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Canadian Law of Carriage of Goods by Air: An Overview and A Summary of Recent Developments

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Introduction

The Canadian law of carriage of goods by air is considerably more complicated than the law in relation to carriage of goods by sea or rail and possibly also by road. This is so because the law differs depending upon whether the carriage is domestic or international and because there is no single international regime governing all international carriage. To the contrary there are a number of conventions/protocols that apply to international carriage and the determination of which regime applies depends on the countries of departure and destination. It is therefore of the utmost importance to determine which conventions/protocols the countries of departure and destination have ratified.

Domestic Air Carriage

Domestic air carriage means the carriage of goods by air from one place in Canada to another place in Canada. (Note: If there is an “agreed stopping place” in a country other than Canada (ie. carriage from Vancouver to Montreal via Chicago), the carriage would not be domestic.

Surprisingly, the domestic carriage of goods by air is not extensively governed by legislation. The Carriage by Air Act , C-26, does not apply to domestic carriage. The only legislation governing the form and content of domestic air carriage contracts is the Air Transportation Regulations, SOR 88/58, passed pursuant to the provisions of the Canada Transportation Act, S.C. 1996, c.10. These regulations merely require air carriers to file tariffs with the Canadian Transportation Agency and to specify in those tariffs the terms and conditions of their contracts of carriage. The regulations do not attempt to impose upon carriers any particular terms and conditions.

Therefore, the domestic carriage of goods by air is essentially unregulated by legislation and freedom of contract prevails. In theory, this means that the parties to a domestic contract of carriage are free to negotiate and to include whatever terms they wish in the contract of carriage. In practice, it means that a domestic air carriage contract inevitably includes terms that limit the carrier’s liability for loss of or damage to cargo or that completely exclude liability regardless of whether the loss or damage was caused by negligence.

Although the domestic carriage of goods by air may be unregulated by legislation, the general common law of contract does impose some constraints and limits on the ability of

carriers to completely avoid the consequences of their negligence. For example, the general law of contract requires that onerous terms or conditions be properly and sufficiently brought to the attention of the other party to the contract before or at the time the contract is entered into. There have been many decided cases in which exclusion or limitation clauses were held not to form part of the contract of carriage because they were not properly brought to the attention of the shipper prior to shipment. Additionally, when interpreting exclusion or limitation clauses the courts will usually require that any such term be expressed in clear and unambiguous language and will strictly construe such terms against the interest of the carrier and in favour of the shipper. Again, there have been many decided cases in which exclusion or limitation clause have been held to not be applicable because of imprecise or inadequate wording. Finally, any terms or conditions that are considered to be “unconscionable” by the courts will not be enforced. (Note, however, that this generally applies only to contracts with consumers. Rarely will a court find that a contract between two commercial entities is unconscionable.)

International Carriage

The international carriage of goods by air is governed by the Carriage by Air Act, C-26. Pursuant to section 2 of that Act there are four separate regimes governing the international carriage of goods by air.

1. Section 2(1) of the Act implements the Convention for the Unification of Certain Rules Relating to International Carriage by Air (commonly referred to as the Warsaw Convention). The Warsaw Convention applies whenever the country of destination and country of departure are both parties to the Convention.
2. Section 2(2) enacts the Hague Protocol to the Warsaw Convention. The Warsaw Convention as amended by the Hague protocol applies whenever the country of destination and country of departure are both parties to the Hague Protocol.
3. Section 2(2) also enacts the Montreal Protocol No. 4 to the Warsaw Convention. The Warsaw Convention as amended by Protocol No. 4 applies whenever the country of destination and country of departure are both parties to the Montreal Protocol No. 4.
4. The fourth regime is the Montreal Convention, 1999, a modernized and updated version of the Warsaw Convention. The Montreal Convention 1999 is included as

Schedule VI to the Carriage by Air Act. The convention required the ratification of 30 states and was to become effective 60 days after ratification of the 30th state. The ratification of the convention by the 30th state only recently occurred on 5 September 2003 when the United States of America deposited its instrument of ratification with the International Civil Aviation Organization. The Montreal Convention thus came into force internationally on 4 November 2003. Additionally, pursuant to Order in Council dated 22 October 2003 (SI/2003-165), the Montreal Convention as contained in Schedule VI of the Carriage by Air Act also came into force in Canada on 4 November 2003. As with the other regimes, the regime implemented by the Montreal Convention will only apply where the country of departure and the country of destination are both parties to the new convention.

From the foregoing it is obvious that the first step in assessing an international air cargo claim is to ascertain which instruments the country of departure and country of destination have ratified. This will determine the applicable regime. A useful website to determine which instruments a country has ratified is the International Civil Aviation Organization Treaty Collection at: http://www.icao.int/cgi/goto_leb.pl?icao/en/leb/treaty.htm.

