Federal Court of Appeal  Cour d'appel fédérale

Date: 20151207

Docket: A-81-14

Citation: 2015 FCA 283

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
SCOTT J.A.

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant
(Respondent on Cross-Appeal)

and

CANEXUS CHEMICALS CANADA, LP, OLIN CANADA, ULC DOING BUSINESS AS OLIN CHLOR ALKALI PRODUCTS, ERCO WORLDWIDE, A DIVISION OF SUPERIOR PLUS LP, CHEMTRADE LOGISTICS INC. and CHEMTRADE WEST LIMITED PARTNERSHIP

Respondents
(Appellants on Cross-Appeal)

and

CANADIAN TRANSPORTATION AGENCY

Respondent
(Respondent on Cross-Appeal)

and

AGRIUM and
THE CANADIAN FERTILIZER INSTITUTE

Interveners

Heard at Montréal, Quebec, on May 27, 2015.

Judgment delivered at Ottawa, Ontario, on December 7, 2015.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] The Canadian Transportation Agency (the Agency) was asked by a group of shippers of hazardous products to rule on the legality and reasonableness of Item 54, a group of clauses dealing with liability and indemnity issues, in Tariff 8 published by the Canadian Pacific Railway Company (CP). The shippers, Canexus Chemicals Canada, LP, Olin Canada ULC doing business as Olin Chlor Alkali Products, ERCO Worldwide, a division of Superior Plus LP, and Chemtrade Logistics Inc. and Chemtrade West Limited Partnership, (collectively, the Shippers), argued that Item 54 is prohibited by subsection 137(1) of the *Canada Transportation Act*, S.C. 1996 c. 10 (the Act) or, alternatively, should be struck down as unreasonable pursuant to section 120.1 of the Act.

[2] The Agency examined the question and, in the course of two decisions, held that portions of Item 54 were indeed prohibited by subsection 137(1) and, pursuant to section 26 of the Act, ordered that CP refrain from applying Item 54 until such time as the tariff was amended to remove the prohibited limitations of liability. At the same time, the Agency ruled that it could not disallow Item 54 as unreasonable pursuant to section 120.1 of the Act because it found that section 120.1 applied only to charges and associated terms and conditions for incidental or

additional services whose cost had been unbundled from the rate for transporting the goods. On the facts of this case, Item 54 was not such an item.

[3] CP appeals from the order prohibiting it from applying Item 54. The Shippers cross-appeal from the dismissal of their application under section 120.1.

[4] For the reasons which follow, I would allow the appeal and dismiss the cross-appeal. I would return the matter to the Agency with instructions that the Shippers' application should be dismissed.

II. FACTS AND LEGISLATION

[5] Unless it has entered into a specific contract with a shipper, a railway can only charge a rate and stipulate terms and conditions which have been published in a tariff. A railway's obligation to publish its rates and conditions in a tariff flows from section 117 of the Act:

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.	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.
(2) The tariff must include any information that the Agency may prescribe by regulation.	(2) Le tarif comporte les renseignements que l'Office peut exiger par règlement.
(3) The railway company shall publish and either publicly display the tariff or make it available for public inspection at its offices.	(3) La compagnie de chemin de fer fait publier et soit affiche le tarif, soit permet au public de le consulter à ses bureaux.

[6] Pursuant to the authority conferred in subsection 117(2), the *Railway Traffic and Passenger Tariffs Regulations* SOR/96-338 (the Regulations) were promulgated. They make it clear that a tariff is not limited to the stipulation of the rate but must include the terms and condition of carriage as well:

2. The following information shall be included in every traffic or passenger tariff that is issued and published by a railway company under Part III of the Act: …	2. Tout tarif de transport des marchandises ou des passagers que la compagnie de chemin de fer établit et publie aux termes de la partie III de la Loi doit comporter les renseignements suivants : ….
(f) any terms and conditions of the tariff, including terms and conditions of the carriage of persons with disabilities, or an explanation, with references, of where the terms and conditions can be found;	f) les modalités du tarif, y compris les conditions de transport applicables aux personnes ayant des déficiences, ou une indication, avec les renvois pertinents, de l'endroit où se trouvent ces modalités

[7] Section 126, which is referred to in the opening words of section 117, is the provision which allows the parties to proceed by way of a confidential contract which may contain rates and terms and conditions other than those in the railway's published tariff :

126. (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting:	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) the rates to be charged by the company to the shipper;	a) les prix exigés de l'expéditeur par la compagnie;
(b) reductions or allowances pertaining to the tariffs that have been issued and published in accordance with this Division;	b) les baisses de prix, ou allocations afférentes à ceux-ci, indiquées dans les tarifs établis et publiés conformément à la présente section;
(c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;	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) 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) 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.

[8] In this case, CP published Tariff 8 including Item 54 which, due to its length, is reproduced as Appendix "A" to these reasons. In brief, Item 54 provides as follows:

a) CP shall not be liable to the shipper for claims, loss or damage caused by or arising from the transportation of the commodities [the Shippers' traffic].

b) The shipper shall defend, indemnify and hold harmless CP for claims, loss or damage arising from or caused by the transportation of the commodities.

c) This indemnity shall include any liabilities arising from;

   i. Any failure of, release from or defect in the equipment tendered by the shipper for the transportation of the commodity.

   ii. Loading, sealing and/or securing the commodity in the shipper's equipment.

   iii. Release, unloading, transfer, delivery, treatment, dumping, storage, or disposal of the commodity.

   iv. Any fines or penalties resulting from the actual or alleged violation of any environmental or other law, code, or regulation.

   v. Any loss caused by the sole negligence of the shipper.

d) The shipper shall have no obligation to indemnify CP for liabilities arising from the sole negligence or willful misconduct of CP, its agents or employees.

e) The shipper shall defend, indemnify and hold CP harmless for any liabilities due to the presence of contaminants in the commodity which are not properly described in the commodity shipping document.

f) The shipper's obligation to indemnify CP does not include claims for loss, damage or delay to the commodities.

g) Subject to the shipper's obligation to defend and indemnify CP, where Customer alleges that claims, loss or damages arising from or caused by the transportation of the commodities are caused by the joint, contributory or concurrent negligence of CP, responsibility for the claims, loss or damage shall be adjudicated under

> principles of comparative fault in which the trier of fact shall determine the percentage of responsibility of CP, the shipper or any other party. CP shall be liable only for its percentage of responsibility and the shipper shall be responsible for the balance.

[9] As can be seen, Item 54 deals with issues of liability between CP and the shipper, as well as liabilities owed to third parties The question which the Shippers put before the Agency was whether Item 54 ran afoul of subsection 137(1) of the Act which deals with limitations of liability:

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.	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) 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.	(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.

[10] Pursuant to the authority granted by paragraph 137(2)(b), the *Railway Traffic Liability Regulations* (SOR/91-488) were promulgated. They contain a number of terms but, for present purposes, the most noteworthy are the following:

4. Subject to sections 8 and 15, for the purposes of subsection 137(2) of the Act, a carrier is liable, in respect of goods in its possession, for any loss of or damage to the goods or for any delay in their transportation unless that liability is limited by these Regulations. ….	4. Sous réserve des articles 8 et 15, pour l'application du paragraphe 137(2) de la Loi, le transporteur est responsable, quant aux marchandises qui sont en sa possession, des pertes, des dommages et des retards de transport subis par celles-ci, sauf dans les cas où cette responsabilité est limitée par le présent règlement.

5. (1) A carrier shall not be liable for any loss or damage in respect of any goods or for any delay in the transportation of the goods if the loss, damage or delay, as the case may be, results from
(a) an act of God;
(b) war or an insurrection;
(c) a riot, strike or lock-out;
(d) any defect in the goods;
(e) any act, negligence or omission of the shipper or owner of the goods;
(f) an authority of law; or
(g) a quarantine.

