PRIVITY OF CONTRACT AND THIRD-PARTY BENEFICIARIES IN CANADIAN SHIPPING

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Himalaya clauses are provisions in contracts of carriage that limit the liability of third parties who perform the carriage. The doctrine of privity has traditionally restricted the enforcement of such clauses. However, after the Supreme Court of Canada established the "principled exception" to privity, courts permitted the enforcement of Himalaya clauses by third-party beneficiaries who were unaware of the clause at the time of performing the carriage. This Article argues that this wide enforcement of Himalaya clauses causes incoherence in Canadian contract law. Further, the Article proposes an alternative restrictive understanding of the "principled exception" based on estoppel.

Les clauses « Himalaya » sont des dispositions dans des contrats de transports qui étendent les limitations de responsabilité à des tiers. Par le passé, leur application était restreinte par le principe de la connexité contractuelle. Mais après que la Cour suprême du Canada ait établi l'« exception fondée sur des principes » à la règle du lien contractuel, les tribunaux permettent l'exécution des clauses « Himalaya » par de tiers bénéficiaires qui ignoraient l'existence de cette clause au moment d'effectuer le transport. L'auteure de cet article soutient que cette application répandue des clauses « Himalaya » est source d'incohérence dans le droit contractuel au Canada. De plus, elle propose une interprétation restrictive de l'« exception fondée sur des principes » basée sur la préclusion.

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Contents

1. Introduction

Following the establishment of the "principled exception" to the classical doctrine of privity by the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*,[2] the enforcement of "Himalaya clauses"[3] by third parties in shipping cases has become wider than it should be in Canadian contract law.

Himalaya clauses are commonly included in contracts for the carriage of goods by sea (also known as "bills of lading") between a cargo owner[4] and a carrier[5] to protect the carrier's employees, agents, and independent

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2 *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108, 1999 CanLII 654 (SCC) [*Fraser River* cited to SCR]

3 This type of clauses was named after the ship "Himalaya" in *Adler v Dickson*, [1955] 1 QB 158 (HL).

4 Cargo owner is the person who has legal ownership or possessory title over the goods at the time when the loss or damage occurred, e.g., shipper of the goods, or consignee or endorsee of the bill of lading. See *The Albazero*, [1977] AC 774 (HL); *Bills of Lading Act*, RSC 1985, c B-5, s 2.

5 Carrier is the person who contractually undertakes against a cargo owner to transfer cargo via sea, e.g., a shipowner, charterer, or freight forwarder. See *Marine*

contractors against liability for cargo loss or damage. It is a reality in modern shipping that carriers often engage other professionals to perform the carriage for them, such as shipowners, charterers, stevedores, and rail or road carriers. These professionals, although third parties to the contract of carriage, may be liable to the cargo owner in tort.[6] Thus, if the goods are lost or damaged while in the custody of a third party, the cargo owner may sue the third party for damages. Himalaya clauses limit this type of liability, usually by extending the carrier's contractual protections to third parties. A typical clause provides as follows:

> Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions and immunities from the limitations of liability which the Carrier has under the provisions of this Bill of Lading.[7]

The legal question arising from the use of Himalaya clauses is whether, as a matter of principle, they can be directly enforced by third parties to strike out the cargo owner's action. The doctrine of privity generally prohibits the enforcement of Himalaya clauses by third parties because they are not the promisee of the clause and have not provided consideration for it. However, as discussed below, courts have found ways to avoid the effect of the privity doctrine. In fact, Canadian courts have been willing to apply Himalaya clauses in a permissive manner so as to protect a wide range of third parties.

Liability Act, SC 2001, c 6, Schedule 3, art I(a); Aldo Chircop et al, eds, *Canadian Maritime Law*, 2nd ed (Toronto: Irwin Law, 2016) at 600.

[6] Third parties engaged by the carrier have a duty to take reasonable care of the goods for as long as they remain under their control. See *Canadian General Electric Co v Pickford & Black Ltd*, [1971] SCR 41 at 43, 1970 CanLII 186 (SCC) [*Pickford*]; *ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 at 764, 792, 1986 CanLII 91 (SCC) [*ITO*]; *Scruttons Ltd v Midland Silicones Ltd*, [1962] AC 446 (HL) [*Midland*]. For sub-bailment duties, see Norman Palmer, *Palmer on Bailment*, 3rd ed (London: Thomson Reuters, 2009) at paras 1.044, 20-021-22; *The Pioneer Container*, [1994] 2 AC 324 [*Pioneer Container*]. For certain statutory limitations of third party liability for loss or damage of cargo, see *Marine Liability Act*, *supra* note 5, Schedule 3, art IV.bis.(2).

[7] *Timberwest Forest Corp v Pacific Link Ocean Services Corp*, 2008 FC 801 at para 54, aff'd 2009 FCA 119 [*Timberwest*]. For more advanced drafting, see International Group of P&I Clubs, "Special Circular No 6: Revised Himalaya Clause for Bills of Lading and other Contracts" (2014), online: *BIMCO* <https://tinyurl.com/2d3cstma> [perma.cc/7FAC-QJKQ].

The permissive approach taken by Canadian courts with respect to Himalaya clauses in the last two decades is best reflected in the recent decision of the Federal Court in *Labrador-Island Link General Partner Corp v Panalpina Inc*:

> Himalaya clauses are well-recognized terms in transport contracts, and they are enforceable by the courts notwithstanding a third party's complete ignorance of the existence of a clause granting it a benefit at the time of the performance of its own contract.[8]

The court continued:

> attempts by cargo claimants to circumvent the carriers' limitations of liability and other terms, whether it be by suing in tort or by artificially raising privity of contract issues, are long passé now … [T]he increased recognition of Himalaya Clauses ha[s] brought an end to these artificial attempts.[9]

This Article argues against this approach. Not *every* third party should be able to enforce a contract, especially a third party who did not even know about the existence of the contract at the time of performing the services. The increased recognition of Himalaya clauses in Canada by operation of the *Fraser River* exception is problematic because it abrogates the privity doctrine and the bargain theory of contract and causes incoherence in Canadian contract law. Thus, any attempt to reconcile the enforcement of Himalaya clauses with legal doctrines, like the attempt made in this Article, can neither be "long passé" nor "artificial."

To make this argument, the Article is organized in the following Sections: In Section 2, I examine the tests that allow the enforcement of Himalaya clauses vis-à-vis the privity doctrine and their application by courts. In Section 3, I argue that the wide enforcement of Himalaya clauses on the basis of the *Fraser River* exception causes incoherence in the general law of contract. Finally, in Section 4, I propose that the *Fraser River* exception should be applied and justified by the equitable doctrine of estoppel so as to limit the enforcement of Himalaya clauses in shipping cases.

2. The Development of Himalaya Clauses vis-à-vis Privity

Under the classical doctrine of privity, third parties cannot enforce Himalaya clauses. The doctrine of privity provides that a person cannot

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8 *Labrador-Island Link General Partner Corp v Panalpina Inc*, 2019 FC 740 at para 80 [*Panalpina*].

9 *Ibid* at para 84.

be entitled under or bound by a contract to which they are not a party.[10] One aspect of privity is that only a *promisee* can obtain rights or benefits under a contract, i.e., only a person who has exchanged a contractual offer and acceptance can enforce the resulting contract.[11] Another aspect of privity is that only a promisee who has provided *consideration* for the promise can enforce it.[12] Taken together, these two aspects safeguard the private and bilateral character of a contractual relationship by negating a *jus quaesitum tertio* (a third-party right of enforcement), and they also ensure that only a person who participated in a mutual exchange of offer, acceptance, and consideration can obtain rights and obligations under the resulting contract. Thus, a third party is precluded from enforcing a Himalaya clause in a contract of carriage because it was not the promisee of the clause (the clause was a promise directed to the carrier as contracting party) and it provided no consideration for it at the time the contract was formed. This doctrine has been explained by the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*[13] and affirmed by Canadian courts.[14]

In older shipping cases, Canadian courts applied the privity doctrine strictly and refused to allow third parties to enforce a contract, even where the contract purported to confer a benefit on them. For example, the Supreme Court of Canada in *Canadian General Electric Co v Pickford & Black Ltd* held that the stevedores could not benefit from the limitation clause in the contract of carriage because they were complete strangers to the contract,[15] and the Supreme Court of British Columbia in *Calkins & Burke Ltd v Far Eastern Steamship Co* held that the stevedores could not benefit from the exemption clause in the contract of carriage because

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10 *Tweddle v Atkinson*, [1861] EWHC J57 (QB) [*Tweddle*]; *Greenwood Shopping Plaza Ltd v Beattie*, [1980] 2 SCR 228 at 236–237, 1980 CanLII 202 (SCC) [*Greenwood*]; Jack Beatson et al, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020) at 613.

