

# Exporting goods from Canada to China – what exporters need to know



Business and political will in Canada is behind improving trade with China. Cyndee Todgham Cherniak reviews the current regulations – and the nuances to such regulations – governing the export of goods and technology from Canada to the PRC.

Canada imports more goods from China than it exports to China. Canadian manufacturers and exporters would like to export more Canadian goods to China. Many Canadian federal and provincial and municipal government officials have clearly stated that Canadian businesses must have a China strategy. Prime Minister Trudeau has signaled a desire for Canada to negotiate a free trade agreement with China, just like Australia. A member of Prime Minister Trudeau's transition team was Peter Harder, the president of the Canada China Business Council. The talk of enhancing a trade relationship between Canada and China is meaningful. This is the starting point for any discussion about Canada's export restrictions and China – trade in goods from Canada to China is considered to be a positive and desirable trade flow.

Canada does not impose any multilateral or unilateral economic sanctions against China. Canada does not impose any export restrictions against China under the United Nations Act or the Special Economic Measures Act. What this means is that if the good/technology is to be exported to China as a final destination, there would not be destination considerations.

Canada's export restrictions vis-à-vis China fall under the umbrella of export controls. Canada imposes these export controls in the same manner as it controls exports of goods to many other countries. China does not receive special treatment – good or bad. Canada does offer preferred treatment to Australia, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Slovakia, Slovenia, Spain,

Sweden, Switzerland, Turkey, the United Kingdom and the United States in certain circumstances. So, one can refer to Canada's China export position as 'cautiously desirable'.

This does not mean that everything can be exported from Canada to China. On the contrary, many goods cannot be

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exported without an export permit or export licence.

### **The General Rule**

The 'General Rule' applies in respect of exports of goods to China. The General Rule for the export of restricted goods is contained in the Export and Import Permits Act. The General Rule is that goods and technology may be exported from Canada to China unless the goods are listed on Canada's Export Control List ('ECL'). That being said, the Minister of Foreign Affairs may issue to any resident of Canada an export permit to export or transfer goods or technology included in the ECL. The Export Controls Division of Global Affairs Canada (previously DFATD and DFAIT) processes applications for export permits. Export permits are required on an export-by-export or shipment-by-shipment basis. Just because an export permit was issued previously does not mean that Global Affairs Canada will issue an export permit each time.

Before applying for an individual or special export permit, it is necessary to classify the goods according to the ECL.

The ECL comprises goods which fall within seven groups of goods. The seven groups are as follows:

- Group 1: Dual-Purpose List (Special materials and Related Equipment, Materials Processing, Electronics, Computers, Telecommunications, Information Security, Sensors and Lasers, Navigation and Avionics, Marine, Aerospace and Propulsion);
- Group 2: Munitions List;
- Group 3: Nuclear Non-Proliferation List;
- Group 4: Nuclear-Related Dual-Use List;
- Group 5: Miscellaneous Goods (This group includes a variety of non-strategic goods, such as United States origin goods (5400), certain forest products, certain agricultural and food products, military and strategic goods and technology, catch-all goods and technology)
- Group 6: Missile Technology Control Regime List; and
- Group 7: Chemical and Biological Weapons and Non-Proliferation List.

With respect to Group 3, Canada has a longstanding nuclear non-proliferation policy, which is designed to ensure that Canada's nuclear exports are not used for any improper purpose. Generally, Global Affairs will decline any application to export Group 3 goods to an end-user in China.

With respect to Groups 5-7, if the goods are destined for China, Global Affairs Canada will not issue an export permit for such goods unless acceptable assurances are provided.

The Export and Import Permits Act places very strict controls on the export of prohibited firearms, prohibited weapons and prohibited devices (as defined in the Criminal Code of Canada). Export permit applications for these items are only considered to

countries on the Automatic Firearms Country Control List ('AFCCL'). China is not listed on the AFCCL and therefore, prohibited firearms, prohibited weapons and prohibited devices cannot be exported to China.

An individual or special export permit will not be approved/issued by Global Affairs Canada if the goods are ultimately destined for North Korea. North Korea is on Canada's Area Control List, which essentially means that any export (including benign items such as paper clips) cannot be exported to a country on the Area Control List.

