Up Where? The Ins and Outs of Moving Freight in All the Canadian Provinces (Eh?)

Canadian International Freight Forwarders Association

TIA CAPITAL IDEAS CONFERENCE
San Antonio Texas
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Freight Forwarders: Helping Canadians do business with the world

A HIGHER STANDARD, A PROFESSIONAL RESULT, A CIFFA FORWARDER
Do you currently move freight in Canada?
Do you currently move freight in Canada?
What is your biggest concern in expanding your business to move more Canadian freight?
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The In’s and Out’s of Freight Brokering in Canada: It’s the Wild West Up North

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The Wild West up North? Canada’s Two Regulations for Brokers in Ontario and Quebec and the role of U.S. regulations
1. The Ontario Trust Requirement
2. The Quebec Registration Requirement
3. Do U.S. Regulations apply up in Canada?

With Few Regulations or Statutory Protections, Cargo and Casualty Liability Can Be an Unpleasant Surprise

Contracts are a Broker’s Best Friend: The Key Provisions to Include or Exclude
The Wild West up North?
Canada’s Two Regulations for Brokers in Ontario and Quebec
and the role of U.S. regulations

1. The Ontario “Deemed Statutory Trust”
   - s. 191.0.1(3), Highway Traffic Act R.S.O. c. H-8
   - A person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator until the money is paid to the operator.
   - note the application to the generic definition of “a person”
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Don’t Let the (very) limited Regulation in Canada Fool You

• After de-regulation, the only legislated definition that applies to Transportation Intermediaries in Canada is:

  “a person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle ...”

• What does this mean?
  • “freight forwarders” are **not** regulated in Canada
  • no bonds, no licences, no formal status
  • In Canada: a freight forwarder = a freight broker = a load broker
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What does the deregulation mean for Brokers in Canada?

• Canadian broker and U.S. subsidiaries of a Broker have freedom in Canada to arrange for the movement, storage, and delivery of freight in Canada without the limitations imposed in the U.S.

• But, your customers have no assurance of your legitimacy, and no guaranteed protection such as a bond or even insurance.
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*Were You “Robbing Peter to Pay Paul”?*

The Consequences of Non-Compliance: Ontario Trust Fund Obligation

• Trust fund requirement in Ontario can be enforced by piercing the ‘corporate veil’
  with the result that officers and directors could be **personally** liable in accordance
  with ‘directing mind’ theory.

• Personal Involvement of Directors & Officers is key: “knowing receipt” vs.
  “knowing assistance” of trust fund obligation = personal liability, whereas simple
  status as an officer or director will likely not invoke personal liability.
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*When is it most likely a director or officer will be personally named in litigation in Ontario?*

- When a shipper hires a broker who hires a carrier
  ... with the carrier invoicing the broker who invoices the shipper.

- One more reason why an unpaid carrier (or collections agency such as Baxter Bailey) may aggressively pursue the non-compliant broker and personally name officers & directors in the lawsuit.

- Canadian law generally deems shipper who has paid a broker to have discharged any freight charge liability it may have had.
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2. The Quebec “Registration Requirement”

“An Act Respecting Owners, Operators and Drivers of Heavy Vehicles” CQLR c P-30.3.

15. The Commission shall establish and maintain a list of transport service intermediaries carrying on business in Québec. The list is public. The Commission shall also establish a file on each transport service intermediary who applies for registration.

• Only intermediaries entered on the list may provide such services.
• The expression “transport service intermediary” means any person who, for remuneration, acts directly or indirectly as an intermediary in a transaction between third persons the object of which is the transportation of persons or property by a heavy vehicle.

16. Every transport service intermediary must register or renew registration by filing an application with the Commission, in the form and tenor determined by the Commission, together with payment of the fees fixed by regulation of the Government.

• Where such a person fails to register or renew registration, any contract entered into by the person becomes without effect.
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What if ... you are not registered in the province of Quebec?

“An Act Respecting Owners, Operators and Drivers of Heavy Vehicles” CQLR c P-30.3.

Where such a person fails to register or renew registration, any contract entered into by the person becomes without effect.

• So, if you are a Broker doing business in Quebec, but are not registered, register as soon as feasible.
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3. Does the U.S. Regulatory regime even apply to Brokers in Canada?

*But What If....*

i. You operate as a load broker **in** the province of Ontario, but arrange shipments intended to travel **outside** of Ontario in whole or in part?
The Wild West up North?  
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But What If....

ii. You operate as a load broker outside of the province of Ontario, but arrange shipments intended to travel in Ontario in whole or in part?
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**But What If....**

iii. You operate as a load broker **outside** the province of Ontario, but you have a related division or office located **inside** the province of Ontario?
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But What If....

iv. You are a carrier and ‘double broker’ a load?
The Wild West up North?
Canada’s Two Regulations for Brokers in Ontario and Quebec and the role of U.S. regulations

But What If....

v. You are a carrier and you have an interline arrangement?
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But What If....

vi. You operate as a load broker in Canada, and you arrange shipments into, from or in the United States?
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The FMCSA requires Carriers to register!