11 This is known as the "third party rule." See Stephen A Smith, "Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule" (1997) 17:4 Oxford J Leg Stud 643 at 644 [Smith, "Third Party Rule"]; HG Beale, ed, *Chitty on Contracts*, 32nd ed, vol 1 (London: Sweet & Maxwell, 2017) at para 18-003; John N Adams & Roger Brownsword, *Key Issues in Contract* (Edinburgh: Reed Elsevier, 1995) at 125.

12 Smith, "Third Party Rule", *supra* note 11 at 644.

13 *Dunlop Pneumatic Tyre v Selfridge and Co Ltd*, [1915] ACT 847 at 853 (HL) [*Dunlop*].

14 See *Greenwood*, *supra* note 10; *Pickford*, *supra* note 6; *Sears v Tanenbaum*, 1969 CanLII 35 (ONCA); *Van Hemelryck v New Westminster Construction & Engineering Co*, 1920 CanLII 548 (BCCA).

15 *Pickford*, *supra* note 6 at 43–44.

they were not parties to it, even though the clause explicitly exempted the liability of "any stevedores used or employed by the Carrier."[16]

The privity doctrine has been strongly criticized by law reform bodies,[17] and it has been subjected to statutory exceptions in England[18] and Canada.[19] New Brunswick and Quebec, for example, allow by statute the enforcement of contracts by third parties in certain circumstances.[20] But in other provinces, the enforcement of Himalaya clauses by third parties continues to be a matter of common law. For this reason, I proceed to examine below the various common law tests used by courts to allow the enforcement of Himalaya clauses vis-a-vis privity in shipping cases. These tests include agency, sub-bailment, and the "principled exception."[21]

2.1 Agency and sub-bailment

In shipping, courts have used two devices to avoid the privity doctrine and permit third parties to enforce contractual provisions: agency or sub-bailment on terms.

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16 *Calkins & Burke Ltd v Far Eastern Steamship Co* (1976), 72 DLR (3d) 625 at 631, 635, 1976 CanLII 1177 (BCSC) [*Calkins*].

17 Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: OLRC, 1987); Law Reform Commission of Nova Scotia, *Privity of Contract (Third Party Rights)* (Halifax: LRCNS, 2004); Manitoba Law Reform Commission, *Privity of Contract* (Winnipeg: MLRC, 1993); UK, Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) [UK Law Report No 242].

18 See *Contracts (Rights of Third Parties) Act* 1999, c 31, ss 1, 6(5). See also *Explanatory Notes to the Contracts (Rights of Third Parties) Act* 1999, c 31 at para 26. For a comparison of the English statute with Canadian common law, see Mary Ppasiou, "Finding a Home: The Development of Himalaya Clauses in England and Canada" (2022) 7:1 Cambridge L Rev 86.

19 See e.g. *Insurance Act*, RSO 1990, c I.8, ss 195, 244, 258(1); *Insurance Act*, RSA 2000, c I-3, s 665; *Insurance Act*, RSBC 2012, c 1, s 64; *The Insurance Act*, CCSM c I-40, s 172(1); *Mortgages Act*, RSO 1990, c M.40, s 20; *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, s 26; *Bills of Lading Act*, *supra* note 4, s 2; *Mercantile Law Amendment Act*, RSO 1990, c M.10, s 7.

20 See *Law Reform Act*, RSNB 2011, c 184, s 4 and art 1444 CCQ respectively.

21 Another test that operates to avoid the effect of the privity doctrine is trust, but it has not been applied as such in shipping cases. Trust is considered to be an "exception" to privity in that it permits a (third party) beneficiary to enforce the agreement between settlor and trustee and claim the benefit of the trust, even though there was no promise or consideration to and from the beneficiary. See John McCamus, "Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?" (2001) 35:2 Can Bus LJ 173 at 184–185; Jason W Neyers, ed, *Fridman's The Law of Contract in Canada*, 7th ed (Toronto: Carswell, 2024) (forthcoming) at ch 5 "Privity" [Neyers, *Fridman's*].

In agency, a third party can enforce a provision contained *in the contract between the carrier and cargo owner* if it is shown that the carrier acted as the third party's agent when formulating the contract of carriage with the cargo owner.[22] Canadian courts have nonetheless set some strict requirements to prove agency:

(a) The contract must clearly indicate that the contracting parties intended to create an agency relationship between the carrier and the third party in relation to the Himalaya clause.[23]

(b) The third party must authorize or require the carrier to stipulate the Himalaya clause in its contract with the cargo owner,[24] or alternatively, the third party must ratify the Himalaya clause within reasonable time after the contract is made and before its performance.[25]

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[22] This was established by Lord Reid in *Midland*, *supra* note 6 at 474 in which he said that:

> I can see a possibility of success of the agency argument if (first) the Bill of Lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the Bill of Lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

This is known as the "agency test" and its requirements were first met in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)*, [1975] AC 154 (PC) at 166 [*Satterthwaite*]. See also *Owners of the Borvigilant v Owners of the Romina G*, [2003] EWCA Civ 935 (CA) at paras 12–13. The agency test was applied by the Supreme Court of Canada in *ITO*, *supra* note 6 where it was found that the carrier entered into the contract of carriage with the cargo owner as an agent of the third party terminal operators. For a discussion whether the agency relationship creates a unilateral or bilateral contract between the cargo owner and the third party for which the latter provides consideration by performing the services, compare *Satterthwaite*, *supra* at 167–168 with Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120:2 Law Q Rev 292 at 304.

[23] See *Calkins*, *supra* note 16 at 635; *Braber Equipment Ltd v Fraser Surrey Docks Ltd*, 1998 CanLII 3946 at paras 29–30 (BCSC)[*Braber*].

[24] See *Saint John Shipbuilding & Dry Dock Co Ltd v Kingsland Maritime Corp* (1981), 1981 CanLII 2795 at paras 10, 12 (FCA) [*Saint John Shipbuilding*]; *Kodak v Racine Terminal (Montreal) Ltd*, 1999 CanLII 7750 at paras 10, 16 (FC) [*Kodak*].

[25] See *Sears Ltd v Ceres Stevedoring Co (The Tolya Komar)* (1988), 88 NR 296 (FCA) [*Ceres*]; *Fibreco Pulp Inc v Star Dover (The)*, 1998 CanLII 7356 at para 21 (FC) [*Fibreco*]; *Bombardier Inc v Canadian Pacific Ltd*, [1988] OJ No 1807 (HCJ) [*Bombardier*].

(c) The third party must provide consideration for the Himalaya clause to the cargo owner by actually rendering the services.[26]

Due to these strict requirements, the agency device has been found to be inapplicable in most maritime cases.[27]

In a sub-bailment on terms situation, a third party can enforce a provision contained *in its own contract with the carrier* against the cargo owner if it is shown that: (a) the third party (sub-bailee) voluntarily took possession of goods for transport while knowing that the goods were the property of the cargo owner (bailor),[28] and (b) the cargo owner had consented to the subcontracting of the carriage by the carrier (bailee).[29] Thus, in cases where a sea carriage contract included a subcontracting clause, pursuant to which the cargo owner authorized the carrier to subcontract the whole or part of the carriage "on any terms," Canadian courts have been prepared to accept that the cargo owner was bound by any limitation clause contained in the subcontract.[30]

These two devices work around the privity doctrine because they establish a special relationship between the cargo owner and a third party. This relationship is premised on and limited by principles of authority (in agency) and consent (in sub-bailment), which also explains why the third party should be able to enforce contractual provisions against the cargo owner. However, due to the strict requirements and limited scope of agency and sub-bailment, the Supreme Court of Canada, in two of its decisions during the 1990s, decided to further relax the privity doctrine by introducing a wholly new exception, named the "principled exception."

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26 See *ITO*, *supra* note 6 at 789–90. See also *Satterthwaite*, *supra* note 22 at 168.

27 See e.g. *Ceres*, *supra* note 25; *Saint John Shipbuilding*, *supra* note 24 at paras 11–12; *Fibreco*, *supra* note 25 at para 21; *Calkins*, *supra* note 16 at 635; *Greenwood*, *supra* note 10 at 238–239; *Kodak*, *supra* note 24 at para 33; *Braber*, *supra* note 23 at paras 28, 31. Indeed, the only success of the agency test in the maritime context was *ITO*, *supra* note 6 at 789–90.