5. (1) Le transporteur n'est pas responsable des pertes, des dommages et des retards de transport subis par les marchandises qui sont attribuables à l'une des causes suivantes :
a) cas de force majeure;
b) guerre ou insurrection;
c) émeute, grève ou lock-out;
d) défectuosité des marchandises;
e) acte, omission ou négligence de l'expéditeur ou du propriétaire des marchandises;
f) application d'une loi;
g) mise en quarantaine.

[11] These provisions largely reproduce a common carrier's obligations (and the exceptions to those obligations) at common law where a common carrier is treated as the insurer of the shipper's goods: See *Canadian Forest Products Ltd v. B.C. Rail Ltd*., 2005 BCCA 369, [2005] B.C.J. No. 1486 at paragraphs 35-36, *Boutique Jacob Inc. v. Pantainer Ltd.*, 2006 FC 217, [2006] F.C.J. No. 292 (reversed on other grounds, 2008 FCA 85), citing *Canadian National Railway co. v. Harris, [1946] S.C.R. 352*.

[12] In their application, the Shippers asked the Agency to make orders determining that Item 54 contravened subsection 137(1), that it was unreasonable, and that it be eliminated from Tariff 8. They said that the Agency had, by virtue of sections 26 and 120.1 of the Act, the authority to make the orders which they sought.

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.	120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance.
…	….
(7) For greater certainty, this section does not apply to rates for the movement of traffic.	(7) Il est entendu que le présent article ne s'applique pas aux prix relatifs au transport.

[13] With that background in mind, I now turn to the decisions under appeal.

III. THE DECISIONS UNDER APPEAL

[14] As noted earlier, there are two decisions in issue in this appeal. The first, Decision 202-R-2013 (Decision 202), was issued on May 24, 2013. In that decision, the Agency dealt with the interpretations of subsection 137(1) and Item 54. However, because certain questions namely, the effect of the indemnity and hold harmless provisions of Item 54 and whether section 120.1 applied to Item 54, had not been canvassed, the Agency asked for further submissions on those questions.

[15] Following receipt of those submissions, the Agency released Decision No. 388-R-2013 (Decision 388) on October 7, 2013. Decision 388 did not limit itself to the two questions on which further submissions were requested. It returned to the ground already covered by Decision

202 and, in my view, came to different conclusions than it had in Decision 202. It then addressed the issues on which further submissions were requested and decided those questions.

[16] In order to facilitate comparison of the two decisions, I will set out the reasoning and conclusions on the questions which are common to both decisions. I will then deal with the questions which were specifically referred for further submissions.

[17] The first issue dealt with in Decision 202 is the interpretation of subsection 137(1).

[18] The Agency had little difficulty rejecting CP's submission that the phrase "limit or restrict its liability to a shipper for the movement of traffic" should be read as "limit or restrict its liability to a shipper for loss or damage to the shipper's goods". The Agency found this interpretation was inconsistent with the plain meaning of the words used in the legislation.

[19] According to the Agency, subsection 137(1), on its face, prohibits a railway company from "limiting or restricting its liability to a shipper for the movement of traffic [of goods including equipment required for their movement] except by written agreement signed by the shipper or by an association or other body representing shippers": see Decision 202 at paragraph 58. The words in brackets are the statutory definition of traffic found at section 87 of the Act.

[20] The Agency then focussed on the meaning of the expression "movement of traffic" which it found was broader than simply a reference to goods. After referring to this Court`s decision in *Canadian Pacific Ltd v. Canada (National Transportation Agency)* (1992) F.C.J. No. 116, the

Agency held that "movement of traffic" "should be read to mean the whole process by which goods, including equipment required for their movement, are transported from origin to destination": see Decision 202 at paragraph 63. The Agency then restated its position on subsection 137(1) by substituting this expanded expression for "movement of traffic", with the following result:

> … subsection 137(1) of the CTA must be read as prohibiting a railway company from limiting or restricting its liability for the [whole of the process or series of actions by which traffic [of goods including equipment required for their movement] is moved from origin to destination] except by means of a written agreement signed by the shipper or by an association or other body representing shippers."
>
> Decision 202 at paragraph 66.

[21] The Agency then turned to the scope and purpose of subsection 137(1) of the Act, and the statutory regime. The Agency noted the decision of the British Columbia Supreme Court in *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Company*, 2012 BCSC 1415, in which it was held that the purpose of subsection 137(1) was to protect shippers from being subject to a limitation of liability without having full knowledge of the terms of that limitation.

[22] As for the statutory regime, the Agency referred to one of its prior decisions, Decision No. 212-R-2001, in which it made the point that while deregulation left shippers and carriers largely free to make their own arrangements, nonetheless the Act continued the economic regulation of the railway industry by providing specific remedies to shippers and imposing obligations on railway companies. The Agency found that subsection 137(1) was an obligation imposed on the railways whose object was to protect shippers from unauthorized transfers of liability: see Decision 202 at paragraph 70.

[23] The Agency summarized its reasoning dismissing CP's argument as to the scope of subsection 137(1) as follows:

> The narrow interpretation argued by CP that the limitation of liability to a shipper is limited to the liability for loss or damage to the shipper's goods is inconsistent with the plain meaning rule and not supported by the legislative purpose behind this provision.
>
> Decision 202 at paragraph 73

[24] Having rejected CP's argument, the Agency restated its position on the interpretation of that provision as follows:

> The Agency finds that subsection 137(1) of the CTA prohibits a railway company from limiting or restricting its liability to a shipper in respect of any liability that is caused by, arising from, or associated in any way with the movement of traffic, unless there is a written agreement or as provided for in regulations promulgated pursuant to subsection 137(2) of the CTA.
>
> Decision 202 at paragraph 76

[25] The gloss which the Agency has added to the words of subsection 137(1) is found in the words "in respect of any liability that is caused by, arising from, or associated in any way with the movement of traffic".

[26] I now turn to Decision 388 where the same ground was covered.

[27] Focussing on the words "liability to a shipper" in subsection 137(1), the Agency noted that the underlying assumption is the existence of actual or potential liability of a railway company to a shipper. It concluded from this that a claim against the railway company by anyone other than a shipper was outside the scope of subsection 137(1): Decision 388 at paragraph 37.

[28] Precisely because subsection 137(1) was specific to a railway's liability to a shipper, it did not apply to all liability related to or arising from the movement of traffic. In particular, the imposition of obligations on a shipper in relation to third party claims was not caught by subsection 137(1):

> "Subsection 137(1) of the CTA does not deal with all aspects of liability that may be related to the movement of traffic. It is specific to the railway company's limitation of liability to a shipper. In other words, subsection 137(1) only prevents the railway company from limiting the amount it may owe to a shipper as a result of an event that occurred in relation to the movement of the shipper's traffic which caused damages to that shipper. If the railway company imposes obligations on the shipper in relation to a claim against the railway company from a third party, it is not captured under section 137, and nothing in subsection 137(1) would prevent the railway company from imposing terms and conditions on a shipper to limit or attenuate the financial impact those third party liabilities will have on the railway company."
>
> Decision 388 at paragraph 39

[29] The Agency summarized its position as follows:

> ... terms and conditions found in Item 54 will only be contrary to subsection 137(1) if they have the effect of limiting, restricting, or in any way reducing the amount of a claim a shipper has or may have against CP in connection with the movement of the shipper's traffic.
>
> Decision 388 at paragraph 44

[30] To summarize, in Decision 202, the Agency attributes to subsection 137(1) a very wide scope so that it catches "any liability that is caused by, arising from, or associated in any way with the movement of traffic", while in Decision 388, the Agency excludes from the scope of subsection 137(1) any liability which the railway company may have to third parties or any reallocation of that liability by the railway company to a shipper.

