APPROVED
By Kristin Povilonis at 11:09 am, Sep 28, 2011

The Transportation Lawyer

October 2011 • Volume 13, Number 2

October 19, 2011
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A Joint Publication of

Transportation Lawyers Association

and

Canadian Transport Lawyers' Association

Association Canadienne des Avocats en Transport

A Comprehensive Journal of Developments in Transportation Law

TLA's Website: www.translaw.org *CTLA's Website: www.ctla.ca*

In Canada, A CONSIGNEE MAY BE LIABLE TO PAY TWICE FOR THE SAME SHIPMENT OF GOODS

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Introduction

Consignees should be wary of the recent decision in *Cassidy's Transfer & Storage Ltd. v. 1443736 Ontario Inc.*,[1] where the Ontario Superior Court was persuaded that the Federal *Bills of Lading Act*[2] favoured the unpaid carrier, trumping the Consignee's defences, and causing the Consignee to pay twice for the same cross-border shipments of socks.

In a small but influential case prosecuted swiftly under the (Ontario) Simplified Rules of Civil Procedure, without the benefit of examinations for discovery, the consignee, the Government of Canada, was ultimately held to be liable to the plaintiff carrier for the unpaid freight charges of the bankrupt shipper based on S. 2 of the *Bills of Lading Act.*

This decision is particularly significant for transportation lawyers and their clients for three reasons since Justice Ray:

1. Clearly dictates the liability of a consignee to an unpaid carrier where freight is pre-paid, the consignee accepts the goods and knows the carrier is unpaid, and the *Bills of Lading Act* applies;
2. Introduces the defence of *laches* for a consignee whereby waiver can be presumed by the Court when there is such delay by the carrier in asserting its claim that it is prejudicial to the consignee; and
3. Illustrates the benefit of achieving results swiftly and economically under the Simplified Rules of Civil Procedure.

Factual History

As noted in the Reasons for Decision, the facts in this case are straightforward. Following a Request for a Proposal, the Government of Canada ("GOC") contracted with 1443736 Ontario Inc., operating as Canada One Sourcing ("Canada One"), in June 2006 for the supply and delivery of socks for the Canadian Forces. The total value of the contract, including freight, was more than $9,000,000. Although a freight forwarder was initially involved, it was eliminated as "unnecessary"[3] and, thereafter, the plaintiff carrier dealt directly with Canada One and arranged to pick up the shipments of socks in North Carolina and deliver them to Montreal and Edmonton.

Between March and April 2008, the plaintiff carrier provided services to and invoiced Canada One and was paid $11,427.50 in May 2008. However, the carrier had unpaid invoices between April 11, 2008 and July 4, 2008 which totalled $51,028.50. When the plaintiff carrier pressed for payment, Canada One began using a different carrier. Canada One went into bankruptcy April 30, 2010.

It was significant to the Superior Court that as early as December 2008, the carrier demanded payment from the consignee; however, despite this demand, the consignee continued to pay invoices to Canada One through April 9, 2010 (including a further contract entered into on March 3, 2010 for the supply and delivery of $1,144,780.88 in socks).

These payments to Canada One continued even after the consignee received written notice that an action would be launched against it for the unpaid claims.

The plaintiff carrier commenced its action against Canada One and the consignee in September 2009, with the consignee cross-claiming against Canada One for indemnity. Canada One failed to defend and was noted in default on January 13, 2010.[4]

The invoicing and payment requirements stipulated in the original contract between the GOC and Canada One were all inclusive (meaning shipping was included in the price to be paid to Canada One by the GOC).

It was significant to this decision that the shipments were required by the contract to be opened and inspected by the consignee *before* the requisite invoice would be paid. The GOC witness therefore testified that the GOC, as the consignee, *knew* at the time of delivery by the plaintiff that the shipment had not yet been paid to the plaintiff carrier due to the

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above-outlined payment procedures: inspection first, payment thereafter.

The standard "straight" form bill of ladings prepared by the plaintiff (using standard transportation software)[5] accompanied the shipments to their destinations. Six of the eight bills stated that the freight charges were "*prepaid*" and also noted: "*Received, subject to the contract between the Shipper, Consignee or Third Party and the carrier in effect on the day of shipment...*"[6]

A director for the plaintiff testified that the notation "prepaid" simply meant not "collect" from the consignee on delivery and was a term widely used in the industry to include billing to another party (Canada One in this case). This evidence was significant to the finding in favour of the carrier, as set out below.

The Decision and Analysis

The Plaintiff Carrier's Winning Argument

The plaintiff carrier relied upon S. 2 of the federal *Bills of Lading Act*, to argue the GOC was liable as a consignee for the unpaid balances.[7] S. 2 reads:

> Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with the consignee/him.[8]

The Consignee's Double Liability?