28 *Pioneer Container*, *supra* note 6 at 14–15; Halsbury's Laws of Canada, *Commercial Law I*, "Bailment" (I.1.(1)) at HBL-1 "Accepted Definition", (III.4.(6)) at HBL-62 "Limitation of liability clause" (2020 Reissue).

29 *Morris v CW Martin & Sons*, [1966] 1 QB 716 at 729–730; *Pioneer Container*, *supra* note 6 at 16–17; *Punch v Savoy's Jewellers Ltd* (1986), 54 OR (2d) 383 at paras 27–29 (ONCA); *Mason v Westside Cemeteries Ltd*, 1996 CanLII 8113 at para 21 (ONSC). For the duty of the carrier to bring the terms of the subcontract to the cargo owner's notice, see *Promech Sorting Systems BV v Bronco Rentals & Leasing Ltd*, 1995 CanLII 11033 at paras 22, 25 (MBCA).

30 See *Canadian Pacific Railway Co v Boutique Jacob Inc*, 2008 FCA 85 at para 51 [*Boutique*]; *Cami Automotive, Inc v Westwood Shipping Lines Inc*, 2009 FC 664 at paras 64–66 [*Cami*]; *Panalpina*, *supra* note 8 at para 85.

2.2 The principled exception

In the Supreme Court of Canada's unanimous decision in *Fraser River* in 1999, Justice Iacobucci established a new exception to privity as an "incremental change" to the common law "necessary to address emerging needs and values in society."[31] This exception originated from the earlier decision of the Supreme Court of Canada in *London Drugs Ltd v Kuehne & Nagel International Ltd* in 1992, also delivered by Justice Iacobucci, which allowed employees to enforce a limitation clause contained in a contract between their employer and a customer by reason of the identity of interest between employer and employee.[32] The decision in *Fraser River* essentially converted this limited *jus tertii* arising from the employer-employee relationship into a general exception to privity applicable to all kinds of contracts,[33] including contracts for the carriage of goods by sea.

The exception established in *Fraser River* provides that a third party can acquire a right to enforce a contractual provision subject to the following test:

> (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and
>
> (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?[34]

This test focuses exclusively on the contracting parties' intentions: the first requirement asks whether the contracting parties *intended* to confer the benefit of certain contractual provisions on a third party, and the second requirement asks whether the contracting parties *intended* to regulate the third party's activities by their contract. Thus, the central question is whether, on the proper construction of the contract, the third party was an *intended* beneficiary.

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31 *Fraser River*, *supra* note 2 at para 44.

32 *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 441, 444–446, 1992 CanLII 41 (SCC) [*London Drugs*]. In this case, the court found that the employees were implied beneficiaries of the limitation clause because the term "warehouse*man*" in the clause could be reasonably read as "warehouse*men*."

33 *Fraser River*, *supra* note 2 at paras 31–32.

34 *Ibid* at para 32.

Some other basic features of the principled exception, as explained in *Fraser River* and *London Drugs*, are that:

(a) The contracting parties cannot vary or modify their contract without the third party's permission after the third party's rights have "crystallized" at some undefined moment in time;[35]

(b) The contracting parties cannot impose obligations or liabilities on third parties;[36] and

(c) Third parties cannot use the principled exception to sue a contracting party (as a "sword") but only to defend themselves against the claims brought by a contracting party (as a "shield").[37]

The test of the principled exception is significantly simpler than other devices that work around privity. For example, in contrast to sub-bailment on terms, the principled exception does not require the cargo owner to consent to the subcontracting of carriage. And, in contrast to agency, the principled exception does not require third parties to authorize the carrier to obtain a Himalaya clause for their benefit, nor to ratify the clause before performing the services.[38] In fact, as will be discussed in the next Section, courts have recently asserted that the principled exception does not require third parties to know about the existence of the Himalaya clause at the time of performing the services. Finally, the principled exception does not require third parties to provide consideration for the benefit of the Himalaya clause.[39] Overall, the requirements of the principled exception are less stringent in that the recognition of third-party rights in a contract ultimately and solely depends on the intention of the contracting parties to confer a benefit.

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35 *Ibid* at para 36. *Contra* the dictum of Justice Iacobucci in *London Drugs*, *supra* note 32 at 440.

36 *Fraser River*, *supra* note 2 at para 22; *London Drugs*, *supra* note 32 at 416.

37 *Fraser River*, *supra* note 2 at para 37; *London Drugs*, *supra* note 32 at 440–441, 450. But more recent cases suggest that the principled exception can be also used as a sword, see *Brown v Belleville (City)*, 2013 ONCA 148 at paras 110–111 [*Belleville*]; *1196303 Ontario Inc v Glen Grove Suites Inc*, 2015 ONCA 580 at paras 102–103 [*Glen Grove*]; *Li v Piao*, 2019 BCSC 488 at paras 78–80 [*Li*]. For a discussion, see Neyers, *Fridman's*, *supra* note 21 at ch 5.

38 See *Valmet Paper Machinery Inc v Hapag-Lloyd AG*, 2002 BCSC 868 at paras 45, 51–54 [*Valmet*]; *Fraser River*, *supra* note 2 at para 12.

39 See *Fraser River*, *supra* note 2 at para 13. Contra *Satterthwaite*, *supra* note 22 at 167; *ITO*, *supra* note 6 at 789–90.

2.3 The enforcement of Himalaya clauses post-Fraser River

The enforcement of Himalaya clauses following the decision in *Fraser River* shows, in the words of Justice Fullagar, "a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence—an anxiety which refuses to be baulked even by so well-established a general doctrine as that of *Tweddle v. Atkinson.*"[40] Indeed, following the relaxation of the privity doctrine in *Fraser River*, courts have avoided the question of *why*, in principle, third parties deserve contractual protection in the circumstances. By contrast, they have been ready to allow the enforcement of Himalaya clauses by third parties who did not authorize, ratify, rely, or otherwise know about the clause at the time of performing the services in an attempt to give effect to the parties' intentions. There are four cases that illustrate this phenomenon.

First, in 2002, the Supreme Court of British Columbia in *Valmet Paper Machinery Inc v Hapag-Lloyd AG* was prepared to allow truckers to enforce a Himalaya clause in the contract of carriage.[41] In this case, the cargo owner contracted with a freight forwarder to arrange for the carriage of goods from Finland to British Columbia; the freight forwarder subcontracted with an ocean carrier for the carriage of goods by sea; the ocean carrier subcontracted with two truckers for the carriage of goods by road; and the cargo was damaged during road carriage because it fell off of the trailer unit. The cargo owner sued the truckers for damages. The truckers claimed they could limit their liability by enforcing a Himalaya clause in the bill of lading between the freight forwarder and the ocean carrier. The clause provided that "no claim … shall be made against any Person whomsoever by whom the Carriage is performed or undertaken (including all Sub-Contractors of the Carrier)."[42] The court refused to allow the truckers to enforce the Himalaya clause because the bill only applied to the period of sea carriage.[43] However, the court proceeded to examine whether the clause would be enforceable if the bill also covered the period of road carriage (i.e., if it was one of multimodal transport).[44] If that was the case, the court said that the *Fraser River* exception would apply since the Himalaya clause clearly showed the parties' intention "to limit the liability of all parties who participated in loading, unloading, and carriage of the [goods] during the transport covered by it," including

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40 *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*, [1957] 95 CLR 43 at 71 (HCA).

41 *Valmet*, *supra* note 38.

42 *Ibid* at para 39.

43 *Ibid* at paras 17, 37.

44 *Ibid* at para 38.

those third parties who performed services in Canadian highways.[45] The court also said that the fact that the truckers "were not parties to the Bill of Lading; indeed, at the time of the accident, they knew nothing about it"[46] or the fact that the truckers did not ratify the Himalaya clause before the damage occurred,[47] does not bar the enforcement of a Himalaya clause by an intended beneficiary.