Other useful sites are McGill University's Air and Space Law Institute at <http://www.iasl.mcgill.ca/airlaw/statusof.htm> and Juris International at <http://www.jurisint.org/pub/>.

Warsaw Convention

The Warsaw Convention is included as Schedule I to Carriage by Air Act. It deals with both carriage of passengers and carriage of cargo. Here I shall deal only with those aspects relating to carriage of cargo. In summary, the Convention provides as follows:

1. **Application:** Article I stipulates that the rules set out in the convention apply only to international carriage and defines what constitutes “international carriage”. In essence it provides that carriage between two states that are party to the convention is international carriage to which the rules apply. It further provides that carriage between two places within the territory of single state that is a party to the convention will be subject to the rules if there is “an agreed stopping place” in another state. An “agreed stopping place” is one that has been actually contractually agreed as between the shipper and carrier. (See *MDSI v Fedex*, 2003 BCCA 9, a summary of which is appended hereto.)
2. **Waybill Requirements:** Articles 5 through 11 deal with air waybill requirements. Article 5 provides that every carrier and consignor have the right to require an air waybill (although the lack of one does not affect the applicability of the rules). Article 8 enumerates 17 particulars that must be included in the air waybill. The issuance of an air waybill and the particulars it contains are important because Article 9 provides that a carrier will not be entitled to the benefit of the exclusion and limitation provisions in the convention if it accepts cargo for carriage without an air waybill or without including certain of the particulars required by Article 8, items (a) through (i) and (q), namely:
 - (a) the place and date of its execution;
 - (b) the place of departure and of destination;
 - (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
 - (d) the name and address of the consignor;

- (e) the name and address of the first carrier;
 - (f) the name and address of the consignee, if the case so requires;
 - (g) the nature of the cargo;
 - (h) the number of the packages, the method of packing and the particular marks or numbers upon them;
 - (i) the weight, the quantity and the volume or dimensions of the cargo;
 - (q) a statement that the carriage is subject to the rules relating to liability established by this Convention.
3. **Liability of Carrier:** Article 18 provides that the carrier is liable for loss of or damage to cargo that “took place during the carriage by air” and defines this period as the period during which the cargo is in the charge of the carrier whether in an aerodrome or on board an aircraft. Hence, unlike carriage of goods by water, the period of liability is not limited to the period during which the cargo is actually on board the aircraft. Moreover, by article 18(3) any damage to cargo during carriage by land or water for the purpose of loading, delivery or trans-shipment will be presumed to have been caused during air carriage, unless proof to the contrary is made. Article 19 provides that the carrier is liable for delay.
4. **Defences:** The defences available to a carrier are set out in Articles 20 and 21. Article 20(1) provides the carrier is not liable if it proves that all necessary measures were taken to avoid the damage or that it was impossible to take such measures. Article 20(2) provides the carrier is not liable if he proves the damage was caused by negligence in pilotage or navigation and that in all other respects all necessary measures were taken to avoid the damage. Finally, by Article 21 the carrier can raise the defence of contributory negligence.
5. **Limitation:** Article 22 gives the carrier a right to limit liability. Specifically, by Article 22(2) the carrier can limit its liability to 250 francs per kilogram. Through the application of section 2(7) of the Carriage by Air Act, gold francs are converted to Standard Drawing Rights (“SDRs”) at the rate of 15.075 gold francs per SDR which gives a limitation amount in SDRs of 16.58 SDRs per kilogram.

SDRs can, in turn, be converted to Canadian dollars or any other currency by looking at the prevailing exchange rate. (These can be obtained at http://www.imf.org/external/np/tre/sdr/db/rms_five.cfm) At current exchange rates the limitation amount is approximately Cdn\$31.50 per kilogram.

