

# TRANSPORTATION & LOGISTICS GROUP NEWSLETTER

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# The Strait of Hormuz and “End of Voyage” Declarations: Legal Boundaries on Cargo Diversion and Cost Shifting

By Andrea Fernandes

The Strait of Hormuz has once again become a focal point of geopolitical risk. As a narrow but critical maritime chokepoint through which roughly one fifth of the world’s seaborne oil and significant containerized trade passes, disruptions in or around the Strait have immediate commercial consequences. Heightened military activity, threats to navigation, and rapidly changing sanctions and security conditions have prompted ocean carriers to reassess voyage feasibility mid transit. One increasingly invoked response is the declaration of an “End of Voyage”, followed by discharge of cargo at an alternative port and demands that shippers take custody there. This is often accompanied by diversion charges, demurrage, and onward forwarding costs.

This overview highlights the legal considerations surrounding such declarations under common carrier contracts and international maritime law, including the circumstances in which shippers may be charged additional costs after full freight to the original destination has been prepaid. This is not, however, a one-size-fits-all answer. Each matter turns on its own facts, and the specific language of the governing contract will often be decisive. If you are facing questions about additional charges on a particular shipment, we encourage you to contact our office for advice tailored to your specific situation.

## Legal Foundations for Declaring an “End of Voyage”

The right of a carrier to declare an “End of Voyage” is not a free standing doctrine but

rather a contractual and legal construct derived from a combination of bill of lading terms, charterparty clauses (where incorporated), and general maritime law principles. Most modern bills of lading contain liberty clauses permitting deviation, alternative discharge, or suspension of performance where continuation of the voyage would expose the vessel, crew, or cargo to war risks, piracy, or similar perils.

In addition, war risk clauses typically authorize the carrier to refuse to proceed to, enter, or remain at a port deemed unsafe. Where the Strait of Hormuz is characterized as presenting an actual and objectively reasonable risk to navigation, a carrier may have a defensible basis to terminate the contractual voyage short of the named destination.

However, courts have historically required that such decisions be grounded in reasonableness rather than commercial convenience. The carrier bears the burden of demonstrating that the risk was real, not speculative, and that no reasonable alternative existed to complete the voyage as contracted. A generalized increase in insurance premiums or geopolitical tension, without a credible threat to the particular voyage, may be insufficient.

## Alternative Discharge and Shippers’ Obligation to Take Delivery

When an end of voyage is lawfully declared, carriers commonly discharge cargo at the nearest “safe” port and notify shippers that delivery is complete. The legal effectiveness of this maneuver depends heavily on bill of lading language.

Clauses allowing discharge “at any port or place whatsoever” are not interpreted literally in most jurisdictions. Courts often construe them *contra proferentem* (against the contract drafter) and in light of the fundamental obligation to carry goods to the agreed destination. Where alternative discharge is permitted, it is typically

conditioned on necessity and reasonableness, not mere operational preference.

If the carrier lawfully discharges cargo at an alternative port, shippers may indeed be required to take custody there to mitigate losses. However, acceptance of cargo does not necessarily equate to acceptance of cost liability. Shippers can, and frequently should, accept delivery under protest and expressly reserve their rights to challenge diversion charges and downstream costs.

### **Demurrage, Detention, and “Diversion Charges”**

A particularly contentious issue is the proliferation of “diversion” or “contingency” charges imposed following alternative discharge. These charges often include terminal handling fees, storage, demurrage, and administrative surcharges not contemplated at the time of booking.

From a legal standpoint, demurrage and detention are traditionally compensatory, not punitive. They presuppose a breach or delay attributable to the cargo interest. Where congestion, regulatory delay, or forced diversion arises from a carrier’s own decision to terminate the voyage, imposing demurrage on the shipper is legally vulnerable. This is especially so if the shipper had no ability to take delivery earlier or at the contracted destination.

Many bills of lading attempt to contractually allocate these risks to shippers through broad indemnity provisions. Whether such provisions are enforceable depends on the jurisdiction and the governing law. In common law jurisdictions, clauses that effectively shift the carrier’s core performance risk to the shipper may be scrutinized, particularly where they undermine the commercial purpose of prepaid freight.

### **Prepaid Freight and the Limits of Cost Shifting**

The issue of prepaid freight is central to disputes arising from Hormuz related diversions. Freight prepaid to the original destination generally reflects the agreed consideration for complete carriage. Under long standing maritime principles, freight is earned upon delivery as contracted unless the contract provides otherwise.

