



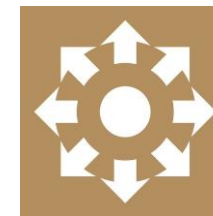
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Carrier's Limitation of Liability

When One is the New Zero. When does a carrier's limitation clause in fact result in full value liability.

February 10, 2021



MARSH

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Introduction

The analysis of a carrier's capacity to limit or exclude its liability in the case of loss or damage to the goods.

Single question: How may a carrier limit or exclude its liability where it is responsible at law for the damage to the goods?

Outline

- 1) A bit of History
- 2) CN vs ACE European Group
- 3) ABB vs CN

General Notions

- (i) Concept of a common carrier
- open offer to provide transportation services to the general shipping public
 - cannot refuse service
 - obligation to carry goods to destination.

A common Carrier has an obligation of result as opposed to an obligation of means (best efforts) and may only invoke certain basic defenses.

- Act of God
- War or insurrection
- Riot strike or lockout
- Defect in the goods
- Act, negligence or omission of the shipper
- Authority of law
- A quarantine
- Natural shrinkage

Otherwise carrier is liable.

History

Oldest case law of carrier liability.

Buckton vs Townsend, 1343

Overloaded ferry, a horse was lost, carrier was liable for loss.

2 key cases by Lord Holt C.J. Kings Bench

Coggs vs. Bernard, 1703

Load of barrels of Brandy transported from Market to Water St. ½ mile in London

Barrel dropped and staved – 150 gallons of Brandy lost !!

- No contract
- No consideration
- But a Bailee of the goods
- Goods placed in trust with carrier
- Carrier liable for loss

Lane vs. Cotton, 1701

« Hard thing to charge a carrier with strict liability »

If not a carrier may:

- be in correspondence with thieves
- cheat owner
- impossible for shipper to prove carrier's action
- thus the law presumes against the carrier

Strict liability, obligation of result

Limitation of liability

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graph TD; A[Limitation of liability] --> B[RAIL]; A --> C[HIGHWAY TRANSPORT];
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RAIL

Railway liable for full value of loss or damage unless limited by regulations or by agreement.

HIGHWAY TRANSPORT

Carriers max. liability 2.00\$/lb unless higher value declared by shipper.

RAIL THE LAW

Canada Transportation Act (CTA)

- 87 – Tariffs – Rates – terms and conditions of carriage (open offer to shippers)
- 113 – Railway's obligation as a common carrier
- 126(i)(e) – Confidential contracts outside Published Tariffs
- 137(i) – Limitation of liability by agreement signed by the shipper.

Railway Traffic Liability Regulation

Quebec Civil Code

- 2034 – Conditions of limitation of liability
- 2049 – Carrier obligation – carry to destination – liable for damage

The Common Law

The Canadian Constitution – division of powers

Canadian National Railway vs. ACE European Group

Quebec Court of Appeal

August 2019

On appeal from a Quebec Superior Court Judgement, June 2017
(leave to appeal to SCC denied May 2020)

The Parties

- CN (carrier) – A large international class one railway, headquartered in Montreal.
- Bombardier (shipper) – A manufacturer of passenger rail cars, a large multi-national transportation company, headquartered in Montreal.
- ACE European Group Ltd. – Bombardier's insurer

Facts

- Bombardier contracted to move 2 regional passenger rail cars from New York to La Pocatière for repair.
- Bombardier was a frequent client of CN for these moves
- Agreed to lower rate with cars moved as part of train consist – not as an over dimensional load on flat car load, where there was another agreement limiting CN's liability to \$25 000 max.
- Bombardier signed agreement to totally exclude CN's liability in case of loss or damage
- “Rate is subject to zero liability” – very clear language in contract
- CN published a special tariff \$2,883 and specified \$0 liability in case of loss or damage
- Consist was pushed at Taschereau Yard, the two cars derailed causing \$600K damage
- Instructions to only set these cars at the rear of any consist were not followed
- Bombardier claimed for the value of the damage from its insurer, ACE, who paid the claim and sued CN in subrogation

