



COMMERCIAL LAW

Sovereignty of Canadian Laws Facing the American Neighbour.

Nowadays, relations between Canada and the United States have reached an importance such that our economies can now be qualified as an “integrated economy”. In the face of this ever more increasing trade, one question arises: can a business ignore Canadian laws in order to protect its commercial relations with a foreign country? The answer is no.

This question was brought before the Human Rights Tribunal who, in its December 29, 2010 decision, upheld the most fundamentals values of the Province of Québec.

The case is as follows: a Canadian citizen of Pakistani origin, Mr. Javed Latif, is a former fighter pilot with more than 25 years of experience, having reoriented toward business aviation. In March 2004, in order to meet the requirement of a job offer, Mr. Latif applied with Bombardier Inc. (*Bombardier Aerospace Training Center*) for simulator training on *Challenger 604* and *Global Express* planes. Despite the fact that Mr. Latif was ready to meet all required expenses, his application for training under Canadian license was refused.

Indeed, since 9/11, the U.S. authorities have instated a security check by which any pilot without US citizenship must obtain the approval of the United States Department of Justice (“D.O.J.”) in order to be admissible for training. In 2007, the D.O.J. listed more than 700,000 specific persons as “potential terrorists”. Bombardier received notice from the U.S. authorities ordering that no training should be provided to Mr. Latif. Bombardier elect to follow this order in fear of seeing its training certification revoked by the U.S. authorities. It must be noted that Bombardier is the only Canadian training center that offers training on the planes for which Mr. Latif has received employment offers. The refusal to provide training to Mr. Latif thus deprive him of many offers of employment.

- *Where can U.S. pressure lead us? What are the limits?*

Mr Latif appealed to the Human Rights Tribunal on the basis of **discrimination based on ethnic or national origin**. The ground of his claim was the violation of the *Charter of Human Rights and Freedoms*. He claims compensation for the direct prejudice he suffered, being:

1. Material damages for loss of opportunity (loss of revenue);
2. Moral damages for emotional shock upon learning that his request for training was refused;
3. Punitive damages based upon an illicit and intentional violation to the *Charter of Human Rights and Freedoms*.

In support of his claim, Mr. Latif invokes the following rights guaranteed by the *Charter of Human Rights and Freedoms* :

“10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.”

“12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.”

Ultimately, the Tribunal concludes that there was discrimination. The refusal to provide training under Canadian license constitutes a distinction based on ethnic or national origin, effectively violation Mr. Latif's right to the full and equal recognition and exercise of his rights.

However, under certain conditions, the *Charter of Human Rights and Freedoms* allows discrimination. Bombardier did not fail to invoke these exceptions in its defence. Indeed, when a defendant can demonstrate a **real, rational, and reasonable** justification for discrimination, the *Charter* does not apply. The defendant must demonstrate that the discriminating rule has been adopted in good faith and with a rational goal with regards to the situation. A rule is considered **rational** when it is legitimate and pertinent. Finally, the rule must be **reasonably** necessary to reach the pursued goal, i.e. the means taken must be proportional to the objectives.

Bombardier put forward two arguments:

1. **Security.** Bombardier refused to provide training in order to protect the safety of Canadians and of aviation in general.
2. **Financial Justification.** Bombardier affirmed that if the U.S. authorities' notice had not been followed, this would have had a negative impact upon its commercial activities in the U.S., leading to loss of jobs and of revenue.

As for the first argument, the Human Rights Tribunal judged that Bombardier was not the legitimate entity responsible for Canada's national security, As the Canadian state had not decided to follow the U.S. security measures, Bombardier's actions were neither legitimate nor pertinent in view of a security objective.

As for the second argument, the Tribunal judged that Bombardier's purported goal of protecting jobs and revenues in Québec was not rational in this context. As the criterion of **rationality** was not met, it was not necessary to analyze the other steps.

Bombardier's decision was thus discriminatory and in violation of the rights guaranteed by the *Charter*.

- *What monetary compensation can Mr Latif receive as a result of the violation of his Charter rights?*

A person or a business that commits a fault, which causes to damage to another, has the obligation of indemnifying this other person. A fault can be intentional or not—the obligation to indemnify remains. In application to Mr Latif's case, the violation of his rights guaranteed by the *Charter* constitutes a civil-law fault.

- *Has the fault caused damage to Mr Latif?*

According to the Human Rights Tribunal, yes. Bombardier's fault resulted in a loss of salary and an emotional shock. The damage is called “**material**” when it affects the victim's patrimony, and “**moral**” when it affects the victim's person (honor, dignity, etc.).

In addition, the *Charter of Human Rights and Freedoms* goes farther: its Article 49 provides for punitive damage, as follows:

“49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.”

- *Why is granting punitive damages necessary? What measures can be taken to insure that businesses respect the Charter? Why does the law provide for punitive damages?*

In certain exceptional cases, compensation under the Civil Code is not sufficient to guarantee respect of the Law—punishment is necessary. This is why, when a violation to a *Charter* right or freedom is **illicit** and **intentional**, punitive damages can be ordered. Such damages are an exception to the general principles of civil law, in that they aim not to compensate the damage suffered, but rather to punish the culprit and thus make an example for society's sake. In addition, since punitive damage depends according to the facts of every specific case, one cannot predict in advance the amount in which they will be allocated. In this way, punitive damages act as a deterrent against willful violation of rights.

Take, for example, the situation of a restaurant server who is refused a job, based upon his sexual orientation. Compensation owed because of this fault depends upon the damage suffered. Thus, should this person find another job the next week, she would only be entitled to compensation equivalent to one week of lost pay.

In its decision of December 29, 2010, the Tribunal condemned Bombardier to pay over \$300,000 in material damages, \$25,000 in moral damages, and \$50,000 in punitive damages. In addition, it ordered Bombardier to cease following notices given by the U.S. authorities regarding pilot training under Canadian licences.

It must be noted that this judgment is the first of its kind that, since the 9/11 attacks, showcases the consequences that pressure from U.S. authorities can have on Canadian businesses. The judgment also constitutes the largest amount of punitive damages awarded by the Human Rights Tribunal to this day.

The story is not over yet—on February 17, 2011, Bombardier appealed the judgment before the Court of Appeal.

Conclusion

Trade relations being particularly extensive between countries nowadays, one may ask up to what point one country would be ready to go in order to preserve its preferred relations with a foreign country. The Bombardier case recounts the story of a plane pilot of Canadian citizenship and Pakistani origin who finds himself barred from a pilot training course in Canada under the pretext that he did not pass a security check implemented by the U.S. authorities in the aftermath of 9/11. The Human Rights Tribunal grants the plaintiff's claim and awards the highest amount in punitive damage ever granted in Québec to this day. A business cannot, in order to keep good relations with a foreign State, disregard the *Charter of Human Rights and Freedoms* that enshrines the most fundamental values of Québec.

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