

Stuck in the Cloud: Trade Control Compliance Issues in Cloud Computing

International Compliance Professionals
Association 2019 Canada Conference

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May 16, 2019

Growing Impact of Canadian Trade Controls

- ↪ what's driving this?
 - ↪ since 9/11, new emphasis of Canadian authorities on security (vs. government revenues)
 - ↪ more recently, increased penalties, enforcement by U.S. authorities
 - ↪ pressure from U.S. affiliates, suppliers and customers (and U.S. government)
 - ↪ but Canada now a “sanctions hawk”
 - ↪ penalty, operational, reputational exposure
- ↪ Canadian companies are now more concerned than ever before about whom they deal with, where their products and technology end up, and who uses their services
- ↪ financings, banking relationships, mergers and acquisitions

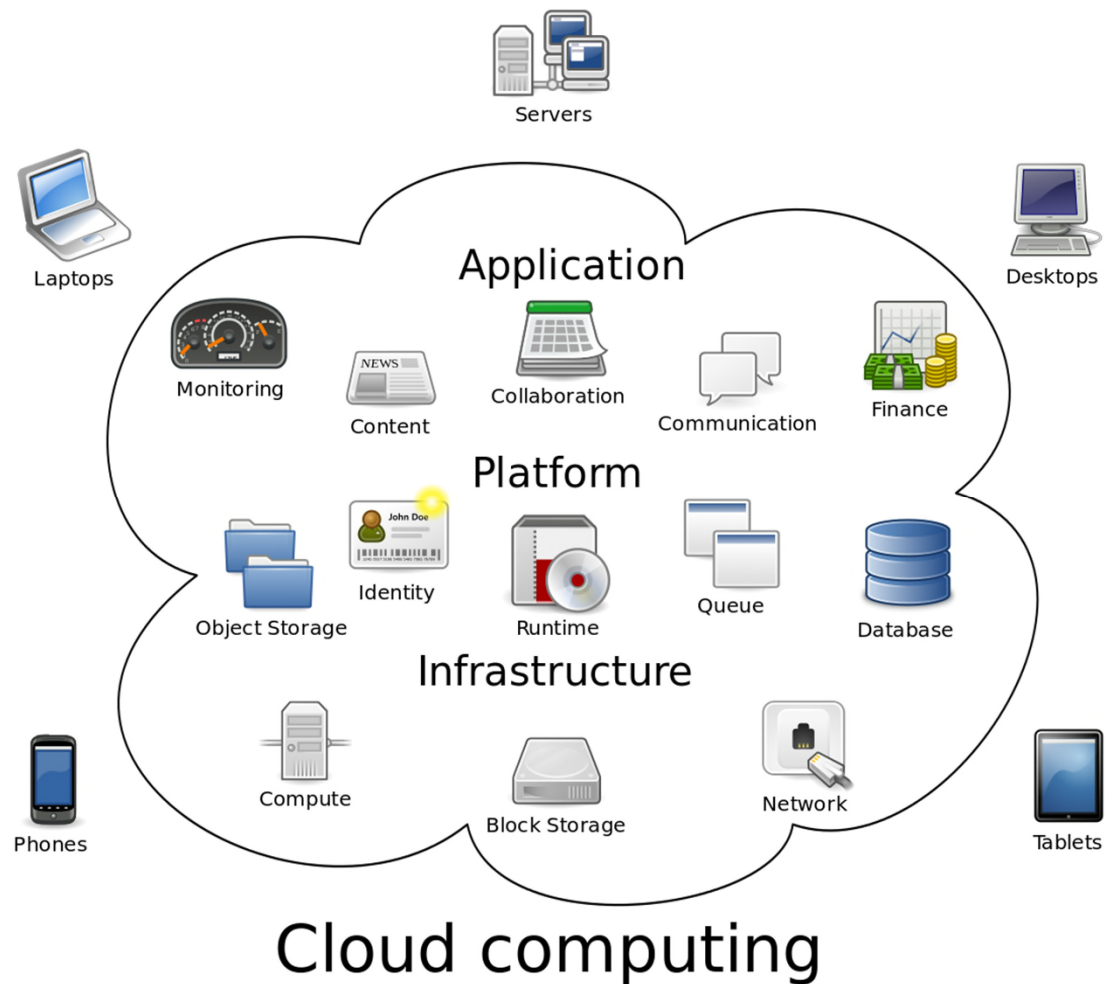
What Are Canada's Trade Controls?

