

TRADE CONTROLS & ECONOMIC SANCTIONS

A SHORT TREATISE ON CANADA'S SYSTEM OF EXPORT & IMPORT CONTROLS, SANCTIONS AND OTHER TRADE-RELATED MEASURES

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INTRODUCTION

This is an overview of the major features of Canada's system of export and import controls and economic sanctions. It includes a brief description of Canada's import controls as well, since the two are related.

The objective is to help guide Canadian businesses through what often seems like a tangled web of complex laws and regulations that sometimes leave the non-expert uncertain if not confused.

There is no intention to be definitive or to substitute for proper expert advice, legal or otherwise. Any reader interested in more in-depth analysis on particular problems or concerns should seek an expert's opinion.

In dealing with this subject, it is important to keep in mind the distinction between **export controls**, on the one hand, and **economic sanctions**, on the other. The two are based on different legal regimes under different pieces of

legislation. A Canadian good or service that may not require an export permit may still be prohibited from export under Canada's sanctions laws.

The key federal government department administering both export controls and sanctions is **Global Affairs Canada** (formerly the Department of Foreign Affairs and International Trade):

- Export controls come under the *Export and Import Permits Act* (EIPA) and are the responsibility of the **Trade Controls Bureau** of Global Affairs.
- Economic sanctions come under the *United Nations Act* and the *Special Economic Measures Act* are administered by the Department's **Economic Law Section** within the Department's Legal Bureau.

Details of each can be found on the Global Affairs web-site:

Export Controls:

http://www.international.gc.ca/controls-controles/report-rapports/list_liste/index.aspx?lang=eng

Sanctions:

<http://www.international.gc.ca/sanctions/countries-pays/index.aspx?lang=eng>

INTERNATIONAL TREATIES

Most of Canada's trade controls and economic sanctions, in one way or another, are based on **treaties and international agreements** that Canada is a party to.

In the case of export controls, most measures stem from agreements with like-minded countries aimed at ensuring international peace and security controlling international sales of nuclear items, arms, munitions, chemical weapons and other sensitive technologies.

In the case of sanctions, these consist of a combination of binding UN Security Council decisions and multilateral agreements, some of which are political arrangements with NATO and other allies as opposed to legally binding commitments.

EXPORT CONTROLS

The Global Affairs web-site contains virtually exhaustive information on the workings of Canada's export controls and permit requirements. The key piece of information is the Department's **Export Controls Handbook**, designed as the main tool for guiding exporters through the system:

http://www.international.gc.ca/controls-controles/export-exportation/exp_ctr_handbook-manuel_ctr_exp-p2.aspx?lang=eng

Given its jurisdiction over border matters – both imports as well as exports – the **Canada Border Services Agency** also has a role in administering the

export control system and ensuring that all export requirements have been met before shipments leave the country. The key source document is the Agency's **Step-by-Step Guide to Exporting Commercial Goods from Canada:**

<http://www.cbsa-asfc.gc.ca/export/guide-eng.html>

The Export Control List

Goods and technology, including software, that require export permits are described on the *Export Control List* (ECL). The ECL is issued through orders-in-council under the *Export and Import Permits Act* (EIPA). The ECL is regularly updated by Global Affairs Canada.

No person can export an ECL item from Canada without a permit issued by the **Minister of Foreign Affairs**. In reality, ministerial approval is based on recommendations by senior officials in Global Affairs. There is leeway in these decisions where permits are based on governmental policy, for example, in approving or disapproving exports based on human rights factors.

The issues surrounding Ministerial approval was prominent in media reports in the spring of 2016 in relation to the export of a large number of Canadian-made light armoured vehicles to Saudi Arabia.

In some cases, export authorization for things such as nuclear goods and technology, hazardous wastes, cultural properties, etc., require approvals of other Federal agencies or departments.

