

## Canada-U.S. Blog

LEGAL DEVELOPMENTS AFFECTING CANADA-U.S. CROSS BORDER TRADE

# Directors and Officers Liability for Failure to Obtain an Export Permit

By Cyndee Todgham Cherniak on December 8th, 2015

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The Government of Canada (in particular Global Affairs Canada) may pursue directors and officers of a corporation who fail to obtain the required export permits, licenses and certifications. Corporations cannot act on their own. Individuals make decisions that cause the corporation to take actions. With respect to exports, individuals take the steps that cause the export to occur. It may be that an individual makes the decision to not obtain the required export permit, license or certificate. For example, a good may be on Canada's Export Control List and officer/director may be prosecuted for failing to obtain an export permit when that officer/director authorized an export of the good in circumstances where a general export permit or exemption does not apply.

Section 20 of the *Export and Import Permits Act*, states:

“Where a corporation commits an offence under this Act, any officer or director of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.”

There are a number of important points:

1. The Crown can pursue an officer/director even if the Crown has not prosecuted (and the Court has not convicted) the corporation;
2. An officer or director who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may be prosecuted for the offence;
3. Employees are not identified in section 20 of the *Export and Import Permits Act*, which means that only officers and directors may be pursued personally; and
4. The limitation period in subsection 19(2) of the *Export and Import Permits Act* (that is, three years after the time when the subject-matter of the complaint arose) applies to prosecutions of officers and directors.

Subsection 19(1) of the *Export and Import Permits Act* states that:

“Every person who contravenes any provision of this Act or the regulation is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding twelve months, or to both; or

(b) an indictable offence and liable to a fine in an amount that is in the discretion of the court or to imprisonment for a term not exceeding ten years, or to both.”

This means that the Crown may elect to pursue a corporation (or officer/director) by way of summary conviction or indictment. If the Crown pursues the corporation (or officer/director) by way of summary conviction, the maximum penalty is \$25,000 and/or imprisonment of no more than 12 months. However, if the Crown pursues the corporation (or officer/director) by way of indictment, the judge has discretion to set a fine in any amount. The judge cannot impose a term of imprisonment in excess of 10 years.

### **Due Diligence**

Unlike many directors and officer’s liability provisions, there is no due diligence defense in the *Export and Import Permits Act* for offences committed by the corporation or officer/director. An argument may be raised that common law allows for a due diligence defense where the officer/director can show that reasonable care was taken to avoid the commission of an offence. A failure to obtain an export permit is a strict liability offense. For example, if an officer/director implemented a policy to obtain export permits and underlings failed to follow proper procedures, it may be that the facts would support a due diligence defense.

A due diligence defense is available where a Canadian corporation obtains an export permit for a non-resident and that non-resident commits an offence. Section 21 of the *Export and Import Permits Act* states:

“Where a permit under this Act is issued to a person who has applied for it for, on behalf of, or for the use of, another person who is not a resident of Canada and that other person commits an offence under this Act, the person who applied for the permit is, whether or not the non-resident has been prosecuted or convicted, guilty of the like offence and liable, on conviction, to the punishment provided for the offence, on proof that the act or omission constituting the offence took place with the knowledge or consent of the person who applied for the permit or that the person who applied therefor failed to exercise due diligence to prevent the commission of the offence.”

If the officer/director can show that that he/she exercised due diligence to prevent an offence from taking place, he/she should not be convicted (depending on the facts).

If you have any questions, please contact Cyndee Todgham Cherniak at 416-307-4168 or [cyndee@lexsage.com](mailto:cyndee@lexsage.com).

Tags: director, EIPA, employee, Export and Import Permits Act, Export Control List, exporter, exports, importer, liability, officer, strict liability

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Cyndee Todgham Cherniak  
c/o LexSage Professional Corporation  
The Gooderham “Flatiron” Building, 49 Wellington Street East, Suite 501  
Toronto, Ontario  
M5E 1C9  
Phone: 416-307-4168  
Fax: 416-760-8999

Susan Kohn Ross  
c/o Mitchell Silberberg & Knupp LLP  
11377 W. Olympic Boulevard  
Los Angeles, California

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90064

Phone: 310-312-3206

Fax: 310-231-8406

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