#### Nuances to the General Rule

It is important to note that there are a number of nuances to the General Rule:

- **Nuance #1:** If the good on the ECL may be exported under the authority of a general export permit ('GEP') and all the conditions of the GEP are satisfied, the exporter does not have to obtain an individual or special export permit. Few GEPS are applicable to exports to China. Some of the GEPs that may be used to export to China are:
  - GEP 3: Consumable Stores Supplied to Vessels and Aircraft (e.g., fuel oils, lubricants, provisions and supplies required for a voyage or flight and medical and surgical supplies)
  - GEP 5: Logs
  - GEP 18 Portable Personal Computers and Associated Software (subject to conditions)
  - GEP 38: CWC Toxic Chemicals and Precursor Mixtures (subject to conditions and cannot be destined for North Korea or Iraq)
- **Nuance #2:** Goods of United States origin that undergo a substantial change in Canada (that is, the goods are further processed or manufactured outside the United States so as to result in a substantial change in value for, or used in the production of new goods) may be exported without the need for an individual export permit unless they fall into a category of the ECL (other than 5400). The Export Controls Division generally will consider a good to be of U.S. origin if it contains greater than 50% U.S. content. Goods considered to be of U.S. origin may be exported to China under GEP 12 (unless the final destination is Cuba, Iran,

North Korea or Syria). The CBSA may require an end-use certificate or statement for goods destined for China because China is known to trade with North Korea and the other restricted countries. If GEP 12 is the authority for the export, it must be stated on the export documentation. As a result, it is necessary to know beforehand whether the goods are being exported under GEP 12.

- **Nuance #3:** If a good is within category 5400 of the ECL, the export may require a U.S. re-export or transfer licence. This is actually one of the most restrictive of the nuances because many U.S. origin goods/technology cannot be exported from Canada to China

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based on U.S re-export laws. The exporter would contravene U.S. law (not Canadian law) by exporting the good/technology to China. This nuance is more straightforward for 100% U.S. origin goods. Where the U.S. restrictions get complicated is in respect of Canadian goods that contain U.S. parts/inputs. Some Canadian-made goods with U.S. inputs that do not undergo sufficient transformation may require a U.S. re-export licence to be exported from Canada.

- **Nuance #4:** If a good/technology is not on the ECL, export reporting may still be required. Any goods (including goods that are not on the ECL) valued at \$2,000 or more must be reported on an export declaration prior to exportation to China. An export declaration is not an export permit. An export declaration is a reporting to the Government of Canada for trade statistics and security purposes. Section 95 of the Customs Act provides that 'all goods that are exported shall be reported at such time and place and in such manner as may be prescribed'. Failure to report the export of goods valued

over \$2,000 may result in the goods being seized and an administrative monetary penalty being imposed.

- **Nuance #5:** If a good/technology is not on the ECL, an export licence may be required. With respect to certain nuclear goods, an export licence and an export permit would be required. The Canadian Nuclear Safety Commission issues permits for nuclear equipment and substances that are controlled under the Nuclear Non-proliferation Import and Export Regulations. An exporter must apply for a licence to export a controlled nuclear substance, controlled nuclear equipment or controlled nuclear information. Since China is a participant in the Nuclear Suppliers Group, an exemption may be applicable for controlled nuclear substances.

#### Further considerations

There are other statutory provisions and regulations that may apply to an export of goods and/or technology to China (e.g., controlled cultural property, rough diamonds, endangered species, hazardous waste, certain wild plants and animals, steel, etc.). It is best to consider what restrictions apply prior to exporting the goods to China.

The Canada Border Services Agency ('CBSA') is the gatekeeper and could intercept packages and detain goods that are being exported to China. The CBSA may ask for copies of the export permits and licences. If the exporter adopts an export first and ask questions later approach, the detention may be lengthy and the storage costs may be significant (as it can take years to resolve the issues). Most importantly, the Canadian exporter may lose face in the eyes of the Chinese buyer if the goods never arrive or arrive late due to export controls issues.

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