THE NAVIGATOR

IN THIS ISSUE

FEDERAL COURT GUTS SECTION 46 OF *THE MARINE LIABILITY ACT*

In the recent decision of *Arc-En-Ciel Produce Inc. v. BF Leticia (Ship)*, 2022 FC 843 Justice Rochester gutted the body of Section 46 of the *Marine Liability Act*, leaving it to the Parliament of Canada to fix it.

In 2001, in order to protect Canadian shippers from the high cost and inconvenience of having to litigate cargo claims in a foreign forum stipulated by choice of jurisdiction clauses contained in bills of lading, the Canadian Federal government enacted legislation to nullify the binding effect of choice of jurisdiction clauses. Section 46(1) of the *Marine Liability Act* (SC 2001, c 6) permits a party to a contract of carriage by sea to commence legal proceedings in Canada despite the presence of a choice of jurisdiction clause stipulating a foreign forum.

The Arc-En-Ciel decision is the latest case to weaken the application of Section 46. The erosion started on August 23, 2006, when the Federal Court of Appeal in *OT Africa Line Ltd v Magic Sportswear Corp.* (2006 FCA 284) decided that, notwithstanding Section 46, the cargo loss claim in that case ought to be resolved in the English High Court and not in a Canadian court. While the Federal Court of Appeal expressly restricted its judgment to a situation in which the shipper, consignee and goods were not Canadian, the decision nonetheless significantly weakened the applicability of Section 46.

Arc-En-Ciel concerned several containerized shipments of fresh produce transported from Costa Rica to Etobicoke, Canada. The Plaintiff, Arc-En-Ciel Produce Inc. [“the Cargo Claimant”] alleged that the cargo arrived at its destination in a damaged and deteriorated state. The Cargo Claimant commenced two actions in the Court, naming as defendants Great White Fleet, the vessels that carried the cargo, and their respective owners. The Defendant, Great White Fleet [“the Carrier”], was a defendant in both actions.

The Carrier and the Cargo Claimant had a business relationship spanning several years. The nature of the contractual relationship

FIRM AND INDUSTRY NEWS

- **Mission to Seafarers Golf Tournament Fundraiser** support by the Canadian Board of Marine Underwriters, July 21, 2022, Flamborough Hills Golf Club, Ontario.

- **Marine Club Celebration Dinner** Honouring International Day of Seafarers, July 23, 2022, The Lakeview by Carmens, Hamilton Ontario.

- **Grunt Club Golf Tournament**, August 8, 2022, Club de Golf Kanawaki.

- **CIFFA Central Gold Tournament**, September 15, 2022, Caledon Golf Club, Ontario.

- **Canadian Transport Lawyers Association Annual Meeting & Seminar**, October 13-15, Toronto. **Carole McAfee Wallace** will be running the conference as President. **Rui Fernandes** and **Kim Stoll** will be speaking and **Andrea Fernandes** will be moderating the Maritime Law Update Panel. **Gordon Hearn** will be speaking on the Cross-Border Carrier Liability and Canadian Motor Carrier Compliance panels.

- **Fleet Safety Council Conference**, October 14th, 2022, Etobicoke Ontario. **Rui Fernandes** will be speaking on Structuring Corporate Policies and Procedures to Support Due Diligence Efforts. **Kim Stol**l will be speaking on Nuclear Verdicts.

- **Comite Maritime International Conference**, October 18-21, Antwerp. **Rui Fernandes** and **Andrea Fernandes** will be attending.

- **CIArb 10th Annual Symposium on International and Domestic Arbitration and Awards**, October 19, 2022, Montreal.

between them, as it pertained to the shipments in question, was at issue in the court applications.

The Carrier brought a motion in each of the actions seeking a stay, pursuant to subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7, on the basis of a forum selection clause in favour of the United States District Court, Southern District of New York. The Carrier's position was that the parties should be held to their bargain and, consequently, this Court should exercise its discretion to grant a stay. The Carrier submitted that the Cargo Claimant had failed to show a "strong cause" as to why the forum selection clause should not be enforced.

The Cargo Claimant asked the Court to decline to enforce the forum selection clause on two grounds. First, the Cargo Claimant submitted that the contracts at issue fall within the scope of section 46 of the *Marine Liability Act*, SC 2001, c 6 ["the Act"]. Section 46 of the Act permits a claimant to institute proceedings in Canada despite a foreign jurisdiction clause, provided certain requirements are met. Second, and in the alternative, the Cargo Claimant submitted that it had demonstrated that a "strong cause" exists to set aside the forum selection clause.