6. **Declared Values:** Pursuant to Article 22(2) the right of a carrier to limit, or the amount to which a carrier can limit its liability, is dependant upon whether the consignor has made a declaration of value at the time of delivery and has paid a supplementary sum “if the case so requires”. Where the consignor has made a declaration of value, the carrier is liable to pay the declared sum unless it is greater than the actual value. However, the carrier may be able to avoid the effects of a declaration of value by a properly worded contractual term limiting the amount a shipper can declare. (See the summary of *MDSI v Fedex*, 2003 BCCA 9, appended hereto.)
7. **Loss of Right to Limit:** Article 25 further limits the right of the carrier to limit liability. This article provides that the carrier is not entitled to rely on those provisions of the convention that limit or exclude liability if the damage is caused by wilful misconduct of the carrier or of his agents acting within the scope of their employment. The most usual example of wilful misconduct theft of cargo by the carrier’s servants (*Nuvo Electronics v London Assurance* (2000) 49 O.R. 3d 374, a summary of which is appended hereto.)
8. **Prohibition Against Contracting Out:** Article 23 prohibits the carrier from contracting out of the liabilities and limits set by the convention and provides that any provision purporting to do so is null and void.
9. **Notice Requirements:** Notice requirements are dealt with in Article 26. Notice in writing of damage to cargo must be given within 7 days of receipt or within 14 days in the case of delay. If such notice is not given, no action shall lie against the carrier unless there has been fraud on the part of the carrier. There is no provision dealing specifically with notice for non-delivery and in *Green Computer in Sweden AB v Federal Express Corp.*, 2002 FCT1015, affirmed 2003 FCT 587, it was held that the notice requirements of the convention did not apply to cases of non-delivery.

10. **Limitation Period:** The time limit within which claims must be brought against carriers is established by Article 29 at two years from the date of arrival of the aircraft.

Hague Protocol

The Hague Protocol is included as Schedule III to the Carriage by Air Act. It contains a number of amendments to the Warsaw Convention. The most significant amendments enacted by the Hague Protocol relate to increased limits of liability for death or personal injury to passengers. Nevertheless, the Hague Protocol also enacts some noteworthy changes to the rules as they apply to cargo claims. The more noteworthy of these changes are as follows:

1. **Application:** Same as Warsaw.
2. **Waybill Requirements:** The Hague Protocol significantly reduced the air waybill requirements under the unamended Warsaw Convention. Article 8 of the Convention was replaced with a new provision that requires only three particulars be included in the air waybill in place of the 17 previously required. Under the Hague Protocol the only particulars required are the place of departure and destination, an indication of any one agreed stopping place (if the country of departure and destination are the same and there is an agreed stopping place in another state), and a notice that the Warsaw Convention may be applicable and limits the liability of the carrier. Additionally, Article 9 was replaced with a new provision which provides that a carrier will only lose the benefit of the exclusion and limitation provisions in the Convention if it accepts cargo for carriage without an air waybill or if the air waybill fails to contain the notice required by Article 8 that the carriage may be subject to the Convention which limits liability.
3. **Liability of Carrier:** Same as Warsaw.
4. **Defences:** The Hague Protocol deletes Article 20(2) which provided the carrier with a defence in the event of damage caused by negligence in pilotage or navigation.
5. **Limitation:** The Hague Protocol rewords the limitation of liability provisions and implements some noteworthy changes but does not change the amount of limitation. New Article 22(2)(b) clarifies that in cases where only part of the cargo is lost or damaged the weight upon which the limitation is calculated is the weight of the lost or damaged cargo. However, if the value of the other cargo is also affected then the total weight of the cargo is used. New Article 22(4) makes it

clear that litigation costs awarded by a court are in addition to the limitation amount unless the carrier has made an offer in writing within 6 months of the occurrence in an amount equal to or greater than the damages awarded. New Article 25A clarifies that the servants and agents of the carrier acting within the course of their employment are entitled to rely upon the limitation provisions.

6. **Declared Values:** Same as Warsaw.
7. **Loss of Right to Limit:** The test for when the carrier loses the right to limit is changed by the Hague Protocol. Under new Article 25 the carrier loses the right to limit if it is proved that the damage resulted from an act or omission of the carrier, or his servants or agents acting within the course of their employment, was done with intent to cause damage or recklessly and with knowledge that damage would probably result. The new test was thought to be more onerous than the wilful misconduct test in the unamended convention. However, in practice it has not proven to be so. Examples of cases where the test has been met and limitation broken are *Connaught Laboratories v British Airways*, [2002] O.J. No. 3421 and *World of Art Inc. v Koninklijke Luchtraart Maatschappij N.V.*, [2000] O.J. No. 2364 (Ont. S.C.) affirmed [2000] O.J. No.4567 (Ont. C.A.), summaries of which are appended hereto.
8. **Prohibition Against Contracting out:** The Hague Protocol adds a new clause to Article 23 clarifying that the prohibition against contracting out does not apply to loss or damage resulting from inherent defect, quality or vice of the cargo.
9. **Notice Requirements:** The notice requirements in Article 26 are increased. The seven day notice requirement in cases of damage to cargo is increased to fourteen days and the fourteen day notice requirement in the case of delay is increased to twenty-one days.
10. **Limitation Period:** Same as Warsaw. (ie. 2 years)

Montreal Protocol

The Montreal Protocol No. 4 is not to be confused with the Montreal Convention. The Montreal Protocol is included as Schedule IV to the Carriage by Air Act and was enacted as part of Canadian law on 15 October 1999. It amends the existing Warsaw regime and is applicable when the countries of departure and destination have both signed the Protocol.

