Date: 20080306

Docket: A-116-06

Citation: 2008 FCA 85

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

BOUTIQUE JACOB INC.

Respondent

and

ZIM INTEGRATED SHIPPING SERVICES LTD., A.P. MOLLER-MAERSK A/S, HAPAG-LLOYD CONTAINER LINE GMBH, SAFMARINE CONTAINER LINES N.V., AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION INC. ET AL

Interveners

Head at Montreal, Quebec, on November 19, 2007.
Judgment delivered at Ottawa, Ontario, on March 6, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] Before us are an appeal and a cross-appeal from a judgment of Mr. Justice de Montigny of the Federal Court, 2006 FC 217, dated February 20, 2006, which allowed, in part, the respondent

(and cross-appellant) Boutique Jacob Inc.'s (Boutique Jacob) action against the appellant (and respondent in the cross-appeal) Canadian Pacific Railway Company (CPR) and, as a result, ordered CPR to pay the sum of $35,116.58 with interest at the rate of 6% from April 27, 2003 to the date of payment.

[2] Both CPR and Boutique Jacob seek to vary the Federal Court's decision. More particularly, they seek the vary the amount of damages awarded by de Montigny J. CPR submits that it is entitled to limit its liability to the sum of $1,432.89, whereas Boutique Jacob submits that the Judge ought to have made an award in the sum of $71,550.47.

[3] The main issue raised by the appeal is the Trial Judge's interpretation of section 137 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). That issue calls for a determination of the word "shipper" found in various sections of the Act, including section 137 thereof. Also at issue is CPR's entitlement to limit its liability in respect of the loss suffered by Boutique Jacob.

THE FACTS

[4] The case before Mr. Justice de Montigny proceeded on an Agreed Statement of Facts which he reproduced in full at paragraph 1 of his Reasons. For present purposes, the following summary of the facts will suffice.

[5] Boutique Jacob, whose place of business is in Montreal, carries on the business of retailing girls', young women's and women's fashions in stores located throughout Canada. At all material times herein, it was the owner of a shipment of assorted garments and accessories consisting of

16,740 textile pieces in 1,605 cartons, having a total gross weight of 10,549 kilograms (cargo), which it purchased from various suppliers located in Hong Kong.

[6] Boutique Jacob retained the services of Panalpina Inc. (Panalpina Canada), a freight forwarder in Canada, to make arrangements for the carriage of its cargo from Hong Kong to Montreal. More particularly, through Panalpina Canada's agency, Boutique Jacob entered into a contract of carriage with Pantainer Ltd. (Pantainer), a non-vessel operating carrier, a member of the Panalpina Group of companies, to carry the cargo from Hong Kong to Montreal.

[7] In the event, Pantainer issued express line bills of lading numbers 744870, 744871, 744872, 744873, 744874, 744813, 744726 and 744879. These bills of lading contained the same terms and conditions that appeared on the back of bills of lading issued for previous shipments of Boutique Jacob in the two years prior to the shipment at issue. Boutique Jacob did not declare any value for its cargo.

[8] Through the agency of Panalpina (China) Ltd. (Panalpina China), as instructed by Panalpina Canada, Pantainer entered into a contract of carriage with Orient Overseas Container Line Ltd. (OOCL), pursuant to which OOCL undertook to carry Boutique Jacob's cargo from the port of Hong Kong to Montreal under bill of lading (waybill) OOLU82922212. In regard to OOCL's bill of lading, paragraphs 19, 20, 22 and 23 of the Agreed Statement of Facts are relevant and I hereby reproduce them:

> 19. OOCL did not issue an original or any hardcopy waybill or bill of lading nor was it requested to do so by Pantainer. There was no master contract or booking note entered into between Pantainer and OOCL. The document covering this shipment was prepared, issued and was acted upon electronically. The electronic document itself is claused as

> follows: "The printed terms and conditions appearing on the face and reverse side of this bill of lading are available at www.oocl.com, in OOCL's published US tariffs and in pamphlet form". Neither Pantainer nor OOCL have records or recollection of discussions with respect to any limitations of liability or any other OOCL terms and conditions;
>
> 20. OOCL maintains a website at www.oocl.com through which NVOC operators such as Pantainer may reserve space on board vessels according to scheduled departure for specified destinations, provide the information necessary to appear on the electronic bill of lading (waybill), obtain confirmation that the containers presented for shipment at the terminal have been loaded, the name of the ship, the progress of the voyage, the expected time of arrival, and notice of arrival. NVOC operators may obtain an electronic copy of the bill of lading (waybill) that only becomes available once containers are actually loaded on board a container vessel.
>
> …
>
> 22. On the aforesaid OOCL website, the bill of lading terms and conditions are provided for by a specific link. They have been in force in their present form since at least 2000, and have not been amended since then. They were in force at the time the carriage of the Subject Cargo was contracted and performed.
>
> 23. Pantainer was not specifically aware of the OOCL B/L terms and conditions in place at the time of the shipment in question; Pantainer whether by itself or through Panalpina China Ltd. or Panalpina Inc. have made frequent use of OOCL's online services with respect to the previous transport of cargo of Plaintiff and other customers and they did use the online service with respect to the transport of the Subject Cargo.