Where a carrier elects (or is compelled) to terminate the voyage early, the legal justification for retaining full freight while also charging shippers for onward forwarding is far from settled. Some bills of lading purport to allow freight to be “fully earned upon shipment,” even if the voyage is incomplete. Courts have upheld such clauses in limited circumstances, but they are not universally enforceable, particularly where performance is frustrated by foreseeable geopolitical risks.

Shippers have stronger arguments where:

- freight was prepaid without clear “freight earned” language;
- the carrier selected the alternative port primarily for its own operational benefit;
- onward carriage costs are disproportionate or exceed the original freight; or
- the shipper had no contractual relationship with the substitute carrier or forwarder.

In such cases, the carrier’s attempt to recover forwarding costs may be viewed as an impermissible double recovery.

### **Practical Risk Allocation and Dispute Strategy**

For shippers, Hormuz related end of voyage scenarios underscore the importance of scrutinizing war risk clauses, freight earned provisions, and indemnity language before booking. Where possible, shippers should negotiate explicit caps or exclusions for diversion related charges and ensure that prepaid freight terms are clearly defined.

When disputes arise, contemporaneous documentation is critical. Shippers should request the carrier's risk assessment, basis for declaring the port unsafe, and justification for the chosen alternative discharge location. Silence or boilerplate responses may strengthen a later challenge.

For carriers, transparency and proportionality remain key. Courts and arbitral tribunals are more likely to uphold end of voyage declarations where the carrier can demonstrate good faith decision making, reasonable cost allocation, and genuine concern for safety rather than revenue preservation.

### Conclusion

The Strait of Hormuz presents real and evolving risks, but it does not suspend the fundamental legal architecture of carriage of goods by sea. An "End of Voyage" declaration may be justified in exceptional circumstances, yet it does not automatically entitle carriers to shift all resulting costs onto shippers. This is particularly the case where freight has been prepaid to a specific destination. As geopolitical instability increasingly intersects with global supply chains, the legal boundaries of cargo diversion and cost allocation will remain fertile ground for dispute, and careful contractual drafting will be the first and best line of defense.

## Federal Court of Appeal Upholds WestJet Employee Termination Over Vaccine Policy

By Rui M. Fernandes

A recent Federal Court of Appeal decision, *Henrikson v. Westjet*, [2026 FCA 39](#), has confirmed that WestJet acted lawfully in terminating an employee who refused to comply with its COVID-19 vaccination policy.

The case stems from federal measures introduced in 2021 requiring vaccination policies for workers in federally regulated transportation sectors, including aviation. The federal measure, the *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 43*, (2021) C Gaz I, 5314, required employees in the airline sector to be fully vaccinated before attending an aerodrome property. In response, WestJet implemented a policy mandating that employees be fully vaccinated by October 30, 2021, particularly for those required to access airport properties.

Bjarni Henrikson, an aircraft maintenance engineer employed by WestJet, did not comply with the policy and was dismissed in December 2021. He subsequently filed an unjust dismissal complaint, which was rejected by the Canada Industrial Relations Board. The Board found that WestJet's policy was reasonable, clearly communicated, and fairly applied, and that termination was justified given the circumstances.

Henrikson sought judicial review of the Board's decision, arguing that the decision was unreasonable, procedurally unfair, and influenced by bias. He also challenged the constitutionality of the federal vaccination requirement. However, the Federal Court of Appeal, which heard the judicial review, found no errors in the Board's reasoning, affirming that the vaccination policy was a legitimate workplace safety measure regardless of the broader constitutional question.

The Court noted that sitting in judicial review, a court may set aside a board decision if it is unreasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#). It also noted that matters of procedural fairness, including bias, are reviewed on a standard akin to correctness, per *Canadian Pacific Railway Company v. Canada (Attorney General)*, [2018 FCA 69](#) at para. 54; *Girouard v. Canada (Attorney*

General), [2020 FCA 129](#) at para. 38, and that the court must be satisfied the process followed was fair and just having regard to all the circumstances: *Adegoke v. Canada (Attorney General)*, [2025 FCA 229](#) at para. 9. The Court emphasized that it could not reweigh evidence or substitute its own findings for those of the Board.

The Court concluded that the Board's decision was coherent, justified, and consistent with established legal principles on workplace policies and discipline.

