAD $479,969.85 in total vessel demurrage fees during the 2013-2014 crop year. Of that, LDC claims USD $3,715,726.60 and CAD $335,978.90 in damages from CN, representing 70% of the total vessel demurrage costs incurred. LDC estimated that 70% to 80% of these fees were incurred because of the shortfall. According to LDC, had CN provided timely delivery of the 3,376 railcars, vessel demurrage charges paid

by LDC in the relevant period would have been significantly reduced.

CN maintained that LDC (1) failed to prove causation with respect to the majority of the charges claimed, which is premised on unproven assumptions, (2) ignored evidence of delays at the four elevators which were not caused by CN's service failures, and (3) does not have a sound basis for validating the quantum for the vessel demurrage damages claimed.

The court agreed with CN that the evidence showed that there were multiple factors that led to delays in the very unusual 2013-2014 crop year and the claim for these charges was not justified by the record. While some demurrage fees were attributable to the railcar shortfall during the relevant period of the claim, other events and circumstances during those weeks, as well as the remainder of the crop year, contributed significantly to the loading delays and resulting demurrage fees. The court awarded demurrage fees representing 35% of the total vessel demurrage fees claimed by LDC, in the amount of USD $1,857,863.30 and CAD $167,893.90.

Finally, the court dealt with LDC's claims for reputational harm with its producers (farmers) and purchasers (customers) in the amount of $3.5 million. The court did not award any damages for reputational harm noting:

> [392] To recover damages for reputational harm, LDC must establish that CN's service failures caused harm to LDC's reputation that resulted in a tangible and quantifiable loss. At common law, it is not sufficient for a plaintiff to assert that its reputation was damaged (*Nolar Industries Ltd v Freight Transportation Association*, [2005] OJ No 4495 (Ont SCJ) at para 32.
>
> The court agreed with CN that LDC failed to substantiate a tangible and quantifiable loss resulting from the impact on its reputation that would be attributed to CN's breach. The evidence showed that the industry as a whole was impacted and affected by delays during the relevant period, and that LDC's issues with CN were not isolated cases between a shipper and its customers. All of CN's customers were impacted by the issues it was facing. LDC ultimately received railcars that its competitors did not receive. It would not be justified to award damages to LDC for reputational harm when it was clear that its competitors were impacted just as much, if not more, than LDC. The court was not convinced that LDC's customers were reluctant to conduct business with LDC during and after CN's service failures. The court was also not convinced by LDC's argument that it would have received even more future business from its existing customers had its reputation not been harmed by CN's service failures.
>
> In summary, the court awarded damages to LDC for CN's service breach during weeks 13 to 35 of the 2013-2014 crop year. Those damages amounted to CAD $21,641,943 for lost profit, and USD $1,857,863.30 and CAD $167,893.90 for vessel demurrage. No damages are awarded for the third head of reputational harm.

Proposed New Requirements for Lithium-Ion Batteries in Consumer Products

By Rui M. Fernandes

Health Canada has published a Notice of Intent regarding proposed regulations for lithium-ion batteries and consumer products containing

lithium-ion batteries (under the *Canada Consumer Product Safety Act* ("CCPSA")). The CCPSA regulates consumer products present in the Canadian market by prohibiting the manufacture, import, advertisement and sale of consumer products that pose a risk to human health or safety.

The notice issued on December 2, 2025 seeks comments from interested parties on a proposed regulatory initiative that would introduce mandatory requirements for lithium-ion batteries and consumer products containing lithium-ion batteries under CCPSA.

Lithium-ion batteries have become the battery of choice in a wide variety of consumer product applications (for example, vaping devices, mobile and wearable devices, toys, tools, appliances, energy storage systems), as well as transportation applications (for example, vehicles, e-bikes and other micromobility devices) and medical devices (for example, portable ventilators and cochlear implants).

Poor design or manufacturing of the batteries and/or the products containing them, or conditions that cause excess mechanical, electrical or thermal stress during operation, charging or storage can cause batteries to fail.

The hazards can range from overheating, off-gassing and smoke, to fire, thermal runaway and explosion. The failure progression to the extreme effects of fire and explosion can happen in a matter of seconds.

Health Canada has completed a risk assessment summary report on lithium-ion batteries. To request a copy, contact Health Canada Consumer Product Safety via email (ccpsa-lcspc@hc-sc.gc.ca) or telephone at 1-866-662-0666 (toll-free within Canada and the United States).