Second, in 2008, the Federal Court of Appeal in *Boutique Jacob Inc v Canadian Pacific Railway Co* allowed a rail carrier to enforce a limitation of liability clause in a bill of lading by operation of a Himalaya clause therein.[48] In this case, the cargo owner retained a freight forwarder to arrange for the carriage of goods from Hong Kong to Montreal; the freight forwarder retained an ocean carrier for the carriage of goods by sea to Vancouver; the ocean carrier retained a rail carrier for carriage of goods by rail to Montreal; and the goods were damaged in rail transit due to a train derailment. The cargo owner sued the rail carrier for damages. The rail carrier claimed the benefit of a limitation of liability provision in the bill between the cargo owner and the freight forwarder and the bill between the freight forwarder and the ocean carrier because these bills contained a Himalaya clause which provided that "[e]very servant or agent or sub-contractor of Carrier shall be entitled to the same rights, exemptions from liability, defences, and immunities in which Carrier is entitled."[49] The court cited *Fraser River* in support of the view that Himalaya clauses are generally "legally binding" in Canada "notwithstanding the fact of a third-party's ignorance of the existence of a clause granting it a benefit at the time of performance of its obligations under a contract,"[50] and that in any event the cargo owner "knew or ought to have known that the railway portion of the carriage might be performed by a sub-carrier."[51] Thus, the court seems to have been satisfied that the language of the Himalaya clause was intended to cover rail sub-subcontractors and their inland operations.

The Federal Court in *Timberwest Forest Corp v Pacific Link Ocean Services Corp* adopted the same reasoning in 2008, where the goods were

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45 *Ibid* at paras 52, 55.

46 *Ibid* at para 41.

47 *Ibid* at paras 52, 54.

48 *Boutique*, *supra* note 30 at para 59. The court held that the rail carrier could alternatively limit its liability on the basis of sub-bailment on terms (see *ibid* at paras 29–30). This decision was later affirmed in *Cami*, *supra* note 30. For a similar approach taken in the United States, see *Norfolk Southern Ry v James N Kirby Pty Ltd*, 543 US 14 (2004) [*Kirby*].

49 *Boutique*, *supra* note 30 at paras 23, 51.

50 *Ibid* at para 24, citing *Fraser River*, *supra* note 2.

51 *Boutique*, *supra* note 30 at para 52.

lost during carriage from British Columbia to California.[52] The issue, in this case, was whether certain third parties, such as the carrier, the charterer of the tug and barge, the master of the tug and a stevedore, were entitled to enforce a waiver of subrogation clause contained in a marine cargo insurance policy between the cargo owner and its insurer. In applying the decisions in *London Drugs* and *Fraser River* to the facts, the Federal Court concluded that the requirements of the principled exception were made out since the third parties were mentioned by name or class in the policy and were performing the very services provided for in the contract of carriage when the loss occurred.[53] Thus, in the court's view, the third parties could enforce the waiver in their own right "notwithstanding that [they] had not required [the cargo owner] to have such a clause inserted and notwithstanding that [they] knew nothing of the insurance policy until after the loss."[54]

Finally, in 2019, the Federal Court in *Panalpina* allowed third parties to enforce a time-bar provision in the contract of carriage via a Himalaya clause.[55] The cargo owner, in this case, retained a freight forwarder to arrange for the transportation of cargo from Quebec to Newfoundland; the freight forwarder then retained stevedores for the storage of the cargo at the port terminal pending shipment and a carrier for the transportation of the cargo by sea. During the discharge operations, the cargo owner noticed that the cargo was damaged, and more than a year later, they sued both the stevedores and the ocean carrier for damages in negligence. These third parties argued that they could enforce a nine month limitation period contained in the freight forwarding service agreement by operation of a Himalaya clause, which provided that the conditions of carriage also apply "whenever any claim is made against any employee, agent or independent contractor" employed by the carrier "to perform any transport or related service."[56] The court, by citing *Boutique*, explained that Himalaya clauses are "well recognized terms in transport contracts" and "they are enforceable by the courts notwithstanding a third party's complete ignorance of the existence of a clause granting it a benefit at the time of the performance of its own contract."[57] The court further explained that the effect of the Himalaya clause is that every participant in the carriage of goods, "whether they are explicitly named [in the contract]

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52 *Timberwest*, *supra* note 7.

53 *Ibid* at paras 50, 58, 64.

54 *Ibid* at para 50.

55 *Panalpina*, *supra* note 8. The court also hinted that the enforcement of the contract by the third parties could alternatively be justified on the doctrine of sub-bailment on terms (*ibid* at para 85).

56 *Ibid* at para 77.

57 *Ibid* at para 80.

or simply an agent or sub-contractor [of the carrier], is entitled to benefit [from the contract]."[58]

These cases follow the position taken by the Supreme Court in *Fraser River* that a third party may be able to enforce a contract "notwithstanding the doctrine of privity" in order to give effect to the parties' intentions.[59] Indeed, the courts in these cases permitted third parties to enforce a Himalaya clause in the contract of carriage because, on a proper construction of the contract, the parties intended to extend a benefit to them. It was not relevant in the judicial analysis whether the third parties were in a special relationship with the carrier or whether they relied on or knew about the Himalaya clause at the time of performing the carriage. It follows that, by operation of the *Fraser River* exception, the parties' intention to confer a benefit is all that is required to generate third-party rights in a contract.

3. The Doctrinal Problem

In this Section, I argue that enforcing Himalaya clauses post-*Fraser River*, as evidenced by the cases examined previously, reveals a doctrinal problem. The problem is that the parties' intention to confer a benefit on a third party, as the sole basis of the *Fraser River* exception, is not a suitable test for recognizing third-party rights because it leads to incoherence in Canadian contract law. This is based on three important claims: (1) intention swallows the whole of the doctrine of privity, contrary to the court's intention to create a "narrow exception"; (2) intention weakens the bargain theory as the justifying theory of contract law; and (3) there are no good reasons for offering such a wide protection to third parties in shipping cases. I proceed to make these claims below.

3.1 Intention abrogates privity

The first claim is that intention abrogates the whole privity doctrine, contrary to the intention of the Supreme Court of Canada in *Fraser River* to create a limited exception.[60] It is clear that the court in *Fraser River* did not intend to abolish privity but merely saw itself as creating a "narrow

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58 *Ibid* at para 81.

59 *Fraser River*, *supra* note 2 at paras 34, 42.

60 For similar arguments, see Jason W Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52:4 McGill LJ 757 at 760, 769 [Neyers, "Explaining the Principled Exception"]; Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 225, 235; Stephen Waddams, "Modern Notions of Commercial Reality and Justice: Justice Iacobucci and Contract Law" (2007) 57:2 UTLJ 331 at 334–335; Jason Brock, "A Principled Exception to Privity of Contract: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*" (2000) 58:1 UT Fac L Rev 53 at 60, 70.

exception" to it.[61] The court noted that the relaxation of the established privity doctrine in the circumstances is an "incremental change to the common law rather than a wholesale abdication of existing principles"[62] and that such an abdication "would result in complex repercussions that exceed the ability of the courts to anticipate and address."[63] The court further explained that any major reform of the privity doctrine should be introduced by the legislator and not by the courts.[64] Nevertheless, the court chose not to justify the new test by referencing one of the existing exceptions to privity.[65] Instead, it took a "more direct approach" to determine whether privity should be relaxed in the circumstances.[66] However, using intention as the basis of the new test does not reflect the court's rationale.

As explained, privity provides that a contract cannot confer rights or impose obligations to persons other than its parties. Turning back to the decision in *Dunlop*, the leading privity case, it was established that the "law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right … cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."[67] The intention-based test of the *Fraser River* exception directly contradicts this premise by allowing the creation of third-party rights by contract (i.e., by the Himalaya clause). Thus, it is not a limited exception to privity (such as one created out of a special relationship, like agency or sub-bailment), but in reality, it overrides the heart of the doctrine.

Furthermore, the intention-based test is not narrow since it does not place any limits on the scope of the *Fraser River* exception. *Any* third-party beneficiary may be able to enforce the contract. For example, the exception is no longer restricted to beneficiaries who are employees, as it was originally envisioned by the Supreme Court in *London Drugs*,[68] nor to beneficiaries who authorized, ratified, relied on, or otherwise knew about the Himalaya clause before the loss or damage occurred. In other words, intention does not distinguish between categories of beneficiaries that may be entitled to enforce a contract, as other exceptions to privity do.

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61 *Fraser River*, *supra* note 2 at para 37. See also *London Drugs*, *supra* note 32 at 450.

62 *Fraser River*, *supra* note 2 at para 30.

63 *Ibid* at para 43. See also *London Drugs*, *supra* note 32 at 437.

64 *Fraser River*, *supra* note 2 at para 43. See also *London Drugs*, *supra* note 32 at 436–437.

65 *Fraser River*, *supra* note 2 at paras 25, 27.

66 *Ibid* at para 27.