[9] In turn, OOCL retained the services of CPR, pursuant to a confidential rate contract wherein CPR agreed to carry the cargo by rail from Vancouver, British Columbia, to Montreal. Although CPR did not issue a waybill, it recorded the reception of the containers in which the goods had been placed and the train on its online system relied upon by both Pantainer and OOCL.

[10] During the rail transit from Vancouver to Montreal, Boutique Jacob’s cargo was damaged by reason of a train derailment which occurred on or about April 27, 2003, near Sudbury, Ontario. The lost or damaged cargo was covered by Pantainer bills of lading numbers 744873 and 74879, and by the OOCL bill of lading. Specifically, 3,342 pieces of textile, having a weight of 494.1 kilograms and a F.O.B. value of $26,880.40 were lost or damaged.

[11] On January 8, 2004, Boutique Jacob filed a Statement of Claim against Pantainer, Panalpina Canada, OOCL and CPR, seeking damages in the sum of $71,550.47. Following service of the Statement of Claim upon it, Pantainer issued a third-party claim against OOCL.

[12] The plaintiff's action was heard in Montreal on September 19 and 20, 2005, and on February 20, 2006, Mr. Justice de Montigny dismissed Boutique Jacob's action against Pantainer, Panalpina Canada and OOCL, and allowed it against CPR, condemning it to pay to Boutique Jacob the sum of $35,116.58. I should point out that the third party action against OOCL was also dismissed by the Judge.

THE FEDERAL COURT DECISION

[13] Although the Judge dismissed Boutique Jacob's action against all defendants other than CPR, his reasons for dismissal are relevant to the determination of this appeal and I will therefore review them in conjunction with his reasons for allowing the action against CPR.

[14] The Judge began his analysis by pointing out that both Panalpina Canada and Panalpina China acted as agents for Boutique Jacob with respect to the conclusion of the contract of carriage between Pantainer and Boutique Jacob. He then observed that there could be no doubt that Pantainer, as contracting carrier, was liable for all damages sustained by Boutique Jacob unless it could exclude or limit its liability. On the basis of clause 6.5(h) of Pantainer's bills of lading, which provided that Pantainer was not liable for any loss or damage arising from "any cause or event which Carrier could not avoid and the consequences of which the Carrier could not prevent by the

exercise of due diligence", the Judge concluded that Pantainer was not liable for the loss which occurred when CPR's train derailed near Sudbury.

[15] The Judge then turned his attention to OOCL's liability. He began by pointing out that pursuant to clause 3.1 of its bills of lading, Pantainer could "sub-contract directly or indirectly on any terms the whole or any part of the handling, storage or carriage of the goods, and all duties undertaken by Carrier in relation to the goods". This led him to say that if OOCL owed any liability to Boutique Jacob, it was in its capacity as bailee for reward. At paragraph 25 of his Reasons, the Judge opined as follows:

> [25] As a result, OOCL is liable only as a bailee of reward, as it received the cargo in Hong Kong and undertook to deliver the merchandise to Montreal, as can be seen from paragraph 18 of the Agreed Facts (see also the waybill and the terms and conditions in the Agreed Documents). Bailment on terms has been accepted in Canadian maritime law, and it is well established that the owner of the goods can sue the sub-bailee directly for loss or damage to the goods. The only issue is whether the Plaintiff is bound by the conditions found in [*sic*] the OOCL's terms and conditions.

[16] In the following paragraphs, the Judge went on to answer that question. He began by turning to Lord Denning's famous dictum in *Morris v. Martin*, [1966] 1 Q.B. 716, where, at pages 729 and 730, he said:

> Now comes the question: Can the cleaners rely, as against Mrs. Morris, on exempting conditions, although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on Mrs. Morris, if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the cleaners, if they are held liable to a greater responsibility than they agreed to undertake. […] <u>The answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions</u>, but not otherwise. […] In this case, Mrs. Morris agreed that Mr. Beder should send the fur to the cleaners, and by so doing I think she impliedly consented to his making a contract for cleaning on the terms usually current in the trade.
>
> [Emphasis added]

[17] The Judge then noted, at paragraph 27 of his Reasons, that in the context of maritime law, the Privy Council had held, on numerous occasions, that authorizing a carrier to "… sub-contract the whole or any part of the carriage of the goods 'on any terms' demonstrated that the owner had 'expressly consented' to the sub-bailment of their goods…". In that regard, the Judge referred to the Privy Council's decisions in *K.H. Enterprise (The) v. Pioneer Container (The)*, [1994] 2 A.C. 324, and in *Singer Co. (U.K.) Ltd. v. Tees and Hartlepool Port Authority*, [1988] 2 Lloyd's Rep. 164.

[18] The Judge pointed out that that principle had been accepted by Canadian courts and he referred to *Punch v. Savoy's Jewellers Ltd. et al.* (1986), 14 O.C.A. 4 (Ont. C.A.); *Bombardier Inc. v. Canadian Pacific Ltd.* (1991), 85 D.L.R. (4th) 558 (Ont. C.A.). He then turned to the facts of the case before him to determine whether Boutique Jacob and Pantainer had expressly or impliedly consented to OOCL's terms and conditions. In his view, they had.