The two issues in the motion were therefore (i) whether section 46 of the Act applied to the contracts at issue; and (ii) if not, whether there was a "strong cause" to refuse to enforce the forum selection clause.

Justice Rochester acknowledged that she had two choices, stating (at para. 8):

> This Court thus finds itself faced with a choice between, on the one hand, a strict interpretation of the Act based on the meaning of language used and the documents in existence in the 19th century, and on the other hand, an expansive interpretation taking into account the modern realities of the international carriage of goods and the objective of protecting Canadian consumers. A consideration of the origins of the documentation and the legislative texts at issue is therefore, among other things, appropriate and necessary to the determination of the present motions.

Justice Rochester chose the strict interpretation leaving it the Canadian Parliament to rectify.

In this case there were six Shipping Documents. The Carrier referred to one of the Shipping Documents being an "unsigned non-negotiable Express Release Bill of Lading. The Claimant referred to this Shipping Document as an "non-negotiable International Bill of Lading." Justice Rochester noted that the nature and characterization of the Shipping Documents and the consequences that flow from that characterization was central to the application before the Court. She noted that whether the Shipping Documents were bills of lading was ultimately important in how they would be treated under the Act.

Justice Rochester noted that the Act does not define "bill of lading". Historically a bill of lading fulfills three key functions: (a) to act as a receipt for the goods received by the carrier; (b) to evidence the terms of the contract of carriage; and (c) to act as a "document of title." The Cargo Claimant pled that the Shipping Documents were bill of lading. The Carrier pled that they were not "bills of lading" as they did not fulfill all of the three functions, and thus, were not bills of lading.

Justice Rochester then proceeded to evaluate the case law on of bills of lading or order to determine if the Shipping Documents were bills of lading.

In terms the bill of lading as a document of title, she approved of Professor Tetley's explanation of what the term meant (*1) (para. 45):

> The term "document of title" as applied to a bill of lading generally refers not to "title" in the sense of ownership of the goods carried under the bill, but, more precisely, to the right to possession of them. "Title" thus has to do primarily with the right of the consignee or last endorsee of the bill to demand delivery of the goods from the carrier or its agent at the port of discharge. In this sense, the bill of lading, although traditionally termed "a document of title", is better understood as being a document of transfer. It is important to make this distinction.

Justice Rochester went on to review the evolution of the Hague-Visby Rules, noting that the Hague-Visby Rules are appended to the Act and incorporated into it by reference. It was pled by the Carrier that the definition of a contract of carriage as contained in the Hague-Visby Rules does not include the Shipping Document, with the result that neither section 43 nor section 46 of the Act apply. The Cargo Claimant disagreed. She noted (at para. 63):

> Section 46 of the Act applies to "a contract for the carriage of goods by water". This expression is not defined in the Act. The Carrier pleads that the same expression is also used in section 43 of the Act, where it provides that the "Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water". In other words, if a contract is a "contract for the carriage of goods by water", then, pursuant to section 43, and provided the other conditions are met, the Hague-Visby Rules apply to that contract. The Carrier submits that a "contract for the carriage of goods by water", be it in section 43 or section 46 of the Act must have the same meaning. If, pursuant to section 43, a contract for the carriage of goods by water is the type of contract to which the Hague-Visby Rules apply by force of law, then section 46 can only apply to those same types of contracts.

Justice Rochester went on to point out that the Carrier relied on Cami Automotive (*2), where Justice Edmond P. Blanchard found that to determine the meaning of the phrase a "contract for the carriage of goods by water" in the context of section 43 of the Act, one must turn to the definition of "contract of carriage" as contained in Article 1(b) of the Hague-Visby Rules, appended to the Act. Article 1(b) defines a contract of carriage as a contract "covered by a bill of lading or any similar document of title…".

The Carrier's position was that the Shipping Documents were not contracts "covered by a bill of lading or similar document of title" as per the Hague-Visby Rules. Consequently, they were not the type of contract that attracted the application of the Hague-Visby Rules by force of law pursuant to section 43 of the Act, and thus did not attract the application of section 46 of the Act. Simply put, the phrase could not mean one thing in section 43 and another in section 46 of the Act.

