

# US and Canadian Regulation of Controlled Goods and Technology: ITAR and CGP

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# Today's Focus

- Canada's Controlled Goods Program (CGP)
- US International Traffic in Arms Regulations (ITAR)
- final ITAR Rule on dual- and third-country nationals (ITAR 126.18)
- how will the US and Canadian rules work together?

# Canada's Controlled Goods Program

- domestic industrial security program
- administered by the Controlled Goods Directorate (CGD) (part of Public Works and Government Services Canada)
  - background and history
  - relationship with U.S. ITAR and “Canadian exemption”

## Canada's Controlled Goods Program (cont'd)

- CGP applies to:
  - most Export Control List (ECL) Group 2 munition items
  - ECL item 5504 (strategic goods & US ITAR basket) – includes non-military items – satellite systems, propulsion and space-related equipment
  - ECL Group 6 items (missile)

## Canada's Controlled Goods Program (cont'd)

- key CGP obligations
  - registration required in order to examine, possess or transfer a controlled good
  - maintain security
  - prevent unauthorized transfers, examinations

## So We Have Controlled Goods, What Now?

- as a CGP registrant, you must:
  - perform a “security risk management assessment”
  - develop and implement a written security plan
  - appoint a Designated Official
  - maintain records and supporting documentation
  - provide training programs and security briefings
  - advise CGD of any security breaches

## So We Have Controlled Goods, What Now? (cont'd)

- Designated Official (DO) must
  - submit to a security assessment by CGD
  - conduct, without consent security assessments of individuals requiring access to controlled goods or technology
  - determine extent to which individual poses risk of violation
  - make and keep individual evaluations of honesty, reliability and trustworthiness
  - authorize extent to which individuals may examine, possess, transfer controlled goods or technology
  - submit applications to CGD for temporary workers / visitors to access controlled goods or technology

## Who Can Access Controlled Goods at Your Facility?

- access to your controlled goods and technology will be limited to:
  - officers, directors and employees authorized by DO
  - temporary workers or visitors (not Canadian citizens or residents) proposed by DO and authorized by CGD
  - contractual workers that are themselves registered or employees of registered firm
  - officers, directors and employees of US companies registered under ITAR

## What About Exporting a Controlled Good or Technology?

- exporting most controlled goods items from Canada for end-use in the United States does not require a permit
- exporting controlled goods items to other destinations
  - must apply to DFAIT's Export Controls Division for export permit and provide evidence of registration under CGP

# Compliance Issues

- ↪ non-compliance attracts penalties of up to \$2 million per day and 10 years imprisonment
- ↪ possible enforcement action
  - ↪ Voluntary Disposal
  - ↪ Negotiated Compliance
  - ↪ Warning Letter
  - ↪ Formal Hearing
  - ↪ Suspension or Cancellation of Registration
  - ↪ Detention and Removal
  - ↪ Prosecution
- ↪ no prosecutions yet

# Canadian Human Rights vs. ITAR

- compliance with U.S. ITAR licensing requirements
- in order to benefit from ITAR 126.5 “Canadian exemption”, transfers of technical data and defence services must be to Canadian registered persons
  - exemption unavailable if “dual national” of a proscribed country, including those holding citizenship or perhaps born there
- terms of TAA or MLA approved by State may allow transfers only to certain “dual nationals”
- compliance may require Canadian companies to determine citizenship, country of origin/birth, exclude access to certain areas, projects
  - may also require application for license or TAA/MLA amendments

## Canadian Human Rights vs. ITAR (cont'd)

- problem if the employee was born in or holds citizenship in certain proscribed countries
- temporary residents, students
- in order to comply, companies in Canada may be required to determine country of birth, citizenship
- if licence denied, required to restrict individual's access to the controlled goods, technology or software
  - denial of employment
  - denial of advancement, training opportunities

## Canadian Human Rights vs. ITAR (cont'd)

- ↪ prima facie breach of Canadian human rights law, if on basis of citizenship or country of origin:
  - ↪ terminate an employee
  - ↪ deny employment
  - ↪ restrict access to training
  - ↪ treat others preferentially
    - ↪ promotions
    - ↪ overtime
    - ↪ scheduling
  - ↪ also - asking about citizenship, nationality, country of birth

## Canadian Human Rights vs. ITAR (cont'd)

- possible defence to a complaint
  - bona fide occupational requirement
    - rule is rationally connected to job performance
    - adopted in honest and good faith belief that it is necessary
    - reasonably necessary and impossible to accommodate without imposing undue hardship
  - no case law re compliance with discriminatory laws
  - drug testing policy – accommodate to point of undue hardship

## Canadian Human Rights vs. ITAR (cont'd)

- examples of conflicts (ITAR)
  - General Motors Defense (2007 – Ontario Human Rights Commission)
    - complaints by six employees, Canadian citizens or landed immigrants, citizenships of third countries (ITAR proscribed states)
    - employees sent home with pay, restricted their access to information, reassignments
    - settled, including monetary remedies
    - employer to make “all reasonable efforts to secure such lawful permission as may be obtained to minimize any differential treatment”