67 *Dunlop*, *supra* note 13 at 853. The court clarified that a third party right may be nonetheless created by way of another special relationship, such as trust or agency (*ibid*).

68 *London Drugs*, *supra* note 32 at 441, 444–445, 452.

Another reason why intention is not a narrow test is that it fails to explain some central limiting features of the *Fraser River* exception, such as why the contracting parties are not free to modify their contract without the permission of a third-party beneficiary or why third parties can only use the exception as a "shield" and not as a "sword."[69] If the parties' intention is the sole requirement for the recognition of third-party rights, then what prevents the parties from contracting out of these limiting features?

Intention also fails to explain why the contracting parties are not free to impose obligations on third parties.[70] If the parties' intention can create contractual rights, then why can it not foist burdens on third parties? This contradiction is illustrated by the fact that, while a third party is treated as a party to the contract of carriage for the purpose of obtaining the benefit of a Himalaya clause, a third party is not treated as a party for the purpose of being contractually *liable* to the cargo owner. The same goes for forum selection clauses. While Canadian courts accept that a third party may be entitled to enforce a forum selection agreement against a signatory if the parties intended to confer such benefit,[71] a third party is not bound to comply with a forum selection agreement unless it assented to it.[72] This was exactly the concern of Justice Crompton in *Tweddle v Atkinson* as early as 1861 in stating that "it would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."[73] Given that a contract is a private relationship that creates correlative rights and duties for the parties to it, a third party who wishes to become part of this relationship by asserting a right to enforce the contract could *eo ipso* be subject to a duty under it.[74] In this sense, privity also protects third parties from being subject to burdens. But this rights/duties distinction is

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69 Neyers, "Explaining the Principled Exception", *supra* note 60 at 768–769. Indeed, some courts have been ready to accept that the principled exception may be used as a sword, see *Belleville*, *supra* note 37; *Glen Grove*, *supra* note 37; *Li*, *supra* note 37.

70 Neyers, "Explaining the Principled Exception", *supra* note 60 at 768.

71 *Baran v Pioneer Steel Manufacturers Ltd*, 2021 BCSC 491 at para 92; *Landex Investments Co v John Volken Foundation*, 2008 ABCA 333 at para 9. Contrast with the earlier English case of *The Mahkutai*, [1996] AC 650 (PC) [*Mahkutai*] where Lord Goff prohibited the third-party shipowners from enforcing an exclusive jurisdiction clause via a Himalaya clause in the contract of carriage. He explained that, even if the shipowners were explicitly named in the Himalaya clause as intended beneficiaries, they would not be able to enforce the clause because exclusive jurisdiction clauses embody a mutual agreement between the contracting parties, with mutual rights and obligations, and not a limitation included in the contract for the benefit of third parties.

72 *T Co Metals LLC v Federal Ems (Vessel)*, 2012 FCA 284 at paras 86, 104; *Aldo Group Inc v Moneris Solutions Corp*, 2013 ONCA 725 at paras 44, 52.

73 *Tweddle*, *supra* note 10 at 398.

74 Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA: Harvard University Press, 2019) at 79–80.

not justified under the intention-based test of the *Fraser River* exception and consequently the interests of third parties in a contract are not balanced. For these reasons, intention does not offer a limited exception to the privity doctrine but swallows many of its fundamental aspects.

3.2 Intention abrogates bargain

The second claim is that intention weakens the bargain theory of contract as the underpinning basis of promissory liability.[75] If we were to accept that bargain is the justifying theory of the law of contract in Canada, then the test of the *Fraser River* exception should respect and be consistent with the idea of contract as bargain so as to treat like cases alike and promote legal certainty in transactions.

Viewed as a bargain, a contract is a private affair between parties who have exchanged offer, acceptance, and consideration.[76] The requirements of offer, acceptance, and consideration are essential in establishing a contract under the bargain theory because they work fully in tandem to produce a two-sided promissory relationship under which each party reciprocally and mutually moves something of value to the other.[77] Thus, where A makes an offer, and B accepts and gives something as a price for the offer, then B may have a right to enforce the resulting contract against A.[78] In the absence of mutually inducing offer, acceptance, and consideration, B cannot acquire a right in contract against A, even if A intended to confer a benefit on B.[79]

The intention-based test of the *Fraser River* exception clearly does not fit in with the bargain theory since it replaces the requirements of

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75 For similar arguments, see Peter Kincaid, "Privity and Private Justice in Contract" (1997) JCL Lexis 7 at 30 [Kincaid, "Privity"]; Peter Kincaid, "Third Parties: Rationalising a Right to Sue" (1989) 48:2 Cambridge LJ 243 at 243, 257; Catherine Mitchell, "Searching for the Principles behind Privity Reform" in Peter Kincaid, ed, *Privity: Private Justice or Public Regulation* (Burlington: Ashgate/Dartmouth, 2001) 104 at 124.

76 Kincaid, "Privity" *supra* note 75 at 29–30, 33 (referred to as promise and exchange, or privity and consideration); Horst K Lucke, "Striking a Bargain" (1962) 1:3 Adel L Rev 293 at 293–295.

77 Benson, *supra* note 74 at 101. For a theoretical discussion of offer, acceptance, and consideration in contract formation, see Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), Ch 5 [Smith, *Contract Theory*]; Benson, *supra* note 74 at 40–47, 101–110.

78 Kincaid, "Privity", *supra* note 75 at 34–35.

79 *Ibid* at 34. As it was explained by Stephen Smith, where the traditional contract formation rules are not met, the parties will not have created a contract, even if they sign a document stating "we have a legally binding contract" (Smith, "Third Party Rule", *supra* note 11 at 648). See also Benson, *supra* note 74 at 117–121.

offer, acceptance, and consideration with the requirement of intention. This creates inconsistency between the general law of contract and the law relating to third parties in Canada. While intention is insufficient to generate contractual rights between two parties, it is sufficient for third parties by operation of the *Fraser River* exception. But why are third parties deserving of a different test for the recognition of contractual rights? Is it not unfair that a party is required to prove offer, acceptance, and consideration in order to enforce the contract, but third parties are only required to show that they were intended beneficiaries? Indeed, the intention-based test places third parties in a more favourable position than the actual parties in obtaining contractual rights, and it also undermines the role of offer, acceptance, and consideration as essential elements of a bargain. However, the issues of inconsistency were not given much weight in *Fraser River*, and they went unnoticed in the subsequent shipping cases. Thus, the current basis of the *Fraser River* exception weakens the bargain as a coherent and organizing theory of contract law.

3.3 No good reasons for offering wide protection to third parties in shipping

The third claim is that there are no good reasons for offering such wide protection to third parties in shipping cases. As others have noted, the focus of the *Fraser River* exception on the parties' intention misses what is really important; the important question is not whether the language of the contract can be twisted or wrung out to show an intention to confer a benefit, but whether there are good reasons for protecting the third party in the circumstances.[80] Put differently, third-party protection is not about contract interpretation but rather it is about *why* the law should allow a third party to enforce the contract. Hence, in applying the *Fraser River* exception, it is vital to ask: why a negligent third party deserves contractual protection in the circumstances?

Giving effect to the parties' intention is commonly put forth by commentators who support the reform of the privity doctrine because, in their view, privity violates the parties' intention to confer a benefit on a third party.[81] However, this reason hardly applies in shipping cases. Prohibiting a third party from enforcing a contract does not frustrate the

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[80] Swan, Adamski & Na, *supra* note 60 at 223.