The Cargo Claimant pled that (i) the Shipping Documents were a bills of lading, as they clearly said so on the face of the documents, and (ii) the phrase contained in section 46 of the Act, whose policy it is to protect Canadian importers and exporters, should be given a wider scope than the same phrase found in section 43 of

the Act or the definition contained in Article 1(b) of the Hague-Visby Rules.

Justice Rochester then went on to consider whether the Shipping Documents constituted contracts of carriage as defined by Article 1(b) of the Hague-Visby Rules. She noted that (at para. 70):

> It is common ground between the parties that the Shipping Document was used as an acknowledgement of receipt for the cargo. Moreover, it is clear from the record that the Shipping Document evidences the terms of carriage as between the Cargo Claimant and the Carrier. The material issue, as plead by the Carrier, is whether the Shipping Document is a "document of title".

The Shipping Documents name the Cargo Claimant as consignee, meaning, the Cargo Claimant was identified on the Shipping Document as the party to whom the cargo was to be delivered. There was no language contained on the face of the Shipping Documents that indicates that it was transferable, as would have been the case had it been made out to the named consignee (the Cargo Claimant) and its "order or assigns" or similar words of transferability. The upper right-hand corner of the Shipping Documents contained the printed words "NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER". Justice Rochester noted that not only was there no language permitting transferability in the Shipping Documents, there was language negating transferability). The Carrier highlighted that only one copy of the Shipping Documents was issued and that the copy did not have to be presented by the Cargo Claimant in order to obtain delivery of the cargo.

Justice Rochester found that this last point to weigh heavily on her decision, stating (at paras. 79 and 80):

> I find that the fact that the Shipping Document was not required to be surrendered to the Carrier or its agent in order to obtain delivery of the cargo substantially weighs against the Shipping Document being considered a straight bill of lading or other document of title under the Hague-Visby Rules. It is clear from the record that the parties did not intend that the Shipping Document be presented in order to obtain the cargo. Moreover, it was the practice of the parties for such shipments, the modus operandi, that presentation was not required. For the particular cargo at issue, the Cargo Claimant was not required to present or tender a copy of the Shipping Document in order to obtain delivery. The Shipping Document contains the notation "express release", which is in fact what took place.
>
> Alongside the practice of the parties, I also find that the terms contained in the Shipping Document speak against its production as a prerequisite to delivery. The Shipping Document contains a printed attestation clause "IN WITNESS WHEREOF, the Carrier has signed ____ original Bills of Lading, all of the tenor and date, and if one is accomplished the others shall be void.
>
> Dated_____ Signature_____".
>
> Unlike in the Rafaela S, it was the practice in this case that no originals were issued and only one copy was issued for each cargo. In the copies of the Shipping Documents that were issued by the Carrier for the cargos, the attestation clause is left blank indicating no original bills were ever

> issued nor was the Shipping Document signed. No original bill was thus tendered for delivery that would render the other originals void. That no original bills, let alone a set of three, were issued weighs against the Shipping Document being a document of title as covered by the Hague-Visby Rules.

Justice Rochester also noted that if the Shipping Documents were considered waybills, waybills are not considered to be bills of lading or similar documents of title and the Hague-Visby Rules do not apply to them by force of law. She held (at para. 109):

> I therefore find that the true nature and effect of the Shipping Document is akin to a waybill. It is a receipt for the cargo carried and evidence of the terms of the contract of carriage, however, it is not a document of title. Consequently, the contract of carriage at issue is not evidenced by a bill of lading or similar document of title as per Article 1(b) of the Hague Visby Rules and is not the type of contract that would attract the application of the Hague-Visby Rules by force of law (*3).

Justice Rochester then had to consider whether section 46 could be divorced from the wording in section 43. She held that it could not. She acknowledged that the Cargo Claimant pled that if the Shipping Documents did not fall within the ambit of section 46, this would have far-reaching and devastating consequences for Canadian shippers and consignees, along with the carriage of goods regime in Canada. The Cargo Claimant submitted that those who contract on a door-to-door basis would be denied the protection of section 46 and be forced to abdicate their right to pursue a claim in Canada. The Cargo Claimant further submitted that the growing use of non-negotiable documents in multi-modal transport was very real and to restrict the application of section 46 to bills of lading or similar documents of title would frustrate the purpose of section 46 of the Act. The Cargo Claimant was seeking to have this Court adopt an expansive interpretation of section 46. She noted however, (at para. 135):

> Given that the Hague-Visby Rules' limited application in terms of transport documentation by comparison to more modern international conventions, a number of nations have passed legislation extending their carriage regimes to cover waybills and other non-negotiable documents (Cami Automotive at para 46; Tetley at 2304). Examples include Australia, United Kingdom, New Zealand, Denmark, Norway, Sweden, Finland, South Africa and Singapore. As noted by Justice Blanchard in Cami Automotive, no such legislation has been enacted in Canada (para 46).