The consignee argued that provincial, not federal law, applied and, therefore, the parties were bound by the definition of a bill of lading in the Ontario *Mercantile Law Amendment Act* which excluded the plaintiff's bills from the protection afforded to carriers. The consignee relied upon the definition of a bill of lading in the provincial *Mercantile Law Amendment Act* which reads:

> "… bill of lading" includes all receipts for goods accompanied by an undertaking to transfer them from the place where they were received to some other place by any mode of carriage whatever, whether by land or water or partly by land and partly by water.[9]

Factually, the consignee argued that it had no contract with the plaintiff, that its contract with Canada One specifically bound subcontractors to its terms by language in the bill of lading, and that it had already paid Canada One and should not be liable to pay twice.

Justice Ray did not find the consignee's arguments persuasive, eliminating each and every one.

In his decision, Justice Ray preferred earlier decisions from the Quebec Court of Appeal, which were relied upon by the plaintiff. In *SGT 2000 Inc. v. Molson Breweries of Canada Ltd.*,[10] the consignee, Molson, was found liable for unpaid shipping invoices on very similar facts after the supplier became insolvent. Liability was imposed under S. 2 of the *Bills of Lading Act*. The court noted that the notation "prepaid" was not understood by Molson in its literal sense; instead industry practice showed the notation to mean the shipper's invoices were paid by the consignee after delivery, which subsequently paid the carrier's invoices.[11]

However, the significance of *Cassidy's* to transportation lawyers and their clients lies in Justice Ray's distinction of the 2009 decision of the Federal Court in *H. Paulin & Co. v. A Plus Freight Forwarder Co.*[12] *H. Paulin & Co.* was litigated by our own editor, Marc D. Isaacs, who successfully defended a claim against the consignee, winning a dismissal of the claim with costs.

In *H. Paulin & Co.*, Justice Harrington came to a different conclusion than in *Cassidy's* since he interpreted the freight "prepaid" notation as a representation by the carrier to the consignee that the freight had been paid. This prevented the carrier from claiming payment against the consignee in accordance with the language under the *Bills of Lading Act*.

Justice Harrington distinguished the facts in *H. Paulin & Co.*, from those in *Molson*, (wherein the latter case the consignee was liable to the carrier), on the grounds that in the case before him H. Paulin did not become owner of the cargo in virtue of the bills of lading; which were not negotiable and which the Court found were apparently never in the hands of the shipper.[13] Further, it was significant to Justice Harrington that the entire contract between the shipper and the carrier was not contained in the bills of lading, and the overall contract obliged the shipper to pay freight.[14]

Justice Harrington considered that even if property passed pursuant to the bill of lading, the consignee's liability is under the *Bills of Lading Act* "as if the contract *contained in the bill of lading* had been made with himself."[15] The contract contained in the bills of lading, the overall contract, did in fact state that the freight was paid. By contrast, as outlined above, some of the bills of lading in *Cassidy's* contained the notation that the shipment was received subject to the contract between the shipper and the carrier.

In order to find for the carrier in *Cassidy's*, Justice Ray distinguished the findings in *H. Paulin & Co.* on a factual basis. Justice Harrington did not hear evidence in *H. Paulin & Co.* regarding what the consignee understood the "freight prepaid" notation to mean. Therefore, Justice Ray found that the evidence was materially different in

both *H. Paulin & Co* and *Molson* on this key point.[16]

The Facts in Favour of the Carrier

In *Cassidy's*, Justice Ray found that the facts led to a different conclusion: the plaintiff carrier was not a party to the contract between the GOC and Canada One, had no notice of its terms, and the language "[r]eceived subject to the contract between the Shipper, Consignee or Third Party and the carrier in effect" was incorporated into the plaintiff's bills of lading. Despite this, the GOC argued its contract with Canada One displaced the presumption and protection afforded to the carrier by S. 2 of the *Bills of Lading Act*, *supra*.

Justice Ray rejected the consignee's arguments and found the consignee liable to the carrier who was not a party to the contract between GOC and Canada One. He did so by finding that the *Bills of Ladings Act* creates a statutory privity of contract where the carrier can bring itself within its terms.

The significance of *Cassidy's* does not lie only in the factual considerations. Justice Ray reconciled the Federal and Provincial legislation, and after finding the *Bills of Lading Act*, *supra*, to be the governing legislation, he also found that the applicable bills of lading fell within the definition in the *Mercantile Law Amendment Act*, based on an implied undertaking that the plaintiff would transport the goods from their point of origin to the destination.

Justice Ray found that the plaintiff carrier had fulfilled its implied undertaking by virtue of the GOC signing as consignee. This implied undertaking was based on the GOC acknowledging receipt of the goods, knowing where they had came from, what they were, and in its expectation for their delivery.