As explained in the **Export Controls Handbook** and the Departmental website, the goods plus associated technologies and software on the ECL are broken down into the following categories:

- **Conventional arms and munitions:**

Exports of military arms, hardware and technology are controlled pursuant to international arrangement Canada is party to called the *Wassenaar Arrangement for Export Controls*. As well, Canada controls these kinds of exports as part of its own long-standing policy to not endanger international destabilization and human rights abuses abroad.
- **Biological and chemical weapons:**

These controls come under Canada's commitment to the 1972 *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* (usually referred to as the *Biological Weapons Convention*); and the 1992 *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (the *Chemical Weapons Convention*).
- **Missiles and missile technology:**

Controls in this area are pursuant to decisions under the *Missile Technology Control Regime* (MCTR), an association of like-minded countries aimed at controlling exports of missile systems capable of delivering weapons of mass destruction.
- **Nuclear goods and technology:**

The most important international agreement here is the 1968 *Nuclear Non-Proliferation Treaty* (NPT), designed to limit the spread of nuclear weapons. The NPT is administered internationally through the Nuclear Suppliers Group (NSG), a multinational body that develops and coordinates national controls agreed to under the NPT.

Nuclear items in this category are also subject to separate license requirements administered by the Canadian Nuclear Safety Commission under the *Nuclear Safety and Control Act* and the *Nuclear Non-Proliferation Import and Export Control Regulations*. Together with seeking an export permit from Global Affairs Canada, therefore, exporters in nuclear industries must make the necessary application and provide the required documentation to the Commission.

- **Miscellaneous Items:**

This package includes such things as raw logs and all US-origin goods and technologies, discussed below.

The descriptions of items on the ECL can be highly detailed and care is required to thoroughly read the descriptions and any associated notes and explanations – that is, the fine print. When in doubt, an opinion can be obtained from the Department as to whether an export permit is needed.

Pursuant to section 27 of the Act, the Minister is required to report on to Parliament annually on the overall administration of the export control system: http://www.international.gc.ca/controls-controles/report-rapports/2015.aspx?lang=eng#ar_2.

In addition, the Global Affairs Department issues separate reports on **exports of military goods**. These reports are found at: <http://www.international.gc.ca/controls-controles/report-rapports/mil-2015.aspx?lang=eng>

Because of the criminal penalties for failure to comply with export permit requirements, companies must be diligent and must ensure at least a basic

understanding of how the system operates. Inattention to the details in EIPA, the ECL and the various regulations can result in unnecessary difficulties and commercial repercussions.

Businesses that have export issues — such as being unsure whether a particular good or technology is a controlled item — should contact the Export Controls Division in the Trade Controls Bureau in Global Affairs Canada: www.international.gc.ca/controls-controles.

The Area Control List

The EIPA also prohibits exports of goods of any kind, whether or not on the ECL, to **all destinations** listed on the *Area Control List* (ACL). These are countries that are considered dangerous or aggressive or that fail to respect international norms of civilized behavior and human rights. ACL-listed destinations currently are: **North Korea and Belarus**.

US Origin Goods

To deal with concerns of Canada being used as a conduit to transship US-origin goods that are otherwise prohibited under US law, Canada requires that exports from Canada of goods or technology of **US origin** destined for Cuba, Iran or Syria to have an export permit. No Canadian permit will be issued without the exporter having US government approvals for the re-export as well.

For all other destinations of US-origin goods, there is a bit of an oddity here in that a **general export permit** is already issued by government regulation (called General Export Permit 12). All that a Canadian exporter has to do is refer to that permit on its export declaration as valid export authorization.

The issue as to what constitutes goods of US origin is not fully settled as between the Canadian and the US governments. While there is no explicit guideline or policy statement on the matter, Canada considers a product that has been “**substantially transformed**” in Canada to not retain its US origin. The US government, on the other hand, considers a product, including software, that retains 25% or more of US value - and as little as 10% for some destinations - to continue to be a US-controlled item.

TRADE WITH CUBA — A SPECIAL CASE

While the US government continues to prohibit trade with Cuba, there is no such prohibition in Canada. Attempts several years ago by US authorities to require Canadian-based subsidiaries of US corporations to comply with the American trade embargo led to Canada enacting the *Foreign Extraterritorial Measures Act* (FEMA).