[31] I now return to Decision 202 to examine the Agency's interpretation of Item 54 and its application of subsection 137(1) to that interpretation. The Agency began its analysis with an assessment of the effect of the phrase "shall not be liable to a customer" (the Broad Limitation). I reproduce below, in redacted form (to assist in readability) the opening paragraph of Item 54:

> CP shall not be liable to Customer and Customer shall fully indemnify, defend, and hold harmless CP, from and against any and all claims, … damages … and for any and all liability, claims, actions, fines, penalties, and associated costs and expenses (collectively "Liabilities") which are caused, arise from, or are associated in any way with transportation of the commodities or anything done or failed to be done and Customer shall fully indemnify, defend, and hold harmless CP, under this tariff.
>
> [My emphasis]

[32] The Agency's conclusion as to the scope of this clause is reproduced below:

> The Agency is of the opinion that, by using the expression "shall not be liable to a Customer" in Item 54, CP integrated in its tariff a complete exclusion of liability to shippers of hazardous materials for any liability that may arise with respect to transportation of hazardous materials by CP.
>
> Clearly, this broad exclusion of liability constitutes a limitation and restriction of liability to a shipper for the movement of traffic within the meaning of subsection 137(1) of the CTA.
>
> Decision 202 at paragraphs 81-82

[33] Since this limitation and restriction of liability appears in a tariff, which is not a written agreement signed by the shipper, the Agency found that it was contrary to subsection 137(1) of the Act.

[34] The Agency then turned to Item 54's requirement that the customer (the shipper) "fully indemnify and hold harmless CP". The Agency found that Item 54 imposed on shippers the

obligation to reimburse CP for any liabilities incurred in the transportation of hazardous materials. It found that this obligation to indemnify must necessarily arise in relation to third party liabilities since "CP has already excluded all liability to the shipper under Item 54": see Decision 202 at paragraph 86.

[35] Item 54 also includes a clause dealing with joint liability (the Joint Liability clause), reproduced below:

> Subject to Customer's obligations to defend and indemnify CP as set forth above, should Customer believe that Liabilities are caused in whole, or in part, by the joint, contributory, or concurrent negligence or fault of CP, responsibility for Liabilities shall be adjudicated under principles of comparative fault in which the trier of fact shall determine the percentage of responsibility for CP, Customer, and any other party. CP shall be liable only for the amount of such Liabilities allocated to CP in proportion to CP's percentage of responsibility. Customer shall be liable for all other Liabilities.

[36] The Agency was of the view that this clause could result in the shipper being responsible for more than it would otherwise be responsible under the law applicable to the situation. Since a shipper must first indemnify and defend CP before claiming the benefit of the joint liability clause, the Agency found that in doing so, the shipper would incur costs which were not recoverable under the joint liability clause. This led the Agency to find that "in certain circumstances, [Item 54 could] result in the shipper being ultimately responsible for more than the shipper would otherwise be responsible under the law applicable to the situation": see Decision 202 at paragraph 91.

[37] In the end, the Agency found that Item 54 not only excluded CP's liability to the shipper but also imposed additional obligations on the latter with respect to liabilities that might arise

related to the transportation of a shipper's traffic. For example, the Agency was of the view that should an event occur which triggered Item 54, the shipper would not only be unable to recover its own losses from CP, but it would have to assume CP's liability to third parties and assume the cost of defending CP. Furthermore, the shipper would have to absorb miscellaneous costs such as "CP's emergency response and evacuation costs, remediation costs and government oversight costs (whatever those might be), and the cost of adverse effects on wildlife or the environment": see Decision 202 at paragraph 94.

[38] This reasoning led the Agency to conclude as follows:

> Because Item 54 sets aside the principle of allocation of liability under the law governing joint liability between CP and the shipper, by reducing or nullifying CP's share of liability, the Agency finds that this constitutes a limitation of liability to a shipper. Considering that these terms are neither included in a written agreement between CP and the applicants nor established by regulation, the Agency finds that this limitation of liability is prohibited under subsection 137(1) of the CTA.
>
> Decision 202 at paragraph 95.

[39] It appears that this conclusion flows from the Agency's interpretation of the Joint Liability clause.

[40] Having found that the joint liability clause limited or restricted CP's liability to shippers, the Agency questioned whether the obligation to indemnify, defend and hold harmless was itself a limitation or restriction on liability:

> By imposing on the shipper an obligation to indemnify, defend, and hold harmless, CP has integrated in the Tariff a mechanism by which CP ensures it will be made whole by the shipper for third party liabilities. This obligation goes beyond a limitation of liability and therefore may not be a limitation of liability to the shipper.
>
> Decision 202 at paragraph 96

[41] However, since there were no pleading on the issue of the "indemnify, defend and hold harmless" clause, the Agency asked for further submissions.

[42] Decision 388 resulted from those further submissions. On the issue of the obligation to indemnify, the Agency found that it simply required the shipper to pay CP an amount equal to the amount which CP owed to third parties, subject to the shipper's right to claim those amounts back from CP pursuant to the Joint Liability clause. This did not relieve CP of its obligations to those third parties. However, since CP did not owe anything to the shipper with respect to third party liability, the indemnification clause could not limit or restrict CP's liability to a shipper. For that reason, the Agency found that the obligation to indemnify was not a limitation of liability to a shipper within the meaning of subsection 137(1) of Act.

[43] Because the obligation to defend found in Item 54 imposes additional obligations on the shipper and does not reduce any liability which CP may have to the latter, the Agency found that it was not a limitation of liability which was caught by subsection 137(1).

[44] As for the obligation to hold harmless, the Agency relied on the following definition from *Black's Law Dictionary*:

> [Hold harmless agreement] Agreement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.
>
> Decision 388 at paragraph 54

[45] Relying on this definition, the Agency concluded that:

> This definition suggests that the shippers' obligation to hold harmless CP could extend beyond CP's liability to third parties. It could also be construed as a waiver by the shipper in respect of any claim that the shipper has or may have against CP in relation to third party liabilities. To this extent, the shipper's obligation to hold harmless CP would limit or restrict the amount of a shipper's claim against CP in relation to the movement of the shipper's traffic.
>
> Decision 388 at paragraphs 55-56

[46] The Agency did not explain how a document issued unilaterally by the railway company could amount to a waiver of its rights by the shipper.

[47] The last issue to be dealt with is whether the Agency had jurisdiction pursuant to section 120.1 to deal with in the reasonableness of Item 54. In Decision 202, the Agency formed the preliminary view that the terms and conditions in Item 54 were not associated with a charge. However, it gave the parties the opportunity to make further submissions. The Agency then addressed the issue of the scope of section 120.1 of the Act in Decision 388.

[48] For ease of reference I reproduce section 120.1 below:

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any	120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus

charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions. …	d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance. …
(7) For greater certainty, this section does not apply to rates for the movement of traffic.	(7) Il est entendu que le présent article ne s'applique pas aux prix relatifs au transport.

[49] The Agency noted that its jurisdiction under section 120.1 was limited to "charges" and "associated terms and conditions" for the movement of traffic or for the provision of incidental services. While rates are specifically excluded from the matters which may be reviewed under section 120.1, the Agency reasoned that this did not mean that anything other than a rate was therefore reviewable.

[50] After reviewing several dictionary definitions of the word "charge", the Agency concluded that "charge" in its ordinary sense "could literally include any obligation, whether the payment of a sum of money or the execution of an obligation to do something": Decision 388 at paragraph 84.

