FRASER MILNER CASGRAIN LLP

An Examination of ITAR: The Impact on Canadian Dual National Employees

As originally published on the Human Resources Professionals Magazine, June 2007

by Evelyn L. Ackah B.A., LL.B
With assistance from Amy Then, Student at Law

What is ITAR?

The International Traffic in Arms Regulations (ITAR) is a collection of US government regulations that control the export and import of defence-related articles and services that are on the U.S. Munitions List. The US denies the export and import of defence articles and defence services destined or originating in countries with respect to which it maintains an arms embargo, such as: Burma, China, Haiti, Liberia, Rwanda, Somalia, Sudan, Cote d'Ivoire, Zimbabwe and Democratic Republic of the Congo. Other "countries of concern" include Cuba, Syria, Lebanon, Iran, North Korea, Balkans, Belarus, Iraq and Afghanistan, Venezuela, among others. The ITAR regulations arose from US concerns that US-built technology was being exported for military use by countries identified by the US as "rogue states".

Canada not Exempt

Prior to 1999, Canada was not subject to the requirements of ITAR. Since the 1941 Hyde Park agreement, there has been cooperation between the US and Canada in military production and trade. As a result, there were ongoing exemptions in both Canadian and US laws to allow for military trade between the two countries free from licensing requirements.

In 1999 the US revoked Canada's ITAR exemption and imposed licensing requirements on defence related articles and services that had previously not been subject to the export permit process. Perhaps most startlingly, the 1999 also amended the very definition of "Canadian" and ruled that Canadians with dual citizenship were not Canadians and, in some circumstances, would not be granted ITAR eligibility requirements (despite said Canadian citizenship).

There were several concerns which allegedly led to the US revocation of the Canadian exemption to the ITAR regulations. These included: Foreign ownership of some Canadian companies; Canada's refusal to ban defence exports to countries deemed as countries of concern by the US; Canada's dual-citizenship allowance; and Canada's allegedly lax border controls and immigration policies.

Impact on Canadian Businesses

The primary impact of ITAR is that if a Canadian company in the defence industry requires access to US technology (which is quite likely given that the US is Canada's main defence partner), an ITAR license will be required for each employee exposed to the controlled technology. As a result, if a dual national in Canada is exposed to controlled technology, the technology is deemed to have been "exported" not only to Canada but also to the employee's other country of citizenship, which could lead to significant problems under ITAR.

As a result of ITAR, employers must now consider the level of access and "exposure" an employee will have and whether Canadian dual-nationals are eligible to receive controlled technology and qualify for a US ITAR license. US controlled technology is most often stored in electronic format, therefore, exposure and possibly "deemed export", is most likely to occur when an employee has access to the employer's computer network. As such, employers and

immigration counsel should ask the following questions: Whether the dual nationality employee (or potential employee) has unrestricted server access?; has "master" IT access; is exposed to internal company research materials?; or participates in meetings or conference calls regarding such materials and technology?

If the answer to any of the above is "yes" than the employer will need to obtain an ITAR license for that employee. If the employee is a dual-national from a country of concern, the license will most likely be denied. If the employee remains at the company, the American company wishing to export their technology to Canada will likely not be granted an export permit.

Impact on Canadian Dual-National Employees

Canadian dual national employees in the defence industry are caught between American and Canadian legislation. As an independent country, Canada has chosen to recognize dual nationality of individuals from all countries including those considered by the US to be "countries of concern". However, for the purposes of ITAR, the US does not similarly recognize Canadian dual nationals as Canadians – as General Motors (and its successor company General Dynamics) and Bell Canada Textron Canada Ltd. have discovered.

General Motors

General Motors settled with the U.S. Department of State for $20 million after a series of alleged ITAR violations related to dual citizen employees having access to technical data. One GM employee who knows all too well the considerable impact of ITAR is Marcos Henriquez. Henriquez, formerly a private in the Canadian military, drove light armoured trucks and even trained American soldiers. He is also a citizen of El Salvador and therefore considered a

"security risk" and not eligible for ITAR licensing. GM attempted to negotiate a waiver for Mr. Henriquez but was refused and told by the US government that no exceptions are made under ITAR. GM was left with a choice: Henriquez or the American defence contract. Henriquez was let go and has not returned to General Motors since the summer of 2001, despite offering to denounce his El Salvadorian citizenship. He reached a settlement with GM for an undisclosed amount.

The Ontario Human Rights Commission is investigating 200 layoffs by GM as a result of ITAR compliance and GM will face the tribunal in early 2007. In Canada, discrimination based on nationality is prohibited. As a result, companies like GM, hoping to benefit from the $7 billion dollar a year defence industry, are caught between American legislation and Canadian human rights legislation. For example, job advertisements, such as the one which was posted on CAE's web site on January 6, 2007, violate Canadian human rights laws. The CAE job advertisement for a "Program Analyst I – Mirabel" included "must be eligible to meet requirements of U.S. International Traffic in Arms Regulations (ITAR) […]". Clearly this is incompatible with the Canadian Human Rights Commission's Hiring Guide which states that "job advertisements cannot directly or indirectly ask about race, ancestry, place of origin, colour, ethnic origin, citizenship, creed […]".

Bell Helicopter

This is not an isolated problem. Bell Helicopter Textron Canada, which uses controlled technology and data when manufacturing helicopters, was forced to "reassign" 24 dual-nationality employees in order to comply with ITAR. Again, the Canadian company was forced to decide whether to comply with American legislation and keep a $849 million contract with the

US Department of Defence or to comply with Canadian laws. A former Bell intern of Venezuelan and Canadian nationality is seeking $110,000 from the company due to ITAR restrictions leading to his loss of employment.

Conclusion

Immigration and employment law counsel must recognize that when advising corporate clients and HR professionals whose employees are exposed to controlled technology, the employer must not only consider Canadian immigration and employment law requirements, but must also consider American legislation. This sad fact has become increasingly common and is not limited to the defence industry. In the banking industry, for example, in an effort not to contravene US banking and anti-terrorism legislation, the Royal Bank of Canada in January 2007 refused to open US dollar bank accounts for individuals who are nationals of "countries of concern" such as Iran.

The choice for employers, while bleak, is clear: sovereignty or sales? The ITAR rules have extended US jurisdiction into Canada and have significantly impacted the way Canadian businesses recruit new employees. How many more Canadian dual citizens are going to have to choose between their jobs and their citizenship?

As originally published on HRPAO magazine