

CANADA'S NEW EXPORT BROKERING REGIME

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On September 17, 2019, Canada will formally become a State Party to the United Nations Arms Trade Treaty that regulates the international trade in conventional arms, which range from small arms to battle tanks, combat aircraft and warships. In preparation for Canada's accession, the government has made significant amendments to the *Export and Import Permits Act* ("**EIPA**").^[1] to broaden Canada's traditional export control regime. The amendments aim to make Canada's regulatory regime compliant with international obligations under the Arms Trade Treaty. The current regime is focused exclusively on the export and import of certain goods and technologies to and from Canada, whereas the new regime will also regulate the movement of these goods and technologies between two or more foreign countries when Canadian citizens or organizations are involved in the transaction. The provisions of *An Act to amend the Export and Import Permits Act and the Criminal Code* ("Bill C-47"), previously assented to on December 13, 2018, and its associated regulations will come into force on September 1, 2019.

Brokering

A significant amendment to the EIPA defines the act of brokering as "arranging or negotiating a transaction that relates to the movement of goods or technology included in a Brokering Control List ("**BCL**") from one foreign country to another". Such transactions include those relating to the acquisition or disposition of such goods or technology. Furthermore, the disclosure of the contents of such technology, such as communicating technical data or providing technical assistance, also constitutes a transaction. The treatment is similar to how communicating technical data to someone outside Canada is an export and generally subject to the same restrictions and prohibitions as the physical export of a good.

The act of brokering, under the EIPA, is applicable to any person organization in Canada. The brokering provisions under the EIPA also have extraterritorial application, and apply to any Canadian citizen, permanent resident or organization incorporated under the federal or provincial laws of Canada, that is brokering abroad.

The *Regulations Specifying Activities that Do Not Constitute Brokering* ("**Brokering Exemptions**") contains a list of activities that do not constitute brokering for the purposes of the EIPA.^[2] The brokering of transactions relating to the movement of goods found on the Export Control List ("ECL") do not constitute brokering under the EIPA when done:

- Between corporations and their affiliates when the goods are for end-use by the affiliate; or
- By a Canadian citizen or permanent resident, outside of Canada, on behalf of their non-Canadian employer, where the citizen or resident does not have de facto control of said employer.

Such Brokering Exemptions do not apply when the goods involved are found in Group 9 (Arms Trade Treaty) of the ECL. Group 9 was created by the *Order Amending the Export Control List (Arms Trade Treaty)*^[3] and it contains all goods that Canada has agreed to control in accordance with its obligations under the Arms Trade Treaty. Goods listed in Group 9 include but are not limited to military vehicles, missiles and firearms, even if already included in other Groups in the ECL.

Brokering Control List

The cornerstone of the new regime is the creation of the BCL. This new list will include all Munitions List (Group 2) and Arms Trade Treaty (Group 9) items, and may include any article on the ECL that, at the determination of the Governor in Council, is likely to be used to produce or develop a weapon of mass destruction. The specific descriptions and conditions attached to each article, however, may differ from those found for the associated article in the ECL.

Based on the provisions published in the Canada Gazette, registered on June 17, 2019, the BCL will contain the following goods and technology from the schedule to the ECL^[4]:

Groups in the ECL

- 2 – Munitions List
- 9 – Arms Trade Treaty

Items included in the BCL

All goods and technology.

- 1 – Dual Use
- 3 – Nuclear Non-proliferation
- 4 – Nuclear-related Dual Use
- 5 – Strategic Goods*
- 6 – Missile Technology Control Regime
- 7 – Chemical and Biological Weapons Non-proliferation

Any goods and technology which, if their properties and any information made known to the broker would lead a reasonable person to suspect that they will be used:

- a. in the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of
 - i. chemical or biological weapons,
 - ii. nuclear explosive or radiological dispersal devices,
 or
 - iii. materials or equipment that could be used in such weapons or devices,
- b. in the development, production, handling, operation, maintenance or storage of
 - i. missiles or other systems capable of delivering chemical or biological weapons or nuclear explosive or radiological dispersal devices, or
 - ii. materials or equipment that could be used in such missiles or systems, or
- c. in any facility used for any of the activities described in subparagraphs (i) and (ii)

The same applies for any goods and technology in these groups or sub items that the Minister of Foreign Affairs (“**Minister**”) has determined, based on their properties, intended end-use, or the identity or conduct of their consignees, are likely to be used for the above-mentioned purposes.