[81] See UK Law Report No 242, *supra* note 17 at paras 1.8, 3.1; Donal Nolan, "Reforming the Privity of Contract Doctrine" in Mads Andenas & Nils Jareborg, eds, *Anglo-Swedish Studies in Law* (Iustus Förlag, 1999) 288 at 293; Robert Flannigan, "Privity—The End of an Era (Error)" (1987) 103:4 Law Q Rev 564 at 582–583; Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No 242" (1996) LMCLQ 467 at 468. See also *Fraser River*, *supra* note 2 at paras 42–43; *Darlington Borough Council v Wiltshier Northern Ltd*, [1995] 1 WLR 68 (CA) at 76 (CA).

parties' intention since a contracting party can, in any event, enforce the contract for the benefit of the third party.[82] For example, if the cargo owner (A) brings an action against a third party (X) for lost goods, the carrier (B) is free to intervene in the action and enforce the Himalaya clause on behalf of X. In such a case, there is no privity issue since B is privy to the contract of carriage, and any intention to confer a benefit on X can be fulfilled by bringing a motion to stay A's action. If B nonetheless chooses not to intervene on behalf of X, it can be assumed that B has no interest in insisting on its original intention, and thus, there is no violation.[83]

Another potential reason for protecting third parties is to give effect to their expectations. Commentators who support the reform of the privity doctrine have often argued that privity produces injustice because it does not meet the third party's expectations.[84] However, expectation alone is insufficient to create third-party rights in contract. Just because X expects to enforce the Himalaya clause in the contract between A and B, it does not mean that the law should give effect to such expectation.[85] In fact, X's expectation may not always be legitimate or reasonable since a Himalaya clause is a promise made by A to B (as contracting parties), and not to X, and, as we have seen, X is often unaware of the existence of the clause when performing the carriage.[86] Moreover, there is not always an injustice in prohibiting X from enforcing the contract of carriage. In many cases, X is a sophisticated entity with experience in shipping and access to legal advice,[87] which means that alternative forms of protection against liability exist. For instance, where X is engaged by B to carry A's goods and X is neither a promisee, principal or sub-bailee, then X can mitigate the risk of liability either by obtaining insurance for loss or damage of cargo under

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82 Stevens, *supra* note 22 at 293.

83 *Ibid*. See also Neyers, "Explaining the Principled Exception", *supra* note 60 at 771.

84 See Nolan, *supra* note 81 at 292; Burrows, *supra* note 81 at 468; UK Law Report No 242, *supra* note 17 at para 3.2.

85 See Stevens, *supra* note 22 at 296; Kincaid, "Privity" *supra* note 75 at 14–16.

86 See Stevens, *supra* note 22 at 296 explaining that "it may be queried how deserving of sympathy a party who relies upon a promise made to someone else is. Such a person runs the risk that it will not be kept. The only party who has legitimate expectations generated by a promise is the promisee." Thus, unless the expectations of the third party were raised by way of promise or consideration (as in contract), authority or ratification (as in agency), consent (as in sub-bailment), reliance (as in estoppel), or any other special relationship, it is hard to justify the recognition of contractual rights. How can a third party reasonably expect to enforce a Himalaya clause if it does not even know whether such clause exists at the time of performing the carriage? The fact that courts allowed unaware third parties to enforce the contract (see cases examined in Section 3 above) supports the conclusion that expectation is not the most suitable explanation of the *Fraser River* exception.

87 See e.g. *Boutique*, *supra* note 30; *Panalpina*, *supra* note 8; *ITO*, *supra* note 6.

its control or by adding an indemnity provision in its own contract with B. If X chooses not to obtain any such protection, it will face the normal consequences of its negligence in being liable against A for cargo loss or damage. Therefore, courts should not be too quick to conclude that X will suffer an injustice if not allowed to enforce the contract according to its expectations.

Other reasons for third-party protection include the courts' desirability to give effect to "commercial reality" or "commercial practices," "risk allocation," "justice" and "fairness,"[88] or to preclude cargo owners from circumventing the contract by suing third parties in tort.[89] Nevertheless, like intention and expectation, these reasons also fail to justify the abdication of privity and bargain,[90] especially where alternative principles can be used to ensure third-party protection, such as agency or sub-bailment. The court in *London Drugs* admitted this point by saying that while the concepts of commercial reality and justice "may not, in themselves, justify doing away with the doctrine of privity, they nonetheless give a certain context" that supports a reform or relaxation of privity in relation to third party beneficiaries.[91]

So, the problem remains. The *Fraser River* exception lacks a justification that reconciles third-party protection with privity and bargain. Matters of coherence and doctrine are often neglected in commercial cases, especially in shipping cases, mainly because of the inevitable participation of third parties in the performance of carriage and the frequent inclusion of Himalaya clauses in bills of lading. While it is desirable to give effect to commercial realities and practices that surround the contract of carriage, this desirability should not abrogate established common law doctrines nor disrupt the coherence of the general law of contract. As Viscount Simonds put it, privity is an "elementary" principle of law and "[t]he law is developed by the application of old principles to new circumstances. Therein lies its genius."[92] Likewise, the *Fraser River*

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88 See *Fraser River*, *supra* note 2 at paras 25, 41; *London Drugs*, *supra* note 32 at 453; *Timberwest*, *supra* note 7 at paras 69, 75; *Valmet*, *supra* note 38 at para 53; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)*, [1981] 1 WLR 138 at 144, 146 (PC) [*Port Jackson*].

89 See *London Drugs*, *supra* note 32 at 445; *Mahkutai*, *supra* note 71 at 660–661; *Timberwest*, *supra* note 7 at para 69 citing *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd*, [1924] AC 522 (HL). See also Swan, Adamski & Na, *supra* note 60 at 224.

90 See Neyers, "Explaining the Principled Exception", *supra* note 60 at 774 for the argument that "commercial reality" (meaning the "reasonable expectations of business people when entering into various transactions") cannot explain the central limiting features of the *Fraser River* exception.

91 *London Drugs*, *supra* note 32 at 438–439.

92 *Midland*, *supra* note 6 at 467–468, citing *Dunlop*, *supra* note 13 at 853.

exception, as an incremental development of the law, should be able to reconcile the old principles of privity and bargain with modern shipping circumstances. Hence it calls for an alternative justification that permits the limited protection of third parties.

4. An Equitable Solution: Estoppel as the Basis of Fraser River

In this Section, I seek to show that there is a better justification for the *Fraser River* exception, which also addresses the problems of coherence discussed in Section 3. This justification is found in the equitable doctrine of estoppel. I argue that estoppel is the best explanation of the exception because it permits the limited protection of third parties in a way that respects the doctrines of privity and bargain.

Many scholars have sought an alternative justification for the exception created in *Fraser River*,[93] but only a few argued that such a justification can be found in estoppel. In particular, Bruce MacDougal and Jason Neyers argued that the decisions in *Fraser River* and *London Drugs* are best explained by estoppel.[94] On the one hand, MacDougal argued that the estoppel involved in those decisions is "promissory estoppel" because the third party was the promisee of an assurance, contained in a contract to which it was not privy, that the promisor would not bring claims against it.[95] On the other hand, Neyers argued that the estoppel involved in those decisions is "conventional estoppel" because the contracting parties and the third party shared an assumption arising from the contract that the former would not bring claims against the latter.[96]

Both promissory and conventional estoppel can generally justify the exception created in *Fraser River* since they both fall under the broader category of reliance-based estoppels.[97] Reliance-based estoppel does

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[93] See Stephen Waddams, "Breaches of Contracts and Claims by Third Parties" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 191; Jim LR Davis, "Privity and Exclusion Clauses" in Peter Kincaid, ed, *Privity: Private Justice or Public Regulation* (Burlington: Ashgate/Dartmouth, 2001) 284 at 306; Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57:2 UTLJ 269; Swan, Adamski & Na, *supra* note 60 at 226–229; Carlo Corcione, *Third Party Protection in Shipping* (New York: Routledge, 2020) at para 1.6.

[94] Bruce MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis, 2019) at para 3.142; Neyers, "Explaining the Principled Exception", *supra* note 60 at 781.

[95] MacDougall, *supra* note 94 at para 3.142.

[96] Neyers, "Explaining the Principled Exception", *supra* note 60 at 781, 786–787.

[97] For the view that conventional estoppel is in substance promissory estoppel relating to future performance, see Piers Feltham et al, *Spencer Bower: Reliance-Based*

not challenge privity or the bargain theory of contract.[98] This is because estoppel does not create new rights, but it prevents the enforcement of existing ones.[99] For example, when there is an assumption that a person (promisor) will not sue another person (promisee) and the promisee relied on the assumption to their detriment, the promisor will be stopped from suing. Similarly, where there is an assumption that the promisee will not be liable to the promisor for loss or damage of cargo, and the promisee relied on the assumption to their detriment, then the promisor will be stopped from enforcing their right to sue for loss or damage of cargo. Estoppel aims to protect the promisee's reliance in equity by avoiding the detriment that would follow if the promisor was allowed to go back on the assumption. As a result, an estoppel-based analysis does not slip into the discussion of whether a person exchanged an offer, acceptance, and consideration for the purpose of recognizing new contractual rights. Moreover, estoppel does not swallow the privity doctrine since it can only arise if the strict requirements of "common understanding, reliance and detriment"[100] are met and can only be used as a defence.[101] Since reliance-based estoppel offers a coherent and limiting test for third-party protection, Canadian courts can use either promissory or conventional estoppel to justify the exception created in *Fraser River*.