An order issued under FEMA in 1992 (called the “blocking order”) **prohibits** any Canadian corporation and any corporation registered in Canada – meaning a subsidiary of a US corporation as well as a branch operation – from complying with the US trade embargo of Cuba. This prohibit extends to any director, officer or senior employee of that subsidiary.

Compliance by the Canadian operation of instructions or directions not to export goods and services to Cuba could render the Canadian subsidiary and its directors and officers liable for substantial penalties, including criminal prosecution.

As well as prohibiting direct or indirect compliance with the US trade embargo, the blocking order requires all Canadian companies to notify the federal Justice Department of any **instruction communication, directive or guidance** received from its US parent that requires compliance with the US embargo.

There is an exception to the blocking order when it comes to **exports to Cuba of US-origin goods**. Because of the obvious need to prevent Canada being used as a transit venue and a way of circumventing the US embargo, these goods will require a Canadian export permit. Without the export being cleared by US authorities, Global Affairs won't issue that permit.

In 2015, there was some easing of US travel, communications and financial restrictions by the Obama administration through executive orders of the president. Over time, there may be additional relaxations which in turn may ease complications for Canadian companies, including US subsidiary corporations. However, any larger and longer-term changes to the US embargo will require Congressional legislation.

ECONOMIC SANCTIONS

Sanctions are another set of laws that Canadian business needs to pay heed to because they tend to change frequently as the international situation unfolds. Inattention can lead to complications at the port of export and, in the worst case scenario, to criminal prosecutions.

Canada operates **two different systems**, one that implements UN Security Council decisions and another, outside the UN orbit, that responds to

international events that are deemed to threaten Canadian security such as acts of terrorism or involve egregious human rights abuses by foreign governments.

Detailed information on Canada's sanctions can be found on the Global Affairs web-site at: www.international.gc.ca/sanctions/countries.

United Nations Sanctions

The first group of sanctions is imposed on named countries and terrorist organizations in order to implement binding UN Security Council resolutions. These are issued under the *United Nations Act*.

At present, Canada applies UN-mandated sanctions against Côte d'Ivoire, North Korea, Congo, Eritrea, Iran, Iraq, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia and Sudan. Canada also applies UN sanctions against Al-Qaida and international terrorist organizations like ISIS.

United Nations Act sanctions do not always follow the same pattern and their scope and the targeted items can differ, depending on the particular UN resolution. It's important to look carefully at the wording of each. Some, like the sanctions against North Korea, are aimed mostly at prohibiting trade in nuclear-related materials. Others, like those against Syria, Libya, Côte d'Ivoire, Somalia and Sierra Leone, are aimed mostly at preventing trade in arms and munitions.

As an example of changes in the international situation, many of Canada's UN-based sanctions against Iran were removed in 2015 as a result of an agreement reached in July 2015 between Iran and the P5+1 group (the 5 permanent members of the UN Security Council plus Germany) known as the *Joint Comprehensive Plan of Action* (JCPOA). The Security Council approved

the agreement, and in doing so amended its nuclear-related sanctions against the country.

In general, UN Security Council sanctions prohibit not only trade in specific types of goods and services but in many cases prohibit dealings with “designated persons,” companies and individuals blacklisted by the United Nations.

These change continually, placing additional burdens on anyone doing business in or with these countries. It’s important to be aware of these changes when they occur.

Sanctions Outside the UN System

Together with sanctions mandated by the UN Security Council, Canada applies sanctions to respond to difficult and/r threatening international situations, whether or not the UN has been involved.

These are issued by the federal cabinet under the *Special Economic Measures Act* (SEMA). SEMA gives the federal government broad powers to implement agreements or understandings among Canada’s allies or to act unilaterally where the cabinet determines that “a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.”

The federal cabinet has used SEMA many times to issue sanctions prohibiting trade and business dealings with countries like Zimbabwe, Burma, Iraq and, most recently, with Russia, Ukraine, Iran and Syria.