[19] He immediately made clear that the fact that neither Boutique Jacob nor Pantainer had actual knowledge of OOCL's terms and conditions was not a bar to a finding that they had consented to those terms and conditions. The Judge found that Pantainer, through Panalpina China and Panalpina Canada, had a history of prior dealings with OOCL and, more particularly, in respect of cargo originating in the Far East. He further found that OOCL's documents clearly alerted its clients to the existence of its terms and conditions which could easily be found on its web site. The Judge then pointed out that Pantainer had admitted using OOCL's web site for purposes related to the booking and the tracking of cargos. Consequently, at paragraph 30 of his Reasons, the Judge held:

> [30] … Pantainer must be taken to have knowledge of its [OOCL's] standard terms due to previous dealings, the course of dealing and the fact that nothing in the terms that OOCL relies on is unduly burdensome or unconscionable in the commercial context. In fact, as we shall see shortly, the limitations found in OOCL's terms are very similar in scope and application as those in Pantainer's terms.

[20] This led the Judge to find that Boutique Jacob was bound by the terms and conditions of both Pantainer's and OOCL's bills of lading, which provided that Pantainer and OOCL could sub-contract "on any terms". With respect to OOCL's terms and conditions, he said, at paragraph 33 of his Reasons:

> [33] … The terms and conditions found in OOCL's waybill are of the type that would ordinarily be expected to be found in that sort of contract, and are certainly not unreasonable or unconscionable. Moreover, these terms are very similar to those accepted by Jacob in Pantainer's bill of lading. Consequently, Jacob cannot argue that they were taken by surprise and that they could not foresee [*sic*] the OOCL's limitations.

[21] Having concluded that Boutique Jacob was bound by the terms and conditions found in OOCL's bill of lading, the Judge then turned to those clauses which OOCL relied upon to either exonerate itself or limit its liability. First, he referred to clause 4(B)(1)(a)(viii), pursuant to which OOCL's liability was excluded where the loss or damage occurred by reason of "any cause or event which the Carrier could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence".

[22] The Judge also turned his attention to clause 4(B)(1)(c), which purported to limit OOCL's liability. In particular, he referred to that part of the clause which limited OOCL's liability, failing a declaration of value by the cargo owner, to the sum of US$2 per kilo of gross weight of the goods lost or damaged. On the basis of these clauses, the Judge concluded that OOCL was not liable because the event which caused Boutique Jacob's loss, i.e. a train derailment, could not have been

prevented by the exercise of reasonable diligence on the part of OOCL. The Judge further indicated that, in any event, by reason of clause 4(B)(1)(c) of its bill of lading, OOCL's liability could not exceed the sum of $1,432.89, i.e. US2$s per kilo.

[23] The Judge went further. In his view, even if OOCL had not been entitled to invoke the terms and conditions of its bill of lading, it could have nonetheless relied on clause 6.5 of Pantainer's bills of lading by reason of the "Himalaya clause" found at clause 3.2 thereof, which, for ease of reference, I reproduce:

> 3.2 Every servant or agent or sub-contractor of Carrier [Pantainer] shall be entitled to the same rights, exemptions from liability, defences, and immunities in which Carrier is entitled. For these purposes, Carrier shall be deemed to be acting as agent or trustee for such servants or agents, who shall be deemed to be parties to the contract evidenced by this Bill of Lading.

[24] After reproducing that clause, the Judge opined that the case law (see: *Midland Silicones Ltd. v. Scruttons Ltd.*, [1961] 2 Lloyd's Rep. 365 (H.L.*); The Eurymedon (New Zealand Shipping Company Ltd) v. A.M. Satterthwaite & Co. Ltd.*, [1974] 1 Lloyd's Rep. 534 (P.C.); *International Terminal Operators Ltd. v. Miida Electronics Inc. et al.*, supra, at pp. 782 ff.; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services*, [1999] 3 S.C.R. 108), was to the effect that Himalaya clauses were legally binding, notwithstanding the fact of a third-party's ignorance of the existence of a clause granting it a benefit at the time of performance of its obligations under a contract.

[25] As a result, the Judge, at paragraph 40 of his Reasons, concluded that Boutique Jacob's actions against both Pantainer and OOCL had to be dismissed. He then turned his mind to CPR's liability and, in the course of his analysis thereof, he addressed section 137 of the Act, which allows

a rail carrier to limit its liability if certain conditions are met. For the sake of convenience, I reproduce section 137 of the Act:

137. (1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers. (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may (a) on the application of the company, specify for the traffic; or (b) prescribe by regulation, if none are specified for the traffic	137. (1) La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs. (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.

[26] The Judge then emphasized the fact that CPR was not contesting its liability for the loss suffered by Boutique Jacob. Rather, CPR's submission was that it could rely on the terms and conditions found in its confidential rate contract with OOCL, in Tariff CPRS 7589, in OOCL's and Pantainer's bills of lading and, as a result, limit its liability to a sum of $1,432.89.