The proposed regulatory initiative under the CCPSA would establish mandatory safety requirements for lithium-ion batteries and consumer products containing lithium-ion batteries that are manufactured, imported, advertised and sold in Canada. These would include performance criteria for battery protection and battery management systems of consumer products that will help to maintain a lithium-ion battery's safe operating parameters.

The proposed regulatory initiative applies to lithium-ion batteries and consumer products containing lithium-ion batteries within the scope of the CCPSA and does not apply to mains power-connected products that are subject to the Canadian Electrical Code (CSA C22.1) or to products listed in Schedule 1 of the CCPSA, which includes:

- Medical devices, as defined as 'devices', within the meaning of section 2 of the *Food and Drugs Act* (FDA).
- Vehicles within the meaning of section 2 of the *Motor Vehicle Safety Act* and a part of a vehicle that is integral to it — as it is assembled or altered before its sale to the first retail purchaser — including a part of a vehicle that replaces or alters such a part. Of note, this exclusion currently applies to electric micromobility devices, such as e-bikes or e-scooters, which meet the definition of "vehicle".
- Pest control products within the meaning of subsection 2(1) of the *Pest Control Products Act*, except treated articles within the meaning of subsection 1(1) of the Pest Control Products Regulations.

To participate in this consultation, "stakeholders" are asked to submit responses to the Questionnaire. Stakeholders can do this by either filling out the online questionnaire or sending their responses to ccpsa-lcspc@hc-sc.gc.ca.

This pre-consultation will be open for comment from December 2, 2025 to February 14, 2026 (75 calendar days).

Feedback collected through this pre-consultation will be used to inform the development of mandatory requirements that align with the purpose of this proposal.

Will 2026 see the end of Driver Inc.?

By Carole McAfee Wallace

Worker misclassification is an ongoing issue in many workplaces and industries. Both provincial and federal employment standards legislation include prohibitions against employers treating workers as independent contractors, if they are employees. Section 5.1(1) of the Ontario *Employment Standards Act, 2000* provides that "[a]n employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act." The *Canada Labour Code* includes a presumption that a worker is an employee, unless the employer can prove otherwise. Section 167.01(1) states "*[a] person who is paid remuneration by an employer is presumed to be their employee unless the contrary is proved by the employer*". Section 167.1 further states "*[a]n employer is prohibited from treating an employee as if they were not their employee*".

In the trucking industry, there is a category of worker known as Driver Inc. These are drivers who provides truck driving services, but does not own or lease their own truck. They are paid through their corporation, and no deductions are made from their compensation for income tax, Canada Pension Plan, or Employment Insurance. The trucking company treats them as an independent contractor. The model is criticized because the companies who use Driver Inc. drivers are thought to have an unfair competitive advantage because they do not have to comply with employment standards requirements such as overtime pay, vacation pay, and termination pay, and there is also a concern that the Driver Inc. drivers are not paying their fair share of income tax.

There are two ways in which the federal government is addressing, and trying to dismantle, the Driver Inc. model. The first is by way of a significant increase in inspections carried out by Employment and Social Development Canada ("ESDC") to determine whether a federally regulated trucking company (one whose trucks cross provincial or international borders) is misclassifying its workers. The second is a recent decision of Canada Revenue Service ("CRA") to lift the moratorium on penalties for the failure to issue a T4A to the Driver Inc. drivers, which is effective for the 2025 tax year.

Federal Labour Program Inspections

With respect to ESDC inspections, a labour affairs officer may appear on the trucking company's doorstep, without advance notice, and demand to review the company's payroll records and driver contracts. In some cases, the carrier is given a few days' advance notice of the inspection by way of letter that sets out the documents and records that must be made available for inspection.

Based on the labour affairs officer's review of records, and interviews of individuals at the workplace who are familiar with the carrier's labour standards, payroll systems, and employment records, the officer will make a determination as to whether there has been any misclassification of a driver as an independent contractor, when they are in fact employees.

The officer applies the Supreme Court of Canada test set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII), which considers the following:

- How much control does the carrier have over the workers?
- Who owns the tools and equipment required to perform the work?
- Who has the chance of profit and who bears the risk of loss?
- To what extent is the worker integrated into the carrier's workplace?

The total working relationship between the parties is examined.