Justice Ray then went on to outline the following principles that emerge from the authorities concerning the *Bills of Lading Act* s. 2:

1. The section was enacted to create a statutory privity of contract so as to eliminate the need for a finding of privity of contract between the carrier and the consignee in order to permit the carrier to recover its freight charges. There is a presumption that the consignee is responsible for the freight charges. It is not required that the consignee know the terms of the freight agreement to be bound by it;
2. To avoid liability, the consignee must rebut the presumption by proving:
   (a) The existence of another arrangement that the shipper alone would be responsible for the freight charges; AND,
   (b) The carrier had not waived the protection of the Act.
3. The carrier's waiver may be express or implied, but it may not be presumed from the silence of the parties;
4. The term 'freight prepaid', may on the evidence amount to a waiver if it is found to be a representation to the consignee that the carrier charges had been paid. However, if the evidence of the consignee were that it understood as a fact that the freight charges had not been paid, then it would not amount to a waiver. Alternatively, if the evidence of the consignee were that it knew that the term was understood in the industry to mean something other than its ordinary meaning, then it may be found not to constitute a waiver.[17]

Based on these principles, the court held that the fine print on the bills of lading were intended to incorporate any tariff or fee arrangements between the carrier and the shipper rather than the terms of the contract between the GOC and Canada One.

Significantly, no evidence of a waiver by the plaintiff was found. Rather, the GOC knew at the time of delivery that the freight had not been paid and was put on notice of the carrier's claim. Liability was therefore imposed on GOC for failing to displace the legal effect of the *Bills of Lading Act*, *supra*, by proving the plaintiff had entered into another arrangement that exonerated the GOC. There was therefore no waiver of the protection afforded by S. 2 of the *Act*.

Observations and Conclusions

It is significant that as outlined above, each situation will be interpreted based on the individual facts of the case. This was specifically noted in *H. Paulin & Co.* by Justice Harrington when he wrote:

> There have been a number of decisions of this Court, and provincial courts, as to the meaning ["freight prepaid"]. Cases in this Court have been limited to carriage by sea. Care should be taken in analysing judgments from other courts as considerable reference has been made to customary practices, particularly the trucking industry.[18]

As a result of the outcome in *Cassidy's*, both consignees and carriers should define their understanding of the freight terms in advance. Carriers, and those representing their interests, must indicate whether shipping has in fact been 'prepaid' from the carrier's perspective and make it clear that the goods are accepted subject to the tariff or fee arrangements between the shipper and carrier.

Conversely, consignees must be aware of the presumption of responsibility for freight charges and that it is not a defence to liability to

claim that a consignee is unaware of the terms of a freight agreement between a shipper and carrier.

In conclusion, this decision is particularly significant for transportation lawyers and their clients for three reasons:

1. A consignee can be held to be liable to an unpaid carrier where freight is pre-paid, the consignee accepts the goods and knows the carrier is unpaid, and the *Bills of Lading Act* applies;
2. A consignee faced with a carrier's demand should consider the defence of *laches* whereby waiver can be presumed by the Court when there is such delay by the carrier in asserting its claim that it is prejudicial to the consignee; and
3. Counsel faced with significant cases requiring swift resolution should consider prosecuting the action under the Simplified Rules of Civil Procedure.

Endnotes

1. *Cassidy's Transfer & Storage Ltd. v. 1443736 Ontario Inc.*, 2011,ONSC 2871, [2011] OJ No. 2207 ("Cassidy's").
2. R.S.C. 1985, c. B-5.
3. *Cassidy's*, para 5.
4. Note above that the consignee entered into another contract with Canada One after it was found in default.
5. The software was not identified in the decision.
6. Two additional bills were in a different form with one having no notation regarding freight charge terms and the other was marked "collect." Also, *Cassidy's* was identified as the Shipper in six of the eight bills of lading, and as carrier in the other two.
7. The *Bills of Lading Act* does not contain a definition of bill of lading.
8. *Supra* note 2, at S. 2.
9. R.S.O. 1990, Chapter M-10 s. 7(1); *Supra* note 3, at S. 1. The court noted there is no definition of bills of lading in the federal *Bills of Lading Act*.
10. [2007] J.Q. no 11491, 2007 QCCA 1364. ("SGT2000 Inc.").
11. See: *2318-1654 Quebec inc. c. Swiss Bank Corp. (Canada)*, [2000] J.Q. no 2059, J.E. 2000-1475; *3099-4107 Quebec inc. c. Rowboat Company*, [2008] J.Q. no 5229, 2008 QCCQ 4785.
12. [2009] F.C.J. No 899, 2009 FC 727 ("H. Paulin & Co.").
13. *Ibid.*, at para 57.
14. *Ibid.*, at para 58.
15. *Ibid.*; *Mercantile Law Amendment Act*, *supra* note 3, at S. 1.
16. *Cassidy's*, para 18.
17. *Cassidy's*, *supra* note 1, at para 26.
18. *H. Paulin & Co.*, *supra* note 9, at para 44.