[27] The Judge was of the view that CPR could not benefit from the terms and conditions of the various documents on which it relied. He indicated that CPR's argument "would be compelling" were it not for section 137 of the Act. By reason of his interpretation of that section, he held that CPR could not limit its liability in regard to the loss suffered by Boutique Jacob. First, he pointed to the fact that subsection 137(1) did not allow a railway company to limit its liability with respect to a "shipper" unless its liability was limited by way of a written agreement signed by the shipper. As there was no written agreement between Boutique Jacob and CPR, he concluded that CPR could not

limit its liability. Second, he could not accept CPR's argument that OOCL was the shipper of the cargo in the present matter. In his view, section 6 of the Act clearly distinguished between a shipper and a carrier and, as a result, he could not accept that "OOCL can be anything else than a carrier for the purposes of that Act" (paragraph 45 of the Judge's Reasons).

[28] The Judge's analysis did not stop there. He went on to opine that even if CPR could avail itself of section 137 of the Act, it nevertheless could not limit its liability in respect of Boutique Jacob's loss. After setting out CPR's argument that by reason of the confidential rate agreement entered into with OOCL, it was entitled to rely on Tariff CPRS 7589, which provided that its liability could not exceed an amount equal to the steamship company's [OOCL] liability under its ocean bill of lading, the Judge held that CPR's submission could not succeed in view of the wording of section 5 of the confidential rate contract, which provided the following:

> 5. Limitation of Liability. All shipments of commodity (ies) under this Contract shall be subject to all the applicable terms and conditions of CPRS 7589 Series, CPRS 7690 Series and CPRS 700 Series with the following exception:
> CPR shall not be liable for any loss, damage or delay to any container or the contents on chassis, owned or leased by the Shipper except for loss or damage caused by, or resulting from negligence on the part of CPR, PROVIDING HOWEVER, that in no event shall the liability of the CPR exceed the following amounts:
> 1 – In respect to the contents of any such container, either twenty (20), forty (40) or forty-five (45) feet in length, the sum of $250,000.00 (two hundred and fifty thousand dollars). It is understood that the shipper will only supply CPR with containers (and chassis where applicable) in good working order and condition.
>
> [Emphasis added]

[29] In the Judge's view, as section 5 of the confidential rate contract clearly superseded the limitation of liability provisions found in Tariff CPRS 7589, "… CPR's maximum liability would be $250,000.00" (Emphasis added). (See: paragraph 49 of the Judge's Reasons).

[30] The Judge then dealt with CPR's argument that it was entitled to invoke to its advantage the limitations and exceptions found in the terms and conditions of OOCL's and Pantainer's bills of lading. Although he recognized that clause 1 of OOCL's bill of lading and clause 3 of Pantainer's bills of lading, i.e. the Himalaya clauses, expressly provided that sub-contractors were entitled to the same rights, exemptions from liability, defences and immunities to which the carrier was entitled, he nonetheless dismissed CPR's argument. In his view, allowing CPR to invoke the clauses found in Pantainer's and OOCL's bills of lading "… would defeat the purpose of s. 137 of the *Canada Transportation Act*". His reasoning appears from paragraph 50, where he says:

> [50] […] It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are the railway companies.

[31] Finally, the Judge proceeded to assess Boutique Jacob's damages. After a careful review of the evidence and of the relevant jurisprudence, he found that Boutique Jacob had suffered damages in the sum of $35,116.58.

ISSUES

[32] CPR's appeal raises two issues. The first is whether the Judge erred in his interpretation of section 137 of the Act. More particularly, did he err in holding that OOCL was not the "shipper" within the meaning of that provision? Second, did the Judge err in concluding that CPR could not limit its liability herein pursuant to Tariff CPRS 7589 or pursuant to the terms and conditions of Pantainer's and OOCL's bills of lading?

[33] As to the cross-appeal, it raises only one issue: did the Judge err in assessing Boutique Jacob's damages when he concluded that its damages were to be calculated on the lowest discounted prices of the cargo, rather than on the basis of the average post-loss sales of goods of the same nature and style as the lost cargo?

SUBMISSIONS OF THE PARTIES

[34] CPR argues that de Montigny J. erred in deciding that section 137 prevented it from invoking the benefit of the liability limitations contained in Tariff CPRS 7589, the OOCL waybill or the Pantainer bills of lading. It submits, contrary to the Judge's conclusion, that Boutique Jacob is not the shipper within the meaning of the provision. CPR says that the "shipper" cannot be Boutique Jacob because it did not enter into a contract with it with respect to the carriage of the goods from Vancouver to Montreal. In its view, that Judge's interpretation of section 137 is inconsistent with other provisions of the Act, namely, sections 111 to 139. CPR further argues that the *Railway Traffic Liability Regulations*, SOR/91-448 (the "Regulations") make a distinction between the owner of goods and the shipper thereof. In support of its position, CPR refers to the decisions of the Quebec Court of Appeal in *Canadian National Railway Company v. Sumitomo Marine and Fire Insurance Company Ltd.*, [2007] J.Q. 7207, [2007] Q.C.C.A. 985 (dated July 10, 2007), and that of the Supreme Court of the United States in *Norfolk Southern Railway Co. v. Kirby*, 125 S. Ct. 385 (2004) which, the appellant submits, is relevant to this appeal as the United States has a legislative provision to the same effect as section 137 of the Act.