[51] After referring to the modern approach to statutory interpretation, the Agency considered the context in which the expression "charges" appears in the Act. This led it to conclude that the issue was the meaning to be given to "charges" in the context of a railway company's tariff.

[52] The Agency then compared (a) the remedy available under section 120.1 in relation to "charges and associated terms and condition for the movement of traffic or for the provision of incidental services" to (b) the remedy available under section 161 in relation to "the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods". It found that the difference in remedies depending upon whether a rate or a charge was being challenged meant that the terms "rates", "charges", "terms and conditions" as used in the definition of tariff had distinct meanings and were not interchangeable.

[53] The Agency went on to reason that if section 120.1 was intended to permit the Agency to review everything in a tariff that was not a rate, Parliament would have used language more suited to that purpose, as it did in paragraph 114(4)(b) of the Act which allows the Agency to disallow any rate or tariff in certain circumstances.

[54] In the result, the Agency concluded that the term "charges" referred to something other than "rates" or "terms and conditions" for the movement of a shipper's traffic or for the provision of incidental services: Decision 388 at paragraph 90.

[55] The Agency then considered a railway company's obligations to a shipper upon payment of the tariff rate. Subsection 113(2) of the Act provides that upon payment of the rate, a railway company is bound to pick up the traffic at the point of origin, carry it and deliver it to the point of destination. The Agency found that the obligation to pay the rate was not tied to ancillary or incidental services but was payment for the start-to-finish movement of the traffic.

[56] The Agency also found that "terms and conditions" in section 120.1 referred to the obligations, other than the payment of the rate, which a shipper must satisfy "as a condition for the movement of traffic by a railway company": Decision 388 at paragraph 94. An example of the latter would be the shipper's obligation to properly label the traffic, as set out in Tariff 8. The Agency concluded from this that "charge" must relate to obligations other than the payment of the rate or the satisfaction of other conditions to be fulfilled by the shipper as a condition for the movement of the traffic.

[57] According to the Agency, a charge is an obligation of a shipper in respect of a specific service to be provided, or specific goods to be provided by the railway company other than the goods and services which are covered by the rate. A charge could include a payment for an optional service requested by the shipper or made necessary as a result of a shipper's failure to fulfill its obligations under the tariff: Decision 388 at paragraph 95-96. An example of the latter might be demurrage.

[58] The Agency's view was confirmed by an examination of the provisions of subsection 116(4) of the Act which deals with the Agency's powers in the event that a railway company does not live up to its level of service obligations. After investigation of a complaint, the Agency may require a railway company to undertake various measures and specify "the maximum charges that may be made" with respect to those measures. The use of the term "charges" in connection with goods or services to be provided to meet the railway company's level of service obligations is consistent with the use of that term to refer to obligations other than those covered by the rate.

[59] Another use of the term “charge” is found in subsection 169.31(1) which deals with final offer arbitration in the context of the negotiation of a confidential contract as to how a railway company will meet its level of service obligations. Subsection 169.31(1) defines the subjects which may be submitted to final offer arbitration, including “whether the railway company may apply a charge” with respect to “operational terms” or “incidental services”. The Agency was of the view that the “operational terms” and “incidental services” were services to be provided or performed by the railway but which were debundled from, and not included in, the rate.

[60] The Agency’s conclusion as a result of this review of the statutory regime was that its interpretation of the term “charge” in section 120.1, as set out in paragraph 57 above, was consistent with the use of that term in the balance of the statutory scheme: Decision 388 at paragraph 102.

[61] The Agency concluded its analysis with a reference to the legislative history of section 120.1. It found that the types of charges that were of primary concern to shippers at the time section 120.1 was introduced were demurrage, car cleaning and car storage. These services were incidental, optional or ancillary to the movement of traffic, and all of them related to specific activities or transactions that had been debundled from, and thereafter not included in, the rate for the movement of goods.

[62] This line of reasoning led the Agency to the following conclusion:

> In this case, the shipper's obligation to indemnify, defend and hold harmless found in Item 54 is not linked or related to a specific service to be performed or goods to be supplied by CP, that is, it is not debundled from the rate. Under Item 54, the shipper must undertake to indemnify, defend and hold harmless CP as a condition for the transportation of that shipper's traffic. In return for undertaking that obligation, the shipper only obtains the execution of CP's primary obligation, which is the movement of the traffic. That is to say, the railway company's obligation is incorporated into the rate.
>
> Decision 388 at paragraph 104

[63] Accordingly, the Agency found that it did not have jurisdiction under section 120.1 to grant the Shippers the remedy they sought, as the obligation to indemnify, defend and hold harmless was not a charge or a term or condition associated with a charge: Decision 388 at paragraph 105.

[64] This conclusion meant that the Agency did not have to undertake an analysis of the reasonableness of Item 54. However, in response to an argument by Agrium that it disallow Item 54 pursuant to section 26 (which deals with prohibited acts), the Agency restated its position that since Item 54 did not relate to "charges" or "associated terms and conditions", it was not prohibited by section 120.1 and, as a result, could not be the subject of an order under section 26.

[65] The Agency concluded Decision 388 by stating that since Item 54 contains terms and conditions that limit a railway company's liability to a shipper contrary to subsection 137(1) of the Act, CP was ordered, pursuant to section 26, to refrain from applying Item 54 until such time as it was amended to expressly remove any prohibited limitations on CP's liability to shippers.

[66] If I have correctly understood the Agency's decisions, CP can comply by removing the Broad Limitation and Joint Liability clauses from Item 54. This produces an anomalous result in that while CP will remain liable to the Shippers, they will be bound to indemnify it for all third party liabilities, except those caused by its sole negligence. As a result, the Shippers will have lost the right to claim contribution from CP in the case of joint or contributory negligence.

IV. THE ISSUES IN THE APPEALS

[67] CP appeals from the order requiring it to refrain from applying Item 54 until the offending provisions are removed. The Shippers appeal from the Agency's interpretation of section 120.1.

[68] The first step in the analysis is to determine the proper standard of review. In this case, there are two standards of review to be considered. The first concerns the Agency's interpretation of subsection 137(1) and its application to Item 54. The second relates to the Agency's analysis of section 120.1.

[69] Given that both of the decisions under appeal are solely questions of interpretation, the ultimate issue is whether the Agency's interpretations are consistent with the relevant standard of review.

V. THE STANDARD OF REVIEW

[70] What is the standard of review with respect to the Agency's interpretation of subsection 137(1) and its application to Item 54?

[71] The interpretation by a tribunal of "its own statute, or statutes closely connected to its function, with which it will have particular familiarity should be presumed to be a question of statutory interpretation subject to deference on judicial review": see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (*Alberta Teachers*), at paragraph 34. However, this presumption is rebuttable by a contextual analysis such as that undertaken in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (*Rogers*) where it was held that the correctness standard applied in the presence of a statutory scheme under which both an administrative tribunal and the courts have concurrent jurisdiction at first instance in interpreting the relevant statute: see *Rogers* at paragraphs 13-15.

[72] The decision in *Rogers* was preceded by at least two decisions which employed the same reasoning. In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2002 FCA 166, [2002] 4 F.C. 3 *(Tariff 22*), Evans J.A. conducted a pragmatic and functional analysis to determine the standard of review of the Copyright Board's interpretations of its home statute. In considering the contextual factors, Evans J.A. noted that the Board did not have exclusive jurisdiction to decide what constituted copyright infringement since that question also arose before the courts: see *Tariff 22* at paragraphs 84-87. In the end, Evans

J.A. considered that the presence of concurrent jurisdiction tipped the balance in favour of the correctness standard for the review of the Copyright Board's interpretation of what constituted copyright infringement because in cases of concurrent jurisdiction (and by extension, equal expertise) "judicial deference is unlikely to serve the interests of consistency, adjudicative efficiency and economy": see *Tariff 22* at paragraph 104.