As a result of these inspections, most officers have found that Driver Inc. drivers are employees and not independent contractors. Once that determination has been made, the officer will issue a request that the carrier sign an Assurance of Voluntary Compliance, pursuant to which the carrier agrees to take corrective measures to treat these workers as employees, and to do so by a specified date. If a carrier does not sign the Assurance of Voluntary Compliance, the officer will issue a Compliance Order. While there is a right to seek a review of the Compliance Order from the Head of Compliance and Enforcement (the "Head"), or appeal it to the Canada Industrial Relations Board ("CIRB"), it is unlikely that the Head, or CIRB, will arrive at a different determination as they will apply the same Supreme Court of Canda test. In addition to issuing a Compliance Order, the Labour Program can also take additional measures to ensure compliance including issuing an Administrative Monetary Penalty or prosecution.

The more recent ESDC inspections also include a review of the carrier's health and safety records, for compliance with Part II of the *Canada Labour Code*. As a reminder, a workplace with 20 or more employees is required to establish a workplace health and safety committee that has a number of duties including:

- Dealing with health and safety complaints
- Participating in all inquiries, investigations, studies and inspections relating to employee health and safety
- Participating in the implementation and monitoring of a program for personal protective equipment, clothing, devices or materials
- Participating in the implementation of changes that impact health and safety
- Inspection of all or part of the workplace each month with the requirement that all parts of the workplace are inspected at least once a year

A workplace with 300 or more employees in Canada must also establish a policy health and safety committee.

For those workplaces with fewer than 20 employees, the employer is required to appoint a health and safety representative who is responsible for addressing workplace health and safety issues. Non-managerial employees select a non-managerial person to be the health and safety representative whose duties include:

- Considering and disposing of health and safety complaints
- Ensuring adequate records of work accidents, health hazards and the disposition of complaints
- Meeting with the employer as necessary to address health and safety issues
- Inspection of all or part of the workplace each month so that all parts of the workplace are inspected at least once a year
- Participating in the development of health and safety policies and programs

As the health and safety requirements depend on the number of employees, a finding that

the Driver Inc. drivers are employees, and not independent contractors, may trigger additional health and safety obligations for the carrier. Failure to comply with the obligations could lead to further compliance orders or enforcement.

T4A Requirement

In addition to ESDC inspections, on December 4, 2025, the CRA lifted the moratorium on penalties for the failure to issue T4As in the trucking industry, starting with the 2025 taxation year. A business is deemed to be operating in the trucking industry if more than 50% of its primary source of income is from "trucking activities". The CRA's website describes "trucking activities" as the transportation of goods (both general freight and specialized freight), as well as acting as an intermediary or broker, and arranging freight transportation between shippers and carriers.

If a business operates in the trucking industry and pays more than $500 in a calendar year to a Canadian-controlled private corporation ("CCPC"), they must issue a T4A to that CCPC. The CRA recommends issuing a T4A even if the trucking company is unsure as to whether the company is a CCPC. A CCPC is a private corporation that is not listed on any stock exchange, is a Canadian resident corporation (incorporated in Canada, or resident in Canda since June 18, 1971) and is not be controlled directly or indirectly by one or more non-resident persons or public corporations.

If a trucking business fails to issue a T4A when required to do so, it will face monetary penalties. The Driver Inc. company who receives a T4A will also be required to report on its own income and comply with the personal services business tax obligations.

For the 2025 tax year, the T4A reporting requirement must be completed by February 28, 2026 which falls on a Saturday. The CRA has confirmed that as long as it is received, or postmarked on or before March 2, 2026, it will be considered to have been reported on time.

It is expected that the combination of the ESDC enforcement activities to ensure compliance with the *Canada Labour Code*, and the CRA's imposition of penalties for failing to issue T4As to Driver Inc. drivers, will bring an end to this worker misclassification model. Given the increase in ESDC inspections, including unannounced inspections, carriers must ensure that all of documents, contracts, and payroll records are up to date and readily available.

Looking Ahead to 2026: Freight Brokers, Motor Carrier Casualty Claims and the United States Supreme Court

By M. Gordon Hearn

The United States Supreme Court does not usually rule on transportation cases. A case currently being "briefed" (that is, legal arguments are being filed) is now before the United States Supreme Court which will be of critical interest to freight brokers and their insurers. The case will explore and better frame the liability that freight brokers face when their dispatched motor carriers are involved in accidents that injure or result in the death of third parties.

The "briefing" is expected to be completed in January of 2026. Those watching the Court docket have reported that the hearing of the legal arguments will likely take place in the first half of 2026.

The court case in question – *Montgomery v. Caribe Transport II LLC* – will have a huge

impact on freight brokers and their insurers. This impact will reach far past United States freight brokers. It will also directly impact those Canadian freight brokers who dispatch motor carriers to haul freight in the United States and their liability insurers.

