

Whitelaw — Twining

Motor Truck Cargo in the Canadian Marketplace

Presented by Whitelaw Twining





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**Subrogation and the
Investigation of Cargo Claims:
Basics & Tips to Maximizing
Recovery**

Ben Meadow

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What is Subrogation?

- + “put in place of another or to substitute”
- + It permits an insurer that has paid an insured’s loss to recover some of its expenditure by exercising all legal rights of recovery which the insured would have against a third party for that loss
- + Commonly referred to as the insurer stepping into the shoes of the insured to pursue recovery

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Purposes

1. Preserves fundamental principle of indemnity...

- + Ensures that an “insured receives no more and no less than a full indemnity”

Somersall v. Friedman, [2002] S.C.J. No. 60

2. Ensures that the loss falls on the one who legally caused it

- + Insured who has recovered from their insurer has little incentive to pursue their claim against the third party who caused the loss.
- + Subrogation maintains legal accountability

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Practical Benefits of Subrogation

- + Improves loss ratio and profitability for cargo insurers
- + Helps reduce insureds' premiums and increase customer retention by spreading risk to negligent third parties

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Tips for Maximizing Recovery

- + Initial Scene Investigation
- + Setting up the claim
- + Pursuing the Subrogated Claim



Initial Scene Investigation

+ *Witnesses*

- + Speak to the Insured
 - + Advise of potential subrogation from the outset
 - + Discuss uninsured losses and assist Insured in quantifying
- + Identify key witnesses (e.g. drivers, emergency services, shipment packager, etc.)
- + Obtain statement from key witnesses (include contact information!)

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Initial Scene Investigation

+ *Preservation of evidence*

- + Photographs to capture nature and extent of damage: more is better
- + Preserves the scene
- + Documenting the whole journey of the load
 - + Pictures/videos of cargo transfers



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Initial Scene Investigation

+ *Physical Evidence*

- + Identify the key physical evidence
- + Preserve the physical evidence
 - + Record the chain of custody
 - + Download data from Crash Data Recorder if motor vehicle accident caused loss
 - + GPS for tractor-trailer
- + If others have taken the physical evidence, then put them on notice not to destroy or dispose of the physical evidence
- + Law of spoliation

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After the Initial Scene Investigation

+ *Documents*

- + Determine what documents may be relevant for liability or quantum
 - + Contract between cargo owner and carrier, sales contract documents, bills of lading, delivery receipts, load instructions, e-mails, text messages, etc.
- + Notice of Intention to Claim
- + Subrogated claim against carrier for cargo loss is subject to defences
 - + Act of God (Force Majeure in Quebec), Inherent Vice, Shipper's/Consignee's Default, Queen's or Public Enemies, Acts of Public Authority, Riots, Strikes, etc.

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Setting Up the Claim – Pre-Litigation Steps

+ *Identify possible defendants*

+ What type of claim?

- + In transportation/cargo claims: shipper's default? Freight forwarder/load broker default? Carrier liability? Etc.

+ Determine full legal names of potential defendants

- + Company searches
- + Put parties on notice of claim
- + Ensure Notice of Claim is issued in timely manner to carrier

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Setting Up the Claim – Pre-Litigation Steps

+ *Identify limitation periods*

- + A two-year limitation period applies to most (but not all) tort claims in BC
 - + Discoverability issue
 - + e.g. cargo caused damage to tractor but only discovered after shipment
- + Cargo claims typically have shortened notice requirements
 - + Bill of lading may prescribe shortened limitation period for providing Notice
 - + 60 days/9 month limitation

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Setting Up the Claim – Pre-Litigation Steps

+ *Experts*

- + Identify what expert witnesses may be needed
 - + Cause and origin expert for cargo loss
 - + Materials engineer for a failed part (e.g. failed refrigeration of produce)
 - + Forensic accountant for business loss claim
- + Assess if and when experts will need to attend the scene of the loss
- + Joint destructive testing

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Setting Up the Claim – Pre-Litigation Steps