- **export and technology transfer controls**
 - **Export Control List**
 - **Area Control List**
- **economic sanctions**
 - **Special Economic Measures Act**
 - **United Nations Act**
 - **Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)**
 - **Freezing Assets of Corrupt Foreign Officials Act**
 - **Criminal Code**
- **domestic industrial security**
 - **Defence Production Act, Controlled Goods Program**
- **other legislation of potential concern**
 - **blocking orders (Cuba), anti-boycott policy and discriminatory business practices laws**
 - **anti-bribery law (Corruption of Foreign Public Officials Act and US FCPA)**

Today's Focus

- application of trade controls to technology transfers, and in particular, cloud computing structures

What Is Cloud Computing?



Three Key Questions

- what is the nature of the data or technology being transferred or accessed?
- where is data being stored, transferred to or through, or accessed from?
- what parties are involved in the storage, transfer or access?

Export Controls – Export and Import Permits Act

- is it on the Export Control List?
 - goods, technology and software
- is the destination on the Area Control List?
- is there a General Export Permit available?
 - still must meet conditions – notification, reporting, record-keeping
- otherwise, require an individual export permit

Export Controls on Technology

- what is technology transfer?
 - considered to occur when technology is disposed of or its content is disclosed in any manner, from a place in Canada to a place outside Canada

Export Controls on Technology

- ↪ exporting or transferring technology included in the Export Control List (ECL) requires an export permit
- ↪ technology is defined as specific information necessary for the “development”, “production” or “use” of a product, and takes the form of “technical data” or “technical assistance”
 - ↪ technical data – may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices, such as disc, tape, read-only memories
 - ↪ technical assistance – may take forms such as instructions, skills, training, working knowledge, consulting services and may involve transfer of technical data

Transfers by Intangible Means

- ↪ Export Controls Division examples of transfers by intangible means in its latest Export Controls Handbook (August 2017):
 - ↪ provision of services or training (e.g., “help desk” advice)
 - ↪ downloads or other electronic file transfers
 - ↪ file sharing
 - ↪ cloud access
 - ↪ e-mails
 - ↪ faxes
 - ↪ telephone conversations (e.g., negotiations)
 - ↪ teleconference
 - ↪ face-to-face meetings

Canada's Current Position on Export Controls and the Cloud

- generally, transfers within a cloud structure that involve cross-border transfers or access are covered
 - verbal guidance on encrypted data in transmission and at rest
 - access to encryption key
- no written guidance - contrast with US export controls under EAR and ITAR
- if any uncertainty regarding control status, can apply for a permit to obtain comfort

Important Changes on the Horizon

- Bill C-47 amendments to the Export and Import Permits Act
- a control and permit regime for “brokering”
 - **broker** means to arrange or negotiate a transaction that relates to the movement of goods or technology included in a Brokering Control List from a foreign country to another foreign country, including a transaction referred to [below]
 - a transaction that relates to the movement of goods or technology includes **a transaction that relates to its acquisition or disposition**, and a transaction that relates to the movement of technology also includes **a transaction that relates to the disclosure of its contents**
- mandatory criteria for export and brokering permits
 - must refuse if: serious violations of international humanitarian or human rights law, offences under international conventions or protocols relating to terrorism or transnational organized crime, serious acts of gender-based violence or violence against women and children

Important Changes on the Horizon

- ↪ consultations on Bill C-47 closed on January 31, 2019 – but Canadian government noted that it is also
 - ↪ implementing additional reporting requirements for military and defence exports and transfers to the United States
 - ↪ considering longer export permit processing timelines due to new requirements for more detailed documentation of permit reviews
 - ↪ considering expanding existing export and technology transfer controls to "certain emerging technologies or dual-use items of national security concern"
 - ↪ alignment with US review on export controls over foundational and emerging technologies, including artificial intelligence, quantum computing, etc

Defence Production Act – “Controlled Goods”

- companies that deal with controlled goods and technology as identified in the Schedule to the Defence Production Act
 - includes all US-origin ITAR items and goods manufactured from ITAR technical data
- must carefully monitor transfer and access issues within Canada
- risk of unauthorized transfer
- address cloud structure in security plan

Defence Production Act – “Controlled Goods”