Superior Court

1. Is the exclusion of carrier's liability applicable to – Bombardier?
– Insurer?
2. Was CN negligent?

-
- Refers to 137(1) of CTA
 - By written agreement signed by shipper.
 - Carrier may “limit or restrict ...” its liability for loss or damage, in French “...limiter ...”.
 - Analysis of the language of this article.
 - Justice Suzanne Côté distinguishes between limitation of liability, which is allowed by 137(1), and exoneration of liability (exclusion) because of old language of 137(1), which changed after the incident.
 - Found that CN was responsible for the damage caused to the cars.
 - Ruled that CN could not rely on the clause and was therefore fully liable for the damage.
 - Court suggested that if the incident had occurred after the change to 137(1) in 2015, things might have been different, because of the new language.

Quebec Court of Appeal – Justice M.-J. Hogue

- Court asks : Can CN totally exclude liability when damage is a result of its fault?
- Court analyses the law, find that § 126 CTA is the source of law which allows carriers to limit their responsibility and § 137 is there to impose conditions of form.
- Courts cites CTA Railway company's obligations and powers
 - § 137(1)(c) "...without delay, and with due care and diligence, receive, carrier and deliver the traffic"
 - (4) may enter into confidential contract or other agreement.
- Confidential contracts may include ...
 - 126 (1)(e) any conditions relating to the traffic to be moved including any amount to be paid by the company or the shipper in relation to a failure to comply with any condition related to service obligations under 113.
 - 137(1)(2009) a railway shall not limit or restrict its liability to a shipper ... except by means of a written agreement signed by the shipper.
 - 137 (1) (2015) any issue related to liability including liability to a third party shall be dealt with only by means of a written agreement signed by the shipper.

-
- Does 126(1)(e) allow CN to exclude all liability for damage to the goods.
 - 126(1)(e) “a confidential contract ... respecting ...
(e) Any conditions relating to the traffic to be moved by the company, including any amount to be paid by the company or the shipper in relation to a failure to comply with any condition related to the service obligations referred to in (d)”
 - Court interprets 126(1)(e) to allow a carrier to limit its responsibility in case of fault in a confidential contracts but does not allow the exclusion of all liability.
 - To do so would distort the contract of carriage because the principal obligation to deliver the goods in good condition would be optional for the carrier (potestative)
 - A clause in a contract that allows the stipulating party to decide if it wishes to execute its obligations or not may not be upheld.
 - Refers to it in a note as an abusive clause in the analysis.

« When One is the New Zero »

- CN argued that if it had entered a maximum liability of 1\$ in the contract - it would meet the condition imposed of limiting not excluding liability, and that limiting included reducing the level of liability to zero.
- Justice Hogue disagreed. A ridiculously low amount is equivalent to 0\$ and is equally illegal.
- Finally the Court states that unless the law clearly allows such a thing, a clause excluding all liability of the carrier will be null and inapplicable.

QUESTIONS

- Does 26(1) specifically exclude 2 sophisticated multinational transportation companies from agreeing to exclude liability for damage in transit of passenger cars to Bombardier plant for repair, at a low cost?
- Does “potestative” apply to this clause where, as the Judge says, it is at the carrier’s option to fulfill its obligation? If the carrier chose to cause damage to the goods, it would be gross negligence or “faute lourde”, which would automatically nullify the clause, not the case here.
- When the liability regulation provides that under any special reduced tariff “goods are transported at the risk of the owner – carrier only liable for any loss or damage of goods when caused by the negligence of the carrier”.
- If the liability limit is defined in the regulation and the parties wish to modify that limit by confidential contract, which 126 appears to allow, – why not?
- Is this ruling aligned with § 2034 of the Quebec Civil Code which mentions that a carrier may not “exclude or limit his liability except to the extent and subject to the conditions established by law”?
- Will this be considered differently by a common law jurisdiction court?
- Will the change in art. 137 in 2015 affect the outcome in future cases?

CONCLUSION

Limit but don't exclude!