Justice Rochester agreed with the Cargo Claimant in that the widespread use of non-negotiable carriage documents may well result in claimants, such as the Cargo Claimant, not being able to avail themselves of rights of action in Canada pursuant to section 46 of the Act. However, she held that it "is not for this Court, however, to broaden the scope of Canada's carriage of goods regime, contained in Part 5 of the Act, so as to include waybills and other similar non-negotiable documents. The Carrier pleads that a future Parliament may choose to extend the scope but has not done so yet. I agree with the Carrier that the question of whether Canada's carriage of goods regime, and particularly section 46, should be extended to apply to waybills is one for Parliament." (para. 137) [Emphasis added].

Having found that the contractual arrangements between the parties, namely the Shipping Documents and the Service Contract, did not attract the application of section 46 of the Act, Justice Rochester turned to the question of whether the forum selection clause in favour of the United States District Court, Southern District of New York, should nevertheless be set aside on the basis of the strong test. After reviewing all the factors she came to the view that the Cargo Claimant had not met its burden of showing sufficiently strong reasons to conclude that it would not be reasonable or just to enforce the forum selection clause.

We now await to see if the Parliament of Canada extends section 46 to waybills as other countries have. Stay tuned.

Rui M. Fernandes

Endnotes

(*1) William Tetley, Marine Cargo Claims, 4th ed, (Thompson) at 533

(*2) Cami Automotive, Inc v Westwood Shipping Lines Inc, 2009 FC 664

(*3) At paragraphs 111 to 115 of the judgment Justice Rochester also examined a service contract that existed between the parties. She determined that the service contract was not the type of contract that attracted the application of the Hague-Visby Rules by force of law.

2. A Second Attempt at Reforming Canadian Privacy Legislation: A Cursory Review of Bill C-27

Overview

After a nearly two-year impasse, on June 16, 2022, the Government of Canada tabled the *Digital Charter Implementation Act*, 2022 (otherwise known as "Bill C-27") as part of its ongoing attempt to strengthen Canadian private sector privacy legislation, to create new rules for the responsible design and implementation of artificial intelligence ("AI") systems, and to further implement Canada's Digital Charter.

This newly tabled statutory framework proposes to enact the following legislation (a brief overview on each to follow):

1. The Consumer Privacy Protection Act
2. The Artificial Intelligence and Data Act
3. The Personal Information and Data Protection Tribunal Act

The Consumer Privacy Protection Act

The Consumer Privacy Protection Act ("CPPA") would serve to repeal and replace Part 1 of the Personal Information Protection and Electronic Document Act ("PIPEDA") and re-imagine Part 2 of same as the Electronic Documents Act ("EDA").

The CPPA will ensure that the privacy of Canadians and businesses will benefit from clearly defined and enforceable rules as they continue to adapt their operations in this age of innovation.

The CPPA contemplates a multi-faceted approach in pursuing its legislative directive. Some key areas of the legislation are discussed below.

(i) Consent

The CPPA expands the framework for obtaining consent and further considers applicable exceptions.

Generally, in order to obtain valid consent, an organization is required to provide certain information to the individual at or before the time of collection. In terms of detail, organizations are required to provide the purpose of the collection, use, and/or disclosure of the information together with the reasonably foreseeable consequences of doing so to the individual. Organizations must also identify any third parties to whom the personal information may be disclosed.

It is mandated that for consent to be considered valid, it must be obtained through the use of "plain language" – that is – language that an individual would reasonably be expected to understand.

However, the CPPA enumerates several exceptions to the newly legislated consent protocols, including:

- A "business activities" exemption which provides for when personal information can be collected without the knowledge or consent of the person, including where necessary to: provide a product and/or service requested by an individual; for information, system, or network security, and for the safety of a product and/or service;
- An "explicit exemption" which permits an organization to transfer personal data to its service providers without the consent from the person. However, the CPPA requires organizations to ensure, by contract or otherwise, that the service provider provides an

"equivalent" level of production to that provided under the CPPA; and

- A "legitimate interest" exemption which permits the collection, use, and disclosure of personal information without consent in circumstances where the legitimate interests of the organization outside the adverse effects to the individual.