• In November 2013, the Canadian Trucking Alliance (CTA) sought clarification from the FMCSA whether MAP-21 requirements apply to Canadian motor carriers and the various brokered freight movements that they might arrange (e.g. involving Canada to U.S., U.S. to U.S., U.S. to Canada routing), and whether a carrier’s brokerage operation must carry a separate registration number.

• Six months later, the CTA announced that the FMCSA requires carriers who engage solely in the brokering of freight from Canada to the U.S., between points within the U.S., and from the U.S. to Canada to register with FMCSA and to comply with the surety bond or trust fund requirement of $75,000.

• A broker who knowingly engages in inter-state brokerage operations without the required operating authority is liable to the United States for a civil penalty not to exceed $10,000 and can be held liable to any “injured third party” for a valid claim, without limitation.
Cargo/Casualty Liability: An Unpleasant Surprise

Load Broker Liability for Cargo Loss or Damage - “I don’t own a Truck. How can I be a Carrier!?!?”

Common Cargo-Related Pitfalls:

• Lack of regulation can lead to an unclear business model – the line between broker and carrier is blurred to suit risk appetite and/or insurance coverage.
• Brokers in Canada can wear ‘many hats’ leading to website ambiguity that you are or might be an asset-based performing carrier.
• Some brokers generate forms of bills of lading with the broker corporate logo.
• Are the logos worn by drivers the broker’s logo?
• Repercussions? Unsophisticated clients or plaintiffs can interchange the identity and role of the broker with that of the shipper and/or carrier.
Load Broker Pitfalls: Even If You Are Not a Carrier

Common Carrier-Selection Related Pitfalls:

• Shippers place onerous obligations on Brokers to select a reputable/reliable carrier

• Shippers require Brokers to demand alcohol and drug testing which complies with U.S. laws, not Canadian human rights laws

• Brokers are responsible for ‘screening’ for satisfactory safety rating and DOT / MC numbers (U.S.) and check related government websites
Warning Signs of a Rogue Carrier:

• Excuses for incomplete information, or change in information such as “we are in the course of moving offices”...
• Beware of doctored documents – if they look wrong, chances are they are wrong
• Is insurance really in effect?
  • Has the carrier paid any premiums?
  • What are the exclusions?
• Are there gaps in carrier authority history?
Create an Internal System to Protect Yourself – and Make it Part of Your Business Model!

• Create a checklist and require your sales people etc. to follow it every time.
• Require communication with shipper to verify who will be attending at pick up for the cargo
• Google Maps check to see if “carrier” actually has a terminal
• Verify if the carrier is actually on a load board?
• Check any noted difference in phone numbers between ‘carrier’ contacting you and carrier posted phone
  • (i.e. has someone compared these and noted the comparison?)
Cargo/Casualty Liability: An Unpleasant Surprise

Load Broker Liability for Casualty Claims

• While there are no Canadian cases setting the precedent for a broker to be found liable for casualty claims, the broad legal regimes of tort and principal & agency laws apply.

• Depending upon the amount of control by the Broker, a motor carrier may be an “agent” of the Broker.
  • In the U.S. case, Stratton v. Wallace 2014 U.S. Dist. LEXIS 105816 (W.D. N.Y. 2014), the family of the deceased sued the driver of tractor-trailer, the carrier (Mills Transfer), the Lessor (Great River) and the parent company which owned both (Midwest Holding Group).
    • Despite Graves Amendment which protects lessors against vicarious liability, Court found that the owner and any affiliate had to be free of negligence.
    • The Lessor was liable because sister company was negligent.

• The liability protection afforded by the Graves Amendment for circumstances in which the lessor and lessee were owned by a common parent company was disregarded. This principle could apply in Canada under principal-agent laws.

