Shipping Between the United States and Canada

An overview of the two regimes on motor carrier cargo liability and how the courts resolve “which law applies.”

Suppose that you represent a motor carrier that picked up cargo in Phoenix for carriage to Toronto. The cargo arrives damaged at the destination. The affected party commences an action. You might assume when you prepare your defense that American law will govern the dispute. Will this, however, necessarily be the case? What if the shipment originated in Toronto, arriving damaged in Phoenix? Would Canadian law necessarily govern?

These questions raise important issues for a motor carrier defense practitioner. While carrier liability for cargo claims in the law of the United States and Canada have many similarities, the two regimes adhere to an important difference on a carrier’s right to limit liability for cargo loss or damage. An attorney must consider potential “conflict of laws” ramifications in cross-border carriage cases because the application of one regime over the other could have significant consequences.

This article provides an overview of the two regimes on motor carrier cargo liability and addresses how the courts resolve “which law applies.”

United States

In the United States, the Carmack Amendment governs exclusively the liability of a carrier for loss or damage to interstate shipments of cargo. 49 U.S.C. §14706. Although this article cannot review the Carmack Amendment comprehensively, the following brief summary will help compare Carmack with Canada’s law.

1. Carmack’s core elements include the following:
   2. Federal law preempts all state law claims arising from or related to an interstate shipment, see, e.g., Hall v. N. Am. Van Lines, 476 F.3d 683 (9th Cir. 2007);
   3. A liable carrier would assume liability for “actual loss or injury to the property” transported, 49 U.S.C. §14706(a)(1);
   4. A carrier has the authority to designate claim and lawsuit-filing requirements in the bill of lading, 49 U.S.C. §14706(e);
5. A carrier has the authority to limit its liability by agreement with a shipper for an amount less than the value of the goods, in exchange for lower freight charges, 49 U.S.C. §14706(c) (commercial freight) & (f) (household goods);

6. Carmack establishes concurrent jurisdiction in both state and federal courts to preside over and adjudicate Carmack-related claims, but proper federal jurisdiction requires the loss or damage claim to exceed $10,000, see 28 U.S.C. §1331, 1337(a) & 1445(b); and

Carmack requires a carrier to issue a bill of lading or receipt for property that it receives, but failure to do so does not affect its liability. 49 U.S.C. §14706(a)(1).

Section 14101(b) allows a shipper and carrier to waive in writing any and all rights under Carmack, including those elements summarized above. Obviously, such a waiver would deprive a carrier of the important defense of federal preemption of state law claims and federal jurisdiction.

The U.S. Supreme Court has defined a shipper’s burden to state a prima facie case against a carrier under the Carmack Amendment. To establish liability against a carrier, a shipper must plead and prove the following three elements: (1) the goods were tendered to the shipper in good condition; (2) the goods were delivered in a damaged condition or not delivered at all; and (3) the amount of damages. The shipper’s failure to meet its burden of proof precludes recovery. Missouri Pac. R.R. v. Elmore & Stahl, 337 U.S. 184, 188 (1964).

Once a shipper has established a prima facie case, the burden shifts to the carrier to establish in its defense that it did not act negligently in packing, loading, hauling, or delivering the goods, and one of the following caused the damage: (1) an act of the shipper (e.g., shipper’s improper packing or packaging); (2) an act of God (e.g., flood, fire, weather); (3) inherent vice in the goods; (4) an act of a public authority; or (5) an act of a public enemy.

Probably the most litigated carrier defense is the carrier’s enforcement of its limitation of liability under 49 U.S.C. §14706(c) (commercial shipments), and (f) (household goods shipments). Frequently, a shipper agrees to limit a carrier’s liability to a value lower than the actual value of the goods, in exchange for the benefit of a lower shipping rate. Should a carrier fail to limit its liability effectively, a shipper is entitled to recover from the carrier the full “actual loss or injury.”

A carrier must take four steps to limit its liability under Carmack: (1) maintain a tariff available to shippers upon request; (2) obtain a shipper’s agreement on the carrier’s choice of liability, generally construed by courts as requiring a written agreement; (3) give the shipper reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading before moving the shipment. A carrier’s success in enforcing its limitations of liability often depends on the facts of the case, the form of the bill of lading, and whether it was signed by the shipper, the court, and attorneys arguing the case. Compare Werner Enters. v. Westwind Mar. Int’l., Inc., 554 F.3d 1319 (11th Cir. 2009) (enforcing carrier’s limitation of liability), with ABB Inc. v. CSX Transp., Inc., 721 F.3d 135 (4th Cir. 2013) (finding bill of lading insufficient to limit carrier’s liability under Carmack).