To set the stage for our local Canadian "audience": Canadian based freight brokers and their insurers simply must be "alive" to the discussion in this article. The liability of Canadian based freight brokers for injury or death to third parties arising from motor vehicles accidents occurring in the United States – as well as Canadian based motor carriers and shippers of goods – will be determined by the laws of the jurisdiction where the negligent conduct occured. *Translation*: the laws of the place where the accident occurs will apply as a general rule determine liability.

Accordingly, it follows that the freight broker who is based in Canada but who hires a carrier to haul freight in the United States may well be as much at risk of falling prey to the famous US jury "nuclear verdict" as a US based freight broker. The Canadian freight broker accordingly has serious "skin in the game" in terms of the outcome of the *Montgomery* decision.

The Current Context: Pre-Montgomery v. Caribe Transport II, LLC

Freight brokers in the United States and Canada arrange the carriage of goods by third party trucking companies on behalf of the brokers' shipper customers. The brokers "buy and sell space" on trucks for shippers. Invariably, this involves an element of selection by the broker as to which carrier to "choose" to haul freight. At minimum, in the selection of a carrier, the broker will consider the lanes serviced by the carrier, its freight rates, and the time frame that the carrier can perform the delivery of the cargo to its destination. In the normal course of events, as long as cargo arrives intact and on time, the system is seen to have "worked".

Typically, the freight broker's business model involves a "high volume - low profit margin" business model. The system is about efficiency and keeping cargo moving. The freight broker will generally charge its shipper customer a low markup (which will be incorporated into the performing motor carriers freight bill). For what might simply be a minor $200 markup (or something in that range), the freight broker may however face (albeit, statistically, remote) significant liability exposure, if the carrier that it dispatches is involved in a motor vehicle accident resulting in injury or death to third parties. This is particularly the case in the United States, where (unlike Canada) monetary damage awards for plaintiffs are often meant to be punitive and to act as a deterrent to the rest of the public to not engage in the same reckless behavior as the defendant. In Canada, by contrast, damages for "pain and suffering" for plaintiffs are built on the desire to compensate the victim, rather than making a public example of the negligent party. This is, as a general proposition, why we do not have "nuclear verdicts" - or at least verdicts of the same magnitude - in Canada.

The search for big verdicts has evolved over time to the now prevalent practice in United States motor carrier accident litigation of plaintiffs and their attorneys "moving up the supply chain" and not only suing the transport driver and the carrier in question, but also seeking damages from the "upstream" freight brokers and even shippers who had some role in "putting the negligent carrier on the road".

Various legal theories have evolved whereby liability may be imposed against the freight broker or the shipper. This is despite their employees "not being at the wheel" or having

managed the carrier fleet. The argument is essentially that there was a lack of due diligence or care exercised in the broker's or shipper's selection of the motor carrier that caused the accident.

As a general rule, freight brokers are more often pursued than shippers, no doubt on the basis that they tend to hold out a specific service in carrier selection, and they earn revenue (even if a little mark-up) in the process. Shippers also tend to be one further step removed when they engage freight brokers who in turn select carriers to haul freight.

The above theories, which continue to evolve in United States trucking injury litigation, often assert the following arguments (or variations of same) *that are based on or emanate from the laws of the state where the accident occurred*:

1. The freight broker was essentially in business with the responsible motor carrier responsible for the accident, or the carrier was acting as the freight brokers' agent in performing the carriage of the goods, as a result of which the freight broker should be regarded as being "vicariously" liable for the negligent operation of the truck by the carrier.
2. The freight broker was negligent in its selection and dispatch of the negligent motor carrier, having "given the load" to an unsafe or unreputable carrier.

The above sets the table for the importance of the *Montgomery v. Caribe Transport II Inc.* decision: various states in the United States provide a case law or statutory foundation for the above "evolving arguments" against brokers and shippers whereas the evolving theories for freight broker liability do not exist under federal law. The latter simply does not contemplate any such evolving theories of freight broker liability.

The Road to the U.S. Supreme Court*: Montgomery v. Caribe Transport II, LLC*

Shawn Montgomery was severely injured when his truck, which was stopped on the side of the road, was hit by a tractor-trailer that veered off the road onto the shoulder of an Illinois highway. Mr. Montgomery sued the driver of the tractor-trailer as well as the motor carrier, Caribe Transport II, LLC ("Caribe"), and the freight broker, C.H. Robinson Worldwide, Inc. ("Robinson"). Mr. Montgomery claimed that the freight broker, Robinson, had i) negligently hired the driver and the motor carrier, Caribe and was ii) vicariously liable for the driver's torts (in other words, directly and automatically liable as a matter of law for the negligent operation of the motor vehicle).