[35] CPR further submits that the limitation of liability provisions contained in the OOCL waybill and in the Pantainer bills of lading are available to it because of the Himalaya clauses found in those documents. Accordingly, CPR submits that its maximum liability herein cannot exceed that of OOCL, which is $1,433.89.

[36] With respect to the Judge's finding that the confidential rate contract provided for a limitation of liability of $250,000, CPR says that that document stipulates only a maximum liability and does not prevent it from benefiting from the more generous limitation provisions found in Tariff CPRS 7589 and the OOCL and Pantainer bills of lading.

[37] In the alternative, CPR says that Boutique Jacob should be awarded damages in the sum of $33,598.64, which represents the cost of acquisition of the goods plus insurance and freight, i.e. the F.O.B. value.

[38] Boutique Jacob takes an entirely different position. It says that sections 6 and 137 of the Act and the provisions contained in the Regulations do not support CPR's argument that the "shipper" must be the person with whom the rail carrier has a direct contractual relationship. Boutique Jacob further says that the "shipper" is the person who sends or receives goods, and that it can be the owner of the goods, depending on the circumstances. Boutique Jacob further says that the use of the word "shipper" in other Canadian legislation, namely, the *Canada Shipping Act*, S.C. 200, c. 26, and the *Marine Liability Act*, S.C. 2001, c. 6, indicates that this word does not include a carrier.

[39] With respect to the second issue raised by this appeal, i.e. whether the Judge erred in concluding that neither the confidential rate contract nor Tariff CPRS 7589 could limit CPR's liability herein, Boutique Jacob says that the Judge made no error in concluding as he did. In its view, the plain meaning of section 5 of the confidential rate contract is that CPR agreed to limit its liability to a sum of $250,000.

[40] Finally, with respect to quantum, Boutique Jacob says that the Trial Judge made no error in refusing to accept CPR's submission that the assessment of damages ought to have been made on the basis of the purchase price of the cargo plus insurance and freight.

[41] With respect to its cross-appeal, Boutique Jacob says that although the Judge correctly understood the relevant principles, he did not properly apply them in assessing its damages. It says that it was an error for the Judge to assess its damages on the basis of the lowest discounted prices of the cargo rather than on the basis of the average post-loss sales of goods of the same nature and style as the lost cargo. As a result, Boutique Jacob submits that this Court should intervene and condemn CPR to pay damages in the sum of $71,550.47.

[42] The intervenors support the position taken by CPR in this appeal, emphasizing the fact that the word "shipper" found in section 137 of the Act has to be interpreted in the whole context of multi-modal transportation. In their view, there cannot be any doubt that the "shipper" in the present matter is OOCL. Hence, on that premise, the intervenors submit that CPR is entitled to invoke all defences, limits and exclusions found either in the OOCL or Pantainer bills of lading, subject to any applicable provision of the confidential rate contract. They submit, in the alternative, that CPR can

rely on the limits of liability found in Tariff CPRS 7589, subject to any applicable provision of the confidential rate contract.

ANALYSIS

[43] For the reasons that follow, I conclude that the Judge erred in concluding that Boutique Jacob was the "shipper" within the meaning of section 137 of the Act. I also conclude that the Judge erred in holding that CPR's limitation of liability was $250,000 and, as a result, that it could not limit its liability in regard to Boutique Jacob's loss.

[44] Before proceeding any further, it will be useful at this juncture to reproduce the relevant provisions of the Act, including section 137, which I again reproduce for ease of reference:

6. … "shipper" means a person who sends or receives goods by means of a carrier or intends to do so;	6. […] «expéditeur » Personne qui expédie des marchandises par transporteur, ou en reçoit de celui-ci, ou qui a l'intention de le faire.
…	[…]
113. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,	113. (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :
…	[…]
(c) without delay, and with due care and diligence, receive, carry and deliver the traffic;	c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;
…	[…]
(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.	(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.
…	
116. (5) Every person aggrieved by any	

neglect or refusal of a company to fulfill its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

(6) Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any negligence or omission of the company or any of its employees.

117. (1) Subject to section 126, a railway company shall not charge a rate in respect of the movement of traffic or passengers unless the rate is set out in a tariff that has been issued and published in accordance with this Division and is in effect.

…

118. A railway company shall, at the request of a shipper, issue a tariff in respect of the movement of traffic on its railway.

…

121. (1) If traffic is to move over a continuous route in Canada and portions of it are operated by two or more railway companies, the companies shall, at the request of a shipper intending to move the traffic,
(a) agree on a joint tariff for the continuous route and on the apportionment of the rate in the joint tariff; or
(b) enter into a confidential contract for the continuous route.

(2) If the railway companies fail to agree or to enter into a confidential contract, the Agency, on the application of the shipper, may

[…]

116. (5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.

(6) Sous réserve des stipulations d'un contrat confidentiel visé au paragraphe 113(4) ou d'un tarif établissant un prix de ligne concurrentiel visé au paragraphe 136(4), une compagnie n'est pas soustraite à une action intentée en vertu du paragraphe (5) par un avis, une condition ou une déclaration, si les dommages-intérêts réclamés sont causés par la négligence ou les omissions de la compagnie ou d'un de ses employés.