(ii) Disposal

The newly tabled CPPA will now require an organization, on written request, to, as soon as achievable, dispose of personal information under its control if:

- The personal information was collected, used, or disclosed in a manner which contravenes the CPPA;
- The individual has withdrawn their consent to said collection, use, or disclosure of their personal information; or
- The personal information is no longer necessary to provide a product and/or service requested by the individual for which it was initially obtained.

(iii) Minors

The CPPA considers the personal information of minors to be "sensitive information" and accordingly prescribes heightened protections for the collection, use, and disclosure of same. For instance, the new legislation now authorizes a minor's parent, guardian, or tutor to exercise rights in respect of decisions concerning its collection, use, and disclosure.

(iv) Privacy Management Programs

Under the CPPA, organizations would be required to prepare and make publicly available information including the types of information they collect, use, and/or disclose together with the manner in which said information is used.

Further, the CPPA specifically prescribes that organizations under its mandate implement and maintain a privacy management program, which amongst other requirements, is attuned to the volume, type, and sensitivity of the personal collection that is collects, uses, or otherwise stores. It is required that these programs be robust and comprehensive as they are subject to review by the Privacy Commissioner.

(v) Enforcement

Notably, the CPPA enhances the powers of the Office of the Privacy Commissioner to include the following measures:

- Order an organization to alter, update, or otherwise change its practices and to publicize any such changes; and
- To recommend penalties and/or fines to the newly formed Personal Information and Data Protection Tribunal

The Tribunal, in turn, with its newly legislated authority under Bill C-27, would be permitted to impose monetary penalties to a maximum of $10M or 3% of gross global revenue (whichever is greater) on culpable organizations. Such penalties apply to a variety of breaches under the CPPA, including an organization's failure to obtain valid consent as well as its failure to collect, use, and/or disclosure personal information in a secure manner.

The CPPA also provides for fines of up to $25M or 5% of global revenue (whichever is greater) for infractions such as failing to report breaches to

the Privacy Commissioner or intentionally destroying records which are the subject of an access appeal.

The CPPA would also serve to create a private right of action for individuals impacted by an organization's failure to comply with the provisions of the CPPA. Affected parties, under the new regime, would be able to sue for a privacy violation following a determination by the Office of the Privacy Commissioner and/or the Personal Information and Data Protection Tribunal that an organization had contravened the CPPA to the complainant's detriment.

The Artificial Intelligence and Data Act

The Artificial Intelligence and Data Act ("AIDA") will aim to regulate both international and inter-provincial trade and commerce in AI systems. It further aims to set out new rules and requirements that organizations must follow to ensure the responsible development of AI systems.

Broadly construed, the proposed AIDA will introduce new rules to strength the trust that Canadians have in the development and implementation of AI systems, including:

- Affording Canadians protections by ensuring that AI systems are designed in a manner that assesses and mitigates the risk of harm and bias;
- The establishment of an AI and Data Commissioner to support the Minister of Innovation, Science, and Industry in fulfilling their responsibilities under the Act, including monitoring compliance, performing an auditive function, and sharing relevant information with regulators and enforcers when appropriate; and notably
- Clearly outlining criminal sanctions and/or penalties concerning the unlawful collection of personal information for AI development or the reckless deployment of AI technologies fraudulently purposes and intended to cause economic loss.

Notably, failure to comply with certain provisions of the AIDA would constitute a criminal office, with resulting fines of up to $25M or 5% of an organization's annual gross global revenues (whichever is greater). These penalties, severe by design, are applicable in circumstances where it can be demonstrated that an AI system was deployed with the intention to cause physical or psychological damage, property damage, or economic loss.

The Personal Information and Data Protection Tribunal Act

The Personal Information and Data Protection Tribunal Act will facilitate the creation of an administrative tribunal, termed the Personal Information and Data Protection Tribunal, which would hear recommendations of and appeals from the Privacy Commissioner of Canada.

The Tribunal will also be duly authorized to make Orders in respect of any contraventions of the Consumer Privacy Protection Act.