[73] On appeal to the Supreme Court (sub. nom. *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 (*CAIP*), Evans J.A.'s position on the appropriate standard of review was confirmed in three short paragraphs: see *CAIP* at paragraphs 48-50. The Court distinguished between questions of infringement, which routinely arise in proceedings before the courts, and the working out of an appropriate tariff which lies at the core of the Copyright Board's mandate: see *CAIP* at paragraph 49.

[74] Both *Tariff 22* and *CAIP* are pre- *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), but they come within the *Dunsmuir* precept that where the standard of review has been determined in a satisfactory manner, it is not necessary to resort to the standard of review analysis. Since *Dunsmuir*, *CAIP* was quoted with approval in *Rogers*, and *Rogers* was itself cited with approval in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 (*McLean*), at paragraph 22-24, and more recently applied in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, at paragraph 35.

[75] From this I conclude that the presence of concurrent jurisdiction with respect to a given question by both a tribunal and the courts is a significant, if not a decisive factor in favour of the correctness standard with respect to the tribunal's treatment of that question.

[76] In this case, the Agency and the Court have concurrent jurisdiction over the interpretation of subsection 137(1) and a limitation of liability provision whose enforceability or lawfulness is challenged. These questions come before the Agency, as they did in this case, by way of an application to have the Agency set aside a term or condition of a tariff on the ground that it is prohibited by subsection 137(1).

[77] On the other hand, any attempt by a railway company to enforce the terms of a tariff item against either a shipper or a third party will be decided by the Courts: see *Canadian National Railway Co. v. Neptune Bulk Terminals (Canada)* Ltd., 2006 BCSC 1073, [2006] B.C.J. No. 1600 (*Neptune Bulk Terminals*), where the issue was the enforcement of a term of a tariff against an entity which was not a party to the contract of carriage; *Mitsubishi Heavy Industries Ltd. v. Canadian National Railway Co.*, 2012 BCSC 1415, [2012] B.C.J. No. 1987, where one of the questions to be decided was the identity of the shipper for the purposes of subsection 137(1); *Alstom Canada Inc. v. Canadian National Railway Co.*, 2008 FC 1311, [2008] F.C.J. No. 1788, in which a question arose as to enforceability of a limitation of liability in light of subsection 137(1).

[78] Since the standard of review of the court's decision on the interpretation of subsection 137(1) is correctness, per *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph

8, the standard of review of a tribunal's interpretation of the same provision must also be correctness for the reasons set out in *Rogers*, at paragraph 14:

> It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question de novo if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[79] In this case, the logic is the same. It would make no sense to review the Agency's interpretation of subsection 137(1) on a deferential standard on judicial review and then to review the same question on the standard of correctness when it arises in the course of an appeal from a decision of a court. For that reason, the standard of review of the Agency's interpretations of subsection 137(1) is correctness.

[80] While Item 54 is not part of the Agency's home statute, it could be argued that as a component of a tariff, it comes within the Agency's particular expertise. Against this is the fact that, like subsection 137(1), questions related to limitations of liability will arise at first instance both before the courts and the Agency for the reasons set out with respect to subsection 137(1). For the same reasons as set out in relation to subsection 137(1), I find that the standard of review of the Agency's interpretation of Item 54 is correctness.

[81] The standard of review applicable to the Agency's interpretation of section 120.1 is a straight-forward application of the presumption of reasonableness. None of the factors mentioned in *McLean*, cited above, at paragraphs 21-22, are present so as to rebut the presumption. Section 120.1 does not raise a constitutional question or one of general importance to the legal system. Furthermore, its interpretation is not a matter with respect to which both the courts and the Agency have concurrent original jurisdiction. The standard of review of the Agency's interpretation of section 120.1 is therefore reasonableness, as is its application of section 120.1 to the facts of this case.

VI. THE INTERPRETATION OF SUBSECTION 137(1)

[82] CP attacks the Agency's interpretation of subsection 137(1) on the basis that the Agency has given it too broad a scope. According to CP, this provision was intended to deal only with limitations on a railway company's common carrier and statutory liabilities. In its memorandum, CP lays out the history of common carrier obligations and liabilities and their subsequent codification in section 113 of the Act and section 4 of the Railway Traffic Liability Regulations. According to CP, subsection 137(1) exists to prevent railway companies from contracting out of these liabilities without the express written consent of the shipper.

[83] CP attacks the Agency's decision with respect to the interpretation of subsection 137(1) as it is expressed in Decision 202. As pointed out earlier, there is a difference on this point between Decision 202 and Decision 388.

[84] The Agency expressed its conclusion as to the scope of subsection 137(1) in Decision 202 and again in Decision 388. There is a difference between the two positions. At paragraph 76 of Decision 202, the Agency held that:

> The Agency finds that subsection 137(1) of the CTA prohibits a railway company from limiting or restricting its liability to a shipper in respect of any liability that is caused by, arising from, or associated in any way with the movement of traffic, unless there is a written agreement or as provided for in regulations promulgated pursuant to subsection 137(2) of the CTA.

[85] At paragraph 39 of Decision 388, the Agency described the tenor of subsection 137(1) in the following terms:

> Subsection 137(1) of the CTA does not deal with all aspects of liability that may be related to the movement of traffic. It is specific to the railway company's limitation of liability to a shipper. In other words, subsection 137(1) only prevents the railway company from limiting the amount it may owe to a shipper as a result of an event that occurred in relation to the movement of the shipper's traffic which caused damages to that shipper.

[86] The difference between the two texts is that in Decision 202, the Agency found that subsection 137(1) prohibited a railway company from limiting its liability to a shipper for any liability which arose or was associated in any way with the carriage of the shipper's goods while in Decision 388, the Agency held that subsection 137(1) only prevents a railway company from limiting its liability to a shipper for any amount it may owe to a shipper as a result of the carriage of the shipper's goods which caused a loss to the shipper.

[87] In Decision 388, the Agency went on to consider the not-unlikely scenario of a claim against the shipper by a third party:

> If the railway company imposes obligations on the shipper in relation to a claim against the railway company from a third party, it is not captured under section

> 137, and nothing in subsection 137(1) would prevent the railway company from imposing terms and conditions on a shipper to limit or attenuate the financial impact those third party liabilities will have on the railway company.
>
> Decision 388 at paragraph 39

[88] The position advanced in Decision 388 appears to closely resemble CP's position. That said, the question is whether such a restrictive reading of subsection 137(1) is justified.

[89] A shipper may have a claim against the railway company where damage is caused to a third party, in whole or in part, by the railway company's negligence, and the third party seeks to recover its losses from the shipper. In such a case, the shipper would have a claim against the railway company under provincial contributory negligence law for that portion of the loss caused by the railway company's fault. Any limitation of the railway company's liability to the shipper for its portion of that loss would come within the words "limit or restrict its liability to a shipper" and would be caught by the plain meaning of subsection 137(1).

[90] Is there any reason, either in the purpose of the legislation or the statutory context, to deviate from the plain meaning? CP argues that section 137 codified the common law liabilities of railway to a shipper: CP's memorandum of fact and law at paragraph 54. With respect, I fail to see how this could be so.

[91] Subsection 137(1) does not codify a railway company's common carrier liabilities. Rather, it restricts a railway company's ability to limit its liability to a shipper, without purporting to define those liabilities.

[92] At first glance, CP may appear to be on firmer ground when it argues that the liabilities which are the subject of subsection 137(1) are those set out in section 4 of the *Railway Traffic Liability Regulations*. Subsection 137(2) provides that :

(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,	(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) on the application of the company, by the Agency; or	a) par l'Office, si la compagnie présente une demande;
(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.	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.