On procedural fairness, the Court rejected claims of bias, noting that the Board acted within its authority in managing the hearing and evidence. The Court also found no indication that the employee's role could reasonably be performed remotely, reinforcing the importance of vaccination for on-site safety.

Ultimately, the Court dismissed the application for judicial review, affirming the ability of employers to enforce reasonable health and safety policies in regulated sectors during the pandemic.

## A Carrier's Knowledge is the Key to Consequential Losses in Cargo Claims

By Conal Calvert

Motor carriers will be intimately familiar with the limits of liability for cargo damage and loss. Across Canada, the uniform rules of carriage generally provide for a limit of liability of \$2 per pound or \$4.41 per kilogram, absent a declared value on the face of the bill of lading. Many carriers have terms and conditions on their bills of lading, on their websites or in shipper-carrier agreements, which include their own limitations of liability stemming from

loss, damage or delays in delivery of cargo. Of interest here are losses beyond the value of the cargo where the sole limitation on liability is at common law.

A frequent issue in cargo litigation are claims for consequential losses, which are suffered by a plaintiff as a consequence of the cargo being damaged, destroyed or its delivery delayed. A common example is loss of business damages, incurred by a shipper or consignee due to goods not arriving on time or at all, whether arising through the loss of a customer, from a missed commercial opportunity, lost profits from business interruption or penalties imposed by a third party. The range of potential consequential losses are broad but the key consideration in claims for consequential losses are whether they were foreseeable to the carrier at the time it agreed to transport the cargo.

### ***Hadley v Baxendale* – The origins of the general principle**

The classic case on consequential losses for a carrier's breach of contract is the 1854 English decision in *Hadley v Baxendale*, (1854) 9 Exch 341. Hadley operated a steam-powered mill and needed to send a broken crankshaft to the company manufacturing its replacement to ensure a proper fit. Hadley contracted with Baxendale to deliver the crankshaft to the manufacturer and return it by a particular date. Baxendale failed to meet the date for delivery. Rather than return the crankshaft by wagon, Baxendale waited several days to carry it by water to Hadley along with other goods consigned to them. The mill was out of operation for a period of time as a result of the delay and Hadley sued for the resulting loss of business. The Court determined that the carrier could not be held liable for losses which it could not have anticipated at the time the contract was formed while noting that parties remain free to contract liability for collateral losses where there is

concern they may arise absent timely delivery.

### **Under what circumstances will liability arise?**

Carriers are not insurers bound to make a shipper or consignee whole for any losses flowing from their breach of contract. They are, however, more than a mere bailee and their responsibilities and potential liability under a contract of carriage extend beyond the safety and security of the cargo to its timely delivery.

Where the carrier is aware or made aware of the need for delivery by a particular date and of the potential consequences of failing to do so, it may be exposed to liability for consequential losses. The nature and extent of such liability is based on what was in the reasonable contemplation of the parties at the time the contract was made: *Fidler v. Sun Life Assurance Co. of Canada*, [2006 SCC 30](#) at para. 54. The underlying principle is the assumption that a carrier knows less than the shipper and consignee about the purposes for which the consignee needs the goods or other special circumstances which might cause exceptional losses: *Victoria Laundry (Windsor) Ltd. v. Newman Industries LD.*, [1949] K.B. 528 (C.A.) at 539. If a carrier is not given a firm delivery date and the potential consequences of failing to meet this date are not communicated, a carrier will generally not be held liable for the knock-on effects, as the carrier could not have anticipated them.

### **Tort liability vs. contractual liability**

Absent a direct contract, it is still possible for third parties affected by a loss (including those unknown to or not in contractual privity with the carrier) to advance a claim for consequential losses. As the question is one of knowledge and foreseeability of the consequential losses by the performing carrier, the analysis is the same whether the carrier has contracted directly with the plaintiff or where the plaintiff is claiming in

tort. Losses which are not foreseeable in contract do not become foreseeable as a function of a claim being made in tort: *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986 CanLII 51](#) (SCC).

### **Load brokers' liability**

If a load broker or freight forwarder was made aware of the requirement for timely delivery and the potential consequences of delay or non-delivery, this will not alter the carrier's liability as they cannot have knowledge of discussions to which they were not a party. However, this may serve to impose some measure of liability on a broker who fails to convey critical information to the performing carrier. Where brokers receive information from the shipper or consignee, they should convey that information to the carrier or risk being exposed to liability with no contribution from the innocent carrier. If the broker makes the carrier aware of the nature and risk of consequential losses and they accept the cargo on that basis, they accept the liability as well.