117. (1) Sous réserve de l'article 126, une compagnie de chemin de fer ne peut exiger un prix pour le transport de marchandises ou de passagers que s'il est indiqué dans un tarif en vigueur qui a été établi et publié conformément à la présente section.

[…]

118. Chaque compagnie de chemin de fer doit, sur demande d'un expéditeur, établir un tarif relatif au transport de marchandises sur son chemin de fer.

[…]

121. (1) Les compagnies de chemin de fer qui exploitent des parties d'un parcours continu au Canada sur lequel un transport de marchandises s'effectue doivent, sur demande de l'expéditeur qui veut les faire transporter sur le parcours :
a) soit s'entendre sur un tarif commun pour le parcours et la répartition du prix dans le tarif;
b) soit conclure un contrat confidentiel pour le parcours.

(2) En l'absence d'une telle entente ou

(a) direct the companies, within any time that the Agency may specify, to agree on a joint tariff for the continuous route and an apportionment of the rate that is satisfactory to the Agency; or
(b) within ninety days after the application is received by the Agency,

(i) determine the route and the rate and apportion the rate among the companies, and

(ii) determine the dates, not earlier than the date of receipt by the Agency of the application, when the rate comes into effect and when it must be published.

(3) If the Agency determines a rate under paragraph (2)(b), the companies that operate the route shall pay a shipper who moved traffic over the route an amount equal to the difference, if any, between the rate that was paid by the shipper and the rate determined by the Agency, applicable to all movements of traffic by the shipper over the route from the date on which the application was made to the date on which the determined rate comes into effect.

…

126. (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting
(a) the rates to be charged by the company to the shipper;
(b) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;
(c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;
(d) any conditions relating to the traffic to be moved by the company; and
(e) the manner in which the company shall fulfill its service obligations under section 113.

d'un tel contrat, l'Office peut, sur demande de l'expéditeur :
a) soit ordonner aux compagnies de s'entendre, dans le délai fixé par lui et selon les termes qu'il estime indiqués, sur le tarif commun et la répartition du prix pour le parcours;
b) soit, par arrêté pris dans les quatre-vingt-dix jours suivant la réception de la demande par lui, fixer le parcours, le prix pour celui-ci et répartir ce prix entre ces compagnies et fixer la date, non antérieure à celle où il a reçu la demande, de prise d'effet et de publication du prix.

(3) Les compagnies visées par l'arrêté payent à l'expéditeur qui a fait transporter des marchandises sur le parcours un montant égal à la différence éventuelle entre le prix qu'il a payé et le prix fixé par l'arrêté et applicable à tout le transport fait par lui sur le parcours entre la date de la présentation de la demande et celle de la prise d'effet de l'arrêté.

[…]

126. (1) Les compagnies de chemin de fer peuvent conclure avec les expéditeurs un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne :
a) les prix exigés de l'expéditeur par la compagnie;
b) les baisses de prix, ou allocations afférentes à ceux-ci, indiquées dans les tarifs établis et publiés conformément à la présente section;
c) les rabais sur les prix, ou allocations afférentes à ceux-ci, établis dans les tarifs ou dans les contrats confidentiels, qui ont antérieurement été exigés licitement;
d) les conditions relatives au transport à effectuer par la compagnie;
e) les moyens pris par la compagnie pour s'acquitter de ses obligations en application de l'article 113.

(2) Toute demande d'arbitrage au titre de l'article 161 est subordonnée à l'assentiment de toutes les parties au

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

…

137. (1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.

(2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may
(a) on the application of the company, specify for the traffic; or
(b) prescribe by regulation, if none are specified for the traffic.

…

164. (1) The arbitrator shall, in conducting a final offer arbitration between a shipper and a carrier, have regard to the information provided to the arbitrator by the parties in support of their final offers and, unless the parties agree to limit the amount of information to be provided, to any additional information that is provided by the parties at the arbitrator's request.

(2) Unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates and to all considerations that appear to the arbitrator to be relevant to the matter.

[Emphasis added]

contrat confidentiel.

[…]

137. (1) La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.

(2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.

[…]

164. (1) Dans un cas d'arbitrage entre un expéditeur et un transporteur, l'arbitre tient compte des renseignements que lui fournissent les parties à l'appui de leurs dernières offres et, sauf accord entre les parties à l'effet de restreindre la quantité des renseignements à fournir à l'arbitre, des renseignements supplémentaires que celles-ci lui ont fournis à sa demande.

(2) Sauf accord entre les parties à l'effet contraire, l'arbitre tient également compte de la possibilité pour l'expéditeur de faire appel à un autre mode de transport efficace, bien adapté et concurrentiel, des marchandises en question ainsi que de tout autre élément utile.

[Non souligné dans l'original]

[45] Section 137 of the Act allows a railway company to limit its liability in respect of a shipper's claim by the means of a written agreement signed by that shipper. The Trial Judge concluded that since there was no written agreement between CPR and the shipper, Boutique Jacob, CPR could not limit its liability.