Also, there are two time-limitation provisions in the Carmack Amendment that can work to bar a shipper’s claim. While Carmack does not establish a statute of limitations, it does establish a minimum “reasonable” period of time within which carriers may set their own time limitation period for filing claims and lawsuits. Under 49 U.S.C. §14706(e), “[a] carrier may not provide by rule, contract or otherwise, a period of less than 9 months for filing a claim against it... and a period of less than 2 years for bringing a civil action against it...” A shipper must submit a proper written claim with a carrier within nine months of delivery in compliance with 49 C.F.R. 370.3(a). A lawsuit must be filed within two years and one day from the date when a carrier notifies a shipper that a claim is denied or takes a full and final settlement position on the claim.

Canada

The Canadian provinces regulate both “intra” and “extra-provincial” motor carrier cargo liability. Most of the provinces have enacted by regulation “conditions of carriage” that are deemed to be incorporated into contracts of carriage. These conditions are essentially uniform from province to province, colloquially referred as to the “Uniform Bill of Lading.” See, e.g., Ontario, Regulation 643/05, enacted under the Highway Traffic Act, R.S.O. 1990 H-8. The Uniform Bill of Lading codifies carrier liability and certain rights and obligations of a shipper and a carrier. Shippers and carriers have “freedom of contract” to augment or to deviate from the Uniform Bill of Lading.
per pound, computed on the total weight of the shipment, unless the shipper has declared a value of the goods on the face of the bill of lading. If a value has been so "declared," that amount reflects the maximum amount for which the carrier will be held liable.

The general practice in Canada is that shippers do not declare a value on a bill of lading. One often-cited reason is that a shipper has cargo insurance in place and does not want to draw what might invariably be a freight "surcharge" from a carrier associated with declaring a value. Sometimes shippers are leery of publishing the value of cargo more than necessary as a matter of supply chain security.

Various attempts have been made by affected cargo interests to "break" the $2.00 per pound limit of liability for full recovery. Historically such attempts have been founded on notions of fundamental breach, but this argument "died" with the demise in Canada of that doctrine; or else they have been founded on a willful act of a carrier (e.g., driver being "groggy" at the wheel, being over "hours of service," resulting in an accident to the cargo). This latter argument has tended to fail on the basis that the parties will generally be held to their bargain on the allocation of risk for cargo loss or damage as pertaining to any transit related mishap. Lately the failure of a carrier to issue a prescribed form of bill of lading with a space for a shipper to "declare a value" has been cited as a possible means to "break" limits. The scope of this article does not permit weighing in on the merits of this and the earlier listed attempts to "break limits." Suffice to say that each case will turn on the specific provincial legislation on point as it concerns the requirements for compliance in terms of bill of lading issuance to a shipper. Certainly the presumption remains that the CAN$2 per pound limit of liability will apply without a declaration of value. This article does not intend to suggest that this limitation of liability is impervious to attack on unique facts, for example when a shipper might show legitimate frustration with the ability to have declared a value because a carrier did not issue a bill of lading. The point is that carriers can generally rely on this limitation of liability when they do not have a declaration of value.

The foregoing comparison between U.S. and Canadian law makes clear how the "conflicts of laws" arises. In a cross-border shipment, a Canadian carrier may thus more readily raise a limitation of liability defense citing Canadian law and no value on a bill of lading relative to what the carrier must establish for that purpose under U.S. law. One need only consider a case where valuable cargo is shipped, being somewhat light in weight, to see why a carrier might want to consider invoking a CAN$2.00 per pound limitation of liability, when the carrier might not be able to meet the onus of setting up a limitation under U.S. law.

Brief mention should also be made of certain claim time limits and requirements in the Uniform Bill of Lading. A carrier will not be liable for loss, damage, or delay to any goods unless a notice of same setting out particulars of the origin, destination, date of shipment and the estimated amount claimed is given in writing to the carrier within 60 days of the delivery of the goods, or in the case of the failure to make delivery within nine months after the date of shipment. There is also a requirement that a copy of the paid freight bill be provided to the carrier within nine months of the date of shipment along with a "final statement of the claim." This latter item does not prescribe the time for initiating a lawsuit. When a suit is to be brought will depend on the lawsuit time limitation in the governing law of the contract of carriage. With "freedom of contract," the parties can augment or deviate from these time periods and deadlines.

