

## Steering Through Canadian Cabotage Laws

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Consider the following situation: a commercial truck and trailer, owned by an American company and driven by an American driver, enters Canada via the Peace Bridge at Fort Erie, Ontario. The truck is carrying a less than full load for delivery to Markham, Ontario. Can the truck and trailer be used to pick up goods in Canada for delivery en route to Markham? The answer is dictated by the laws of cabotage.

The word cabotage is related to the French verb “caboter” and the Spanish word “cabo,” meaning “to navigate along the coast.” European countries introduced cabotage laws to protect domestic trade, and imposed restrictions and taxes on foreign vessels dropping off and picking up cargo and passengers along the Atlantic coast. The word “cabotage” in the trucking and transportation industry is used to refer to the point-to-point movement of domestic goods by foreign-based commercial conveyances and operators. Cabotage in Canada is governed by various statutes and policies. The laws are technical, sometimes misunderstood and can be a trap for the unwary.

Cabotage laws affecting the trucking industry can be divided into those affecting the equipment used (which is treated as an import) and those affecting the driver (who is only permitted to move goods directly in and out of the country). Their purpose is to protect domestic trade. (Pablo Mendes de Leon, in *Cabotage in Air Transport Regulation*, notes that cabotage is rooted in mercantilism, that is, the policy of protecting a nation’s own economic interests, and that cabotage rights have been historically granted, subject to reciprocity.) Canadian legislation provides that foreign-based vehicles used for international

commercial transportation in Canada may enter Canada duty-free. However, foreign-based vehicles may not be used in domestic movements except in specified circumstances. The failure to comply with cabotage rules may lead to inspections, detentions or the assessment of duties, taxes, interest, penalties and other adverse consequences pursuant to the *Customs Act* and/or the *Immigration and Refugee Protection Act*.

Cabotage regulations relating to trucking were enacted during a period of relatively strict economic regulation and when few US-based vehicles operated in Canada and few Canadian-based vehicles operated in the US. Times have changed. Today more trade flows across the Windsor-Detroit corridor than any other border crossing in the world. Approximately \$1.6 billion of goods and services cross the Canada-US border each day. Trade between Canada and the United States has almost doubled since the introduction of the North American Free Trade Agreement (“NAFTA”).

The dramatic increase in trade between Canada and the US may be associated with calls for change to cabotage legislation. The Canadian Trucking Alliance and the American Trucking Association have lobbied for liberalized cabotage rules. Road transportation has been identified as an industry that would benefit from regulatory alignment between Canada and the US. Perhaps legislative amendments will result from the work of the Canada-United States Regulatory Cooperation Council, which will provide an action plan this fall. In the meantime, however, Canadian and American cabotage laws remain in force.

If it can be said that Canadian officials have not enforced

cabotage laws as strictly as their American counterparts, this may be changing. In August 2011, the Canada Border Services Agency (CBSA) issued a customs notice respecting the administration and enforcement of cabotage laws affecting the trucking industry. The following is an outline of essential aspects of those laws and policies.

### Foreign-Based Trucks and Trailers

CBSA policy states that only Canadian operators driving Canadian vehicles are permitted to make point-to-point deliveries of domestic goods in Canada. Customs duties may be levied on foreign-based vehicles, containers, trailers and semi-trailers imported into Canada, pursuant to the *Customs Act* and the *Customs Tariff*. They may be imported duty-free if they fit within certain tariff items. In particular, specified highway vehicles, trailers and semi-trailers may be imported into Canada duty-free to engage in the transportation of goods from one point in Canada to another point in Canada where:

- that transportation is incidental to the international traffic of the imported or exported goods;
- the transportation does not occur outside Canada; and
- the conveyance has not entered Canada for the purpose of an in-transit movement through Canada to a point outside of Canada.

Vehicles, trailers and semi-trailers must be exported within 30 days of the date of their importation (or for an additional period not exceeding 24 months where a customs officer is satisfied that the exportation is delayed for prescribed reasons).