The more significant changes implemented by the Montreal Protocol are as follows:

1. **Application:** Same as Hague.
2. **Waybill Requirements:** Article 5 is amended to require that an air waybill, or similar document, be delivered. Article 6 is amended to require that the consignor make out the air waybill and that both the consignor and carrier sign the bill. Article 8 is amended to require that the air waybill contain the place of departure and destination, an indication of any one agreed stopping place (if the country of departure and destination are the same and there is an agreed stopping place in another state), and the weight of the cargo. (Note that the requirement that there be a notice that the Warsaw Convention may be applicable has been removed.) Article 9 is substantially changed. Under the new Article 9 non-compliance with the air waybill requirements no longer affects the ability of the carrier to exclude or limit its liability pursuant to the Convention.
3. **Liability of Carrier:** Article 18 is amended to clarify that the carrier is not liable for loss or damage to cargo caused by inherent defect, defective packing, act of war or act of public authority in connection with the entry, exit or transit of the cargo.
4. **Defences:** Article 20 is amended in relation to claims for the loss of or damage to cargo by removing the defence that the carrier could prove it had taken all necessary measures to avoid the damage. The defence remains, however, for claims relating to delay in respect of cargo.
5. **Limitation:** Article 22 is reworked and reworded by the Montreal Protocol. The amount of the limitation in relation to cargo claims is not changed but is restated to be 17 SDRs per kilogram. Otherwise the limitation provisions remain unchanged.

6. **Declared Values:** Same as Hague.
7. **Loss of Right to Limit:** A very significant change is made by the Montreal Protocol to Article 25. Under Article 25 as amended the carrier can only lose the right to limit liability in relation to the carriage of passengers or their baggage. The carrier's right to limit liability in respect to loss of or damage to cargo is unbreakable and will not depend on the wilful misconduct, intention or recklessness of the carrier or his servants or agent.
8. **Prohibition Against Contracting out:** Same as Hague.
9. **Notice Requirements:** Same as Hague. (ie. 14 days for damage and 21 days for delay)
10. **Limitation Period:** Same as Hague. (ie. 2 years)

Montreal Convention

As indicated above, the Montreal Convention is included as Schedule VI to the Carriage by Air Act. It came into force both domestically and internationally on 4 November 2003. In summary, the Montreal Convention provides as follows:

1. **Application:** The application of the Montreal Convention is essentially the same as the Warsaw Convention. Article 1 provides that the Convention applies to international carriage which is defined as carriage where the places of departure and destination are situated within the territories of two contracting states. Carriage between two points within the territory of a single contracting state is not international carriage unless there is “an agreed stopping place” in another state. (For example, carriage from Vancouver to Toronto would not be international carriage and subject to the convention unless there was an agreed stopping place at an airport outside of Canada. If there was an agreed stopping place at an airport outside Canada, the carriage would be subject to the rules of the convention.)
2. **Waybill Requirements:** The air waybill requirements under the Montreal Convention are set out in Articles 4 through 11. These provisions are essentially the same as those under the Montreal Protocol No.4 to the Warsaw Convention. Article 4 requires that an air waybill, or similar document, be delivered. Article 5 requires that the air waybill contain: the places of departure and destination; any one agreed stopping place (if the country of departure and destination are the same and there is an agreed stopping place in another state); and, the weight of the cargo. Article 7 requires that the air waybill be made out by the consignor but that it be signed by both the consignor and consignee. As with the Protocol No. 4, Article 9 provides that non-compliance with the air waybill requirements does not affect the validity of the contract or the ability of the carrier to exclude or limit its liability pursuant to the Convention.
3. **Liability of Carrier:** The liability of the air carrier for loss of or damage to cargo is set out in Article 18. The liability for delay is set out in Article 19. These provisions are essentially the same as those under the Montreal Protocol No. 4 to the Warsaw Convention.

Article 18 provides that the carrier is liable for loss of or damage to cargo that

took place during carriage by air unless the loss or damage resulted from inherent defect or vice, defective packaging, act of war or armed conflict or act of public authority in connection with the entry, exit or transit of the cargo. The period of carriage by air is defined as the period during which the cargo is in the charge of the carrier. This period will not extend to carriage by land or sea performed outside an airport, however, where there is such carriage any damage will be presumed to have occurred during carriage by air. Additionally, where the carrier, without the consent of the consignor, substitutes another mode of transport for carriage by air such transport is deemed to be carriage by air.