How Do Courts Decide Which Law Governs?

Courts in the United States take three different approaches when deciding which law governs. In Canada, the courts first determine if they can assume jurisdiction. If they can, then they undertake a conflict of laws analysis.

Cases Filed in a U.S. Court: The Different Approaches

When dealing with shipments from the United States to Canada, the U.S. courts have no problem figuring out which law applies. Carmack is clear on this direction of shipments. Carmack expressly applies to shipments from the United States to adjacent foreign countries, such as Canada, transported on a through bill of lading. Specifically, 49 U.S.C. 14706(a)(1) provides:

The liability imposed... is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported.... from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading....' (emphasis added).

The courts have a tougher time figuring out which law applies when the shipments originate in Canada and will be transported to a destination in the United States under a through bill of lading. The U.S. courts take three different approaches to shipments from Canada to the United States:

1. The majority rule is that the Carmack Amendment does not apply to shipments from Canada to the United States under a through bill of lading. Most likely, Canadian law would apply to the cross-border shipment. On the other hand, Carmack would apply to a shipment from Canada to United States if the damage or the loss occurred while the
goods were being transported within the United States and a separate bill of lading was issued for the United States leg of the transportation.

2. A second view is that although Carmack does not apply by its express language, a conflict of laws analysis must be used to determine what law applies (e.g. Canadian, federal common law or a particular state law).

3. The minority view is that the Carmack Amendment applies to shipments originating in adjacent countries, such as Canada, to a United States destination. Part of the reason for the differing views is that the Carmack Amendment is silent concerning its applicability to shipments from an adjacent foreign country to the United States. It expressly applies only “from a place in the United States to a place in an adjacent foreign country.”

Another reason for the conflicting views is the courts' attempt to reconcile the Carmack Amendment, 49 U.S.C. §11701, with the Interstate Commerce Act's “general jurisdiction” provision, 49 U.S.C. §13501, and its earlier versions. This jurisdiction provision provides:

The Secretary of Transportation and the Interstate Commerce Commission have jurisdiction, as specified in this Act, over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier—

1) Between a place in the United States and a place in a foreign country to the extent the transportation is in the United States...

(E) the United States and a place in a foreign country to the extent the transportation is in the United States...

(emphasis added).

Some courts perceive that Carmack's use of from the United States to an adjacent country and its silence on from the adjacent country to the United States conflicts with the general jurisdiction provision's use of between a place in the United States and a place in a foreign country.

U.S. Majority Approach

One of the earliest decisions to articulate the majority rule is Alwin v. Penn. R.R. Co., 15 A.2d 507 (Pa. Super. Ct. 1940). Alwin involved a shipment of cattle by rail from Ontario, Canada, to Middletown, Pennsylvania. After examining the legislative history of both the jurisdictional provision (then found at §1 of the Interstate Commerce Act (ICA)) and the Carmack Amendment (then found at §20(11)), the Alwin court held that Carmack insofar as it governed shipments involving adjacent foreign countries, applied only to movements to a foreign country and not to movements from a foreign country. The court noted: “There is not the slightest ambiguity in the use of the language employed in Carmack and it would grossly distort the meaning to add to the field shipments from an adjacent country to a point in the United States.” 15 A.2d at 509. Further, the Alwin court recognized that the statutory scope of the jurisdictional provision (i.e., describing the field which Congress has taken over), was broader than Carmack's scope (i.e., addressing a carrier's liability for damages). Id. at 512.

As of 1940, the year that Alwin was decided, Congress had recently amended the jurisdictional provision, replacing “from...to” with “from or to... to or from.” Id. at 510. The Alwin court reasoned that if Congress had intended to expand the field of liability for damages to include imports as well as exports it would have said so in clear language.” Id. After 1940, “from or to... to or from” was replaced with “between,” how it reads today in §13501. Despite Congress' many changes to the jurisdictional provision, the Carmack Amendment's “from...to” language has never changed, further supporting the majority view's position.

Although Congress has regulatory power over a shipment after it crosses into the United States, Alwin was also concerned that Carmack would have involved “extraterritorial legislation” if applied to import movements. Id. See also Strachman v. Palmer, 82 F. Supp. 161, 164 (D. Mass. 1949), aff'd, 177 F.2d 427 (1st Cir. 1949) (“If it is at least doubtful whether Congress could constitutionally regulate the Canadian carrier's liability for an event... occurring in Canada in connection with a contract made in Canada by a Canadian corporation.”).