*For Group 5 (Strategic Goods), the above applies only to the following sub items:

- 5504(2)(d) – payloads and components for spacecraft
- 5504(2)(e) – ground control stations for space vehicles
- 5504(2)(g) – radiation-hardened microelectronic circuits

Brokering Permits and General Brokering Permits

The permit regime for brokering is similar to the existing one for export permits. Brokering permits are issued to allow for the brokering of goods or technology on the BCL, subject to the terms and conditions found on the permit or those found in regulations. Unlike export permits, which may only be applied for by Canadian residents (because the Canadian resident will be accountable for the exportation), brokering permits may be applied for by any person or organization (given the broader scope of the brokering restrictions, such as including Canadian citizens aboard). The application must contain the information on the form prescribed by the *Brokering Permit Regulations*.^[5]

Similar to general export permits, the Minister may create general brokering permits, which are blanket authorizations that authorize specific goods and technology to be brokered without the need of an individual brokering permit. The first general permit, General Brokering Permit No. 1 ("**GBP No.1**")^[6] allows for the brokering of goods or technology in Group 2 (Munitions List) of the ECL:

- to a specified list of certain European countries, Australia, New Zealand, Japan, South Korea, and the United States, if the goods or technology are to be imported for end-use in one of those countries; or
- for end-use by the Government of Canada.

However, GBP No.1 does not apply to goods in Group 2 (Munitions List) that are considered prohibited firearms, prohibited weapons or prohibited devices, as defined in the *Criminal Code*, unless each country through which the goods are to be moved, including the country of end-use, are listed on the *Automatic Firearms Country Control List*^[7]. Persons or organizations looking to broker using GBP No.1 are subject to obligations to notify the government prior to use of the permit, as well as specific periodic reporting and record-keeping requirements.

Human Rights: Mandatory considerations for Export Permit and Brokering Permit Approvals

The amendments to the EIPA also contemplate new mandatory considerations that must be assessed by the Minister in the approval process of an export permit or brokering permit application. These conditions include considerations as to whether the goods or technology in the application could undermine peace and security, as well as whether they could be used to commit or facilitate international humanitarian and human rights laws, terrorism, organized crime, or serious acts of gender-based violence or violence against women and children. Furthermore, the Minister may add, through regulations, more mandatory considerations to this list.

Offences of Brokering or Attempting to Broker

The new offence of brokering or attempting to broker, without a brokering permit, has been added to the EIPA. If an act or omission that would constitute this offence, it is deemed to have been committed in Canada if the accused is a Canadian citizen, permanent resident present in Canada or an organization organized under the laws of Canada or a province. The same applies to the conspiracy to commit the offense, the attempt to

commit, or being accessory after the fact. However, proceedings with respect to an offence deemed to have been committed in Canada cannot be taken against an accused without the consent of the Attorney General of Canada. Similar provisions to those already in the EIPA regarding the probative value of certain shipping documents when used as evidence have been added for the offence of brokering or attempting to broker.

Criminal Code Amendments

Finally, Bill C-47 amends the *Criminal Code* to bring the statutory offence of brokering or attempting to broker under the surveillance warrant regime of the *Criminal Code*. This amendment allows a judge to issue a warrant authorizing a peace officer to use any device, procedure or technique in the investigation of a potential brokering offence under the EIPA, including intercepting private communications or performing video surveillance.

Conclusion

Given that the maximum fine per count of an offence under the EIPA is also being increased from \$25,000 to \$250,000, compliance departments should audit their corporate policies and procedures to mitigate the risks caused by this significantly increased cost of non-compliance.

Please reach out to a member of McMillan's International Trade team for any questions regarding the new brokering regime or for assistance in auditing or drafting corporate policies or procedures and enhancing your trade compliance program.

by Geoffrey C. Kubrick, Jonathan O'Hara, Chris Scheitterlein and Thomas van den Hoogen, Articling Student

[1] RSC 1985, c E-19.[ps2id id='1' target='']

[2] SOR/2019-222.[ps2id id='2' target='']

[3] SOR/2019-223[ps2id id='3' target='']

[4] SOR/2019-220.[ps2id id='4' target='']

[5] SOR/2019-221.[ps2id id='5' target='']

[6] SOR 2019-229.[ps2id id='6' target='']

[7] SOR/91-575.[ps2id id='7' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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