Conclusion & Take-Aways

While the June 16, 2022 reading of the Bill C-27 was only the first, we can reasonably expect a second reading, committee, and debate to follow, culminating in its passing in either 2022 or 2023. As part of the ongoing review process, it is possible that further amendments to the present draft will be made.

In the interim, organizations under Bill C-27's purview should conduct a comprehensive review

of their current privacy programs and, for some, plan for a significant overhaul and compliance effort in respect of ensuring that their privacy policies, programs, and infrastructure are consistent with the newly pending regime.

Jamal Rehman

3. My Chicken Was Stolen! Considerations for Insurers Faced with 'Chicken Quota' Claims

Insurers who underwrite policies on behalf of cross-border load brokers and/or carriers should be aware of potential claims that may be made in relation to so-called "product quotas" under the Canada-United States-Mexico Agreement ("CUSMA").

Enacted in late 2019, the CUSMA is a free trade agreement that exists between Canada, the United States of America, and Mexico. It replaced the North America Free Trade Agreement ("NAFTA") which was implemented in 1994. The primary policy intent behind the renegotiation of NAFTA and the ratification of the CUSMA was centred around liberalizing trade between the three countries and abolishing tariffs and other trade barriers.

Although the subject matter of the CUSMA is widespread, this article will focus on discussing key issues that insurers may want to keep in mind when it comes to the importation of chicken into Canada from the United States, and the potential claims that may result from same.

Under the CUSMA, certain types and quantities of chicken products can be imported into Canada from the United States duty free. This is significant given that chicken is considered to be the most popular and most widely consumed meat in Canada. (*1) Due to the high demand for chicken amongst consumers in Canada, the regime that oversees the importation of chicken into Canada is highly regulated.

The importation of chicken into Canada from the United States is governed by an orderly marketing system which is designed to match the supply with the demand. These imports are subject to import controls under Canada's Export and Import Permits Act ("EIPA"), and its corresponding regulations. (*2) In addition to being subject to import controls under the EIPA, chicken imports from the United States are also subject to tariff rate quotas ("TRQs"), negotiated under the CUSMA.

Chicken Importation Permits

Under a TRQ, in any given year, a predetermined quantity of imports of a controlled good can enter the country at a zero or low rate of duty, while imports over this quantity are subject to higher rates of duty. There are various permits that can be used to import chicken into Canada, each with its own set of requirements and implications.

So – why might this matter for insurers? Recently, there have been quite a few "chicken quota" cases wherein an insurer was faced with a claim for the recovery of the value of chicken duties and/or quotas after a shipment of chicken was lost or stolen on Canadian soil, after crossing the border. Whether or not these so-called losses are payable requires careful consideration into the precise facts of the matter underlying the claim.

If faced with a "chicken quota" claim, the first inquiry that an insurer might want to consider is the type of permit that was used to import the chicken. The type of permit that an importer holds will usually govern the quantity of chicken that can be imported, (often referred to as an 'allotment' or 'quota'), and the amount of duty payable, if any. For example, the holder of a 'specific import permit' may have been allocated a certain quantity of chicken that it could import duty-free (this is referred to as 'within access commitment'). If an importer holding a 'specific import permit' has exceeded its allocated quota, then the chicken could be subject to a much higher duty (this is referred to as 'over access commitment'). These 'over access commitment' duties can be as high as 249% (*3)

Chicken Duties and Quotas

The amount of duty payable on a chicken importation is governed by the EIPA and the

Customs Tariff. (*4) Furthermore, the type of permit used to import chicken governs not only the amount of duty payable, if any, but also any recourse that an importer may have to apply for a refund and/or a duty exemption if a load of chicken was subsequently lost or stolen after crossing the border. An insurer should be mindful that there are certain remedies available to an insured and/or third party to apply for a refund of duty paid. These remedies should be pursued first in the event of a claim for the recovery of customs duties.

In Gestion J.F.-Houle Inc v. Canada (Attorney General), (*5) the Federal Court of Canada determined that duty was still payable on two chicken shipments that were imported into Canada from the United States and subsequently stolen. Although the case did not elaborate on whether the insured had made a claim to recover the duties owing from its insurer, the amount that the applicant did recover seemed significant enough to suggest that some incidental amounts may have been paid out. In addition, given the foreseeability of customs duties in the event of international carriage, recovery of payment of these duties is a head of loss that may be recoverable under a policy of insurance. The issue of whether duties paid may be recoverable is a policy-specific question that insurers should consider when underwriting a cargo policy involving cross-border carriers and/or load brokers.