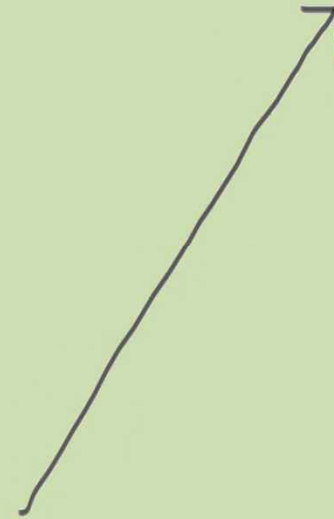
- + Expert Opinion – How do courts view expert testimony?
- + Considerations for an expert:
 - + For settlement or court?
 - + Court experience
 - + Will “stay in their lane”
 - + Advanced “heads up”

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Pursuing the Subrogated Claim

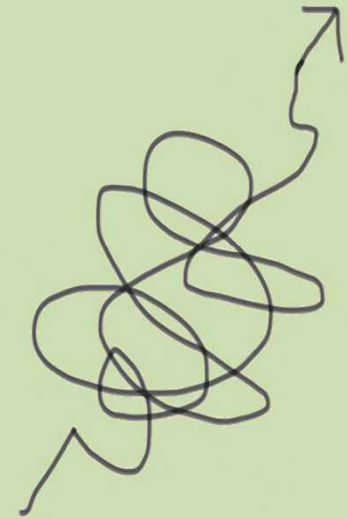
- + *Assess subrogation potential*
 - + Conduct critical analysis of your theory of liability and the evidence in support of that theory
 - + Consider potential defences to the claim
 - + Contractual limitation of liability/Notice of claim not filed in time
 - + Waiver of subrogation
 - + Defences for carrier

SUCCESS



**WHAT PEOPLE THINK
IT LOOKS LIKE**

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**WHAT IT REALLY
LOOKS LIKE**

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Property Damages

- + Causation
- + Mitigation
 - + cannot claim for avoidable accumulation of that loss
- + Measure of damages
 - + Generally market value of damaged/lost cargo
- + Contractual limitation of liability?

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Business Interruption Loss

- + What is a business interruption loss/loss of profit?
 - + Consequential damages
 - + Not covered by limitation of liability for weight of cargo
- + Factors to consider:
 - + Type of business
 - + Loss of contracts
 - + Ability to continue business
 - + Mitigation
- + Documents to support business interruption/loss of profits
 - + General ledger, financial statements, contracts

Pursuing the Subrogated Claim

+ *Assess recoverability*

- + Do the potential defendants have liability insurance?
- + If no insurance, do the potential defendants have assets?
 - + Land Title searches
 - + Asset searches
 - + Garnishment
- + Where do the potential defendants reside (overseas)?

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Pursuing the Subrogated Claim

+ *The Insured's Involvement*

- + Ongoing communication is helpful
 - + Cooperation will be necessary in the litigation
 - + Manages expectation of recovery of deductible and/or uninsured losses
- + Who has conduct of the litigation?
 - + Deductible
 - + Uninsured losses
- + Does the Insured have an ongoing relationship with the defendant(s)?

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Pursuing the Subrogated Claim

+ *The Insurer File*

- + First party file vs. Subrogation file
- + Litigation Privilege
 - + Was litigation in reasonable prospect at the time the document was prepared?
 - + If so, was litigation the dominant purpose for which the document was prepared?
- + Instructions to adjuster, examiner notes, expert reports & communications
 - + Be clear as to purpose of communications and documents
 - + Dealing with first party claim is not usually privileged

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Pursuing the Subrogated Claim

- + *Which law applies*
- + *Choice of Forum*
 - + Small Claims Court – claims under \$35,000
 - + Civil Resolutions Tribunal
 - + BC Supreme Court – all other claims
 - + Arbitration



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Thank you.

For more information, please visit our website at

www.wt.ca

Michael D Silva

T 604 443 3453
E msilva@wt.ca

Kim Wigmore

604 891 72215 T
kwigmore@wt.ca E

Bronwen Black

T 604 891 7293
E bblack@wt.ca

Bo Carter

T 604 891 7245
E bcarter@wt.ca

Benjamin Meadow

604 443 3427 T
bmeadow@wt.ca E

Melissa Santalucia

604 891 7254 T
msantalucia@wt.ca E