In the following analysis, however, I adopt Neyers' argument of "conventional estoppel" because it better explains the function of Himalaya clauses in the shipping context. For example, while promissory estoppel requires the parties to be in an existing legal relationship,[102] conventional estoppel does not.[103] It would arguably be more difficult to make out

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Estoppel, 5th ed (London: Bloomsbury, 2017) at para 1.15 [Feltham et al, *Reliance-Based Estoppel*].

98 On the assessment of interpretive theories of contract law by four criteria—fitness, coherence, morality, and transparency, see Smith, *Contract Theory*, *supra* note 77 at 7, 11. On coherence, see Allan Beever & Charles Rickett, "Interpretive Legal Theory and the Academic Lawyer" (2005) 68:2 Mod L Rev 320 at 334; Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 32–33.

99 Mary Ppasiou, "Promissory Estoppel" in Neyers, *Fridman's*, *supra* note 21 at ch 3a [Ppasiou, "Promissory Estoppel"]; Edwin Peel, ed, *Treitel on the Law of Contract*, 14th ed (London: Sweet & Maxwell, 2015) at para 3-088; MacDougall, *supra* note 94 at para 1.13.

100 *Wagman v Obrigewitsch*, 2010 SKQB 84 at para 67.

101 Ppasiou, "Promissory Estoppel", *supra* note 99; Neyers, "Explaining the Principled Exception", *supra* note 60 at 782–783; Smith, *Contract Theory*, *supra* note 77 at 240; Peel, *supra* note 99 at para 3-089.

102 *Canadian Superior Oil v Hambly*, [1970] SCR 932 at 938, 1970 CanLII 3 (SCC); *Atlantic Steel Buildings Ltd v The Cayman Group Ltd*, 1982 CanLII 5408 at para 23 (NSCA).

103 Conventional estoppel arises so long as there is an understanding *in the context of* an agreement or transaction, even if there is no contract between the parties (*Republic of India v India Steamship Co Ltd*, [1998] AC 878 at 913 (HL) [*India Steamship*];

this requirement in shipping cases since, at the time of entering into the contract of carriage (and thus agreeing to the Himalaya clause), the cargo owner is not in a pre-existing legal relationship with the third parties to be employed by the carrier. In fact, the cargo owner does not even know the identity or existence of the third parties at that time. Another reason for preferring conventional estoppel is that it only requires a mutual assumption by the parties, whereas promissory estoppel requires a clear promise or assurance intended to be binding.[104] Given that a Himalaya clause is, strictly speaking, a promise made by the cargo owner to the carrier (and not to the third party) and that it will not always be clear whether this promise was intended to be binding between the cargo owner and the third party, the clause is arguably best viewed as giving rise to a common *understanding* that the third party will not be liable to the cargo owner for loss or damage to cargo. This understanding is shared and communicated between the cargo owner and the third party through the carrier. Put otherwise, the tripartite relationship between the cargo owner, carrier, and third party may give rise to a convention that binds the cargo owner and the third party in equity.

4.1 The requirements of conventional estoppel

Conventional estoppel is a doctrine that holds parties to the facts or law they have assumed as the basis for their transaction.[105] The effect of convention estoppel is that:

> When parties have acted on the agreed assumption that a given set of facts is to be accepted, this prevents the other from questioning the truth of the statement of facts so assumed … In order to rely on the defence of estoppel by convention,

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MacDougall, *supra* note 94 at para 3.39). Moreover, conventional estoppel may arise by post-contractual conduct, e.g., where the parties have based their dealings on a mutual understanding as to a contract's proper interpretation and one party has detrimentally relied on that interpretation (*Le Soleil Hotel & Suites Ltd v Le Soleil Management Inc*, 2009 BCSC 1303 at para 358). See also MacDougall, *supra* note 94 at para 3.61 citing *1061403 BC Ltd v Canada Willingdon Holdings Ltd*, 2018 BCSC 1067. This fits the maritime context since the carrier may employ a third party long after the sea carriage contract is concluded, and therefore the understanding as to the applicability of the Himalaya clause is not made by the cargo owner and the third party at the same moment in time.

104 *Central London Property Trust Ltd v High Trees House Ltd*, [1947] KB 130 at 134 (HL); *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57, 1991 CanLII 58 (SCC). For the meaning of intention, contrast *Owen Sound Public Library Board v Mial Developments Ltd*, [1979] 26 OR (2d) 459 at 465, 1979 CanLII 1624 (ONCA) with *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para 21.

105 MacDougall, *supra* note 94 at para 3.1.

> a party must establish that they relied on the assumed set of facts to their detriment.[106]

In other words, when a party detrimentally relied on a shared assumption, the other party would be estopped from challenging the truth of that assumption. Conventional estoppel is an equitable tool in that one party is responsible for the other party's reliance on the shared assumption, and therefore, "it would be unjust to allow him to go back on the assumption."[107] The requirements of conventional estoppel have been laid out by the Supreme Court of Canada in *Ryan v Moore* as follows:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption.
>
> (2) A party must have conducted itself, i.e., acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered … since there has been a change from the presumed position.[108]

The first requirement is met when the parties are "of like mind" and "each is aware of the assumption of the other."[109] This means that the convention must be mutual and communicated between the parties. The convention is mutual when both parties understand and accept it as the basis of their relationship,[110] and the convention is communicated when there is a considerable degree of formality or conscious dealing[111] that "crosses the line"[112] between the parties. If the parties happen to share the same understanding, but there is no communication demonstrating

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106 *Adtronics Signs Ltd v Sicon Group Inc*, 2004 BCSC 1201 at para 151.

107 See *India Steamship*, *supra* note 103 at 913; Feltham et al, *Reliance-Based Estoppel*, *supra* note 97 at para 8.2.

108 *Ryan v Moore*, 2005 SCC 38 at para 59 [*Ryan*].

109 *Ibid* at paras 61–62.

110 *India Steamship*, *supra* note 103 at 913.

111 *Canacemal Investment Inc v PCI Realty Corp*, 1999 CanLII 6240 at para 35 (BCSC); *32262 BC Ltd v Companions Restaurant Inc*, 1995 CanLII 354 at para 18 (BCSC).

112 *Ryan*, *supra* note 108 at para 62.

that they know they shared an understanding, the first requirement is not met.[113]

The second requirement is met when a party changes its course of conduct in reliance on the convention. Reliance means that the convention has produced or strengthened a belief, and such belief caused an action.[114] Thus, reliance has two aspects: (a) the inner aspect, which requires a party to know, believe, and depend on the convention, and (b) the outer aspect, which requires a party to change its legal position, either by taking action or not taking action that it would otherwise have taken.[115] For instance, the fact that a party abstained from taking measures that it would otherwise have taken for its protection, security, or advantage, may be viewed as a change of position[116] because the party "did rest satisfied"[117] in the convention.

Finally, the third requirement is met when a party, due to the change of its legal position on reliance of the convention, will suffer some loss or detriment if the other party is allowed to abandon the convention.[118] The detriment may be any prejudice or cost a party suffered from its reliance on the convention.[119]

4.2 Conventional estoppel and Himalaya clauses

In this Section, I examine the application of the requirements of conventional estoppel to the shipping context. The relevant inquiry under an estoppel-based understanding of the *Fraser River* exception is whether the third party relied on a convention arising from the Himalaya clause to their detriment. As already mentioned, the result of this inquiry is not

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113 MacDougall, *supra* note 94 at para 3.75. See *HM Revenue & Customs v Benchdollar Ltd*, [2010] 1 All ER 174 at para 52 (Ch).

114 Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000) at 89.

115 *Ibid* at 89–90, 93. See Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford: Hart, 1999) at 41–42 (There is "an important distinction between *refraining or forbearing from acting* and merely *not acting*." Estoppel is established only when a party had been in a position to adopt a new course of action and had addressed its mind to the possibility of doing so but, on the basis of the assumption, did not).

116 Feltham et al, *Reliance-Based Estoppel*, *supra* note 97 at para 5.45.

117 *Knights v Wiffen*, (1870) LR 5 QB 660 at 666.

118 *Ryan*, *supra* note 108 at para 69.

119 MacDougall, *supra* note 94 at para 3.108 and cited authorities. For different forms of detriment, see Feltham et al, *Reliance-Based Estoppel*, *supra* note 97 at para 5.42. In the context of estoppel, detriment means "reliance loss" and not "expectation loss" (Cooke, *supra* note 114 at 96–97).

the enforcement of the clause by the third party but the prevention of the cargo owner from suing the third party for loss or damage of cargo.