While the scope of SEMA-based sanctions varies, they tend to be quite broad. Special care must be taken in regard to the wording. For example, some sanctions prohibit any “sale,” “export,” “supply” or “shipment” of “any goods”

Others are cast in broader terms and prohibit “dealings” of all kinds, including provision of services and financings involving property held by or on behalf of “designated persons”.

Thus the terms used in each set of sanctions may differ and this difference can be critical for Canadian exporters of goods and services to the area concerned.

Asset Freezes

SEMA also gives the federal cabinet authority to freeze all dealings in assets of named individuals, to order property of a foreign State seized or sequestered, and generally to prohibit all persons inside or outside of Canada from dealing in property of that State, from shipping or supplying any kind of goods and technical data.

Closely related to these asset freezes under SEMA is the *Freezing Assets of Corrupt Foreign Officials Act*, passed in March 2011 to deal with the situation in countries like Egypt, Ukraine and Tunisia, where there are grounds to believe senior officials have been corrupt and have secretly taken money or property out of the country. These persons are defined as “politically exposed foreign persons.”

The statute permits the federal government to freeze the assets or restrain property of such persons at the request of a foreign government, where the cabinet has determined that there is a condition of turmoil or political

uncertainty in that country and where the making of an order or regulation is in the interest of international relations.

Regulations were issued freezing the Canadian-held assets and prohibiting any Canadian person anywhere from dealing with assets of any kind of former government officials in Egypt, Ukraine and Tunisia, including the former presidents of those countries and their extended families.

Notices have been issued to Federally Regulated Financial Institutions by the **Office of the Superintendent of Financial Institutions (OSFI)** about the need for diligence in complying with these regulations:

<http://www.osfi-bsif.gc.ca/eng/fi-if/amlc-clrpc/snc/facfo-bbde/Pages/default.aspx>

Compliance and Penalties

The international situation is extremely fluid and Canada's export controls and sanctions regimes are frequently modified to account for this.

Because criminal penalties apply where the trade and business prohibitions are transgressed, it becomes essential for any business engaged in international dealings in troubled areas or in trade in sensitive items to be aware of the general nature of the system. Given the unsettled international situation, Canadian laws change and those changes need to be carefully watched.

ANTI-TERRORISM MEASURES

In addition to sanctions and export controls, there are anti-terrorism measures that have been enacted by Parliament following the terrorist attacks on the World Trade Center in September 2001, the war in Afghanistan and the subsequent unfolding of terribly destabilizing events in the Middle East. While not in the same category as economic sanctions, these measures need to be appreciated as part of the entire piece.

The *Anti-terrorism Act (ATA)* was enacted in 2011 and amended the *Criminal Code*, the *Official Secrets Act*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and a number of other statutes aimed at preventing terrorists activities in this country.

Under the ATA, a "terrorist group" is defined as an entity that has as one of its purposes or activities the facilitating or carrying out of terrorist activity or that is an entity set out in a list established by regulation.

Under the ATA's amendments to the *Proceeds of Crime (Money Laundering) Act (PCMLA)* **law enforcement authorities and the Canadian Security Intelligence Service (CSIS)** were given additional powers to gather information about suspected terrorist financing activities.

The ATA also expanded the mandate of **FINTRAC** (the Financial Transactions and Reports Analysis Centre of Canada) to add to its role in combating and detecting terrorist financing. Regulations require financial institutions and other financial intermediaries to report suspicions of terrorist financing and terrorist property to FINTRAC on a continuing basis.

Details on these anti-terrorism measures and their relationship to Canada's international efforts can be found on the Global Affairs web-site:

<http://www.international.gc.ca/crime/terrorism-terrorisme.aspx?lang=eng>.

TRADE IN ENDANGERED SPECIES

As part of Canada's panoply of trade controls are measures to regulate and prevent trade in endangered species under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES).

CITES covers animals and plants that are, or may be, threatened with extinction as a result of international trading activities, often undertaken through networks of illicit organizations as well as individuals. CITES applies to both living and dead specimens as well as their parts that are listed in appendices to the Convention.

