

What Determines the Contract of Carriage?

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The rights of parties in shipping arrangements are defined through what is known as contracts of carriage. Such contracts encompass the terms and conditions of the shipment between those involved in the shipment of goods, for instance. Frequently in the carriage of goods context, the tendency is to simply refer to the bill of lading as governing all terms of carriage. Indeed, provincial regulations (in most provinces) deem to incorporate certain uniform terms and conditions into bills of lading, and thus into contracts of carriage. In this manner the bill of lading does frequently represent the best evidence of the parties' intentions and their contract of carriage.

However, this article is intended to highlight the importance of considering the complete full factual matrix of the carriage arrangement at issue. Reviewing two recent Ontario cases together demonstrates that determining what truly constitutes the contract of carriage in a commercial cargo shipment may not always be as straightforward as reviewing the face of the bill of lading. Rather than simply turn to and rely upon the wording of a singular document, such as a bill of lading, parties are better served by looking at all the circumstances of the arrangement, and only then are they in a position to ascertain the terms of carriage, and from that, the rights and obligations of the affected parties.

Recent cases on contracts of carriage

The 2015 case of *A&A Trading v. DIL's Trucking Inc.* 2015 ONSC 1887 ("*A&A Trading*"), involved a plaintiff's goods that were stolen while in transit. The plaintiff sought to recover the value and its costs. Before shipping the goods, the plaintiff had told the defendant that the goods had a value of between \$250,000 and \$263,000 and asked whether the defendant had sufficient insurance. The defendant confirmed that there was sufficient insurance and the shipment proceeded.

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Each party had its own standard bill of lading but neither contained a space to declare value. The plaintiff did not declare a value on the bill of lading but attached a copy of an invoice showing the value of goods to be \$263,520 and a packing slip. The defendant referenced these documents on its bill of lading, while both parties signed that bill.

The central issue was whether the defendant's liability could be capped at \$4.41 per kilogram of lost cargo, pursuant to *Carriage of Goods*, O. Reg. 643.05 under *the Highway Traffic Act*, R.S.O 1990, c. H.8. Relevant observations by the Court included that the regulation does not define a contract or carriage, nor does it equate a contract of carriage to a bill of lading.

The Court ruled in favour of the plaintiff, finding that the defendant was liable for the full value of the goods stolen because the commercial invoice (which did state a value) was referenced on the face of the bill of lading. The Court also referenced the common practice between the parties and held that it was "... clear the defendant was aware of the value of the plaintiff's consignment." The Court therefore concluded the commercial invoice formed part of the contract of carriage. The written reference to the invoice on the face of the bill of lading (and arguably together with the practice of the parties) gave a basis for the Court to hold there was an intent to provide the carrier with notice of the value of goods, which was sufficient declaration of value to prevent the application of the \$4.41 per kilogram limitation of liability.

Thus, the contract of carriage was not wholly reflected simply by reference to the language upon the bill of lading, but rather the Court also considered evidence of the defendant's representations concerning insurance, and accepted a valuation through a document (i.e. the invoice) incorporated by reference into the bill of lading.

Contrasting *A&A Trading* with *National Refrigeration & Air Conditioning Canada Corp. v. Celadon Group Inc.* 2016 ONCA 339 ("*National v. Celadon*") demonstrates the importance of resorting to underlying factual circumstances to appreciate the standpoint of the respective actors and to ascertain the actual contract of carriage between them. In litigating this dispute, both National and Celadon appear to have tried resorting to extraneous facts to extend the contract of carriage and thus improve their respective positions, however both were unsuccessful. The Ontario Court of Appeal issued its ruling in *National v. Celadon* on May 5, 2016.

After National had two shipments of copper tubing stolen while on route from Mexico to Ontario, National sued Celadon for the loss of the shipments. Celadon then claimed (among other things) that its website's terms and conditions excluded it from any liability for loss or damage occurring in Mexico. In making this claim, Celadon attempted to extend the contracts of carriage for these shipments to encapsulate exclusionary language contained within terms and conditions posted on its website.

The trial judge found that Celadon could not rely upon exclusions of liability posted within its website's terms and conditions. The terms and conditions were not sufficiently brought to National's attention, were possibly ambiguous, and ultimately, the Court concluded the terms and conditions did not form part of the contract of carriage. Therefore, on these particular facts, Celadon could not extend the contract of carriage to include its website's terms and conditions. The Ontario Court of Appeal upheld this determination, citing deference to the Trial Court on what the Court of Appeal deemed to be a question of mixed fact and law.

Conversely, before the Ontario Court of Appeal, National also could not extend the contract of carriage in the manner it wanted by its reliance upon extraneous material. National had asserted that a value on a commercial invoice constituted a declared value. In so arguing, National hoped to avoid the limitation of liability pursuant to section 9 of Schedule 1 of Ontario Regulation 643/05, which provides that a carrier's liability is limited to \$4.41 per kilogram, unless a value of goods is declared on the face of the contract of carriage. The Trial Court accepted National's position; however the finding did not stand and was overturned on appeal.

Unlike in *A&A Trading*, these bills of lading did contain spaces for declared values, and did not contain reference to commercial invoices. The Ontario Court of Appeal therefore found that the Trial Court erred in law when it found that the existence of a commercial invoice, and its provision by the Mexican consignor to National and then on to the carrier, satisfied the regulation's requirement for declaring a value on the face of the contract of carriage. Instead, the Ontario Court of Appeal ruled that the limitation of liability of \$4.41 per kilogram could apply, and noted the invoice from the consignor "... had nothing to do with the contract of carriage and providing a copy ... to the carrier was not declaring the value ...". Simply handing the document to a carrier was insufficient to "declare" a value.

Commentary on the distinction between the two cases

The factual distinctions between the two cases provide insights concerning the formation of a contract of carriage, and suggests the following useful principles when considering the scope of liability in a carriage arrangement:

1. A commercial invoice referenced on the face of the bill of lading may constitute proof of declared value - the commercial invoice issued by the consignor in *National v. Celadon* was provided to the carrier but was not referred to on the face of the bill of lading, while in *A&A Trading*, the invoice was provided to the carrier and, perhaps more importantly, was incorporated by reference into the bill of lading, and the Court concluded it formed part of the contract of carriage;
2. The closer the bill of lading conforms to the regulatory scheme, the greater reliance parties may likely place on it as constituting the entirety of the contract of carriage - in *A&A Trading* the bills of lading did not conform to Regulation 643/05, and had no space for stating a declared value. The Court was willing to consider a declared value incorporated by reference to the commercial invoice. In *National v. Celadon* the bill of lading contained an empty space for a declared value, which could itself have precluded any willingness of the Court to consider an incorporation of declared value by reference to a commercial invoice.
3. Evidence of parties' representations and pre-contractual arrangements may be tendered, but may not necessarily be determinative or even impactful - in *A&A Trading* the Court heard evidence of the pre-contractual conversations concerning valuation and sufficiency of insurance, while in *National v. Celadon* the parties prior history and dealings were again presented and considered, but ultimately formed an insufficient basis to allow Celadon to rely upon its website terms and conditions.

These cases once again confirm that the bill of lading, while not determinative of a contract of carriage, often presents as the best evidence of the arrangement. While the bill of lading itself may not contain all required terms and conditions, the possible inclusion of terms and conditions by incorporation by reference (such as through the invoice in *A&A Trading*), or conversely the omission of terms of conditions (such as the absence of the Celadon website's terms), each can have a bearing on the perceived rights of the various actors.