Regarding the "vicarious liability claim", the trial court in first instance (the United States District Court) granted summary judgment in favor of Robinson, ruling Robinson was not vicariously liable for the driver's negligence in respect of the accident because the carrier, Caribe, and its driver/employee were independent contractors of Robinson (Summary judgment involves a preliminary ruling by the court, prior to a conventional, disposing of a part of the case).

This left the "negligent hiring" claim whereby Robinson was said to have failed to meet the necessary degree of diligence in the selection of Caribe as the carrier. This was not "cut and dry" so as to be "thrown out" or dealt with on summary judgment. Being more intricate in nature, this basis of claim proceeded to trial. The trial court ruled that the negligent hiring claim against Robinson must fail on the application of rather intricate U.S. federal statutory law; prescribing that U.S. federal law preempts, or displaces, state law.

The Court's reasoning came down to the following:

1. Mr. Montgomery's negligent hiring claim against Robinson rested on the "preemption" provision of the *Federal Aviation Administration Authorization Act* ("FAAAA"), 49 U.S.C. § 14501(c)(1) which provides:

> *(1) General rule.— Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States* ***may not enact or enforce a law, regulation, or other provision having the force and effect of law*** *related to a price, route, or service of any motor carrier * * ** ***or any motor private carrier, broker, or freight forwarder with respect to the transportation of property****.*
>
> (*my bold emphasis is added*)

The District Court ruled that the above express provision preempted the application of state law which Montgomery was relying on, the same being "preempted" by the above federal law. Accordingly, the "negligent hiring" argument, based on state law, effectively evaporated for Mr. Montgomery.

2. The District Court also addressed the following provision in the same statute:

> *(A) shall not restrict the* ***safety regulatory authority*** *of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;*
>
> (*my bold emphasis is added*)

The District Court held that the sum total of the above statutory language barred state law based claims against freight brokers for the negligent hiring of motor carriers and their drivers, notwithstanding the "carve out" of the stated "safety exception" in (c)(2)(A) above. That is, state law may frame theories of liability against freight brokers in intra-state carriage situations. This would, however, offend the above provision where they are purported to apply to the interstate (or international cross-border) activity of freight brokers.

Mr. Montgomery appealed the dismissal of his "negligent hiring" claim to the applicable appellate court – the Seventh Circuit – which upheld the trial level decision, noting the "significant economic effects that would result from imposing state negligence standards on brokers". The Court found that negligent hiring claims on the part of freight brokers do not trigger the "safety exception" (that I have emphasized in bold above) on the basis that a negligent hiring claim against a broker is not a law that is "*with respect to motor vehicles*". In effect, the federal law was held to trump the "plaintiff friendly" state law that created the "negligent hiring" claim. There being no basis for such a claim in the US federal law, Mr. Montgomery was unsuccessful on his "negligent hiring" claim.

Being unsuccessful at the Seventh Circuit Court of Appeals, Mr. Montgomery has now taken his appeal to the United States Supreme Court.

The United States Supreme Court has agreed to hear the appeal, noting that other District Courts in the United States have ruled differently than the ruling from which Mr. Montgomery was appealing from (these other courts finding that the above "safety exception" *does*, in fact, expose freight brokers to state based negligent claims).

Other policy interests and stakeholders have made compelling arguments for the United States Supreme Court to hear the Montgomery appeal:

1. Robinson – and others on the freight broker side – argue that in enacting the above legislation, (1) Congress intended to preempt state regulation of freight broker services; and (2) state based claims for negligent hiring are not part of the safety exception under that regime.
2. It is further argued by the freight broker perspective that permitting the application of negligence claims based on state law as a "safety exception" would allow each state to enact different standards, which would disrupt the efficiency of the interstate supply chain and deregulate the marketplace. In other words, in rejecting the application of the "safety exception", there would be reduced risk to state-level litigation and the preservation of marketplace competition, allowing for legal certainty for the trucking industry including brokers and their insurers.
3. On the other side of the fence there is a very robust appeal "front". Several states have filed briefs in the case, arguing that federal law should not override state rules on holding freight brokers accountable for the careless hiring of carriers in the trucking industry. Rather, traditional state laws should be permitted to apply to freight brokers where their negligence has caused harm to innocent victims.
4. As stated in one of the filed briefs on the case, "Now is the time for this Court to provide certainty to the industry by resolving the conflict between the various United States court circuits on the question of the application of the savings clause's safety exception to state common-law or statutory negligent hiring claims against freight brokers.