U.S. Federal Common Law Approach

In Ingram Micro, Inc. v. Air Route Cargo Express, Inc., 154 F. Supp. 2d 834 (S.D. N.Y. 2001), the court applied the majority rule with a twist: Although it found that Carmack does not apply to shipments originating in Canada, it found that federal common law applied based on a traditional conflict of laws analysis.

In Ingram Micro, Ingram hired Airroute to transport a shipment of software from a warehouse in Quebec, Canada, to Ingram's warehouse in Harrisburg, Pennsylvania. Airroute took possession of the shipment in good order in Quebec and then, on the same day, redirected it to its subcontractor, Paquin, in Quebec. Airroute hired Paquin to transport the shipment from Quebec to Pennsylvania. The shipment was stolen when Paquin had stored it in a trailer outside its warehouse. Although Canadian law enforcement authorities recovered some of the stolen software, a significant portion was never recovered, and Ingram sought damages of $434,894. Airroute sought to enforce its bill of lading's limitation of liability of the “lesser of $100.00 or $2.00 per pound.” 154 F. Supp. 2d at 837.

The court first addressed the threshold question of which law would apply—
Canadian or United States law. Ingram claimed that U.S. federal common law should govern, and Airroute claimed that Canadian law should apply. After a conflict of laws analysis, the scales tipped toward the U.S. federal common law. Under the court’s analysis, it considered the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. Id. at 840.

The court found that the true place of contracting was California where Ingram transmitted its acceptance of Airroute’s terms. Id. Thus, the contract had already been formed in California when the bill of lading was issued in Canada. Id. at 841. Although the parties disputed the place of performance, the court found that the predominant place of performance was the United States because both parties understood that the delivery was to be made in Pennsylvania. Id. According to the court, the disappearance of the goods from Canada was irrelevant to the determination of the planned place of performance. Id. As a result, the greater portion of the performance was to be in the United States, including the significantly longer travel time and the delivery of the goods there. Id. The other factors, such as the place of negotiation, the location of the subject matter and the domicile or the place of business of the parties were a wash, favoring neither party’s position. Id. The court viewed the place of contracting and the place of performance, which the court gave the heaviest weight, as supporting United States law over Canadian law as the governing law. Id.

Based on the U.S. federal common law, the court found that Airroute’s limitation of liability was enforceable. Id. at 844.

U.S. Minority Approach

The primary source of the minority view is the U.S. Supreme Court case Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury, 254 U.S. 357 (1920). There, the Supreme Court interpreted the “from... to” language contained in the ICC’s jurisdictional provision as encompassing both exports and imports. Writing for the Court, Justice Brandeis found that “[a] carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States.” 254 U.S. at 359. Based on Woodbury, some courts have reasoned that if the “from... to” language in the jurisdictional provision really meant “between,” then the use of similar language, if not identical language, in the Carmack Amendment should be interpreted in the same manner. Most notably, Sompo Japanese Ins. Co. v. Union Pacific Railroad Co., 456 F.3d 54 (2nd Cir. 2006), followed Woodbury and rejected all of the Alwin line of cases. Although Sompo did not involve transportation from an adjacent country to the United States, the court held that the domestic leg of a shipment originating overseas was subject to the Carmack Amendment. 456 F.3d at 69.

Specifically, the Sompo court reasoned that “while the Woodbury Court interpreted the ‘from... to’ language only in that section of the ICA defining the ICC’s jurisdiction, one would think that the same interpretation would have applied to the identical language in Carmack.” 456 F.3d at 66.

The most recent case adopting the minority view is Atlas Aerospace LLC v. Advanced Transportation, Inc., 2012 U.S. Dist. Lexis 157416 (D. Kan. Apr. 24, 2013) (“Atlas Aerospace”). There, the court rejected the line of cases beginning with Alwin and instead followed the Sompo case, even though the Supreme Court in Kawasaki effectively overruled Sompo’s ultimate holding that Carmack applied to the domestic leg of an international shipment originating in a non-adjacent foreign country. Atlas Aerospace, 2012 U.S. Dist. Lexis 157416, at *7–8. Similar to Sompo, the Atlas Aerospace court adopted the reasoning of Woodbury that the “from... to” language in the ICC’s jurisdictional provision meant transportation in either direction and thus encompassed both imports and exports. Id. at *8. The court added that “[i]t here is no reason to believe that Congress intended that these two ‘from... to’ provisions have different meanings.” Id. at *9.