Canada's obligations are implemented under the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* and the *Wild Animal and Plant Trade Regulations*. The permit granting authority resides with the Minister of the Environment.

Within the Department (now called Environment and Climate Change Canada), the **Canadian Wildlife Service (CWS)** administers CITES and interacts with provincial, territorial and other federal agencies.

For more information on Canada's regulation of trade in endangered species, see: <http://www.ec.gc.ca/CITES/default.asp?lang=En&n=C5F64D6F-1>.

EXPORTS OF CULTURAL PROPERTY

Permit Requirements

Exports from Canada of all cultural property are prohibited under the *Cultural Property Export and Import Act*. “Cultural property” is defined under the Act as artistic, historic, or scientific objects in any of the following categories:

- recovered from the soil or waters of Canada
- ethnographic material
- culture military objects
- applied and decorative art
- fine art
- scientific or technological objects
- textual records, graphic records, and audio-visual recordings; and
- musical instruments.

Specific items subject to export control within these categories are listed on the *Canadian Cultural Property Export Control List (CCPECL)*. Any items on the CCPECL require an export permit from the **Canada Border Services Agency**. The responsible CBSA officer will either issue the permit or refer the matter to an **export examiner**.

If the permit is refused by the CBSA on the advice of the expert examiner, the applicant may request a review by the **Canadian Cultural Property Export Review Board**. The Board may uphold the refusal and set an **export delay of two to six months** if it determines that,

- the property in question is subject to export control;
- the property meets the criteria of outstanding significance and national importance as set out in the *Act*; and

- a designated organization might come forward with an offer to purchase the property

If no cash offer to purchase is made within the export delay period, the export permit will be granted.

Information on the export permit system is set out in CBSA Memorandum D19-4-1 and found on the Agency's web-site:

<http://www.cbsa-asfc.gc.ca/publications/dm-md/d19/d19-4-1-eng.html>

Illicit Trade

Canada also prohibits trade of stolen and illicitly-traded cultural property from anywhere in the world in accordance with the 1954 *Hague Convention for the Protection of Cultural Property* and its two protocols. Canadian law makes it an offense for any person to trade in and export or import cultural property covered under the Convention.

For information on controls of Canadian cultural property exports and the operations of the Canadian Cultural Property Export Review Board, see:

<http://canada.pch.gc.ca/eng/1459280537977>

ENVIRONMENTALLY HARMFUL SUBSTANCES

Exports of hazardous chemicals and environmentally-harmful substances are regulated under the *Canadian Environmental Protection Act, 1999* (CEPA 1999) and the *CEPA Export Control List*. These exports are controlled because

their manufacture or use in Canada is prohibited or restricted or because of Canada's obligations pursuant to international agreement.

These export controls are separate from the controls covering chemical weapons under the EIPA, discussed above. Controls in this area are administered by the Export Controls Division of **Environment and Climate Change Canada**. Details on the system and the permit-granting process can be found at: <https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=06942923-1>.

CONTROLLED GOODS PROGRAM

The Controlled Goods Program (CGP) is a domestic security regime created under the *Defence Production Act* that regulates access to and use of **sensitive military and strategic products and technology**. The CGP is administered by the Department of Public Works and Government Services (PWGSC).

The CGP was designed to protect sensitive **US strategic information** and technology in Canada in cases where Canadian companies are jointly involved in US defence procurement projects.

The Program ensures that Canadian companies can take advantage of the **exemptions** for Canada under the US ***International Traffic In Arms Regulations (ITARs)***, which allow a US company to export sensitive goods and technology to their Canadian counterpart, provided that the Canadian company is registered under the Program.

The details of the operation of the CGP are in the *Controlled Goods Regulations* (CGRs) issued under Act. The CGP covers the same military and strategic and dual-use goods on the *Export Control List* described earlier. Thus, there is a close relationship between the CGP and Canada's export control regime.