### Moves Incidental To International Traffic

One condition for the duty-free importation of vehicles, trailers and semi-trailers is that they be used for “incidental moves.” That is, they can enter Canada duty free for the transportation of goods from one point in Canada to another point in Canada which is “incidental to the international traffic” of imported or exported goods. The *Customs Tariff* provides little guidance respecting the meaning of this phrase.

According to the CBSA policy, foreign-based vehicles, trailers or semi-trailers are subject to the following limitations respecting incidental moves:

- only “minor deviations” may be made from the international route or itinerary;
- only one incidental move may be made per international trip in order to pick up or drop off domestic goods while carrying less than a full load of imported goods or goods to be exported; and

- the incidental domestic move must occur during or immediately before or after the international move.

CBSA policy indicates that a domestic move is an “incidental move” if it takes place entirely within Canada and generally follows the route of the international move.

### Minor Deviations

For example, a truck and trailer, owned by an American company, and driven by an American driver, that enters Canada via Fort Erie, Ontario would be permitted to pick up domestic goods in Oakville, Ontario and drop them off in Toronto, Ontario en route to Markham, Ontario. Duty-free entry of the truck and trailer would not be permitted if the driver’s itinerary included the pick-up of domestic goods in Hamilton, Ontario for delivery in London, Ontario. The equipment would not qualify for duty-free entry as the domestic movement would constitute a diversion from the direct trip to Markham, Ontario. Generally, a domestic movement must be on the direct route of the international transportation. Whether or not a domestic move qualifies as “incidental” depends upon the route for the international movement of goods.

### No Transportation Outside Canada

A foreign-based truck and trailer does not qualify for duty-free entry into Canada if it will be used to pick up domestic goods and will leave Canada during the trip. For example, a truck and trailer owned by an American company and driven by an American driver would not qualify for duty-free entry to haul goods from Detroit, Illinois to Fredericton, New Brunswick if the truck will pick up domestic goods in Toronto and travel through Maine and Vermont to reach Fredericton.

### No Transportation Destined Outside Of Canada

A foreign-based truck or trailer that has entered Canada duty-free, loaded with goods in transit to a point outside Canada, is not permitted to carry domestic goods within Canada. For example, a truck and trailer owned by an American company and driven by an American driver would not qualify for duty-free entry into Canada to haul goods from Seattle, Washington to pick up domestic goods in Vancouver, British Columbia to drop them off in Prince George, British Columbia, and then travel to Anchorage, Alaska.

### Repositioning Moves

Foreign-based vehicles may also be used to make repositioning moves. That is, they may move domestic goods between two Canadian points following delivery of a load of imported goods if



the vehicle is en route to pick up a scheduled load of goods for export from Canada. CBSA policy sets out the following conditions:

- the export load must be scheduled for pick-up when the contract for the movement of the domestic load is issued;
- the drop-off point for the repositioning load must be in direct line for the pick-up of the export load; and,
- only one repositioning move is permitted per international trip.

For example, a foreign-based truck and trailer hauling goods from New York, New York to Ottawa, Ontario could schedule the pick-up of an export load in Montréal, Québec for delivery in Boston, Massachusetts. Once the goods have been delivered to Ottawa, the truck and trailer could be used to load domestic goods in Ottawa, Ontario for drop-off at Rigaud, Québec (since Rigaud is located between Ottawa and Montréal on the most direct trucking route).

### Foreign-Based Containers

Foreign-based shipping containers may be imported into Canada duty-free where:

- the transportation does not occur outside Canada; and
- the container has not entered Canada for the purpose of an in-transit movement through Canada to a point outside of Canada.