### **When will a carrier face liability exposure for consequential losses?**

Ignorance is not always bliss. Carriers should not remain deliberately in the dark as to the urgency or the consequences of late or non-delivery as this may expose them to different types of unforeseen liability. A carrier should always know what they are carrying, to whom it belongs and when it must be delivered.

Similarly, a shipper is unlikely to reserve the possibility of a claim for consequential losses merely by intoning ominously, but vaguely, about the dire consequences of missing a delivery. It is no good to suggest the mere possibility of consequences, there must be some particular and foreseeable consequence which is in the contemplation of the carrier at the time of contracting.

A carrier should not imagine itself free of exposure to consequential losses simply because it has no knowledge of special circumstances or particular risk. There are always circumstances in which it will be plainly obvious that certain losses may result from late delivery, given the nature of the cargo or circumstances of delivery. Where perishable goods are being transported for sale, it will be foreseeable to any carrier that late delivery could result in loss of profits. A carrier bringing cargo to a vessel at port which is due to sail could find itself exposed to liability for detention and demurrage charges incurred by the shipper. Though less common in recent years due to technological advancements, a courier is handling time-sensitive documents and who is aware of their import could be found liable for the consequences of a lost opportunity or a government fine for late filing.

Carriers holding themselves out as specialists in certain industries or cargos should also be wary, as they could attract liability where it is found that they ought to have known about the nature of the shipper's or consignee's trade such that the consequences of their default would have been in their contemplation. Recall that a carrier is expected to have less knowledge of the cargo than the shipper or consignee but if the carrier has specialized knowledge of the industry which they serve, a court could find that they would have known of the consequences of a failure to deliver. For example, a company advertising guaranteed rapid delivery of cargo for enterprises engaged in just-in-time manufacturing operations run the risk of liability based on those representations of industry knowledge.

Where a carrier is informed of the need for timely delivery and the potential consequences of a failure to deliver, it will have difficulty resisting a claim for consequential losses at common law. If a party is made aware of the

consequences of a breach of contract, they should price that risk accordingly by charging a higher rate to the shipper. The exigencies of the motor truck industry do not always permit such pricing, but carriers must be prepared to face risks not priced into the equation.

An astute carrier may wonder if their motor truck cargo insurance policy will cover a claim for consequential losses. This is unlikely as most policies on the market expressly exclude such liability, given the broad potential exposure. A policy extension covering consequential losses may be offered by some underwriters but as with the carrier made aware of potential liability by the shipper, as risk increases, so does the price.

The nature of the motor freight industry means that it is not always practical for the parties to sign broker-carrier or shipper-carrier agreements prior to dispatching cargo. It is preferable to have contract terms ousting consequential damages and whenever possible these agreements should be in place to protect carriers. If this is not a carrier's practice, they should have terms and conditions on the face of their bills of lading, on their website and embedded in their email correspondence or they risk finding themselves at the mercy of a court's interpretation of what was in their reasonable contemplation at the time of entering into the contract of carriage.

## Riparian Rights and Waterfront Access on the Pitt River

By Rui M. Fernandes

A recent British Columbia Supreme Court decision (*Mackenzie v. Harken Towing Co. Ltd.*, [2025 BCSC 2493](#)) addresses a long-standing and increasingly common issue in waterfront

property law: whether man-made changes to shoreline land can extinguish riparian rights. In a dispute involving members of the same family and a decades-old marine business, the Court confirmed that riparian rights endure despite significant human alteration of the foreshore.

At the centre of the case was a residential property at in Coquitlam, owned by Shane and Jennifer Mackenzie, the plaintiffs. Their relatives, through Harken Towing Co. Ltd., had operated a marine business on adjacent foreshore and water lots since the 1950s. The conflict escalated in 2022 when Harken Towing erected a barricade and posted no-trespassing signs, effectively blocking the plaintiffs' access to the Pitt River.

The Court ultimately ruled in favour of the plaintiffs, affirming their riparian rights and finding that those rights had been unlawfully interfered with.

The dispute was rooted in a unique family and property history spanning more than 70 years. The property was originally purchased in 1949 by Dorothy Mackenzie. Around the same time, her husband Ken founded Harken Towing, which began operating a barging and towing business from the waterfront area in front of the property.