[93] Section 4 of *the Railway Traffic Liability Regulations* results from the Agency's exercise of the power conferred on it by subsection 137(2). It applies in a case such as this where there is no agreement. But a careful reading of section 4 makes it clear that it deals only with the railway company's liability to a shipper for loss or damage to the shipper's traffic. Section 4 is silent on a railway company's obligations with respect to damage to third parties. That liability is recognized in sections 92-94 of the Act and the *Railway Third Party Liability Insurance Coverage Regulations*, SOR/96-337. But these regulations do not support the position advanced by CP because subsection 137(2) deals with the railway company's liability to the shipper for loss or damage to the latter's goods. The *Railway Third Party Liability Insurance Coverage Regulations*, on the other hand, deal with a railway company's liability to third parties and insurance to cover those losses. This is outside the field of subsection 137(1)'s operation.

[94] As a result, I do not agree with the position taken by CP, and by the Agency at paragraph 39 of Decision 388, quoted above, to the extent that the Agency appears to allow a railway company to limit its liability for its joint, concurrent or contributory negligence other than as provided in subsection 137(1).

[95] As part of its analysis, the Agency identified the statutory purpose of subsection 137(1) as the protection of shippers from being subject to a limitation of liability without having full knowledge and appreciation for the terms of such a limitation: see Decision 202 at paragraph 67. With respect, the reason that railway tariffs are required to be published and made available to anyone who requests a copy is so that the shippers can see what the railway company proposes as a rate or the terms and conditions of carriage: subsections 117(1), (2), and (4) of the Act. This is a public notice function. On the other hand, the objective sought by subsection 137(1) is not to inform shippers but to give them leverage in negotiating the terms of any limitation of liability.

[96] The Agency's analysis of the statutory regime led it to conclude that section 137 existed to protect shippers from unauthorized transfers of liability. It reasoned that this purpose could not be achieved by restricting subsection 137(1)'s operation to liability arising from loss or damage to the shipper's goods. As a result, the Agency concluded that the objectives of the statutory regime, including the encouragement of commercial negotiations, were met by an inclusive definition of the scope of subsection 137(1).

[97] One can accept the Agency's conclusion that the statutory regime seeks to encourage commercial negotiations without accepting the Agency's view of the scope of subsection 137(1).

Railway companies are subject to common carrier obligations which require them to accept for carriage the goods of any person who pays the rate: subsections 113(1) and (2) of the Act. As a result, railway companies do not have the option of declining traffic which represents an unacceptable exposure to liability. This obligation is necessary for the simple reason that an efficient economic system cannot depend upon the vagaries of the good will of those who control the means of transporting goods to market.

[98] But not all goods present the same risks for railway companies. The transportation of dry bulk commodities such as coal or wheat represents a different level of risk than does the transportation of bulk industrial chemicals which in turn presents a different risk that does the transportation of finished manufactured goods. Railway companies have an obvious interest in limiting their exposure to the risks inherent in transporting certain kinds of goods. One of the ways in which they can limit their exposure is through the use of limitation clauses in their tariffs.

[99] Left unchecked, the power to set terms by the use of tariffs would leave the shippers of certain types of traffic at the mercy of the railway company. Subsection 137(1) is the means by which Parliament has chosen to strike a balance between the interests of the railway companies and shippers and to favour the negotiation of commercial agreements between shippers and railway companies.

[100] Requiring the shipper’s signature (however defined) on contracts of carriage which limit the railway company’s liability to shippers is, in effect, a way of forcing railway companies to

either negotiate limitations of liabilities with shippers or to draft their limitation of liability clauses in such a way that they do not need to be signed to be enforceable. If the railway company chooses to limit its liability narrowly, so that it is not caught by subsection 137(1), then the limitation of liability clause is likely to be more balanced, which is to the advantage of the shipper. As we shall see when we examine Item 54, it appears that CP has chosen the second option.

[101] To summarize, I conclude that subsection 137(1) constrains a railway company's ability to limit its liability to a shipper for loss of or damage to, or late delivery of, the shipper's goods. Subsection 137(1) also applies to limitations on the shipper's right to claim over against the railway company for losses suffered by a third party caused, in whole or in part, by the railway company's negligence.

VII. THE INTERPRETATION OF ITEM 54

[102] Before embarking on the interpretation of Item 54, I wish to address an issue which underlies the present application to which neither the parties nor the Agency appear to have addressed their minds. If Item 54 contains terms which would otherwise limit or restrict CP's liability to shippers, the parties and the Agency appear to have assumed that Item 54 would be enforceable according to its terms against the Shippers, a state of affairs which requires the Agency to intervene. However, the plain words of subsection 137(1) make it clear that Item 54 cannot be enforceable against shippers unless it is contained in a signed contract.

[103] To that extent, the Shippers are not subject to a limitation or restriction of liability by the mere publication of Item 54 in Tariff 8 or the incorporation by reference of its terms into an unsigned contract of carriage entered into by a course of conduct, such as requesting transportation services from CP. As a result, whether or not Item 54, in its present form, is removed from Tariff 8 will have no impact on the Shippers, unless it has been incorporated into a signed contract of carriage.

[104] Turning now to the interpretation of Item 54, as a general proposition, it is both an error of law and unreasonable to construe a legal instrument without considering it as a whole and giving meaning to all of its terms: see *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 53, at paragraph 64; *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, at paragraph 36; *Novak v. Bond*, [1999] 1 S.C.R. 808, at paragraph 63; *Tower v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCA 307, [2004] 1 F.C.R. 183, at paragraphs 15-16.

[105] As a starting step, it is perhaps useful to provide an overview of Item 54 as an aid to its interpretation. Broadly speaking, Item 54 consists of three elements: a) a broad limitation of liability in favour of CP (the Broad Limitation) and a general obligation to indemnify, defend and hold harmless by the shipper (the General Obligation to Indemnify), b) a specific limitation and obligation to indemnify in relation to contaminants and improper labelling; and c) three specific limitations on the general obligation to indemnify with respect to loss or damage caused i) solely by the negligence of CP, ii) jointly by the negligence of CP and another, and iii) in relation to loss, damage or delay to the shipper’s goods.

[106] One of the issues which arise from the structure of Item 54 is the relationship of the Broad Limitation to the General Obligation to Indemnify. At this point, it is useful to quote from Item 54 itself:

> … [C]P shall not be liable to Customer, and Customer shall fully indemnify, defend, and hold harmless CP from and against any and all claims, lawsuits, actions … (collectively "Liabilities") which are caused, arise from, or are associated in any way with the transportation of the commodities or anything done or failed to be done under this tariff.

[107] To the extent that CP's liability to a shipper is eliminated by the Broad Limitation, it cannot be the subject of the General Obligation to Indemnify. If CP's liability is eliminated, no amount is payable by CP with respect to that liability and if no amount is payable, there can be no right of indemnity from the Shippers. You cannot be indemnified for what you have not paid. This means that there is a tension between the General Obligation to Indemnify and the Broad Limitation.

[108] This tension could be resolved if it could be shown that the Broad Limitation applied to certain liabilities and the General Obligation to Indemnify applied to others. This line of analysis is foreclosed by the fact that both obligations are with respect to the defined term "Liabilities" which is broad enough to include both inter-party and third party liabilities.

[109] This tension is compounded by the fact that the General Obligation to Indemnify is subject to exceptions. There are three such exceptions: for losses caused solely by CP's own negligence, for losses to the shipper's goods, and for the portion of any third partly loss contributed to by CP's negligence. If there is an exception to the General Obligation to Indemnify, it can only be because the subject matter of the exception would otherwise be subject

to that general obligation. These exceptions therefore help to delimit the scope of the Broad Limitation.