ABB Inc. v. Canadian National Railway Company

2020 FC 817



Takeaways :

- Limitation of liability must be in a confidential contract signed by shipper
- Claims between shipper and interlined carrier decided according to governing law of contract – in Quebec this relationship is properly contractual
- Originating carrier liable for loss/damage occurring in care of subsequent carrier

ABB Inc. v. Canadian National Railway Company

2020 FC 817

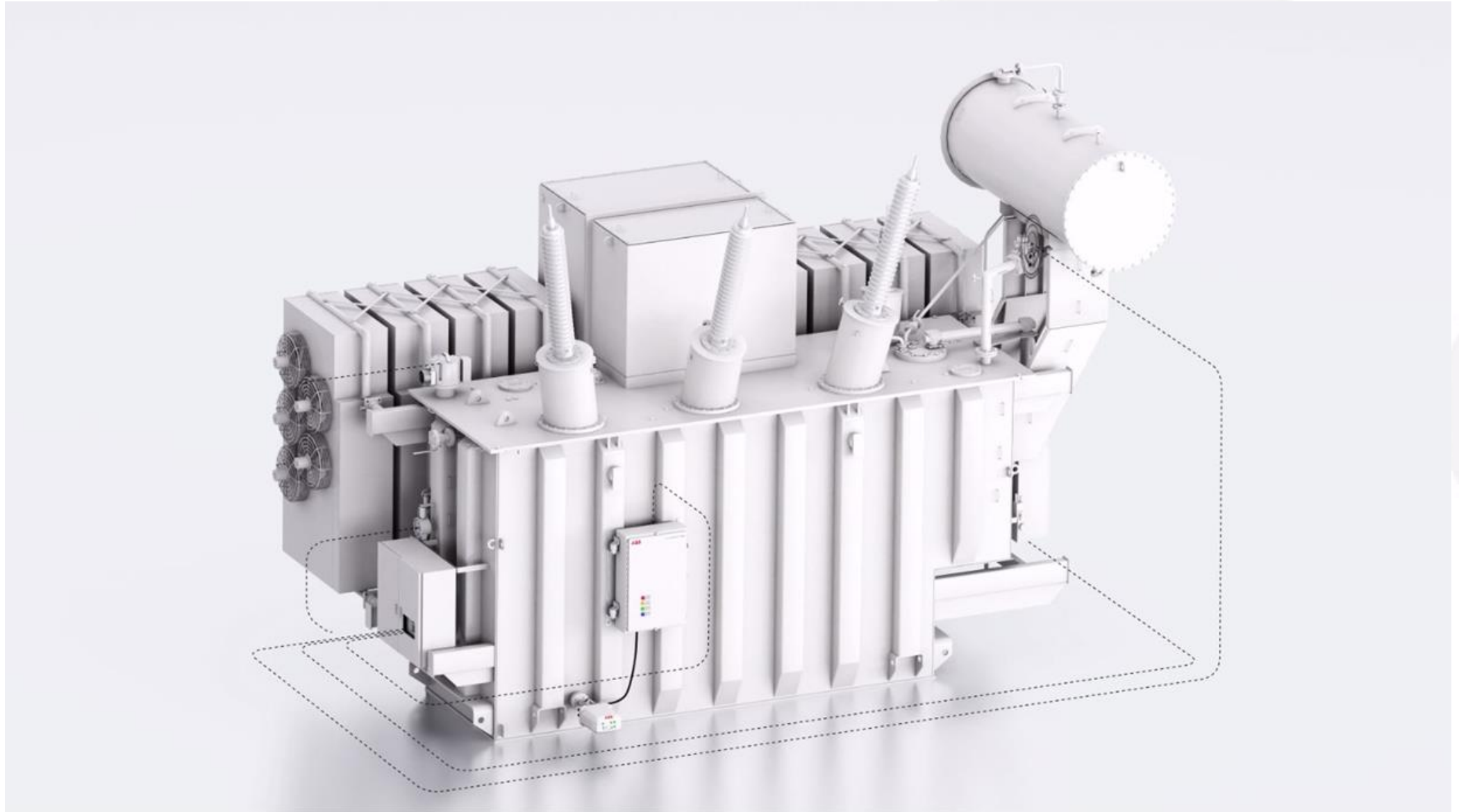


Obiter:

- ACE prohibition on zero or near-zero liability may not apply where negligence is carved out



ABB Headquarters
Varennes, QC





Tennessee Valley Authority Plant
Drakesboro, KY



1933: FDR signs TVA Act



CN Headquarters
Montreal, QC





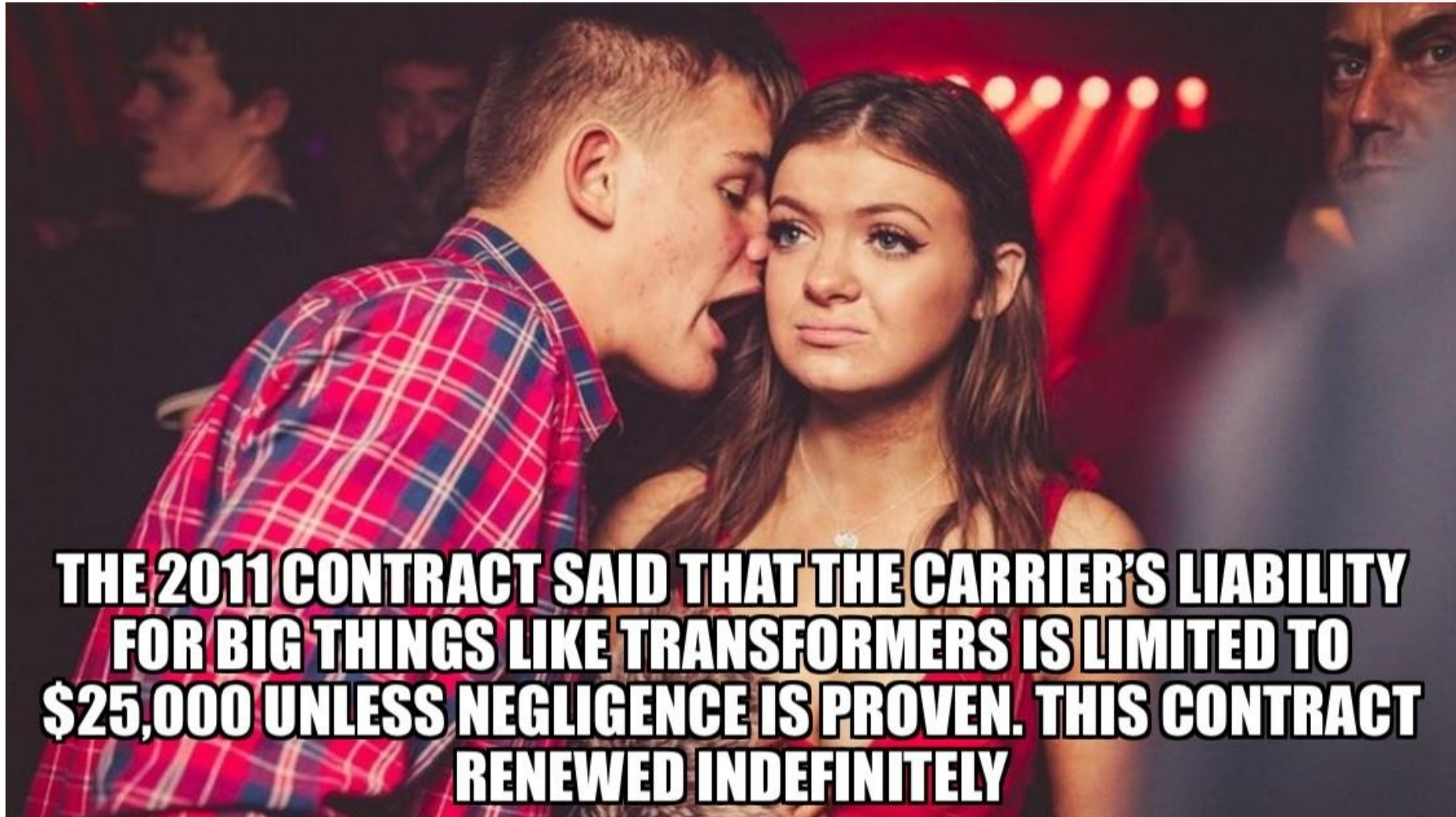


ABB

v

CN

2011



2015



THEN IN 2015 CN ISSUED A TARIFF TO ABB THAT SAID “RATE INCLUDES LIMITED LIABILITY COVERAGE OF \$25,000 USD WHILE HANDLED BY CARRIERS SHOWN IN ROUTE”