For decades, the relationship between the residential property owners and the marine business was cooperative. Harken Towing leased the foreshore and water lots (the bed of the Pitt River) from the federal Crown (administered by the Vancouver Fraser Port Authority "VFPA"), and family members freely accessed the waterfront. The owners of the property (first Dorothy Mackenzie, then her daughter Linda Friskie) never objected to Harken's activities. In fact, they themselves used the docks and waterfront access.

This long-standing harmony ended in 2016 when Shane Mackenzie (Ken and Dorothy's grandson) and his wife acquired the property. Shortly after taking ownership, they raised concerns about Harken Towing's use of the foreshore and sought compensation and formal agreements for continued access and operations. Harken Towing declined these proposals, and the relationship deteriorated.

Although earlier disputes regarding trespass and corporate matters were eventually resolved, the issue of riparian rights, and specifically access to the water, remained unresolved.

The matter proceeded to trial where the central legal issue was whether the property remained "riparian," that is, whether it retained the legal status of land adjoining water, giving rise to certain rights including access to the water.

Harken Towing argued that the property had ceased to be riparian decades earlier. They pointed to the construction of retaining walls and the infilling of land between the property and the Pitt River. According to Harken Towing, this artificial land effectively separated the property from the water, making it non-riparian.

The plaintiffs, on the other hand, argued that the property had always bordered the river and that human-made alterations could not extinguish riparian rights. They maintained that their ability to access the water remained intact until it was blocked by the barricade in 2022.

The Court had little difficulty concluding that the property was originally riparian. Historical title documents and evidence confirmed that the property's boundary was defined by the Pitt River.

The key question was whether that status had changed due to human intervention.

The Court held that artificial alterations such as building retaining walls or depositing fill do not eliminate riparian rights. Unlike natural processes (such as erosion or accretion), which can change property boundaries and legal status, human-made changes do not alter the underlying legal relationship between upland property and adjacent water.

Importantly, the Court found that the land created through infilling remained part of the foreshore owned by the Crown. It did not become part of the upland property, nor did it sever the connection between the property and the river.

The Court also noted that the lease between Harken Towing and the VFPA explicitly recognized the existence of third-party riparian rights and prohibited interference with them. This further supported the conclusion that the property remained riparian.

Having confirmed the existence of riparian rights, the Court then clarified their scope.

Riparian rights include several entitlements, most notably the right of access to the water. This right allows property owners to:

- access the foreshore;
- use ramps and similar structures to reach the water; and
- use docks as a means of entering and exiting the water.

However, these rights are not unlimited. The Court emphasized that riparian owners do not have the right to:

- build structures on the foreshore; or
- permanently moor vessels at docks (except temporarily for loading and unloading).

Accordingly, the plaintiffs were entitled to access

and use the docks for entry and exit, but not for long-term moorage.

While the Court granted declarations confirming the plaintiffs' riparian rights and their entitlement to access, it declined to order the removal of the barricade.

This was due to a procedural limitation: the foreshore and water lots are owned by the federal Crown and administered by the VFPA, neither of which were parties to the case. The VFPA lease also gave the Port Authority certain rights over structures on the land.

As a result, the Court held that it could not order removal of the barricade without affecting the rights of non-parties. However, it noted that the plaintiffs could pursue further proceedings involving the VFPA if necessary.

This decision reinforces a key principle of Canadian property law: riparian rights are resilient and cannot be extinguished by unilateral, human-made alterations to the shoreline.

For waterfront property owners and commercial operators alike, the case highlights the importance of understanding the legal distinction between upland property and foreshore lands, as well as the enduring nature of access rights.

## **Supreme Court of Canada Provides a Restatement of Principles for Interpreting Exclusions in Insurance Policies**

By Tyler O'Henly

Commercial insurance contracts are a complicated patchwork of policies,

endorsements, conditions and exclusions. The Supreme Court of Canada has recently restated the “generally advisable” order for Canadian courts to follow when interpreting coverage and exclusions under property insurance contracts.

In *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3](#), the insured homeowners lost their house in a flood. They held a “comprehensive” home insurance contract with their insurer that included a “Guaranteed Rebuilding Cost Coverage,” which they asserted covered full rebuilding costs of their home (the “**Policy**”). This coverage was subject to a number of exceptions in the policy, including the following:

[The insurer does] not insure against loss or damage resulting from, contributed to or caused directly or indirectly:

[...]