4. **Defences:** Article 19 provides that the carrier is liable for delay unless it proves that it took all reasonable measures or it was impossible to take such measures. Article 20 provides that the carrier may be wholly or partly exonerated from liability by proving the damage was caused by the contributory negligence of the consignor in respect of claims for damage or delay.
5. **Limitation:** The limits of liability under the Montreal Convention in respect of cargo are unbreakable as they are under the Montreal Protocol. Article 22 provides that in the case of the carriage of cargo the liability of the carrier for loss, damage or delay is 17 SDRs per kilogram. In the case of loss, damage or delay to part of a cargo the weight to be taken into account for limitation purposes is the weight of the packages lost, damaged or delayed unless the value of the remainder of the shipment is affected, in which case the weight of the total shipment shall be used.

Article 24 of the new convention provides that the limits shall be reviewed every five years. Article 25 further provides that a carrier may stipulate higher limits or agree to no limits whatsoever.
6. **Declared Values:** As with the Warsaw Convention, the Hague Protocol and the Montreal Protocol, the Montreal Convention provides for declaration of values. Pursuant to Article 22 where the consignor makes a special declaration and pays a supplementary sum, if so required, the carrier is liable to pay the declared sum unless it is greater than the actual value.

7. **Loss of Right to Limit:** The Montreal Convention as with the Montreal Protocol provides no means by which the limitation amounts might be broken in respect of cargo claims. Pursuant to Article 22(4) the carrier is only liable to lose the right to limit in relations to claims by passengers.
8. **Prohibition Against Contracting out:** As with the other regimes, pursuant to Article 26 any contractual provision tending to relieve the carrier of liability or to fix a lower amount than that allowed by the convention is null and void.
9. **Notice Requirements:** Pursuant to Article 31, notice in writing of damaged cargo must be given within 14 days of receipt. In the case of delay in delivery notice must be given within 21 days.
10. **Limitation Period:** Pursuant to Article 35 actions must be commenced within 2 years from the date of arrival of the aircraft or the date it should have arrived.

RECENT CASE LAW**MDSI v FedEx**, 2003 BCCA 9, affirming 2001 BCSC 1411

The case of MDSI v FedEx was a Warsaw Convention case. Its importance lies in the fact that it suggests that an air carrier may, by properly worded contractual terms, limit the amount which a shipper can declare in an air waybill and thereby limit the amount of its ultimate liability.

MDSI was an action for damage to a computer server carried by Federal Express from Vancouver, British Columbia to Atlanta, Georgia. The air waybill under which the cargo was carried contained a declared value in the amount of \$214,000.00. The air waybill did not stipulate that there were any stopping places although the aircraft did, in fact, stop at an intermediate place where the cargo was transhipped. Upon delivery of the cargo at Atlanta it was discovered that the server had been extensively damaged. Although expert evidence indicated that the cargo was most likely damaged by a fork lift, the circumstances of how the damage occurred were never revealed.

At trial, the Plaintiff sought to recover the full amount of its loss (approximately \$240,000) or, in the alternative, the declared value amount of \$214,000. The basis for the Plaintiff's argument that it was entitled to the full amount of the loss rather than merely the declared value was twofold: first, the Plaintiff argued the air waybill did not meet the requirements set by Article 8 of the Convention in that it did not name the intermediate stopping place (Article 8(c)) and did not contain a clear statement that the Warsaw Convention was applicable (Article 8(q)); second, the Plaintiff argued that Defendant was not entitled to avail itself of limits set by the Convention, including the declared value, as the loss was caused by the "wilful misconduct" of the Defendant or its employees.

The Defendant carrier admitted liability but raised two defences. First, the Defendant argued that the Plaintiff was not entitled to recover the declared value amount since the Plaintiff's clerk who filled out the air waybill said on discovery that she believed the declared value amount set the amount that could be recovered from the Plaintiff's insurer. Second, the Defendant argued that its liability was limited to 250 francs per kilogram as per Art. 22(2) of the Warsaw Convention or, in the alternative, to \$50,000. This argument was based on the standard terms and conditions of the Defendant as set out in its Service Guide which was incorporated by reference into the air waybill. The terms of the Service Guide relied upon for this argument were as follows (Note that these are merely excerpts and they do not follow one after the other in the Service

Guide.):

For international shipments, the maximum declared value for customs and carriage will differ from country to country and may depend on the contents of the shipment.

The maximum declared value for customs for a FedEx international shipment... is as follows:

Canada \$50,000: ... United States

The declared value for carriage amount cannot exceed the declared value for customs amount.