Specified containers must be exported within 365 days of the date of their importation (or for an additional period not exceeding 24 months where a customs officer is satisfied that the exportation of the containers is delayed for prescribed reasons). For example, a foreign container arriving in Vancouver, British Columbia from Hong Kong can enter Canada duty-free to haul domestic goods within Canada for up to a year. However, a foreign container loaded with goods in Boston, Massachusetts topped up with domestic goods in Kingston, Ontario for delivery along the way in Toronto, Ontario and destined for Flint, Michigan does not qualify for duty-free treatment.

### Customs Verification and Enforcement

The CBSA's recent customs notice indicates that officers will be taking steps to verify compliance with the cabotage laws. Amongst other things, officers will review the movement of foreign-based commercial trucks, trailers, semi-trailers and containers entering Canada. Owners of trucks, trailers, semi-trailers and containers that have been imported into Canada in contravention of the *Customs Act* and *Customs Tariff* may be liable

to pay all applicable duties, taxes and interest on the goods. In addition, a violation of the *Customs Act* and *Customs Tariff* may result in the cancellation of a carrier's enrolment in CBSA's trusted trader programs such as Free and Secure Trade ("Fast") and Customs Self Assessment ("CSA"). Other potential consequences include the forfeiture or ascertained forfeiture of the goods and/or criminal liability for intentional violations.

### Truck Drivers

While the *Customs Act* and *Customs Tariff* regulate the use of equipment in international moves, the *Immigration and Refugee Protection Act* regulates the truck drivers. If foreign-based equipment may be used to make a domestic move under certain conditions during an international move, foreign drivers require immigration status. Appendix 1603.A.1 to chapter 16 of NAFTA sets out a cabotage provision relating to drivers.

Business visitors may enter Canada without a work permit. NAFTA indicates that "transportation operators" may enter Canada as business visitors in limited circumstances. NAFTA also indicates that truck drivers may be employed to transport goods or passengers to Canada from a NAFTA territory (the US or Mexico), or to load and transport goods or passengers from Canada to a NAFTA territory. However, the driver cannot unload domestic goods in Canada under NAFTA. In general, NAFTA does not permit foreign truck drivers to compete with domestic drivers in a NAFTA territory.

Under NAFTA a foreign truck driver must meet additional conditions in order to qualify as a business visitor. Amongst other things the driver must be a citizen of Mexico or the US, must show that the purpose of the proposed trip is international, and that he or she is not seeking to enter the local labor market. Further, the driver must show that the primary source of remuneration for the work is outside Canada, and that the principal place of business is outside of Canada.

### Immigration Enforcement

Foreign truck drivers may be the subject of immigration port-of-entry examinations by a CBSA border services officer. Border services officers are responsible for determining whether or not persons are entitled to enter Canada. An enforcement manual instructs them to ask individuals who present themselves at a port of entry about the purpose of their intended visit. Officers have options for dealing with a driver who does not have a work permit but who proposes to engage in activities that require a work permit. In that situation a driver may be subjected to a secondary examination, detained, refused entry and flagged for secondary examinations in the future. Other penalties exist for intentional non-compliance.

## Moving Forward

The laws respecting cabotage and trucking have come under criticism for various reasons. Some have advocated for change, suggesting that the laws are technical, easily misunderstood, not environmentally sensitive, and are prone to inconsistent interpretation and enforcement. Others are opposed to the removal of cabotage laws affecting the trucking industry, fearing market share loss to large American transportation companies. Perhaps the Canada-United States Regulatory Cooperation Council action plan will attempt to address these conflicting concerns.

In the meantime, the CBSA has signaled plans to more vigorously enforce cabotage laws affecting the trucking industry. This may have been triggered by suggestions that Canadian enforcement has been lax when compared to American enforcement. Therefore, businesses involved in the transportation of goods into Canada via trucks, trailers, semi-trailers and containers should be prepared to deal with cabotage laws. Companies may steer clear of costly disputes with the CBSA by reviewing corporate practices, and determining whether or not they are compliant with Canadian customs and immigration laws. ■



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