8. because of increased costs of repair or replacement due to operation of any law regulating the zoning, demolition, repair or construction of buildings and their related services... [insertion added]

(the “**Exclusion**”)

To make matters more complicated – the Exclusion had an exception. The homeowners added a “Building By-law & Code Compliance Coverage” exception to their policy, which provided them with, “an additional amount up to \$10,000 . . . for the increased cost of demolition, construction, or repair to comply with any law regulating the zoning, demolition, repair or construction of any insured buildings” (the “**BBCC Coverage**”).

While rebuilding their home, the homeowners incurred significant expenses to comply

with building requirements imposed by their municipality’s conservation authority. When they made a claim for all of these expenses under the Policy, their insurer denied coverage in reliance on the Exclusion. The homeowners, believing that the Exclusion and the BBCC Coverage created an ambiguity that could not be reconciled, brought an application to have the Exclusion declared unenforceable.

Both parties agreed that the conservation authority’s requirements were properly considered “ laws” for the purposes of the Exclusion and the BBCC Coverage. The central issue on appeal was whether the Exclusion was valid for the purposes of limiting or otherwise amending the BBCC Coverage. The homeowners took the position that the exclusion, if given effect, would essentially void the BBCC Coverage, and was therefore unenforceable. On the other hand, the insurer argued that the Exclusion, read together with the BBCC Coverage, simply limited the coverage under that Policy to \$10,000.00, and the insurer would not be responsible for any additional costs.

### **Interpreting Insurance Policy Exclusions**

The Supreme Court of Canada found that the Policy was limited by the Exclusion, which was in turn “expanded” by the BBCC Coverage. The result was that the homeowners’ claim under the Policy was limited to \$10,000.00.

In coming to its decision, the Court restated the following helpful guidelines to follow when interpreting insurance contracts made in Canada.

### **Interpreting Coverage Under a Policy of Insurance**

When determining the applicability of a policy, the following framework is “generally advisable” for courts to follow:

1. First, the insured must prove that the damage

- or loss claimed falls within the initial grant of coverage.
2. Second, the insurer then has an opportunity to establish that one of the exclusions to coverage applies.
  3. Third, if the insurer is successful in demonstrating an exclusion, the insured must prove that an exception to the exclusion applies.<sup>1</sup>

### Specific Issues in Insurance Contract Interpretation

In arriving at its decision, the Supreme Court reviewed how to deal with a few questions which often arise when courts are tasked with interpreting insurance policies.

#### ***How Clear Does an Insurance Policy Need to Be?***

The wording of insurance policies must be unambiguous. When a contract uses unambiguous language, the court should give effect to the policy's clear language, reading the contract as a whole.<sup>2</sup>

A contract's language will be deemed ambiguous when a provision has multiple "reasonable but differing interpretations."<sup>3</sup> Ambiguity in policies of insurance typically arises in two situations:<sup>4</sup>

1. *Where an ambiguously worded provision is not reconciled by other provisions of a contract*

Consider, for example, the following endorsement:

"This Policy covers personal property damage while away from the premises for a reasonable temporary period"

Does this mean personal property *at* the premises is covered while the *occupier* is temporarily away from it? Or does it cover personal property while

the personal property itself is *temporarily away from the premises*, i.e. brought offsite for storage?

What is a "*reasonable temporary period*" – is it one interval of time for all situations, or does a reasonable temporary period differ in each circumstance? For example – if the policy covers personal property on the premises while an occupier is on vacation, what is the duration of a "*reasonable temporary*" vacation?

All of these questions have multiple reasonable yet differing answers.

*2. When an unambiguous provision can be given two or more reasonable differing interpretations when read together with one or more other provisions under a policy.*

Consider, for example, the following two provisions in a policy:

**Exclusion:** "This Policy does not cover loss or damage caused by theft from a vehicle."

**Endorsement:** "This Policy covers all loss or damage caused by theft that occurs anywhere in Canada."

When read alone, the language of the exclusion clearly excludes coverage from any theft from a vehicle and makes no exception. Conversely, when read alone, the language of the endorsement clearly provides coverage for property theft anywhere in Canada and makes no exception. When read together, there are two reasonable differing answers on whether loss or damage for theft from a vehicle located in Canada would be covered.