All corporations and other entities and all persons who deal with controlled goods and/or controlled technology are required to register with the Program. All registered entities must also have a **Designated Official** that is security-cleared and a **Security Plan** filed with the Program.

The DPA makes it an offense for any person that is not registered to knowingly examine, possess or transfer a controlled good to another person. Thus, unless registered under the Program, including having a Designated Official and an approved Security Plan, no corporation or its employees or officers can deal with controlled goods.

Information on the CGP and all aspects of registration can be found online at:

<http://ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/ressources-ressources/contactdmc-contactetzcgp-eng.html>

IMPORT CONTROLS

General

The obverse of Canada's export control system are controls that limit or totally prevent certain types of imports. These involve items such as nuclear materials, military goods, firearms and chemical weapons covered by the 1992 *Chemical Weapons Convention*.

In addition, Canada limits imports of certain types of textiles and apparel pursuant to the WTO Agreement and Canada's bilateral trade agreements with countries such as Costa Rica and Chile.

As discussed below, Canada also limits imports of certain agricultural commodities.

Import controls fall under the EIPA and are covered by the ***Import Control List*** (ICL). Import permits are managed through the **Trade Controls Bureau** in Department of Global Affairs. Details are at:

http://www.international.gc.ca/controls-controles/about-a_propos/impor/importing-importation.aspx?lang=eng

Import permits are issued through an on-line filing system run by the Bureau. Details are on the Bureau's web-site.

Supply-Managed Commodities

While Canada generally operates an open trading regime, the situation is significantly different when it comes to trade in five categories of: dairy products, eggs and poultry (turkeys, chickens and hatching chicks). Imports of

these commodities are under strict quotas as part of Canada's system of **supply management**. The controlled commodities are on the **Import Control List (ICL)** issued under EIPA, described above.

As a national policy, supply management was created in the 1970s to smooth out price volatility and support agricultural production in these five sectors through a Canada-wide system of production controls and guaranteed farm-gate prices.

The regime is controversial. It has been studied by many think-tanks and commented on in the financial press. It has been condemned by Canada's trading partners, particularly the US and New Zealand. Many analysts decry it as a protectionist system that insulates producers from global competition and results in both production inefficiencies and artificially high prices for Canadian consumers.

For the system to work, in conjunction with controls on domestic agricultural production, there has to be **limits on imports** of the particular commodity. This is accomplished through import quotas, allowing a limited duty-free volume of goods into the country. Imports above the quotas (over-quota volumes) are subject to prohibitive duties, permitted for Canada under the WTO Agreement and the NAFTA, which left many internal agricultural policies in place that did not involve direct subsidies.

Under Canada's system, domestic production volumes are established on the basis of projected annual demand, then allocated to individual producers by **national and provincial marketing boards**. Based on estimated demand and the volume of allowable domestic supply, these agencies then pre-determine the **global volume of permitted imports**.

Import quotas within this global ceiling are then allocated to individual importing operations by the Minister of International Trade through the EIPA system. No person can import supply-managed products at low rates of duty without an import quota and a corresponding import permit.

Details on the operation of Canada's quota system for supply managed agricultural products can be found on the web-site of the Trade Controls Bureau of Global Affairs Canada at: www.international.gc.ca/controls-contrôles.

CONCLUDING REMARKS

As is obvious from this brief review, Canada's export controls are complex and varied and interact with its sanctions measures in many ways. These laws and regulations are a bit of a moving target, in the sense that the items covered often change as do, in the case of sanctions, both the type of transaction and the individuals and entities that are on the prohibited list.

The key for business involved in export transactions is to be aware of the sensitivity and potential exposure in terms of the type of product destined for export (goods, services and software) and the eventual destination and end-use of the exported item.

As is obvious, where these potential danger signals are triggered, it pays to have an expert's advice. Short of that, reviewing the massive amount of on-line information posted by government departments is of great assistance.

As is obvious from the brevity of this document, it is not intended to provide legal advice on any particular issue and should not be relied on as such. Any person with a concern or interest involving any of the matters covered in this document should consult an expert.