Canada Transportation Act

S.C. 1996, c. 10

Means to Deal with Carriers' Liability

Agreement

137 (1) Any issue related to liability, including liability to a third party, in respect of the movement of a shipper's traffic shall be dealt with between the railway company and the shipper only by means of a written agreement that is **signed by the shipper** or by an association or other entity representing shippers.

Traitement de la question de la responsabilité des transporteurs

Accord

137 (1) Les questions portant sur la responsabilité relativement au transport des marchandises d'un expéditeur, notamment envers les tiers, ne peuvent être traitées entre la compagnie de chemin de fer et l'expéditeur que par accord écrit signé soit par l'expéditeur, soit par une association ou une autre entité représentant les expéditeurs.



Canada Transportation Act

S.C. 1996, c. 10

No agreement

(2) If there is no agreement, the railway company's liability to the shipper in respect of a loss of or damage to a shipper's traffic in the company's possession or for any delay in its movement shall be dealt with between the company and the shipper,

(a) on the application of the company, by the Agency;
or

(b) if there is no application or, if there is an application but the Agency does not specify any terms or conditions with respect to the matter, in the manner set out in the regulations.

Aucun accord

(2) En l'absence d'un tel accord, le traitement, entre eux, de la question de la responsabilité de la compagnie de chemin de fer, à l'égard de l'expéditeur, relativement aux pertes et aux dommages de marchandises de celui-ci qui sont en la possession de la compagnie ainsi qu'aux retards liés à leur transport est régi :

a) par l'Office, si la compagnie présente une demande;

b) selon les modalités prévues par règlement, si la compagnie ne présente pas de demande ou si elle en présente une et que l'Office ne fixe aucune condition quant au traitement de cette question.



Railway Traffic Liability Regulations

SOR/91-488

Liability of Originating Carrier

8 (1) Where the transportation of goods involves more than one carrier, the originating carrier shall be liable for any loss of or damage to the goods or for any delay in respect of the goods while the goods are in the possession of any other carrier to whom the goods have been delivered.

Responsabilité du transporteur initial

8 (1) Lorsque le transport des marchandises est effectué par plus d'un transporteur, le transporteur initial est responsable des pertes, des dommages et des retards de transport subis par les marchandises pendant qu'elles sont en la possession des autres transporteurs à qui elles sont livrées.

ABB Inc. v. Canadian National Railway Company

2020 FC 817 (claim against CN)

CN ARGUMENTS	FEDERAL COURT RULING
2015 agreement (limitation irrespective of negligence) supersedes 2011 agreement (limitation except in case of negligence) such that limitation applies even where negligence is proven	2011 agreement remains in force and is not superseded. 2015 tariff is not signed by the shipper contrary to CTA 137. Thus, no limitation in case of negligence
Agreement between parties excludes application of regulations: CTA 137(2) "If there is no agreement"	137 CTA and s. 8 of the regulations remain applicable and are suppletive to parties' agreement
	CN liable if negligence (2011 agreement + s. 8 of regulations)
	CSX was negligent
	CN liable for loss
	<i>Proprio Motu</i> : what about ACE? No, does not apply. Since negligence incurs greater liability, there is no "exclusion"

ABB

v

[..CSX..]

Applicable Law Between ABB and CSX

Quebec?



Florida?



Kentucky?



Tennessee?