The Atlas Aerospace court followed Sompo “in concluding that the scope of the agency’s jurisdiction [now found at 49 U.S.C. §13501], and therefore also the scope of the liability provision, under the Carmack Amendment includes shipments between the United States and Canada in either direction.” Id. at *10.

As discussed above, the CAN$2.00 per pound limitation on liability established by Canada’s Uniform Bill of Lading may favor U.S. carriers importing goods from Canada into the United States. In other words, there may be no beneficial reason for U.S. counsel to argue the minority view—that Carmack applies when a shipment originates in Canada—because the U.S. carrier may benefit from a lower limitation of liability by virtue of Canadian law.

Of course, if U.S. law applies, but the shipper and carrier by contract waive any or all rights and remedies under the Carmack Amendment under 49 U.S.C. §14101, then there is a possibility that the parties will agree to a choice of law and venue specific to a certain state or another country. In Kawasaki, the Court acknowledged that a forum-selection clause is “an indispensable element in international trade, commerce, and contracting” because it allows parties to “agree[e] in advance on a forum acceptable’ to them.” 561 U.S. at 109 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–14 (1972)). Such a provision is generally enforceable “unless it imposes a venue ‘so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.’” 561 U.S. at 110 (citing The Bremen, 407 U.S. at 18).

Cases Filed in a Canadian Court

For a Canadian court to assume jurisdiction there must be a "clear and substantial connection" linking the subject matter of the case to the forum. The following are presumptive connecting factors entitling
a Canadian court to assume jurisdiction over a dispute:
- The defendant is domiciled or resident in the province where suit is filed;
- The defendant carries on business in that province;
- The tort was committed in that province, or;
- The relevant contract was made in that province.

If jurisdiction is established, the claim may proceed, subject to a court's discretion to stay the proceedings on the basis of the doctrine of forum non conveniens. If a defendant raises an issue of forum non conveniens, the burden is on it to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. A defendant doing this must show that an alternative forum is clearly more appropriate and that it would be fairer and more efficient to choose such alternative forum and to deny a plaintiff the benefits of his or her decision to select a forum. See *Club Resorts Ltd. v. Van Breda* [2012] 1 SCR 752.

Assuming then that a Canadian court has jurisdiction, which law then applies to a cargo claim arising in the context of a cross-border shipment? Will it be U.S. law or Canadian law?

Under the conflict of laws rules applied in Canadian courts, the parties' express choice of law will generally be given effect, as will the choice of a forum, for that matter. When the parties have not explicitly selected the governing law, the Canadian courts will evaluate whether there is an implied agreement in the construction of the contract and the parties' "objective" dealings before and at the time of the formation of the contract. When a Canadian court cannot divine an implied agreement, it will apply the system of law with which the transaction has its "closest and most real connection" as the governing or "proper law" of the contract. See *Castel & Walker, Canadian Conflict of Laws* 31.5-31.13 (6th ed. Markham, Ontario, LexisNexis, 2005); *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] SCR 443.

If the parties have agreed that the courts of a particular place shall have jurisdiction over the contract, there is a strong inference that the law of that place is the proper law. The Canadian courts have inferred the intentions of the parties from other factors when deciding the proper law. For instance, they have considered the legal terminology in which a contract was drafted. The U.S. Uniform Bill of Lading reference to the "s. 7, "non-recourse" provision, unique to the United States, suggests a U.S. connection. Or a bill of lading might contain French language or something unique to Canadian regulation, of course suggest-
are countless studies that show that diverse boards and workplaces are more effective at identifying and solving problems due to the variety of experiences shared. Certainly diversity and inclusion help companies and firms better understand the views of their own clients and customers, because those clients and customers are of different genders, races, ethnicities, and sexual orientations. But let’s not forget the importance of inclusion. Bringing diversity into a company is great, but if people don’t feel incorporated and truly a part of the team, then they are not going to stay. Letting them through the door is just the first step; they also need a seat at the table.

