

Canadians doing any type of work related to U.S. defence materials or services are subject to rules that can conflict with human rights legislation in this country.



# A FINE BALANCE

BY HEATHER CAPANNELLI

It's not easy being a superpower. It's a challenge to police the world, keep terrorism at bay, and tend to international crises; all the while keeping the homeland safe and secure (and guarding more than a few secrets in the process). Enter the International Traffic in Arms Regulations, a set of U.S. government

regulations that control the export and import of defence-related articles and services to the United States.

The regulations are aimed at keeping U.S. defence information, technology, and materiel out of the hands of the "enemy," and stipulate that only U.S. citizens can handle such information

unless otherwise approved by the U.S. State Department. The authorization is required when any non-U.S. person or entity receives or handles "defence-related articles" that are exported by the U.S. under ITAR. These include anything from computer chips to drawings, schematics, equipment, and

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parts — essentially anything that could make its way into a defence system.

At the centre of the regulations is a list of 26 “embargoed countries” whose citizens are forbidden from having access to U.S. military technology and information — even when that technology and information has been exported to Canadian companies in the defence sector. The list includes the usual suspects — Afghanistan, Cuba, Iran, Iraq, Sudan, North Korea, Sri Lanka, and Zimbabwe, to name a few — and landed immigrants or citizens of Canada who work in the defence sector and maintain dual citizenship with any of the 26 listed countries can find themselves being quietly shifted from one department to another or suspended altogether to avoid contravening ITAR. U.S. companies that violate their licence by doing business with a Canadian company that allows these individuals improper clearance are subject to huge fines and face future licensing problems.

Complying with ITAR has been a challenge for several Canadian companies, given that human rights legislation in this country prohibits an employer from asking about a person’s citizenship or ethnic background in a job interview or screening process. So what is a Canadian company handling U.S. defence technology or information to do to ensure it complies with both ITAR and Canadian human rights obligations? The answer is hard to come by.

Even though agreements have been reached between the Canadian and U.S. governments that allow dual-citizen employees of the Canadian Department of National Defence to have clearance to handle information and goods covered by ITAR, “so far, there’s been no agreement on how to deal with this issue for Canadian companies,” says Catherine Coulter, head of Fraser Milner Casgrain LLP’s Ottawa employment and labour group. “If you’re not DND, you’re still caught up in this conundrum.” She says ITAR is now “one of the biggest yet quietest issues hitting the radar of Canadian importers of U.S. defence-related articles and services,” and that since Sept. 11, 2001 the regulations have become even more closely scrutinized than when they were first introduced back in the early 1980s.

As of June 19, 2008, however, dual nationals in the Canadian Communications Security Establishment, the Canadian Space Agency, and the National Research Council who are issued a “minimum secret-level security clearance” will be permitted access to ITAR-controlled items. But the State Department has made it abundantly clear that “this applies only to the CSE, CSA, NRC and DND and is not extended to private companies in Canada.”

For its part, the Canadian Department of Public Works and Government Services, the ministry responsible for Canada-U.S. relations with respect to ITAR, says, “There are administrative and policy challenges relating to the implementation of ITAR that require the governments of [both countries] to work together.” Speaking for Public Works, Lucie Brosseau says, in the post-Sept. 11 era, one serious issue between Canada and the U.S. has been the increasingly restrictive application of ITAR on U.S. exporters as it relates to access for Canadian citizens with another nationality. But, in spite of this, the timeline for future talks is uncertain, and she will only say that “government officials continue to meet formally and informally on this very important issue.”

In January of this year, Quebec’s Commission des droits de la personne et des droits de la jeunesse, reported that a settlement had been reached between Bell Helicopter and a prospective intern concerning the application of the ITAR rules in the hiring process. The complainant, a Haitian-born Canadian who held citizenship in Canada for almost 30 years, applied for an internship with the company as part of a training program. His application was accepted, along with 14 others, but when he began the internship he was notified that his place of birth disqualified him from continuing under the ITAR rules. “The commission very loudly said that this wasn’t acceptable. It’s only a matter of time before we see more of these,” says Coulter.

In its statement released at the time, the commission reiterated its opposition to the application of the ITAR rules in Quebec “because of their discriminatory impact,” saying they were “inconsistent” with the Quebec Charter of Human Rights and Freedoms. It further publicly invited others who felt their rights had been infringed by the application of ITAR to come forward.

In a case before the Ontario Human Rights Commission, General Motors Defense, a division of General Motors of Canada Ltd. that manufactured military vehicles for various governments, including the U.S. (using material and data exported from the U.S.), was taken to task by six unionized employees who were Canadian citizens or landed immigrants from a country other than the U.S. According to information released by the Ontario Human Rights Commission, the complainants alleged the company called them to a meeting with other employees and told them they were being sent home with pay for reasons relating to their citizenship. After five years and a hearing before the Ontario Human Rights Commission, a settlement was reached with

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the company (now General Dynamics Land Systems Canada Corp.) and the unionized employees were returned to work but subjected to new restrictions in terms of access to information required to do their job, or provided with alternative assignments. “The corporation is caught between federal law, which is required by treaties with the U.S. to follow ITAR, and provincial human rights laws,” says Peter Keating, vice president of communications and public affairs for General Dynamics. “Human rights is a major political issue in Canada, there being a very large

immigrant population. In the U.S., it’s not a codified thing.”

Coulter says since there is so little law on the issue in Canada (largely because employers do their best to make sure these complaints get resolved before they become public) the best advice is to tread carefully and get the assistance of legal counsel. “Nobody wants to be the test case — to be told you’re engaging in a practice that’s discriminating,” she says. But ultimately there is a business decision and a legal decision to be made, which forces companies to walk a very fine line.

Employers, Coulter says, will often try to ensure that nobody loses a job as a result of ITAR compliance, or will try to make it clear from the beginning that certain people aren’t eligible. “But it’s not only important to keep your employees, you need to keep them happy,” says Coulter. “As a lawyer, you can’t advise your client to circumvent the Human Rights Code and discriminate, but they have to then balance it within their own workplace. All we can do is give the appropriate legal advice and make sure the client understands it.” **Q**