All eyes now remain firmly fixed on the United States Supreme Court. If the Montgomery decision is affirmed, then freight brokers should see a significant reduction in the scope of their potential liability arising from motor carrier casualty litigation.

Ambiguous Exclusion Clauses and Reasonable Expectations: Lessons from *Busato v. Gore Mutual Insurance Company*

By Mason Kohn

The decision of *Busato v. Gore Mutual Insurance Company*, 2025 BCCA 79 (CanLII) is a recent and noteworthy case from the Court of Appeal for British Columbia. It reaffirms the well-established principle that insurance contracts are to be construed and interpreted according to the reasonable expectations of an average person applying for insurance, rather than through the perceptions of persons versed in the niceties of insurance law.[1] This case should be taken into consideration by insurers whose contracts contain exclusion clauses that are broad and ambiguous. The decision underscores the perils for insurers who wish to narrow coverage by means of explicit exclusion clauses and affirms that insurers are free to do so in any way they wish, provided that they do so clearly, explicitly, and in a manner that does not unfairly leave the insured uncertain or unaware of the extent of coverage.[2]

Background

In 2014, the plaintiff/appellant (the "**insured**") purchased a homeowners' insurance policy from

1 *National Bank of Greece (Canada) v. Katskonouris*, 1990 CanLII 92 (SCC) [National Bank].
2 *Martin v. American International Assurance Life Co.*, 2003 SCC 16 at para. 29. [Martin].

the defendant/respondent, Gore Mutual Insurance Company (the "**insurer**") that covered the risk of fire, among other risks. The insured renewed the policy annually and it remained valid at the time of the loss.

On April 23, 2017, an accidental kitchen fire started in the insured's home resulting in its destruction. Immediately following the accident, the insured initiated a claim under the policy. The insurer did not dispute that the fire was caused by an insured risk (accidental kitchen fire). However, during its investigation of the fire, the insurer discovered that the insured was growing approximately 25 marijuana plants, pursuant to a valid license issued by Health Canada that permitted the insured to cultivate and possess up to 73 indoor marijuana plants. As such, the insured was well within his legal right to cultivate and possess the marijuana plants.

The insurer nonetheless denied coverage for the loss citing its reliance on an exclusion in the policy relating to marijuana cultivation on the property. The exclusion clause stated:

> We do not insure direct or indirect loss or damage, in whole or in part: [...]
>
> 32. to dwellings or detached private structures or unscheduled personal property contained in them, used in whole or in part for the cultivation, harvesting, processing, manufacture, distribution or sale of marijuana or any product derived from or containing marijuana or any other substance falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*;
>
> regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.

Decision of the Supreme Court of British Columbia

As a result of the denial, the insured commenced an action seeking indemnity under the insurance contract. Both parties brought summary trial applications. At first instance, the trial judge determined that the exclusion clause was unambiguous and dismissed the insured's action.

In finding that the exclusionary clause was unambiguous, the trial judge followed the analysis in *Peitrangelo et al. v. Gore Mutual Life Insurance Company et al.*, 2010 ONSC 568 ("**Pietrangelo**"). Coincidentally, *Pietrangelo* involved the same insurer (Gore), a nearly identical insurance contract, and the same exclusion clause. Notwithstanding the foregoing, the facts of *Pietrangelo* were wholly distinguishable. In *Pietrangelo*, a tenant was illegally producing cannabis resin and caused an explosion that led to the complete destruction of the house. The tenant in *Pietrangelo* did not possess a license for marijuana cultivation and his conduct was subject to criminal charges, which was starkly different from the insured's action in the case at bar.

In *Pietrangelo*, the judge found that the exclusion clause created three distinct subcategories of excluded coverage:

1. Dwellings or detached private structures or unscheduled personal property contained in them used for the cultivation, harvesting, processing, manufacture, distribution, or sale of marijuana;
2. Any product derived from or containing marijuana; and,
3. Any other substance falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*.

The judge in *Pietrangelo* found that the first subcategory was "clear and unambiguous" and that the second subcategory was inapplicable in the circumstances. However, the judge concluded that the third subcategory relating to substances falling within Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulation* included a "faulty and confusing reference." Nonetheless, the trial judge in *Busato* adopted the conclusion of Pietrangelo that any ambiguity in the third subcategory did not detract from the clarity of the first and second subcategory.