Any effort to declare a value in excess of the maximum amounts allowed in this Guide is null and void and the acceptance for carriage of any shipment bearing a declared value in excess of the maximum amounts allowed does not constitute a waiver of any provision of this Guide as to such shipment.

The Plaintiff's response to these issues was threefold: first, the Plaintiff argued that the Convention limit of 250 francs per kilogram did not apply because a declaration of value had been made; second that the conditions of carriage were ambiguous and inconsistent and did not, in fact, limit the amount that could be declared to \$50,000.00; and, third that the provision limiting the amount that could be declared by a shipper for carriage and limitation purposes was null and void by Article 23 of the Convention.

The issues in the case were therefore as follows:

1. Was there a valid declaration of value?
2. Did the terms limit the amount that could be declared to \$50,000.00?
3. If such a term existed, was it invalid by reason of Article 23?
4. Was the Defendant prohibited from relying upon the limitations by reason of failure to comply with the air waybill requirements set by Article 8 namely: failure to specify the agreed stopping places and failure to include a statement that the carriage was subject to the Convention?
5. Was the Defendant prohibited from relying on the limitations by reason of wilful misconduct?

At trial the trial Judge had little difficulty with the first issue. He found that Defendant's argument that there was no declaration of value because the person who filled in the declaration thought the insurer was person from whom the amount would be recovered to be "wholly

without merit”.

The trial Judge next considered the second and third issues. However, he declined to make any finding on the second issue as he held that any provision which limited the amount that could be declared would be invalid by reason of Article 23.

The trial Judge then considered the arguments relating to the air waybill requirements. He decided both issues against the Plaintiff. He held that the Convention did not require that all stopping places be disclosed in the air waybill. Rather, he held the Convention merely required the inclusion of stopping places actually agreed as between the Plaintiff and Defendant. He further held that the statement in the air waybill that the Convention “may be applicable” was sufficient compliance with the Article 8(q) requirement.

Finally, the trial judge turned to the issue of “wilful misconduct”. In a brief paragraph he declined to draw an adverse inference from the failure of FedEx to explain the circumstances of the damage. He referred to the evidence indicating that the damage was caused by a forklift and held that such damage could occur in the absence of “wilful misconduct”.

Accordingly, in result, the trial Judge ordered that the Plaintiff recover the declared value amount of \$214,000.00.

The Defendant appealed to the Court of Appeal for British Columbia. On appeal, there were only two issues:

1. Did the terms and conditions, on a proper construction, limit the amount that could be declared to \$50,000.00?
2. If they did, was such a term null and void by Article 23?

In a split decision the British Columbia Court of Appeal held that the terms and conditions of the Defendant’s Service Guide did not, in fact, limit the amount that could be declared to \$50,000.00. The majority found that the various terms and conditions relied upon by FedEx did not clearly and unambiguously provide for a limit on the value that could be declared by a shipper. The reasons are set out at paragraphs 12 through 13 reproduced below.

[12] On appeal, Mr. Butler for FedEx argues that the waybill conditions are clear and unambiguous and should be determinative as between these two sophisticated parties. He urges us to adopt the following line of reasoning:

1. The front of the waybill referred the consignor to the conditions of contract on

- the reverse side, and the terms headed "Agreement to Terms" incorporated and gave priority to the terms contained in the Service Guide.
2. As stated at para.(a) of the Guide, the declared value for carriage represented FedEx's maximum liability in connection with the shipment.
 3. Under para. (j) of the Guide, the maximum declared value for customs of international shipments going to the U.S. was \$50,000 (Cdn.), and under para. (b), the declared value for carriage could not exceed the declared value for customs purposes.
 4. In the Customs Waiver Agreement, FedEx permitted the maximum declared value of the package for customs purposes to be increased to \$500,000 "subject to" the other provisions of that agreement. Although para. 2 thereof stated that the agreement did not affect the maximum declared value for carriage for International Priority shipments, it also specified that the maximum declared value for carriage could not exceed the "declared value for customs amount" set forth in the Guide. Mr. Butler equates this with the \$50,000 referred to in para. (j) of the Guide.
 5. Since the maximum declared value for carriage purposes was unaffected by the Customs Waiver Agreement, the \$50,000 maximum specified in para. (j) of the Guide represented the limit of its liability.
 6. The prohibition in Article 23 of the Convention was not engaged because the reference to an attempt to fix a lower limit than that specified, denoted the "floor" of 250 francs per kilogram specified in Article 22(2). The \$50,000 limit was higher than that floor, consistent with what Mr. Butler contends is the purpose behind Article 23, i.e., to permit shippers and their customers to negotiate limits of liability between that floor and the actual value. FedEx's policy is to fix its maximum liability at \$50,000 unless the customer pays a special fee (none was asked for in this case) or the shipment comes within one of the other specific provisions of the Guide.