For ease of reference, I will refer to the cargo owner as "A", to the carrier as "B", and to the third party, which seeks to establish estoppel, as "X".

1) Convention

For the first requirement of conventional estoppel, X must prove that there was a convention between itself and A, pursuant to which X would not be liable to A for loss or damage to cargo. The convention may arise from a Himalaya clause in the contract between A and B if A and X had a mutual understanding of the meaning and scope of the clause, and this understanding was somehow communicated between them before the performance of carriage. For example, the fact that A arranged for its own insurance for loss or damage to cargo[120] would support a finding that A and X shared an assumption that X would be exempted from liability.

As a first step, X must show that the language of the Himalaya clause could be reasonably read by itself and A as excluding X's liability for loss or damage to cargo. In this regard, the clause giving rise to the convention must be clear and unambiguous.[121] If the Himalaya clause is ambiguous, courts can use general rules of interpretation to determine whether A and X could have read the clause in a particular way. But the fact that the Himalaya clause is broadly drafted, or that A could have anticipated X to participate in the performance of carriage,[122] cannot by itself create a convention; something more is required to show that A and X read and accepted the Himalaya clause as the basis of their relationship or liability to each other. Moreover, X's subjective interpretation of the clause cannot create a convention.[123]

As a second step, X must show that the Himalaya clause was communicated by A through B. In cases where X is in a direct contractual relationship with B, the Himalaya clause may come to X's attention by its written or verbal dealings with B, i.e., X reads B's standard terms, or X requires B to stipulate for a Himalaya clause in its contract with A. However, in cases where X is not in a direct contractual relationship with

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120 *Valmet*, *supra* note 38 at para 35; *Kirby*, *supra* note 48 at 21.

121 *Low v Bouverie,* [1891] 3 Ch 82; Piers Feltham, Daniel Hochberg, & Tom Leech, *Spencer Bower: The Law Relating to Estoppel by Representation*, 4th ed (London: LexisNexis, 2004) at 187 [Feltham et al, *Estoppel by Representation*].

122 See *Boutique*, *supra* note 30 at paras 52, 55; *Panalpina*, *supra* note 8 at para 84.

123 MacDougall, *supra* note 94 at para 3.41; *1230995 Ontario Inc v Badger Daylighting Inc*, 2011 ONCA 442 at para 8.

B but was subcontracted by another third party, formal communication of the Himalaya clause will be more difficult to show.

2) Reliance

For the second requirement, X must prove that it relied on the convention arising from the Himalaya clause in a way that changed its conduct. As already mentioned, a finding of reliance requires X to know about the existence of the Himalaya clause before rendering the services. Thus, the fact that X chose not to arrange for its own insurance or indemnity against liability for loss or damage to cargo based on its knowledge of the Himalaya clause can amount to reliance. This is usually the case for employees who solely depend on their employer's protections.[124] In the case of independent contractors, the long-term relations between B and X,[125] or the fact that X demanded B to stipulate a Himalaya clause in its contract with A[126] or the fact that X authorized or ratified the Himalaya clause before rendering the services,[127] could support a finding of reliance. However, the fact that X entered into the transaction cannot amount to reliance without showing that X did so in dependence on the existence of the Himalaya clause.[128]

3) Detriment

For the third requirement, X must prove that it will suffer a detriment due to its reliance if A is allowed to avoid the effect of the Himalaya clause. The detriment may be the amount of damages that A will recover from X if A is not estopped from going back on the Himalaya clause. For example, if A is awarded damages against X for loss of cargo, and X had refrained from obtaining indemnity or insurance or any other security in reliance on the

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124 See *London Drugs*, *supra* note 32.

125 See *Bombardier*, *supra* note 25; *Satterthwaite*, *supra* note 22 at 164; *Port Jackson*, *supra* note 88.

126 See *ITO*, *supra* note 6 at 760–61 (clause 7 of the stevedoring contract); *Saint John Shipbuilding*, *supra* note 24 at paras 10, 12; *Kodak*, supra note 24 at paras 10, 26.

127 See *Midland*, *supra* note 6 at 474; *Ceres*, *supra* note 25; *Saint John Shipbuilding*, *supra* note 24 at paras 10–12; *Kodak*, *supra* note 24 at paras 10, 26; *Fibreco*, *supra* note 25 at para 21.

128 See *Keen v Holland*, [1984] 1 WLR 251 (CA) followed in *Wilson v Truelove*, [2003] EWHC 750 at para 23 (Ch); John McGhee, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, 2015) at 306; Feltham et al, *Estoppel by Representation*, *supra* note 121 at 187 (it is not the entry into a transaction that establishes estoppel, but the unfairness that would result if one party is allowed to resile from the convention); MacDougall, *supra* note 94 at paras 3.99–3.100 (for post-agreement estoppel, reliance will be some action or inaction after the agreement or transaction is already in place as a result of the convention).

Himalaya clause, X is in an inequitable position because it is liable for an amount that it could have planned for.

4) Ignorant third parties

Based on this analysis, estoppel would have likely prevented the third parties in *Boutique*, *Timberwest*, *Panalpina*, and *Valmet* from enforcing the Himalaya clause in the sea carriage contract. The fact that the third parties in those cases were completely ignorant about the existence of the Himalaya clause at the time of rendering the services could be taken to show that they did not rely on the clause. As already explained, without having knowledge of the existence of a clause or without demanding the carrier to obtain such a clause, a person cannot possibly act in reliance on that clause to their detriment. And since reliance is an essential element of estoppel, an ignorant third party cannot resist the cargo owner's claim. Moreover, the fact that the contract of carriage in *Boutique* and *Valmet* applied only to the period of sea carriage could be taken to mean that the parties could not have reasonably understood the Himalaya clause to cover land carriers.

But even if estoppel cannot justify the outcome in *Boutique*, *Valmet*, *Panalpina*, and *Timberwest*, the judgments need not be set aside so long as they can be explained by an alternative principle or exception to privity, such as agency or sub-bailment. Agency was not the analytical focus of these decisions, so it cannot be determined whether the third parties authorized or ratified the Himalaya clause before performing the services. However, the fact that the third parties were unaware of the existence of the Himalaya clause until after the loss or damage occurred would probably reject a finding of authorization or ratification. Sub-bailment was also not the analytical focus in *Valmet* and *Timberwest*, and it appears that there was no indication in the contract that the cargo owner consented to the subcontracting of the carriage. By contrast, in *Boutique* and *Panalpina*, the contract explicitly provided that the cargo owner approved the subcontracting on any terms;[129] therefore, these cases are more apt to be explained by principles of sub-bailment on terms.

Nevertheless, courts should also apply the requirements of sub-bailment with caution. The task of construing the *scope* of the cargo owner's consent to the subcontracting of carriage is a difficult one. In *Boutique*, it was held that the cargo owner was bound not only by the contract between the freight forwarder and the ocean carrier but also by the contract between the ocean carrier and the rail carrier (the sub-subcontract). In

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[129] *Boutique*, *supra* note 30 at para 51; *Panalpina*, *supra* note 8 at para 31. See also *Cami*, *supra* note 30 at para 66.

some cases, while it may be reasonable to say that the cargo owner agreed to the terms of its immediate bailee, it may be far-reaching to say that the cargo owner also agreed to the terms of a sub-bailee and to a chain of other downstream contracts. Again, as is the case with the *Fraser River* exception, courts must apply agency and sub-bailment in a manner that is consistent with their underlying rationales.

5. Conclusion

In this Article, I argued that the enforcement of Himalaya clauses in shipping cases subject to the *Fraser River* exception presents a doctrinal problem. As I explained in Section 3, the problem is that the intention-based test of the *Fraser River* exception abrogates the privity doctrine and the bargain theory of contract, creating incoherence in Canadian contract law. This problem is evidenced by the fact that courts in post-*Fraser River* cases allowed the enforcement of Himalaya clauses by third parties who did not know about the clause at the time of performing the carriage. Thus, the problem calls for an alternative justification of the exception that permits the protection of third parties in a limited set of circumstances and reconciles the enforcement of Himalaya clauses with privity and bargain. To that effect, I proposed in Section 4 that courts should adopt the doctrine of estoppel to justify, apply, and limit the *Fraser River* exception. Estoppel offers a principled and restrictive explanation for third-party protection in that only those third parties who detrimentally relied on the Himalaya clause can resist the cargo owner's claims. Therefore, an estoppel-based analysis resolves the doctrinal problem and ensures the coherence of Canadian contract law.