CODE CIVIL DU QUÉBEC



2035 CCQ: connecting carrier is automatically party to K between shipper and originating carrier

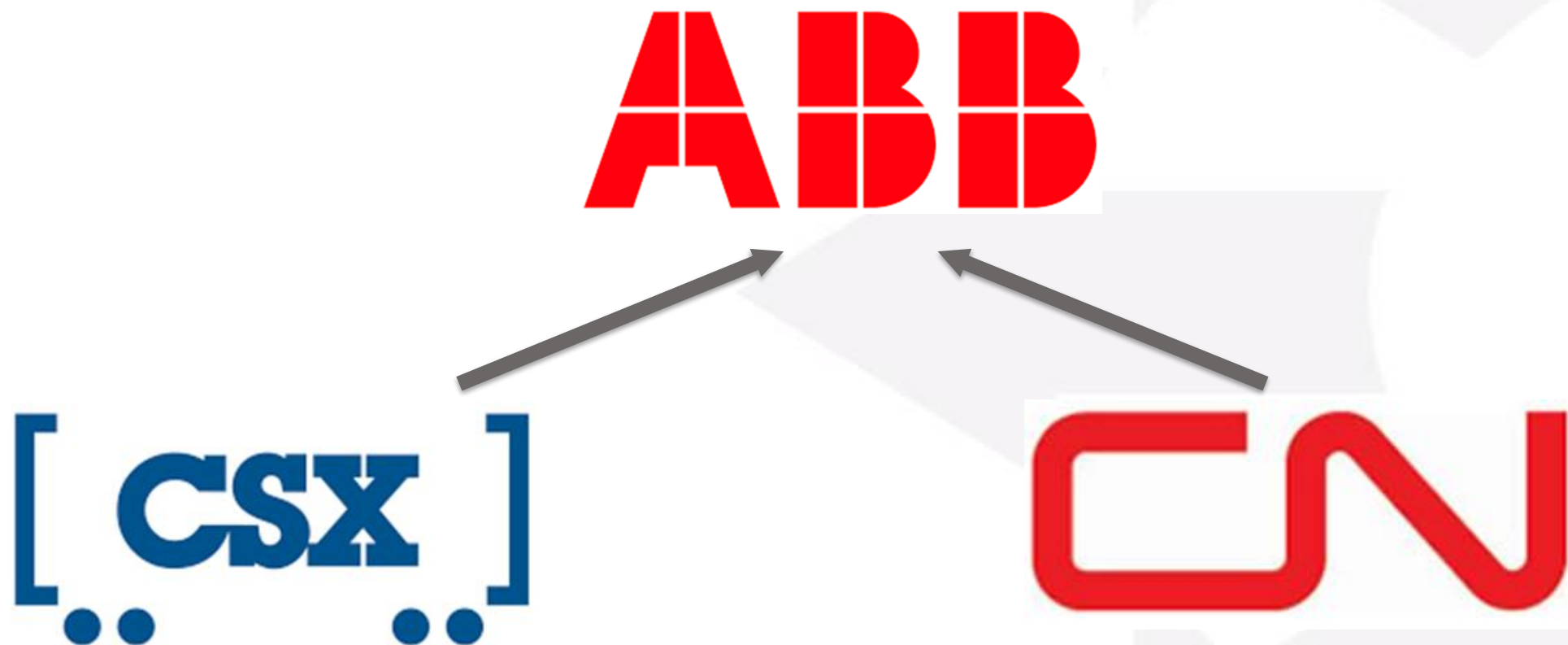
2051 CCQ: shipper may bring claim against its contractual counterparty or against the last carrier.

Federal Court



Cour fédérale

[113] Thus, by accepting to carry the transformer, CSXT became a party to the contract CN had concluded with ABB. Because there is only one contract, the terms governing the relationship between CSXT and ABB must be the same as those binding CN and ABB. Therefore, the limitation of liability between CN and ABB also applies in favour of CSXT, but subject to the same exceptions.