[110] The exception in favour of the shipper's goods reads as follows:

> Customer's indemnity obligations under this Item do not include claims for alleged loss, damage or delay to the commodities.

[111] If the Broad Limitation covers loss or damage to the shipper's goods ("the commodities"), there can be no liability on CP's part for that loss or damage and therefore no shipper's obligation to indemnify CP. I conclude that the Broad Limitation does not apply to loss or damage to the shipper's goods. The reference to "alleged loss damage or delay" means that the exception would apply without the necessity of CP's liability having been adjudicated.

[112] The same question arises with respect to the claims for contribution by the shipper for loss or damage caused by the joint negligence of CP, the shipper and others. The exception is found in the Joint Liability clause:

> Subject to Customer's obligation to defend and to indemnify, should Customer believe that Liabilities are caused in whole, or in part, by the joint, contributory, or concurrent negligence or fault of CP, responsibility for Liabilities shall be adjudicated under principles of comparative fault in which the trier of fact shall determine the percentage of responsibility for CP, Customer and any other party. CP shall be liable only for the amount of such liabilities allocated to CP in proportion to CP's percentage of responsibility. Customer shall be liable for all other liabilities.

[113] The importance of the Joint Liability clause lies in CP's undertaking to pay its proportionate share of any third party loss. This operates as an exception to the general obligation to indemnify found in the opening words of Item 54. But it must also operate as an

exception to the Broad Limitation clause. In a case where a shipper had satisfied a judgement for which CP had been adjudged partially liable, any attempt by a shipper to recover CP's proportionate share of the judgment would be caught by the Broad Limitation, since the amount claimed would be an amount owed to the shipper. The result would be that CP's undertaking to pay its proportionate share of the loss would be defeated. As a result, a claim by a shipper for CP's proportionate share of a loss caused jointly by the shipper and CP must be excluded from the scope of the Broad Limitation so as to give effect to the Joint Liability clause.

[114] On the other hand, if the claim for CP's proportionate share was advanced by the third party, it would not be caught by the Broad Limitation because the latter applies only to liabilities owed to the shipper. Nor would it be caught by the General Obligation to Indemnify since such a claim would be subject to the Joint Liability clause.

[115] The third exception to the obligation to indemnify is where a loss to a third party is caused solely by the negligence of CP or its agents or employees. Since the liability in question is owed to the third party, it is not caught by the Broad Limitation, though it would be caught by the General Obligation to Indemnify because it is a claim which is caused, arises from or is associated in any way with the transportation of the shipper's goods or anything done or failed to be done under Tariff 8, to paraphrase the opening words of Item 54.

[116] However, this claim would be caught by the following exception to the General Obligation to Indemnify:

> However, the Customer shall have no such obligation to indemnify CP to the extent that Liabilities arise from the sole negligence or willful misconduct of CP, its agents or employees.

[117] As a result, the cost of CP's own negligence or that of those for whom it is responsible in law will be borne by CP and not be the shipper.

[118] In the end, as a result of construing Item 54 as whole, one is brought to the conclusion that the Broad Limitation does not have the effect attributed to it by the Agency.

[119] Notwithstanding the broad language used, the Broad Limitation cannot apply to loss or damage caused to the shipper's goods, nor to any claim over which a shipper might have against CP for its proportionate share of damage caused to a third party by the concurrent or contributory negligence of CP, the shipper and others, nor does it apply to any loss caused solely by CP's own negligence.

[120] That said, the obligation to give every term of an instrument meaning cuts both ways. If these liabilities are excluded, what subject matter is left for the Broad Limitation clause? Liabilities to third parties are excluded because the Broad Limitation deals only with CP's liability to the shipper. The categories of CP's potential liability to the shipper appear to have been exhausted in the sense that there are only two possibilities: liability for the shipper's own losses or liability to the shipper for third party losses.

[121] One can pick individual items from within the list of possible claims which are subject to the Broad Limitation, such as attorney's fees, government oversight cost, or emergency response

cost and ask if they are caught by the Broad Limitation. But both the "sole negligence" clause and the Joint Liability clause refer to the defined term "Liabilities" which includes all of the individual items enumerated in the first paragraph of Item 54. The result is that those items are subject to the terms of the Joint Liability and "sole negligence" clauses and, as a result, must be considered as being excluded from the Broad Limitation to the same extent as all other liabilities.

[122] While this problem of interpretation is real, it is not necessary to solve it in order to deal with this appeal. The question which we must answer in this appeal is whether Item 54 restricts or limits CP's liability to shippers, contrary to subsection 137(1). The Agency found such a limitation in the words "shall not be liable to Customer" and in the Joint Liability clause. However, it coming to that conclusion, the Agency did not consider Item 54 as a whole and did not consider all of its terms in context. When Item 54 is interpreted in the light of all its terms, it is clear that the terms on which the Agency relied in Decision 202 do not impermissibly limit or restrict CP's liability to shippers.

[123] In Decision 388, the Agency found that the obligation to hold harmless was also a limitation on CP's liability to shippers. In coming to that conclusion, the Agency relied on a definition from Black's Law Dictionary in concluding that the hold harmless clause could be construed "as a waiver by the shipper in respect of a claim the shipper has or may have against CP in relation to third party liabilities": Decision 388 at paragraph 55. As a result, the Agency found that the obligation to hold harmless constituted a limitation on liability to a shipper which was caught by the terms of subsection 137(1).

[124] With respect, I do not understand the logic of this line of reasoning. A waiver is a voluntary relinquishment of certain rights by the party holding those rights. Waiver is, by definition, the voluntary act of a person who, in the knowledge of his or her rights, foregoes reliance on those rights: see *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at paragraph 19. If follows that a unilateral act by a railway company cannot amount to a shipper's waiver of its rights. Those rights are for the shipper to waive, not the railway company. As a result, the obligation to hold harmless cannot be construed as a limitation on CP's liability to the Shippers.

[125] For all of these reasons, the Agency's interpretation of Item 54 cannot stand.

[126] To summarize, the Broad Limitation found in the opening words of Item 54 does not completely exclude CP's liability to the shipper, as found by the Agency. When that clause is read with the other clauses of Item 54, a more nuanced view of its effect emerges. In particular:

a) CP retains liability to the shipper for loss of or damage to, or delay in delivery of, the shipper's goods.

b) CP retains liability for loss caused by its sole negligence or willful misconduct or that of its agents or employees.

c) CP retains liability for loss caused jointly by it and the shipper and others to the extent of its adjudicated share of the fault causing the damage. The shipper bears the risk of the insolvency of other tortfeasors.

[127] When subsection 137(1) is applied to this interpretation of Item 54, there is no basis upon which to find that Item 54 contains prohibited limitations of liability. The conclusion that the broad limitation of liability in the opening words of Item 54 is a prohibited limitation of liability fails, as that broad limitation is subject to exceptions which preserve the railway company's liability to shippers for loss of or damage to the shipper's traffic and for losses caused in whole or in part by its own negligence. The conclusion that the Joint Liability clause is an impermissible limitation of liability fails for the same reason. As noted above, the Joint Liability clause cannot be considered as a waiver of liability by the Shippers.

[128] As a result, there is no basis for an order under section 26 prohibiting CP from applying Item 54 until the prohibited limitation had been removed. Simply put, Item 54 does not contain prohibited limitations of liability.

[129] The questions which the Court directed to the parties after the case had been argued do not affect this conclusion. Whether one considers that Tariff 8 is enforceable against shippers by virtue of being a tariff, or whether one considers that Item 54 is only enforceable against shippers if it is incorporated into a contract of carriage, as was decided in *Neptune Bulk Terminals*, cited above, at paragraph 107, the result is the same. In either case, Item 54 does not impermissibly limit shippers' liability to CP.