[46] Section 6 of the Act defines a "shipper" as "a person who sends or receives goods by means of a carrier or intends to do so". This broad definition must, in my view, be read in the context of the other provisions of the Act. This issue was squarely addressed by the Quebec Court of Appeal in *Canadian National Railway Company Ltd.*, above, wherein it concluded that the "shipper" within the meaning of section 137 of the Act was the person who directly contracted with the railway company. At paragraphs 48 and 49 of his Reasons for the Court, Dussault J.A. wrote the following:

> [TRANSLATION]
>
> 48. Reviewing these submissions, I note that the parties are debating the meaning and the scope that should be given to the notion of "shipper" defined at section 6 of the Act, without actually relying on the other terms of the Act. It is true that, based on its generality, the definition provided by this section – "means a person who sends or receives goods by means of a carrier" – may at first seem vague. However, if we review subsection 117(1), section 118, and subsections 121(1) and 164(2) of the Act, dealing with establishing tariffs and rates for the movement of goods, it is quite another matter.
>
> 49. Therefore, reading subsection 121(1), I note that rates are determined either by joint tariff for the various rail carriers, by agreement or a confidential contract. In the latter case, paragraph 121(1)(*b*), section 126 and subsection 164(2) all state that it necessarily involves a relationship between the rail carrier and the shipper which, in fact, negotiates the terms of the rates with the carrier . Part IV of the Act, which provides for arbitration when a disagreement arises between the shipper and the carrier on the rates proposed or applied, indeed confirms this "realistic" perception of the notion of shipper. Subsection 164(2) states on this point that "Unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates …". The shipper is therefore the one that, given the possibilities available, made a concrete decision to call on a rail carrier rather than another carrier. In other words, the shipper has a direct connection and, especially, effective and real control over the negotiation of an agreement or contract made with the carrier.
>
> [Emphasis added]

[47] Considering the grammatical and ordinary meaning of the word “shipper”, section 6 of the Act and the scheme of the Act, I cannot but agree with the Quebec Court of Appeal’s interpretation of the meaning of the word “shipper” found in section 137 and other provisions of the Act. Consequently, there can be no doubt that, in the present matter, the “shipper” was OOCL and not Boutique Jacob. In effect, not only was OOCL the entity which contracted directly with CPR by way of a confidential rate contract, it was OOCL which handed over the container to CPR in Vancouver. Thus, there was, as required by section 137, a written agreement between the railway carrier, CPR, and the “shipper”, OOCL. The fact that OOCL was the carrier retained by Pantainer to carry the goods from Hong Kong to Montreal does not deter from the fact that OOCL was the “shipper” insofar as the contract of carriage by rail is concerned.

[48] Counsel for Boutique Jacob argued, in the alternative, that even if we found that OOCL was the “shipper”, CPR could not, in any event, limit its liability because the written agreement adduced in evidence was not signed. That argument is, in my view, without merit, as neither party to the confidential rate contract disputed the validity of their agreement.

[49] I now turn to the issue of whether CPR can limit its liability to a sum of $1,432.89.

[50] The arguments which CPR makes with respect to its right to limit its liability are, to a great extent, the same arguments made by OOCL in defending itself against Boutique Jacob’s action. These arguments were thoroughly dealt with by the Trial Judge and that is why I carefully reviewed

the reasons which he gave for concluding that OOCL was not liable and that, if it were, its liability would be limited to US$2 per kilo of the total weight of the lost or damaged cargo.

[51] I should emphasize at this point that neither the validity nor the effect of both the sub-contracting and Himalaya clauses have been challenged by Boutique Jacob in this appeal. I would add that in view of the long line of cases which have addressed these clauses, Boutique Jacob's decision not to challenge them is fully understandable and, indeed, is the correct decision. For ease of reference, I reproduce these clauses found in the Pantainer and OOCL bills of lading:

1. OOCL's BILLS OF LADING

1) **IDENTITY AND DEFINITION OF CARRIER**

Orient Overseas Container Line Limited is the only Carrier herein. "Orient Overseas Container Line" and "OOCL" are trade names for transportation provided by the Carrier.

It is ultimately adjudged that a second person or entity, including without limitation, the Vessel, her owner, operation, demise, time, slot and space charterer and/or member of an alliance and/or consortium and/or joint arrangement of which the Carrier may be a member, is also a carrier/bailee then that person or entity shall have the benefit of all the rights and defenses provided for in this Bill of Lading or by law.

Notice is hereby given that Carrier is a member of alliances and/or consortia and/or joint arrangements. The members of such groups, including Carrier, reserve the right to carry cargo for each other, and otherwise cooperate with each other in the carriage of cargo, without notice to the Merchant. In the case of such carriage, however, the terms and conditions of this Bill of Lading shall apply, and the Merchant shall be bound by them and Carrier shall be deemed in all instances to be the Carrier of the Goods, subject to the terms and conditions of this Bill of Lading.

2) **DEFINITIONS**

Without limitation of any definition in any applicable law herein mentioned: "VESSEL" shall include the vessel(s) named in this Bill of Lading, any substituted vessel(s), any vessel to which transshipment may be made in the performance of this contract and any vessel, craft, lighter or other means of transportation whatsoever, owned, charted, operated or controlled and used by the Carrier or Participating Carrier in the performance of this contract; … "PARTICIPATING CARRIER" shall include any other sea, water, land or air carrier performing any part of the carriage provided herein;

…

25) **SUB-CONTRACTING AND INDEMNITY**

(a) The Carrier shall be entitled to sub-contract the whole or any part of the duties undertaken by the Carrier in this Bill of Lading in relation to the Goods **on any terms** whatsoever consistent with any applicable law.