In *Busato*, the trial judge concluded that the exclusion did apply to legal marijuana-related activity, was broadly worded, and on its plain reading, excluded all marijuana-related uses of the property, whether legal or illegal. Unfortunately for the insured, the judge again relied on *Pietrangelo*, and held that she could not make a finding about any difference in risk associated with insuring a criminal marijuana grow operation versus licensed cultivation for medicinal purposes, and stated:

> The Exclusion is broadly worded. Based on the evidence of Gore in *Pietrangelo*, it was intentionally drafted as widely as possible: *Pietrangelo* at paragraph 73. On a plain reading, it excludes all marijuana-related uses of the property, whether legal or illegal.

Accordingly, she found that the exclusion clause did not distinguish legal or illegal marijuana-related activities and concluded that such an interpretation was narrow and not consistent with the plain wording of the exclusion clause. Although she acknowledged the exclusion clause resulted in a harsh outcome, she dismissed the insured's action against the insurer.

Decision of the Court of Appeal

The Court of Appeal for British Columbia overturned the trial decision, finding that the exclusion clause was ambiguous and must be interpreted narrowly in favour of the insured.

On appeal, the panel concluded the exclusion clause's wording, specifically, the third subcategory, "Schedule (Section 2) of the *Controlled Drugs and Substances Act Narcotic Control Regulations*" created ambiguity because it combined two separate pieces of legislation, *Controlled Drugs and Substances Act* ("**CDSA**") and *Narcotic Control Regulations* (the "***Regulations***"). Though the *Regulations* were made pursuant to the CDSA, the court found that the insurer's improper citation of this legislation in the insurance contract reflected poor drafting and created ambiguity as to the relevant legislation and attached schedules purporting to inform the exclusion.

Moreover, the ambiguity extended to the substances that trigger the exclusion. It appeared that the exclusion clause referred to a schedule of the *CDSA*, however, the wording referred to "marijuana or any other substance falling within Schedule (Section 2). Importantly, the *CDSA* has eight schedules numbered I-VII. It is likely that the exclusion referred to a single schedule within the *Regulations* and not the *CDSA*.

Based on the third subcategory, the trial judge recognized that the exclusion clause contained "unclear, inaccurate wording" and a "faulty and confusing reference" to the *CDSA* and the *Regulations* but concluded that there was no ambiguity to resolve. It flowed from her reasoning that any ambiguity in the third subcategory did not taint the first or second subcategory.

The Court of Appeal disagreed, finding that the exclusion clause was not enumerated into three subcategories, nor was it visually separated

into subcategories. In the appeal court's view, the division of the exclusion clause into three subcategories, acknowledging one subcategory as poorly drafted but not tainting the others, rewrote the clause to the disadvantage of the insured. Further, interpreting these subcategories separately directly contradicted the general principles of contract interpretation, which suggests that "the court should give effect to clear language, reading the contract as a whole (emphasis added)."[3]

The Court of Appeal found that exclusion clause was ambiguous. Since the general rules of construction could not resolve the ambiguity, the insurance contract had to be interpreted *contra proferentem*, i.e., in favour of the insured.

Importantly, the Court of Appeal indicated that insurance contracts must be interpreted as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law.[4] In resolving ambiguity where there is more than one interpretation supported by the text of an insurance contract, a court will be directed to contemplate the reasonable expectations of the parties and to avoid an interpretation that would provide an unrealistic result or that would not have been considered by the parties. Underpinning the rule of *contra proferentem* is the principle that ambiguity is to be resolved in favour of the party which did not draft the contract. In the case of almost all contracts of insurance, this will be the insured.

Insurers Must Be Mindful of the Clarity of their Exclusions

Insurers can narrow coverage through the use of exclusion clauses but must be careful to draft those exclusions clearly, explicitly, and in a way that does not unfairly leave the insured uncertain or unaware of the extent of the coverage.[5]

This decision reinforces the long-standing principles of insurance contract interpretation and provides a cautionary warning that courts may scrutinize exclusion clauses more closely than insurers may anticipate. Ambiguous drafting, inaccurate statutory references, or overly broad language will not withstand judicial scrutiny.

Ultimately, litigation is expensive, far more so than ensuring that policy wording is clear, unambiguous, and unequivocal from the outset.

As legal landscapes continue to evolve, novel developments in insurance law demand heightened scrutiny. These changes can introduce unforeseen liabilities and coverage determinations, requiring insurers to pay careful attention to emerging topics. Staying proactive and informed is key to mitigating these potential risks.

Make a List and Check it Twice: Are Your Cyber Programs Naughty or Nice?