[130] The conclusion to which I have come also rebuts Agrium's argument of unjust enrichment. Agrium argued that CP was unjustly enriched when shippers, without any juristic reason, made payments for which CP was liable. On my interpretation of Item 54, shippers will

not be bound to make payments for which CP is liable, as they will be able to recover from CP those amounts for which it is wholly or partly liable. To the extent that Item 54 requires shippers to make specific payments that they would not otherwise be liable to make, the juristic reason for those payments can be found in Item 54 which, on my interpretation of it, is not invalid or unlawful.

VIII. THE INTERPRETATION OF SECTION 120.1

[131] The conclusion that Item 54 is not prohibited by subsection 137(1) leaves open the question as to whether section 120.1 allows the Agency to intervene it if it finds that Item 54 is an unreasonable term or condition. On my interpretation of Item 54, it would be difficult to argue that it is unreasonable. Nonetheless, I will deal with the Shippers' argument.

[132] As noted earlier in these reasons, the Agency's reasoning with respect to section 120.1 turned on whether Item 54 dealt with "charges and associated terms and conditions for the movement of traffic or for the provision of incidental services". It concluded that it did not because Item 54 was not "linked or related to a specific service to be performed or goods to be supplied by CP", that it was not "debundled from the rate": Decision No. 388 at paragraph 104. The Shippers attacked the Agency's conclusions with respect to section 120.1 by arguing that it does violence to the plain words of the section. According to the Shippers:

> In order for s.120.1 to have the meaning derived by the Agency, the section would have to apply "to any charges [for the provision of incidental services] or terms and conditions [associated with] the movement of traffic that are found in the tariff". In other words, the Agency held that "incidental services" modifies "charges" and read out all the intervening language, including the conjunctive "and" which links "charges and associated terms and conditions for the movement of traffic" (emphasis added).
>
> Shippers' Memorandum of fact and Law at paragraph 68

[133] To illustrate their position, the Shippers refer to Item 53 of Tariff 8 which requires shippers to purchase liability insurance "for any and all liability and indemnity obligations assumed by the [shipper] under this Tariff", which the Shippers characterize as a charge. Given that the insurance must cover the indemnity and liability provisions of Item 54, the Shippers argue that it is associated with Item 54 and therefore caught by section 120.1.

[134] With respect, this reasoning is not persuasive. It is implicit in the Agency's entire discussion of charges that they are amounts payable to the railway company. For regulatory purposes, an amount payable to a third party cannot be a charge since the Agency has no control over such amounts. The term or condition which requires the payment of such an amount is not associated with a charge and therefore is not subject to section 120.1.

[135] Agrium takes the Shippers' argument one step further and suggests that if CP purchased the insurance itself and then billed the shipper for the premium, the conditions established by the Agency for the application of section 120.1 would be satisfied. It is illogical, it says, for the Agency's jurisdiction to depend upon the vagaries of how a purchase is made. The Agency should therefore look through the form to the substance of the transaction.

[136] Agrium's argument assumes that the charge-back of the insurance premium for the insurance to be provided by the shipper would be a charge. Since the insurance is not a specific service to be performed or goods to be supplied by CP, it is not obvious that the premium is a charge. In return for the payment of the premium, the shipper would not get anything more from CP than the movement of its traffic as required by section 113. Agrium's case is not advanced by arguing by analogy from a doubtful example.

[137] The same reasoning applies to the various other charges included under the definition of Liabilities in Item 54 such as defence costs, emergency response and evacuation costs, remediation and government oversight costs. These costs are not payable for additional or incidental services to be provided by CP. They are among the obligations which the Shippers assume in return for the carriage of their goods pursuant to subsection 113(2) of the Act upon payment of the rate. These liabilities are not charges and are not subject to review under section 120.1.

[138] The Agency's analysis leading to its conclusion with respect to section 120.1 was reviewed in detail earlier in these reasons. That analysis was marked by "justification, transparency and intelligibility" and resulted in a conclusion which was falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, cited above, at paragraph 47. The fact that other outcomes are also reasonable does not make the Agency's conclusion unreasonable.

[139] The recurring argument among those supporting the cross-appeal is that it cannot have been Parliament's intention to leave shippers without recourse in the face of oppressive conditions imposed by near-monopolistic railway companies. Against this is the fact that the Act provides a series of remedies designed to reduce any shipper's reliance on a single railway company such as interswitching (section 127), competitive line rates (section 129), Agency determination of joint rates, as well as final offer arbitration with respect to either the rate or the terms and conditions associated with the movement of goods. If the Shippers are persuaded that Item 54, even when properly construed, is an oppressive and unreasonable condition, then they have a remedy in final offer arbitration where they can propose, as their final offer, Tariff 8 minus Item 54. While this approach involves certain costs, one surmises that the amounts potentially at stake justify the expense.

[140] In light of the above, I would dismiss the cross-appeal.

IX. CONCLUSION

[141] For the reasons set out above, I would:

1) Allow the appeal with costs to CP;

2) Dismiss the cross-appeal with costs to CP;

3) Set aside the order of the Agency that CP refrain from applying Item 54 of its Tariff 8 unless and until such time as it has been amended to expressly remove prohibited limitation of CP's liability to a shipper from the obligations that Tariff item imposes;

4) Return the matter to the Agency for redetermination with the instruction that the Shipper's application be dismissed.

"J.D. Denis Pelletier"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
A. F. Scott J.A."

Appendix “A”

CANADIAN PACIFIC RAILWAYS

Tariff 8 - Hazardous commodities

Indemnification and liability - Item 54

In addition to the provisions set out above, CP shall not be liable to Customer, and Customer shall fully indemnify, defend, and hold harmless CP, from and against any and all claims, lawsuits, actions, applications, demands, complaints, loss, harm, judgments, liens, awards, costs (including, without limitation, attorney's fees and other reasonable costs of litigation including litigation to enforce this indemnity, emergency response and evacuation costs, remediation costs, and government oversight costs), damages (including without limitation special and consequential damages), injury to or death of persons, or adverse effects on wildlife or the environment, and for any and all liability, claims, actions, fines, penalties, and associated costs and expenses (collectively "Liabilities") which are caused, arise from, or are associated in any way with transportation of the commodities or anything done or failed to be done under this tariff. Customer's indemnity shall include, but not be limited to, any liabilities arising from:

Any failure of, release from, or defect in equipment tendered by customer for the transportation of commodity;

Loading, sealing and/or securing commodity in such equipment;

Release, unloading, transfer, delivery, treatment, dumping, storage, or disposal of commodity;

Any fines, penalties, actions, or suits resulting from alleged or actual violation of Federal, State or Local environmental or other law, statute, ordinance, code, or regulation; and

Any loss caused by the sole negligence or fault of Customer.

However, the Customer shall have no such obligation to indemnify CP to the extent that Liabilities arise from the sole negligence or willful misconduct of CP, its agents, or employees.

Customer is solely responsible for and will defend, indemnify, and hold CP harmless against any Liabilities due to the presence of chemicals or contaminants in the commodity which are not properly described in the commodity shipping document.

Customer's indemnity obligations under this Item do not include claims for alleged loss, damage, or delay to the commodities.

Joint liability

Subject to Customer's obligations to defend and indemnify CP as set forth above, should Customer believe that Liabilities are caused in whole, or in part, by the joint, contributory, or concurrent negligence or fault of CP, responsibility for Liabilities shall be adjudicated under principles of comparative fault in which the trier of fact shall determine the percentage of responsibility for CP, Customer, and any other party. CP shall be liable only for the amount of such Liabilities allocated to CP in proportion to CP's percentage of responsibility. Customer shall be liable for all other Liabilities.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-81-14
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CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	DECEMBER 7, 2015

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