[Emphasis added]

2. PANTAINER'S BILLS OF LADING

3. SUBCONTRACTING:

3.1 Carrier shall be entitled to subcontract directly or indirectly on any terms the whole or any part of the handling, storage or carriage of the goods and all duties undertaken by Carrier in relation to the goods.

3.2 Every servant or agent or subcontractor of Carrier shall be entitled to the same rights, exemptions from liability, defences and immunities to which Carrier is entitled. For those purposes, Carrier shall be deemed to be acting as agent or trustee for such servants or agents, who shall be deemed to be parties to the contract evidenced in this Bill of Lading.

[Emphasis added]

[52] It is also important to restate what the Judge clearly said in his Reasons, i.e. that by reason of the sub-contracting clause found in Pantainer's bills of lading (clause 3.1 thereof), Boutique Jacob was clearly informed of the possibility that the whole or part of the carriage of its good would be executed by sub-carriers and that they would perform their obligations subject to terms and conditions applicable to it. Hence, Boutique Jacob knew or ought to have known that the railway portion of the carriage might be performed by a sub-carrier whose terms and conditions would apply to it.

[53] The starting point in regard to CPR's right to limit its liability is obviously the confidential rate contract, to which I now turn. Under the heading of GENERAL TERMS AND CONDITIONS, the confidential rate contract provides in clear terms that the contract is subject to all the terms and conditions of, *inter alia*, Tariff CPRS 7589 (clause 1). It further provides that "[a]ll shipments of

commodity(ies) under this Contract shall be subject to all the applicable terms and conditions of CPRS 7589…" and that CPR's liability shall in no event exceed the sum of $250,000 in respect of the contents of any 20, 40 or 45 feet in length container (clause 5)

[54] I now turn to Tariff CPRS 7589, entitled *Special Terms and Conditions Respecting Carriage by Railway of Import/Export Containers, Loaded or Empty, Owned by Other than Rail or Common Carriers*. Clause 1.A. thereof provides that in respect of the contents of 20 and 40 foot containers, CPR's liability shall be limited to the lesser of the following: "… (1) the value of such contents at the place and time that such contents were loaded into the container … (2) The sum of $10,000.00 [20-foot container] or $20,000 [40-foot container]…; (3) an amount equal to the liability of the steamship company pursuant to the ocean bill of lading, …" [Emphasis added].

[55] CPR says that by reason of Tariff CPRS 7589, which was incorporated in the confidential rate contract, it is entitled to limit its liability to that found in OOCL's bill of lading. In my view, CPR's submission must succeed. As I indicated earlier, Boutique Jacob knew or ought to have known that the contract of carriage undertaken by Pantainer might be sub-contracted to others whose terms and conditions would be applicable to it. The provisions found in Tariff CPRS 7589 are such terms and conditions.

[56] The Judge could not come to this conclusion because of his view that the limitation provisions of Tariff CPRS 7589 were superseded by the limitation of liability found in the confidential rate contract, i.e. $250,000. In my view, the Judge was clearly wrong in that view. His words, found at paragraph 49 of his Reasons, are worth repeating:

> [49] This provision, the opening paragraph of which is exactly the same as that of the Tariff CPRS 7589, clearly supersedes the limitation of liability found in the Tariff. Accordingly, even if we were to apply the agreement entered into by CPR with OOCL, CPR's maximum liability would be $250,000.00.
>
> [Emphasis added]

[57] As the Judge makes perfectly clear in the above passage, clause 5 of the confidential rate contract purports to establish, not a minimum liability, but a maximum liability of $250,000 and, as a result, it is not inconsistent with the limitation provisions found in Tariff CPRS 7589.

[58] I therefore conclude that by reason of Tariff CPRS 7589, CPR was entitled to limit its liability to an amount equal to that found in OOCL's bill of lading, i.e. US$2 per kilo of gross weight of the goods lost or damaged.

[59] In any event, even if CPR could not rely on the limitation provisions of Tariff CPRS 7589, it could, nonetheless, by reason of the Himalaya clauses found in both the Pantainer and OOCL bills of lading (clause 3.2 of Pantainer and clause 1 of OOCL), rely on the limitation provisions found in those bills of lading. I need not repeat the rationale for this conclusion, which the learned Judge correctly expressed in his reasons pertaining to OOCL's liability. Hence, either by way of Tariff CPRS 7589 or by way of the limitation provisions found in the aforesaid bills of lading, CPR can limit its liability to the sum of $1,432.89.

[60] In view of my conclusion with regard to CPR's entitlement to limit its liability for the loss suffered by Boutique Jacob, I need not address the issue raised by Boutique Jacob in its cross-appeal.

DISPOSITION

[61] Consequently, I would allow the appeal, set aside the decision of the Federal Court and, rendering the judgment which ought to have been rendered, I would condemn CPR to pay to Boutique Jacob the sum of $1,432.89 with interest at the rate of 6% from April 27, 2003, to the date of payment. Finally, I would allow CPR its costs herein and below and I would dismiss the cross-appeal with costs.

"M. Nadon"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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