By Jamal Rehman

As 2025 draws to a close, the end of the year offers a valuable opportunity for supply chain intermediaries – including shippers, freight brokers, freight forwarders, warehousemen, and motor carriers – to review and assess the health of their cybersecurity systems, policies, and programs. In today's increasingly digital and interconnected supply chain, the consequences of even small vulnerabilities can have fatal operational, legal, and reputational consequences.

3 *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33 (CanLII) at para. 22.

4 *National Bank*, *supra* note 1.

5 *Martin*, *supra* note 2.

Below, we outline three key cyber and privacy "blind spots" we often see together with practical recommendations on how to strengthen resilience and reduce exposure. Many of these risks do not arise from sophisticated threat actors (of which, there are many), but rather from outdated policies or gaps between written policies and operational / fiscal realities.

The risks set out below are not unique. If you're engaged in the transport or movement of goods along the supply chain either domestically or abroad, there is something on this list for you.

Blind Spot #1: Not Using Multi-Factor Authentication ("MFA") On All Systems

Multi-Factor Authentication ("MFA") can be thought of as a sort of "seatbelt" in the privacy and cyber world. In practice, it can represent the last – and sometimes only – line of defence between your organization and a breach. While many organizations have implemented MFA security on their email systems, many of their other critical platforms and servers often remain unprotected. We strongly urge organizations to implement MFA not just on their email servers, but also on programs and platforms used for accounting, billing, payroll, and vendor management. While it may seem like a painstaking process from a practical point of view, the benefits of an organization-wide implementation far outweigh the drawbacks.

Using MFA significantly reduces the risk of accounts or valuable information being compromised and provides an additional authentication barrier which is more difficult for threat actors to bypass.

Given that many identity theft scams, for instance, rely on stolen credentials, properly configured MFA can help ensure that a stolen credential does not in and of itself allow threat actors to gain access to sensitive information.

Blind Spot #2: Not Having Basic Cyber Training or a Documented Incident Response Plan

Routine privacy and cybersecurity awareness and training helps educate employees to recognize phishing and/or other deceptive communication methods which rely on the manipulation of human trust. By regularly training and testing employees to recognize suspicious communications and the patterns associated with social engineering attacks, organizations can mitigate their risk in the face of such attacks.

On a related note, picture the following scenario: You are a C-Suite Executive at a trucking company. Monday morning comes around, and your dispatch systems go down. The phones are ringing with new shipments to move and clients are asking for updates on existing ones. It is then when you receive a ransom note. What's your first move? Who do you call?

The importance of a well planned out, thoughtful, and most importantly practiced Incident Response Plan ("IRP") cannot be understated. An IRP should be well-documented and reviewed regularly with all those in your organization. It should include a step-by-step protocol for detecting, responding to, and recovering from threat incidents.

An effective IRP must outline the necessary steps and action items necessary to identify and react to a breach incident; evaluate the situation; inform the relevant individuals and organizations about the incident; coordinate the company's response; and assist in the recovery efforts following the incident.

We also encourage organizations to put their IRPs

to the test in the form of test breaches. Being well prepared on paper is a virtue, but response plans must be tested (and re-tested). Test breaches are excellent opportunities to test an IRP in a no - risk environment.

Timeliness is a feature which should be the keystone of any IRP. Rapid identification and containment of compromised information and/or accounts are crucial for preventing further unauthorized fraud. Your organization's response should be swift, intelligent, and coordinated.

Blind Spot #3: Overbroad Account Authority & Administrative User Access

Imagine for a moment that you run a trucking company and every single one of your drivers have administrative access to all email, vendor, and financial accounts. Certainly, this would not be a good idea. Cyber criminals understand well that if they can retrieve administrative account credentials, they "get the keys to the kingdom".

To mitigate this, we strongly urge organizations to adopt the "principle of least privilege". Limiting user access to the minimum level required to complete the assigned duties reduces the overall available "attack surface" and mitigates the potential impact of credentials in the event they become compromised and fall into the wrong hands.

Conclusion

As we venture into 2026, we urge companies to shift away from annual or one-time reviews of their privacy and cyber programs and move towards a paradigm where the review is an ongoing business imperative. Pro-actively reviewing and identifying risks in policies, programs, communications, data storage, insurance coverage, and internal controls will keep you ahead of the game and can assist your organization in being better prepared and more resilient in the face of threats when – not if – they come.

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 directly, or Rui M. Fernandes, at 416.203.9505 or rfernandes@grllp.com.

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