Federal Court of Appeal



Cour d'appel fédérale

RECOMMENDATIONS IF UPHELD ON APPEAL

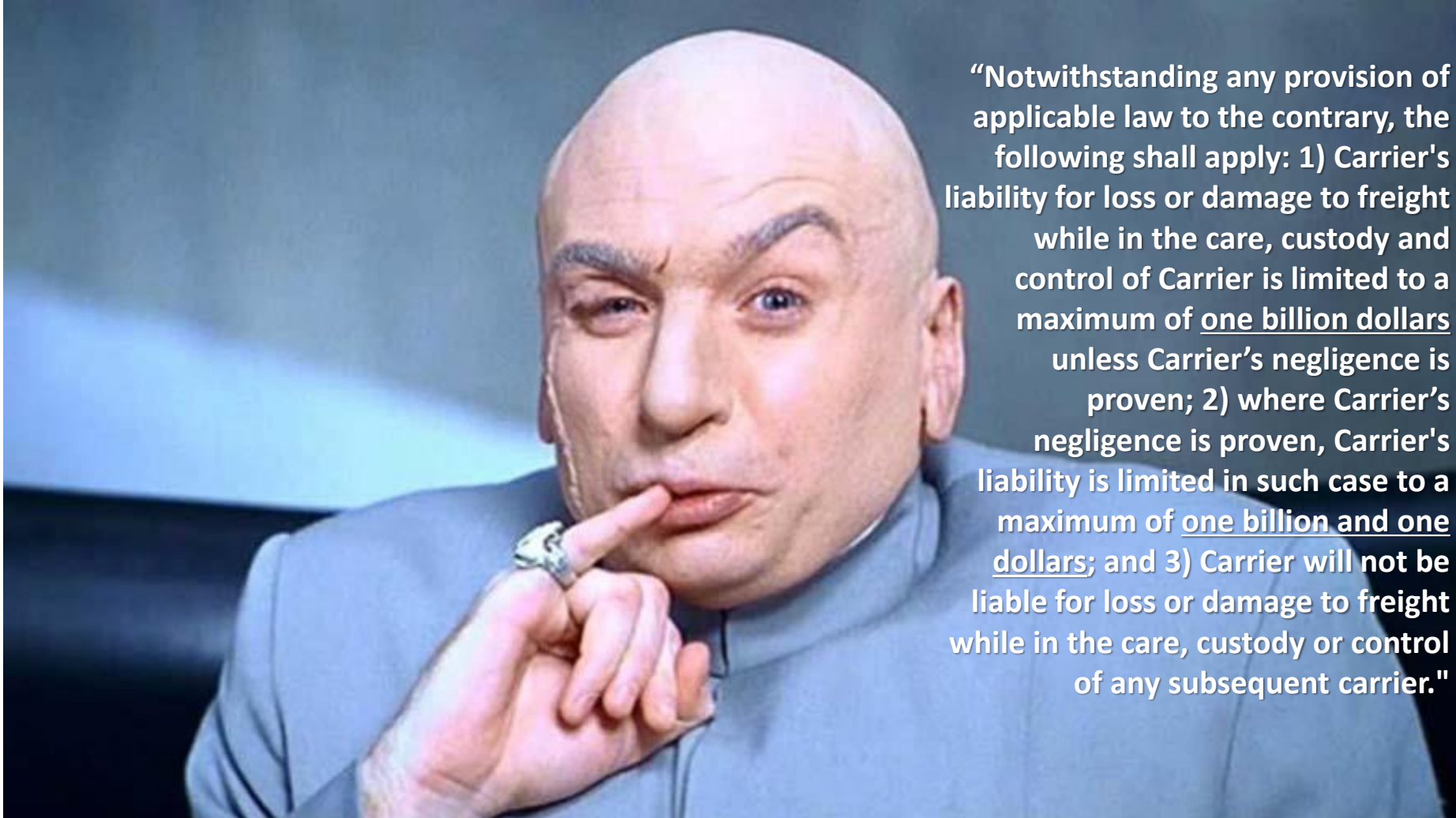












"Notwithstanding any provision of applicable law to the contrary, the following shall apply: 1) Carrier's liability for loss or damage to freight while in the care, custody and control of Carrier is limited to a maximum of one billion dollars unless Carrier's negligence is proven; 2) where Carrier's negligence is proven, Carrier's liability is limited in such case to a maximum of one billion and one dollars; and 3) Carrier will not be liable for loss or damage to freight while in the care, custody or control of any subsequent carrier."



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Question & Answers



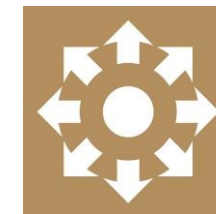
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