**Property**, from page 33

More recently, in a different case involving the California State Controller, an insurer has succeeded in opposing the controller’s motion for preliminary injunction regarding the scope of the audit. *Thrivent Financial for Lutherans v. John Chiang, California State Controller*, No. CCG-13-055156 (Cal. Sup. Ct. Sept. 2, 2014). The court held that the Controller had failed to establish a likelihood of success on the merits, irreparable harm, or that the proposed audit was limited to the inspection of “reasonably relevant” information. The court therefore ordered that the audit should be delayed pending the insurer’s challenge to the underlying basis of the audit. Further rulings in these pending cases may provide guidance on the scope of information that an auditor may request in an unclaimed property audit and on the permissible use of that information.

**Conclusion**
The life insurance industry’s experience with unclaimed property shows the upheaval caused by a novel legal theory in the hands of cash-strapped states and contingency fee auditors. Thus far, the life insurance industry’s common sense and plain language interpretation of unclaimed property laws as applied to life insurance has been vindicated in the courts. Yet the industry will never return to the status quo: the landscape has been altered by a growing body of DMF legislation, the practical effect of multi-state settlements, numerous court decisions, and many insurers’ voluntary efforts to search for insureds’ deaths using the DMF.

**Shipping**, from page 71

A Canadian connection. The Canadian courts may view the form of the documents involved in a transaction, the currency in which payment was made, the use of a particular language, a connection with a preceding transaction, the nature and the location of the subject matter of the contract, or the residence of the parties as factors from which they may infer contracting parties’ intention. A court may also draw on conventional contract law wisdom that when different jurisdictions are involved, the proper law is the law of the place where the offeror communicates the offer because that is where acceptance is communicated by the offeree. When a determination is made that Canadian law governs, there is a legislative stipulation that the conditions of carriage in force in the province in which the shipment originates will govern. See: Conditions of Carriage Regulation SOR/2005-404 enacted under the federal Motor Vehicle Transport Act, 1987.

**Conclusion**

As indicated above, in the United States a U.S. statute, the Carmack Amendment, governs which law applies for shipments between the United States and Canada, although U.S. courts do not agree completely on its interpretation. As such, it can be said that U.S. carriers only have the freedom to contract which law applies if they waive the application of Carmack under 49 U.S.C. §14101(b), which calls for special consideration beyond the scope of this article. Canada, in turn, can be said to have a full “freedom of contract” regime because no statute in Canada addresses the determination of a conflict of laws issue.

The benefits of a negotiated carriage contract are obvious in terms of the certainty that comes with a carrier adopting and implementing a certain business model. Carriers and practitioners alike need to be aware in any event of which law will govern any dispute in both the interpretation of and the application of such a contract. Certainly, if there has been no contract completed by the parties specifying which legal system will apply in the event of a cross-border cargo claim, a practitioner must be aware of the potential for the invocation and any related cost or benefit of one legal regime over the other for a carrier defendant.

**Think Globally**, from page 87

- Using an internal expert to provide fact evidence at trial, either as the party’s corporate representative, or as a fact witness.
- Using an internal expert during a trial to provide counsel with advice on strategies to cross-examine or to address the opposing side’s expert.

In sum, despite the value of an internal expert’s unique knowledge about a product, the courts will restrict the use of such an expert in Canadian product liability litigation. A court will have concerns about independence and objectivity of an internal expert’s opinion and could exclude it or assign little weight to it.

So a party involved in a product liability lawsuit in Canada will need to use an internal expert’s knowledge and experience in other ways, rather than planning to use that expert as a testifying expert witness.

**Writers’ Corner**, from page 88

Third, impose a cap on the length. A cap on length might seem arbitrary, but a cap imposes discipline and helps ensure that you don’t exhaust the reader. Your length might be one page, or three paragraphs, or a certain number of sentences. Whatever it is, if you impose a limit at the outset, you’ll be more likely to follow it.

Fourth, finish by saying what you want. When a court is finished with your brief’s introduction, the court should know how you want the court to rule and why. The final paragraph should make this clear.

Fifth, give your introduction to a colleague to read. I give every brief that I write to a colleague to read; I specifically pick a colleague who hasn’t worked on the case. My colleague’s perspective comes close to mirroring a court’s perspective; my colleague, after all, similar to the court, becomes busy studying the introduction with fresh eyes, and he or she wants to figure out the right answer. If you’re concerned that you can’t bill your colleague’s time, give it to him or her anyway. Wouldn’t you rather have a winning brief?

As a final point, I am very interested to hear from you about the principles that you follow when drafting introductions. What works for me might not work for you. I invite you to contact me, please, at stephen.feldman@elliswinters.com.