The court must give the language of an insurance policy its "ordinary and grammatical meaning," "as they would be understood by the average person applying for insurance,

<sup>1</sup> *Emond v. Trillium Mutual Insurance Co.*, 2026 SCC 3 (CanLII) at para 33.  
<sup>2</sup> *Emond v. Trillium Mutual Insurance Co.*, 2026 SCC 3 (CanLII) at para 37.  
<sup>3</sup> *Emond v. Trillium Mutual Insurance Co.*, 2026 SCC 3 (CanLII) at para 41.  
<sup>4</sup> *Emond v. Trillium Mutual Insurance Co.*, 2026 SCC 3 (CanLII) at para 46.

and not as they might be perceived by persons versed in the niceties of insurance law.” This approach serves consumer protection, which the courts have repeatedly recognized as a key consideration for home and auto insurance.<sup>5</sup>

The courts generally require that insurance policies are “clear, express and easily intelligible.”<sup>6</sup> To determine whether a policy’s language meets this standard, its provisions must be interpreted in light of the contract as a whole, and must not be read in isolation.<sup>7</sup> This is because other provisions in the contract may alter a provision’s meaning, as seen in the example above.

A provision in an insurance policy will not be ambiguous simply because it overlaps with other provisions of the policy. The courts have recognized that insurance policies often include overlapping endorsements, exclusions, conditions and endorsements. Insurers are not expected to fit every piece of an insurance policy together perfectly – interpreting a policy must be an exercise in “searching for harmony rather than discord” between overlapping provisions.<sup>8</sup>

#### ***How is an Ambiguous Provision Resolved?***

Where a provision may have two reasonable interpretations, the court does not “flip a coin” but rather, will follow a principled approach in resolving ambiguities.

The court will look for an interpretation that is consistent with the reasonable expectations of the parties and will not give interpretations that would

<sup>5</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 38](#).

<sup>6</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 39](#).

<sup>7</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 40](#).

<sup>8</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 47](#).

create unrealistic results. The interpretation must be consistent with what the parties would have contemplated in the commercial atmosphere that the contract was made in. Additionally, the interpretation should be consistent with the effect of similar insurance policies.<sup>9</sup>

If these interpretation tools do not reveal a reasonable, clear interpretation, the court will use the doctrine of *contra proferentem* to interpret the provision. Essentially – where a provision is ambiguous, it will be given the interpretation which is most favourable to the insured. This accounts for the “unequal bargaining power at work in insurance contracts,” and forces the insurer, who drafted the policy, to “[bear] responsibility for residual ambiguity.”<sup>10</sup>

#### ***Can a Policy Exclude Insurance Coverage Entirely?***

When the court is interpreting ambiguous exclusions, it cannot find an interpretation which would “completely defeat the very objective of having purchased the relevant coverage,”<sup>11</sup> and render that coverage useless. This keeps with a long-standing common law principle is that an insurance policy cannot contain exclusions which have the effect of defeating the core purpose of the policy.<sup>12</sup> This rule is often referred to as the “nullification of coverage doctrine” or, simply, the “nullification doctrine.”

The nullification doctrine has been followed by Ontario courts for several decades. It was recently articulated by the Court of Appeal as follows:

<sup>9</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 49](#).

<sup>10</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 50](#).

<sup>11</sup> *Emond v. Trillium Mutual Insurance Co.*, [2026 SCC 3 \(CanLII\)](#) at [para 66](#).

<sup>12</sup> See *Cornish v The Accident Insurance Co.*, (1889) 23 QBD 453 (Eng CA).

“The “nullification doctrine” prevents insurance contracts from being construed so as to defeat the coverage the policy provides, thereby defeating the very objective of the insurance contract and rendering it nugatory.”<sup>13</sup>

Put simply – an insurer is not allowed to charge money for a policy of insurance where it does not take on any actual risk. If an insurer is going to offer a policy that purports to cover a certain peril, it cannot “exclude” its way out of providing the essential coverage that an insured would expect.

The nullification doctrine will apply to an exclusion regardless of whether its language is ambiguous. If an exclusion is clear that it would defeat the objective of the policy, the court will deem the exclusion unenforceable.

### Conclusion

Reading an insurance policy cover-to-cover can be a feat in and of itself. It can be even more difficult to parse the correct interpretation of how the many provisions of a policy interact with one another. With the Supreme Court of Canada’s decision in *Emond*, insurers and insureds at least have an up-to-date roadmap on how ambiguities in these complicated contracts should be navigated.

When in doubt, always consult an insurance professional or legal professional on insurance coverage. Policy wording is an essential element of a business and an insurer’s operations, and it is critical that both sides understand what protection and limits are in place before – and not after – a claim occurs.