[13] It is steps 4 and 5 of this reasoning that I believe are flawed. Although little is "clear" from all the terms before us, it does seem clear that para. (j) of the Guide speaks to declared values for customs purposes. According to para. (b), the carriage value could not exceed the declared value for customs purposes. That provision was not infringed in this case — the customs value and the declared carriage value were the same. The Customs Waiver Agreement was said not to "affect the maximum declared value for carriage". This was followed by what purported to be an explanatory statement, that for most FedEx International shipments, the declared value for carriage could not exceed "the declared value for customs amount set out in the Guide." If it was intended that this statement would indeed limit the declared value for carriage to something less than the amount inserted by the consignor, this was a most obscure and unclear way of saying so, and it was inconsistent with the opening sentence of the clause. I think the better explanation of the two provisions, which must be read harmoniously if possible, is simply that notwithstanding the fact that a larger amount than usual was being allowed for customs purposes, para. (b) of the Guide was still applicable — i.e., the declared value for carriage was not to exceed the customs value stated on the waybill. In this case it did not. In any event, the Guide did not specify the "declared value for customs amount." The waybill did, and it was \$214,847 in this case.

Having decided that the terms and conditions of FedEx did not clearly and unambiguously limit the amount that could be declared on an air waybill by a shipper, the majority in Court of Appeal did not need to consider the second issue. However, it went on to do so at paragraph 17, as follows:

[17] In light of my conclusion on this point, it is unnecessary for me to reach a definite conclusion as to whether the trial judge was correct in ruling that the contractual terms stated in the Guide offend Article 23 of the Warsaw Convention and that the Convention had the effect of rendering such terms null and void. I tend to agree with Mr. Justice Hall, however, that the reference in Article 23 to a "lower limit than that which is laid down in this Convention" refers to the 'floor' amount of 250 francs per kilogram and that the general intention of Article 22(2) is to permit the parties to agree on an amount above that floor and below the "ceiling" of the declared value amount stated on the waybill. If that is what FedEx sought to do in this case, but it did not do so effectively or clearly, in my respectful view.

The above paragraph is *obiter dicta* meaning it was not necessary to dispose of the appeal and is technically not binding on other courts. However, it will obviously be of persuasive value, particularly in British Columbia courts.

FedEx subsequently applied for leave to appeal the decision of the British Columbia Court of Appeal to the Supreme Court of Canada. Leave to appeal was refused by the Supreme Court without reasons.

Green Computer in Sweden AB v Federal Express Corp., 2002 FCT1015, affirmed 2003 FCT 587

This was a claim for the loss of one carton of integrated circuits valued at \$50,000.00 carried by air from Sweden to Markham, Ontario. The Defendant air carrier argued that it was not liable as the Plaintiff had not given the notice required by Article 26 of the Warsaw Convention. Alternatively, the Defendant argued it was entitled to limit liability pursuant to the terms of the convention to \$851.00.

With respect to the notice issue the court held that the notice requirements were not applicable to the instant case which was a case of non-delivery or loss of cargo.

With respect to the limitation issue, the Plaintiff argued that the Defendant was not entitled to limit its liability as the Defendant had been guilty of wilful misconduct pursuant to Article 25. Specifically, the Plaintiff argued that an inference should be made that the lost cargo had been stolen. The Court was, however, not prepared to draw any such inference. The court found that the Defendant had merely lost the shipment in transit, something which did not

constitute wilful misconduct.

Finally, the Plaintiff argued that the Defendant was not entitled to limit liability as it had not proved the cargo was lost during the carriage by air. The Court also rejected this argument referring to Article 18(3) which presumes, subject to proof to the contrary, that any damage occurred during carriage by air.

Accordingly, the Court granted judgment in the limitation amount of \$851.00.

Connaught Laboratories v British Airways, [2002] O.J. No. 3421

This case concerned damage to four cartons of vaccines carried by air from Toronto to Sydney, Australia via Heathrow. The cartons bore labels directing that they be kept refrigerated at between 2 and 8 degrees Celsius. A similar direction was printed on the air waybills. At Heathrow, the cartons were not placed in a refrigerated area and, as a consequence, the vaccines were spoiled upon arrival in Sydney. The main issue in the case was whether the carrier could limit its liability to approximately \$2,500.00 pursuant to Article 22 of the Warsaw Convention as amended by the Hague Protocol. The Plaintiff argued that Article 25 of the Convention applied to disentitle the carrier from relying upon the Article 22 limits. Article 25 provides “The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result”.