With respect to quotas, TRQ holders have no property rights associated with TRQs and therefore no value may be associated with TRQs for any insurance or legal action. (*6) To get around this hurdle, insurers may be faced with loss claims that purport to be based on the terms of an agreement between a load broker and carrier that say something to the effect of "if a shipment is stolen upon arrival into Canada, you will be responsible for all quota costs of bringing the product into Canada". These clauses should be assessed with caution.

Conclusion

An insurer that underwrites a policy for an entity that is involved in the business of cross-border transportation and/or logistics should keep in mind the various rules and regulations surrounding the importation of certain goods into Canada from the United States. If faced with a claim of this nature, insurers should make sure that they are properly advised as to the steps that should be taken when assessing the merit of a 'chicken quota' claim.

Saisha Mahil

Endnotes

(*1) Government of Canada, "Canada's Chicken Industry", https://agriculture.canada.ca/en/canadas-agriculture-sectors/animal-industry/poultry-and-egg-market-information/chicken.

(*2) Export and Imports Permits Act, R.S.C., 1985, c. E-19.

(*3) Government of Canada, "Customs Tariff 2022", https://www.cbsa-asfc.gc.ca/trade-commerce/tariff-tarif/2022/menu-eng.html.

(*4) Customs Tariff, S.C. 1997, c. 36.

(*5) Gestion J.F.-Houle Inc v. Canada (Attorney General), 2014 FC 130.

(*6) Global Affairs Canada, https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/trq_info_ct.aspx?lang=eng.

4. Electronic Monitoring Policy

Provincially regulated employers in Ontario have another written policy to prepare. As we advised in the March 2022 edition of The Navigator, all Ontario employers who are subject to the Employment Standards Act, 2000 ("ESA"), and who had 25 or more employees as of January 1st, were required to implement a written Right to Disconnect Policy by June 2, 2022 and distribute it to all employees within 30 days.

For employers who have just completed that task, it is time to move on to the next written policy. Those employers who had at least 25 employees as of January 1st must now prepare a written Electronic Monitoring Policy (the "Policy"). This Policy must be prepared by October 11, 2022 and be distributed to all employees by November 10, 2022.Beginning in 2023, employers must undertake a count of employees as of January of each year and if they meet the 25 employee threshold, they must prepare the Policy by March 1st and distribute it to all employees by March 31st. The employer must provide a copy of the written policy to a new employee within 30 days from their start date and if the employer uses a temporary help agency, they must provide a copy of the written Policy to any assignment employee within 24 hours of the start of the assignment.

The requirement to have an Electronic Monitoring Policy is found in the new Part XI.1 of the ESA. This amendment does not prohibit or limit an employer's right to engage in the electronic monitoring of their employees, but it does require the employer to advise employees if it is engaging in such monitoring, and to also disclose what it will do with the information obtained through this monitoring. Electronic monitoring is not defined in the ESA but with today's technology it is far reaching and includes monitoring an employee's entry and exit to the workplace through key fobs, or swipe cards or timecards. It will include GPS systems on employer vehicles operated by an employee. It will include an employee's use of employer computers, where productivity is monitored by keystrokes, or websites accessed by the employee. It will include the use of webcams and video surveillance in the workplace.

In accordance with Part XI.1 of the ESA, the Policy must contain the following: whether the employer electronically monitors employees and, if it does, the employer must provide a description of how and in what circumstances the employer may monitor employees, and the purposes for which the information obtained through the electronic monitoring may be used by the employer. In addition, the Policy must include the date it was prepared and the date on which any changes were made. Finally, the Policy must include such other information as may be prescribed – to date, no regulation has been passed setting out any additional information that may be required to be included in the Policy.

The amendments to the ESA make it clear that any complaint alleging non-compliance with the Electronic Monitoring Policy may be made only with respect to the failure to have a policy or to distribute it to employees, and that nothing in the amendments affects or limits an employer's ability to use information that is obtained through the electronic monitoring of employees.

It is important to keep in mind that this requirement does not apply to those employers who are subject to the Canada Labour Code, for example interprovincial or cross border trucking companies. While Ontario may be the first province to require an employer to implement an Electronic Monitoring Policy, it is possible that other provinces, and the federal government, may follow their lead.

Carole McAfee Wallace

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