• Other potential sources of liability? Is there pressure on the driver to make a delivery by a certain time?
  • The Driver Coercion Rule (FMCSA Rule)
  • Did Broker pressure contribute to accident?
Contracts are a Broker’s Best Friend

*Create certainty in your business by utilizing contracts designed to fit your business model in Canada:*

- Ensure a clear limitation of liability exists in broker-carrier agreement
- Ensure that obligations made to shippers are harmonized with obligations extracted from carriers
  - Limitations of liability
  - Insurance levels
- Use indemnity provisions with carriers
- Require carrier insurance, and check that the carrier’s exclusions do not exclude the loads you are brokering.
- Ensure that the carrier is clearly independent of you as a broker
  - Employee v. independent contractor
  - No joint venture
  - Carrier nor its drivers can bind the broker
  - Ensure customers are aware of limits on broker’s authority
Contracts are a Broker’s Best Friend

**Shipper-Broker and Broker-Carrier Contracts**

- the assignment issue
- contract equilibrium: avoiding the ‘pinch’
- “Carmack like liability” vs. merely facilitating claim on carrier
- broker to warrant to shipper terms in carrier contract?
- cargo claim offset
- non-solicitation provisions
- no double brokering
- incorporation issues:
  - NTBA or other terms and conditions
  - Carrier confirmation sheets
Contracts are a Broker’s Best Friend

Speaking of the benefit of having a contract ... What if:

• “I am a Canadian shipper and I have a contract with an American freight broker?”
• “I am an American shipper and I have a contract with a Canadian freight broker?”
• “I am a Canadian freight broker and I have a contract with an American carrier?”
• “I am an American freight broker and I have a contract with a Canadian carrier?”
Domestic Canadian Freight Brokerage
How it Really Works
Qualifying your Carriers
  - Authorities
  - Insurance
  - History
Owner Operators
Payment
  - EFT (ACH)
  - Quick Pay
  - Ontario
Tracking
  - Cell Phone vs Satellite
Holiday and Currency Considerations
  - USD vs CAD
  - Provincial, Federal, and Ethnic holidays
Equipment Type
- Tri and Quad Axles
- Long Combined Vehicles (LCV)

Transit Expectations
- OTR vs Rail
- Weather
- Highway Infrastructure

Capacity and Cost
- East – West vs West – East
- Produce Season
- Labour (Labor) Disputes
Pricing and Capacity
- Density
- Pallet/Linear Foot
- Rail vs OTR

Transit Expectations
- OTR vs Rail
Up Where? The Ins and Outs of Moving Freight in All the Canadian Provinces

TIA Convention
Canada’s Trucking Environment

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Canada’s Trucking Environment

Volumes | Capacity | Rates | Costs | Dollar |

- Canada’s outlook positive but fragile – varies by region
  - Slight improvement in load volumes in 2016
  - Many more carriers available in 2015/2016 vs. 2014
  - Advantage of lower dollar
  - Impact of environment and Freight Rates

- Ideal conditions for US brokers looking to expand into Cdn market!
Trends measured from roughly 5,500 of Canada’s trucking companies and freight brokers. Includes domestic, cross-border and interstate data.
Geographic Volumes

Know the geographic regions and differences that may impact your ability to find carriers

<table>
<thead>
<tr>
<th>Regions</th>
<th>Outbound Truck</th>
<th>Outbound Load</th>
<th>Outbound T/L Ratio</th>
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<tbody>
<tr>
<td>Northeast US (Mid-Atlantic)</td>
<td>5,909</td>
<td>738</td>
<td>8.01</td>
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<tr>
<td>South US (South Atlantic)</td>
<td>8,324</td>
<td>1,170</td>
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<tr>
<td>Northeast US (New England)</td>
<td>1,494</td>
<td>225</td>
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<td>South US (East South Central)</td>
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<tr>
<td>West US (Mountain)</td>
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<tr>
<td>Midwest US (West North Central)</td>
<td>6,056</td>
<td>6,603</td>
<td>0.92</td>
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</tbody>
</table>
To Do’s When Brokering Freight

1. Know who you are dealing with
   • Check credit ratings on carrier
   • Google them
   • Obtain documentation
   • Validate documentation
   • Confirm DBA matches if docs are under numbered company
   • Confirm insurance coverage directly with insurance broker
   • Check addresses on Google maps
   • Check references

2. Know the going rate. Get the load for the right price

   Exercise Due Diligence & Reduce the Risk of Fraud or Theft
To Do’s When Brokering Freight

1. Take care of your credit rating
2. Build a relationship with the carriers
3. Pay a fair rate
Benefits of Opening Canadian Office

• Lower corporate tax rates, Ontario 26.5%, US 30-35
• Payroll costs lower – F/X, health care included
• Diverse work force help establish new customers
• Global corporations looking for integrated international operations.
• Building relationships with Canadian carriers help find lowest costs. (backhauls from US, staff experienced in border crossings)
Use Good Technology as Key Enablers

• Use loadboards to find available carriers
• Ensure they have guidelines in place prior to allowing carriers on the system
• Are system tools available to build confidence prior to selection?
  • Insurance and Operating Authorities information
  • Credit ratings
  • Dispute process
  • Information on rates & volumes
Thank You!
Any Questions?