In a thorough and well reasoned judgment, the trial Judge considered whether the test set out in Article 25 was subjective or objective. The trial Judge ultimately concluded the test was subjective and that the Plaintiff therefore had to prove not only that the carrier was reckless but also that the carrier knew damage would probably result from its recklessness. There was, however, no evidence of why the cartons were not stored in a refrigerated area at Heathrow. The Judge noted that it could have been because the relevant person thought no damage would come to the vaccines if not refrigerated or because of mere inadvertence. Neither of these scenarios would meet the Article 25 test. However, the Judge also noted that it could have been that the relevant person knew there was a risk of damage but simply did not want to bother storing the cargo as directed. Such conduct would meet the Article 25 test.

The Judge resolved the issue by drawing an adverse inference from the failure of the carrier to present any evidence as to what actually happened and why. In result, the Plaintiff was

entitled to recover its expenses and the cost, but not the invoice price, of the shipment. (The invoice price of the shipment was not awarded as damages because the shipment was replaced. The Judge held that the invoice price included a profit component which was, in fact, recovered on the second sale.)

Nuvo Electronics Inc. v London Assurance et al., (2000) 49 O.R. (3d) 374 (Ont. S.C.)

This matter arose out of the loss of 15 cartons of integrated circuits valued at US\$1,403,000 and carried by air from San Francisco to Toronto. The shipment left San Francisco on August 10, 1996, and arrived at Toronto on the morning of August 11, 1996. It was then placed in the Air Canada cargo warehouse but was never seen again. The Plaintiff consignee commenced this action for the value of the lost cargo against its cargo underwriter and the air carrier. (That part of the judgment dealing with the claim against the underwriter is not considered here.) The air carrier defended the action arguing that the Plaintiff had not proven the value or the contents of the cargo, that it had delivered the goods to a courier for delivery to the Plaintiff and that it was, in any event, entitled to limit its liability pursuant to the unamended Warsaw Convention.

The only evidence adduced at trial as to the value and content of the shipment was the air waybill, the packing list and the commercial invoice. The carrier objected to the admission of these documents on the basis that they were hearsay and not properly admissible. The Court, however, held that these documents were business records within the meaning of the Canada Evidence Act and were admissible to prove both the content and value of the shipment.

The carrier's second argument, that it had delivered the cargo to a courier, was also rejected by the Court. The Court found as a fact that although the courier driver had signed for the cargo he did not in fact receive the cargo as it could not be located by the air carrier.

The Court next considered whether the air carrier could limit its liability under the unamended Warsaw Convention and held that it could not. There were two reasons advanced by the Court for this decision. First, the Court found that the air waybill was not in conformity with Article 8 of the Convention in that it did not contain the name of the airport departure, the name of the first carrier, whether the weight was in pounds or kilograms and the nature and quantity of the goods. Relying upon American case law, the Court held that if an air carrier fails to include the particulars required by Article 8 of the Convention in the air waybill then, pursuant to Article 9, the carrier is not entitled to limit liability. Second, the Court held that the Plaintiff had proven that it was more probable than not that the cargo was stolen by an employee of the carrier or with

the complicity of an employee of the carrier and that there was an irresistible inference that such employee was in the course and scope of his employment when the theft occurred. Accordingly, the Court held that there was "wilful misconduct" and that the carrier was not entitled to limit its liability.

World of Art Inc. v Koninklijke Luchtraart Maatschappij N.V., [2000] O.J. No. 2364 (Ont. S.C.) affirmed [2000] O.J. No.4567 (Ont. C.A.)

This was an application for summary judgment for the loss of cargo to be carried by air from Iran. The loss apparently occurred because the goods were rerouted through the United States where they were seized by U.S. Customs. The Defendant air carrier was aware of this possibility as a similar incident had occurred previously. As a result, its systems were set up so that a warning would appear automatically on its computer system warning its employees not to route or reroute goods emanating from Iran through the United States. This warning would only appear, however, if the place of origin was accurately stated as being Iran. In this instance that did not occur. The goods were stated as originating in Amsterdam and were rerouted through the United States. This error was noticed by an employee of the Defendant who sent a message to his counterpart in Amsterdam but that message was not acted upon. The Court held that these facts created a strong prima facie case that there had been acts or omissions on the part of the Defendant "done with intent to cause damage or recklessly and with knowledge that damage would probably result". The Defendant filed an affidavit on the application as to the systems of the Defendant but that affidavit did not explain how the various errors that led to the rerouting had occurred. The Court drew an adverse inference from the failure of the Defendant to explain how the errors occurred. In the result, the Defendant was not entitled to limit its liability.