Railway Law Client Alert: Scope of Limitation of Liability Clauses in Rail Tariffs Considered by Federal Court of Appeal

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A recent decision of the Federal Court of Appeal ("FCA") confirmed that CP Rail can benefit from limitations of liability in relation to claims of third parties, contained in its published tariffs, where CP Rail is not negligent. The case is relevant as railways are sometimes named as defendants where they are not negligent in relation to losses which are out of their control. However, the FCA held that CP Rail cannot limit its liability to shippers through published tariffs, for loss or damage or delay resulting from CP Rail's negligence.

This decision has implications for the allocation of risk between shippers and railway companies, and may provide an incentive for parties to negotiate direct commercial agreements instead of relying on published tariffs.

In *Canadian Pacific Railway Company v. Canexus Chemicals Canada LP et al.,* 2015 FCA 283, the FCA overturned a decision of the Canadian Transportation Agency (the "CTA"), which studied limitation of liability and indemnity language in published railway tariffs. A group of shippers (the "Shippers") had asked the CTA to rule on the legality and reasonableness of the limitation of liability and indemnity provisions found in Item 54 of CP Rail's Tariff 8. The FCA undertook a complex statutory interpretation exercise involving the *Canada Transportation Act* (the "*Act*"), its associated regulations, and CP Rail's Tariff 8, and ultimately overturned the CTA's decision.

The Shippers alleged that the limitation of liability provisions in Tariff 8 did not comply with section 137(1) of the *Act,* which restricts a railway company's ability to limit its liability by tariff. The CTA had found that the limitation of liability provisions in CP Rail's Tariff 8 were not being interpreted by CP in a manner which was consistent with section 137(1) of the *Act.* The FCA disagreed and ruled, in part, that section 137(1) of the *Act* allowed CP to limit its liability to third parties in circumstances where CP was not negligent.

By way of background, the FCA observed that railway companies are subject to common carrier obligations requiring them to accept goods for carriage from any person who pays the relevant tariff. The common carrier obligations are codified in section 113 of the *Act.* As a result of the common carrier obligations, railway companies do not have

the ability to decline traffic that represents an unacceptable exposure to liability. Railway companies must publish tariffs setting out their rates and other terms and conditions pursuant to section 117 of the *Act.*Through the terms and conditions in their tariffs, railway companies can attempt to limit their exposure to liability.

The FCA confirmed that the legislature's purpose in enacting section 137(1) of the *Act* was to strike a balance between the interests of railway companies and shippers, by preventing railway companies from imposing overly broad limitations of liability by tariff, and thereby encouraging the negotiation of commercial agreements between shippers and railway companies. The *Act,* specifically section 126, permits shippers and railway companies to negotiate confidential agreements that may deviate from the terms and conditions found in the published tariffs.

The FCA found that CP Rail's interpretation of the limitations of liability language in Item 54 of Tariff 8 offended section 137(1) of the *Act*, where the Shippers were concerned, meaning they were reading a more broad limitation of liability than was permissible under the *Act.* Because Item 54 of Tariff 8 is merely a published set of terms, and not an agreement agreed to by Shippers, CP Rail's broad interpretation of Item 54 of Tariff 8 was found to offend section 137(1) of the *Act* and was found to be unenforceable except where CP Rail was not negligent. Observers speculate that CP Rail's position in the FCA was informed by its concern about the Lac Mégantic litigation where it says it is not negligent, but it is the last solvent entity defending the resulting litigation.

In summary, the FCA ruled that:

- CP **retains liability** to the shipper for:
  - loss, damage, or delay of the shipper's goods;
  - loss caused by CP's sole negligence or willful misconduct, including negligence or misconduct of CP's agents or employees; and
  - loss caused jointly by CP and the shipper and others, to be apportioned based on the extent of the fault adjudicated to CP.
- CP **does benefit** from the limitations of liability and indemnities in relation to claims by third parties where there is no negligence on the part of CP or its agents.

In light of this decision, both shippers and railway companies should consider whether their interests are better served by agreements negotiated and signed by both parties instead of simply relying on a railway company's published tariffs. Both shippers and railway companies should also review their liability insurance to ensure coverage is sufficient based on the risk allocation parameters set forth by the FCA in this decision.

Railway companies should consider a review of any published tariffs to ensure that they do not offend any of the principles set out in this recent FCA decision. Railway companies should also ensure that their tariffs contain appropriate limitation of liability provisions to limit their liability to third parties in circumstances where the railway company is not negligent.

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