## Canadian Human Rights vs. ITAR (cont'd)

- examples of conflicts (ITAR) (cont'd)
  - Bell Helicopter (2008 – Quebec Human Rights Commission)
    - complainant born in Haiti, Canadian citizen for 30 years
    - applied for and hired on internship and training
    - subsequently denied internship because of ITAR rules
    - claim for damages settled

## Canadian Human Rights vs. ITAR (cont'd)

- Québec Human Rights Commission
  - “reiterates its opposition to the application of the ITAR rules in Québec because of their discriminatory impact”
  - “they include requirements that are inconsistent with the *Québec Charter of Human Rights and Freedoms*”
  - “can no longer accept that companies established in Québec submit to foreign rules that infringe on the values and rights of citizens as recognized by the National Assembly”
  - “following the political developments in this matter attentively ... any person that believes that his or her rights have been infringed by the application of the ITAR rules may rely on the services of the Commission”

# Proposed ITAR Revisions

- March 10, 2010 U.S. Administration announcement
  - revise ITARs to eliminate the need for a separate license for foreign persons with dual- or third-country origins or nationality employed by a company, government, or international organization that is a recipient of USML exports
  - “danger of diversion to a proscribed destination does not come from dual- or third-country national who may have a relationship with a proscribed destination and who may have gained inadvertent access to U.S. technology, but rather from a foreign government, company or organization that would deliberately sanction such access”
  - “begin to standardize the licensing treatment of dual- and third-country nationals under the U.S. Munitions and U.S. dual-use export control systems”

# The New ITAR Rule (ITAR 126.18)

- May 16, 2011 final rule – effective August 15, 2011
  - no approval from the US State Department Directorate of Defense Trade Controls (DDTC) required for the transfer of defence articles, including technical data, to a foreign business entity, foreign government entity, or international organization that is an approved end-user or consignee for those items,
    - “including the transfer to dual nationals or third-country nationals who are bona fide, regular employees, directly employed by the foreign business entity”
  - transfer must take place completely within the territories where the end-user is located or where the consignee operates, and must be within the scope of an approved export license, other export authorization, or license exemption
  - the recipient of the defence article is required to have in place “effective procedures to prevent diversion” to destinations, entities, or for purposes other than those authorized by the applicable export licence or other authorization

## New ITAR Rule (ITAR 126.18) (cont'd)

- “effective procedures to prevent diversion” - Canadian firms that are consignees or end-users of the defence articles must either:
  - require a security clearance approved by the Canadian government for its employees **or**
  - implement a screening process for their employees and execute Non-Disclosure Agreements that provide assurances that employees will not transfer any information to persons or entities unless specifically authorized by the employer
    - must screen **all** employees who are to access controlled items for "substantive contacts" with the 25 restricted or prohibited countries under ITAR — including China, Vietnam, Haiti, Cuba, Venezuela and other countries subject to U.S. military sanctions

## New ITAR Rule (ITAR 126.18) (cont'd)

- what are “substantive contacts”?
  - include:
    - regular travel to those countries
    - recent or continuing contact with agents, brokers and nationals of those countries
    - continued demonstrated allegiance to those countries
    - maintenance of business relationships with persons from those countries
    - maintenance of a residence in those countries
    - receiving salary or other continuing monetary compensation from those countries
    - acts otherwise indicating a risk of diversion

## New ITAR Rule (ITAR 126.18) (cont'd)

- if an employee is determined to have “substantive contacts” with persons from the ITAR-restricted or prohibited countries, this is presumed to raise a risk of diversion “unless DDTC determines otherwise”
- other requirements
  - technology security/clearance plan that includes procedures for screening employees’ substantive contacts
  - maintaining records of same for five years
  - technology security/clearance plan and screening records to be made available to DDTC or its agents for civil or criminal law enforcement upon request

## Changes Coming to Canada's Controlled Goods Program

- problem: the final ITAR rule does not contain an explicit exemption for companies that are registered under and comply with CGP
- CGD's Enhanced Security Strategy
  - screening questionnaire being developed and will be provided to Canadian companies to assist them in identifying risks during the security assessment of their employees under the CGP

## Changes Coming to Canada's Controlled Goods Program (cont'd)

- ↪ factors to be considered include the following:
  - ↪ contacts with government officials, agents or proxies
  - ↪ business and/or family contacts
  - ↪ continuing allegiance to a foreign country
  - ↪ relationship with a foreign country government (e.g., employment)
  - ↪ frequent travel
  - ↪ residence and/or bank accounts in a foreign country
  - ↪ affiliations within or outside Canada
- ↪ nature and substance of contacts will be used to determine if an individual should be subject to broader security assessment or denied registration
  - ↪ where risk threshold is exceeded, CGD, working with a number of other govt departments, will undertake a risk assessment of the individual to determine whether access should be granted

## Key ITAR / CGP Issues

- “substantive contact” screening – Canada vs United States
- DDTTC demands for documentation, information
- scope of changes to CGP and role of DO
- government security clearances
- ITAR coverage shrinking, but CGP remains the same
- academic institutions

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