- paragraph 10(h) Controlled Goods Regulations requires CGP registrants to “advise the Minister of any actual or potential security breach in relation to controlled goods within three days after the day on which they discover the breach”
- actual vs “theoretical” access to controlled data

Canada's Economic Sanctions

- Special Economic Measures Act, Magnitsky Law and United Nations Act can include:
 - ban on providing goods, services, technology, investment
 - assets freezes – cannot deal with listed individuals, companies, organizations
 - ban on facilitation
 - monitoring and reporting obligations
- Freezing Assets of Corrupt Foreign Officials Act
 - Ukraine, Tunisia, and Egypt (until March 2016)
- application to persons in Canada and Canadians outside Canada
- permit process and enforcement (GAC, CBSA and RCMP)
- also, Criminal Code – terrorist groups

Economic Sanctions: Jurisdictions of Concern

Burma/Myanmar

Central African Republic

Democratic Republic of Congo

Eritrea

Iran

Iraq

Lebanon

Libya

Mali

North Korea

Russia

Somalia

South Sudan

Sudan

Syria

Tunisia

Ukraine (including Crimea)

Venezuela

Yemen

Zimbabwe

Rise of Targeted or “Smart” Sanctions

- sanctions focusing on designated or listed individuals, entities, organizations – and entities they own or control
- new grounds for measures under Special Economic Measures Act
 - involvement in gross violations of human rights
 - significant corruption
- October 2017 - Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)
- disclosure obligations to RCMP/CSIS

Assessing Your Cloud Risk: Revisiting The Three Key Questions

- ↪ what is the nature of the data or technology being transferred or accessed?
 - ↪ is it export-controlled?
 - ↪ is it of US-origin?
 - ↪ is it subject to Defence Production Act?

- ↪ where is data being stored, transferred to or through, or accessed from?
 - ↪ is an Area Control List country involved?
 - ↪ is a sanctioned country involved?

- ↪ what parties are involved in the storage, transfer or access?
 - ↪ are the parties listed, or owned or controlled by someone listed, under economic sanctions?
 - ↪ nationality of involved individuals (for US purposes)

Best Practice #1 – Screening for Designated Persons

- ↪ prohibition against dealings involving designated or listed persons

- ↪ screen for any involvement in the activity – research partner, collaborator, purchaser, borrower, ultimate user, agents, vendor, creditor, broker, service provider

- ↪ limited consolidation of lists by Canada

- ↪ practical necessity of using a third party screener
 - ↪ due diligence on screener

Best Practice #2 – Controlling Technology Transfers

- more difficult to prevent/detect technology transfer violations than export shipment violations
 - coordination with IT to identify email structures, servers, cloud services, applications
 - implementation of controls on server/file access, rights management apps restrictions on emailing and downloading controlled data
 - marking drawings, specs, data storage devices
 - hand carry controls – encryption of laptops, devices
- firm-wide training especially critical for controlling tech transfers

Best Practice #3 – Contract Clauses and Certifications

- trade control clauses for agreements with borrowers, vendors, customers, research partners, etc.
 - they are not designated person nor owned or controlled by same
 - compliance with trade controls and certifications
 - controls in place to prevent and detect violations
 - product information, including ECL/ECCN classification
 - end-use certification
 - indemnification for contravention of trade control clauses or law
 - notification of investigations or inquiries, cooperation

Best Practice #3 – Contract Clauses and Certifications

- contract clauses important but not enough – need to carefully diligence your supplier on where data will reside or operations performed

Best Practice #4 – “Home Grown” Compliance Policies

- trade control compliance in the shadow of the United States
- Canadian controls can be more onerous than US controls – e.g., cybersecurity, encryption, Russia/Ukraine, Belarus, Burma, North Korea
- Canadian controls over US-origin goods and technology
- conflicts
 - Cuba
 - deemed re-export rules and human rights violations

Best Practice #5 – Using Voluntary Disclosure Mechanisms

- in certain circumstances, can be an effective tool
- coordinate with several government depts
 - Export Controls Division
 - Economic Law Division
 - Canada Border Services Agency
 - RCMP (including mandatory disclosure of dealings with designated persons)
 - Controlled Goods Directorate (mandatory breach reporting for Defence Production Act and Controlled Goods Regulations)
 - other (e.g., Canadian Nuclear Safety Commission)

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