<sup>13</sup> *Ontario v St Paul Fire and Marine Insurance Company*, [2023 ONCA 173](#) (CanLII) at [para 31](#).

## Federally Regulated Employers: Are Your Employment Agreements Still Enforceable?

By Saisha Mahil

Federally regulated employers subject to the *Canada Labour Code* (“**CLC**”) should be mindful of the Ontario Superior Court of Justice’s recent decision in *Ghazvini et al. v Canadian Imperial Bank of Commerce*, [2025 ONSC 5218](#).

Prior to *Ghazvini*, Ontario courts had not rigorously applied the principles from *Waksdale v Swegon North America Inc.*, [2020 ONCA 391](#), to assess the enforceability of termination provisions in employment agreements governed by the CLC. This created uncertainty as to whether the strict contractual interpretation framework established in *Waksdale* extended into the federal employment regime.

In *Waksdale*, the Ontario Court of Appeal confirmed that termination provisions must be read as a whole. If any part of the termination provision contravened minimum employment standards, the entire termination clause would be rendered unenforceable, regardless of whether the offending provision was triggered in the particular case.

While *Waksdale* has had a significant impact on provincially regulated employment agreements governed by the *Employment Standards Act, 2000*, its application to federally regulated employers remained unclear given that the Court had not definitively addressed whether the same criteria applied under the CLC.

In *Ghazvini*, two employees of the Canadian Imperial Bank of Commerce (“**CIBC**”), terminated without cause, sued CIBC for wrongful dismissal.

The plaintiffs argued that the termination provisions in their employment agreements violated the minimum standards under the CLC, thereby entitling them to reasonable notice at common law. In particular, they challenged both the “for cause” and “without cause” provisions. The “without cause” provision was said to be non-compliant because it permitted termination “at any time,” despite the CLC imposing restrictions on when termination may lawfully occur. The “for cause” provision was also questioned on the basis that it set out a list of conduct constituting cause that may not, in all circumstances, meet the legal threshold for just cause under the CLC. As a result, the plaintiffs submitted that the provision could permit termination without notice in situations where the statutory standard was not met, rendering it invalid. CIBC’s position was that the termination provision complied with the CLC and rebutted the common law presumption of reasonable notice.

While the Court undertook an analysis of both the “for cause” and “without cause” provisions, the decision ultimately turned on the “for cause” provision, reproduced below:


**By CIBC for Cause** – CIBC may terminate your employment at any time without advance notice, or pay in lieu of notice, for Cause. Cause includes, but is not limited to, dishonesty, fraud, breach of trust, failure to perform your duties in a satisfactory manner, a breach of [CIBC’s Code of Conduct], failure to obtain or maintain any required [Training Licenses and Accreditations], failure to complete the pre-employment screening process to the satisfaction of CIBC, providing false, misleading or inaccurate information during the hiring process, a breach of any other term or condition of your employment, and any act or omission recognized as Cause under applicable law. If your employment

is terminated for Cause, you will have no entitlement to any notice of termination, payment in lieu of notice of termination, severance or any other damages whatsoever.

Although counsel for CIBC argued that the reference to “cause” in the provision should be interpreted as referring to “just cause” under the CLC, the Court disagreed because the provision did not explicitly state “just cause”. Instead, it included a broad, non-exhaustive list of conduct, some of which may fall short of the legal threshold for just cause under the CLC. As a result, the Court found that this provision failed to comply with the minimum standards under the CLC and therefore violated the CLC because it was ambiguous and defined cause more broadly than what the CLC intended. Like in *Waksdale*, the “without cause” termination provision in the *Ghazvini* agreements were also rendered unenforceable, and the Court determined that the employees were entitled to common law notice.

The decision in *Ghazvini* signals a shift toward consistency in how courts interpret termination provisions across provincially and federally regulated industries. By confirming that the principles articulated in *Waksdale* apply equally under the CLC, employers can no longer assume that employment agreements in federally regulated industries will be afforded a more flexible interpretation. Instead, termination provisions will be examined with the same standard as provincially regulated industries, with any ambiguity likely to render the entire clause unenforceable.

In light of this, federally regulated employers should proactively review and update their employment agreement templates for new hires and consider reviewing current



agreements to determine whether existing employees should enter into new agreements to mitigate the risk of unintended exposure to common law notice.

### **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](mailto:Rui.M.Fernandes), at 416.203.9505 or [rfernandes@grllp.com](mailto:rfernandes@grllp.com).

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