Commission des droits de la personne et des droits de la jeunesse Québec

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RACIAL PROFILING IN A CONTEXT OF EMPLOYMENT

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INTRODUCTION

The Commission des droits de la personne et des droits de la jeunesse[1] must guarantee, by all appropriate means, the promotion and respect of the principles contained in the Quebec *Charter of Human Rights and Freedoms*[2]. Among other things, it assumes the responsibility to investigate in a non-contradictory manner, of its own initiative or when it has received a complaint concerning any situation which could seem to constitute a case of discrimination[3].

Within that context, the Investigation Division of the Commission has received over the recent years several complaints concerning situations of discrimination based on race, ethnic or national origin, exercised by persons in situations of authority **for reasons of security, safety or public protection** (a form of discrimination often described as "racial profiling").

The right of equality is one of the principles recognized by international legal instruments as well by the Canadian (article 15)[4] and Quebec (article 10)[5] Charters raised as a first line of defence against racial profiling.

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1 Referred to throughout as the "Commission".

2 R.S.Q., c. C-12, Referred to throughout as the Charter or the Quebec Charter.

3 Art. 71, Quebec Charter.

4 Art. 15, Quebec Charter:

"(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

5 Art. 10, Quebec Charter:

"Every person has a right to full and equal recognition 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, la language, ethnic or national origin, social condition, handicap or the use of any means to palliate a handicap.

(… next)

That specific demonstration of discrimination is a grave violation of human dignity[6].

In Canada, the Supreme Court, through Justice Wilson in the case of *Morgentaler*[7], states the following:

> "The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."

Racial profiling is based on policies according to which certain crimes are related to individuals belonging to specific ethnic groups.

Before the infamous 9/11, it was common knowledge in North America that persons (or communities) generally considered as victims of profiling were Blacks, Latin-Americans, Natives. Obviously, since 9/11 (2001), persons of Arab origin or of Muslim faith have joined that group[8].

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

6 Art. 4, Quebec Charter:

"Every person has a right to the safeguard of his dignity, honour and reputation."

7 *R.* v. *Morgentaler,* [1988] 1 S.C.R. 30, p. 166.

Our precisions: in that decision, comments concerning the right to dignity (not explicitly written in the Canadian Charter) were developed as an analysis of article 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

8 See: Emerson DOUYON, « L'impact du 11 septembre sur les communautés ethnoculturelles au Canada », dans *Terrorisme, droit et démocratie. Comment le Canada est-il changé après le 11 septembre?*, Canadian Institute for the Administration of Justice, Éditions Thémis, 2002, p. 193-197.

Certain persons consider, in this respect, that the *Anti-Terrorism Act* [9] can have a disproportionate incidence on persons of Arab origin or of Muslim faith.

The urgency of adopting an official definition of racial profiling for the Commission as well as guidelines for its investigations gradually became a clear necessity.

In exercising the responsibilities it has under the *Charter of Human Rights and Freedoms*, the Commission has chosen to adopt the following definition of racial profiling[10]:

> **"Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or**

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9 (L.C. 2001, c. 41). See: Canadian Bar ASSOCIATION, *Submission on the Three Year Review of the Anti-Terrorism Act*, May 2005, [On line]. http://www.cba.org/CBA/submissions/pdf/05-28-eng.pdf

The views of Canadian Scholars on the impact of the anti-trerrorism Act, APPENDIX A, 8, James STRIBOPOULOS, Faculty of Law, University of Alberta, [On line]. http://www.justice.gc.ca/fra/pi/rs/rap-rep/2005/rr05_1/a_08_01.html

LIGUE DES DROITS ET LIBERTÉS, *Nous ne sommes pas plus en sécurité; nous sommes moins libres*, janvier 2004, [On line]. http://www.liguedesdroits.ca/documents/surveillance/campagne/analyse_fr_rev.pdf; numéro spécial : textes du colloque tenu les 26-27 novembre 2004 : *Un monde sous surveillance - Sécurité, libertés civiles et démocratie à l'ère de la guerre au terrorisme,* volume XXIII, n° 1, printemps 2005, voir particulièrement Nicole FILION « Tout n'a pas commencé le 11 septembre 2001… », « Déconstruire le discours sécuritaire pour construire un monde "libéré de la misère et de la terreur" », Denis BARETTE « La loi antiterroriste en bref »; François CRÉPEAU « L'étranger et le droit à la justice après le 11 septembre 2001 », [On line].
http://www.liguedesdroits.ca/documents/bulletins/bulletin_printemps2005.pdf

DROITS ET DÉMOCRATIE, Comité sénatorial spécial sur la Loi antiterroriste, Intégration des protections démocratiques et des droits humains à la loi et aux pratiques antiterroristes canadiennes, Présentation de Jean-Louis Roy, Président, Ottawa le 16 mai 2005, [On line]. http://www.dd-rd.ca/site/_PDF/publications/promoDroits/Senateterreur.pdf

See also: Resolution 04-07-A "Racial Profiling and Law Enforcement" adopted by the Council of the Canadian Bar Associatio, at its annual general meeting held in Winnipeg (MB), August 14 and 15, 2004, [On line]. http://dev.cba.org/cba/resolutions/pdf/04-07-A.pdf; Selwyn A. PIETERS, "Expanding the Boundaries of Human Rights Litigation – Post 9/11, Racial-Profiling and the Impact of the Pieters Settlement " Paper prepared for the "Spinlaw Conference" (Faculty of Law, University of Toronto, and Osgoode Hall Law School, March 08, 2003).

10 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Racial Profiling : Context and Definition*, by M[e] Michèle Turenne, document adopted at the 505[th] session of the Commission held on June 10, 2005, Cat. 2.120-1.25.1.

> **public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.**
>
> **Racial profiling includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed."**

RACIAL PROFILING IN THE RARELY DISCUSSED CONTEXT OF EMPLOYMENT

Most cases listed so far in Canadian and even American jurisprudence refer to situations in which officers are agents of controlling forces and act in a public security context (air or ground public transport services[11], traffic control, customs, criminal investigations, etc.).

However, that does not exclude the fact that racial profiling can be found in other contexts such as access to employment, a context which will be our focus in this paper.

A case listed in Canadian jurisprudence and related to racial profiling (even if the Court does not use the word) in the workplace is the case of *Liebmann* c. *Canada (Department of National Defence)* in the Federal Court of Appeal[12].

Here are the facts in this case:

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[11] In the case of air safety, black lists of undesirable passengers are drawn up in several countries, including Canada "Passenger Protect Program". See: création d'une liste noire des passagers aériens au Canada, Wednesday, July 25, 2007, [On line]. http://congresdutravail.ca/index.php/sant_scurit_et_envir/1211

[12] *Liebmann* v. *Canada (Department of National Defence)* (C.A.), 2001 CAF 243, (2001), [2002] 1 C.F. 29, [On line]. http://recueil.cmf.gc.ca/eng/2001/2001fca243/2001fca243.html

On August 4, 1990, Iraq invaded and occupied Koweït. Over the following weeks, Canada became part of a coalition of military forces in the Persian Gulf area mandated to enforce a certain number of resolutions adopted by the Security Council of the United Nations[13].

The Appellant, Lieutenant Andrew S. Liebmann, who absolutely wanted to participate in the Persian Gulf operation and who satisfied all requirements mentioned, had been assigned as Administrative Assistant (AA) by his commanding officer. A message to that effect had been sent on January 11, 1991.

Nevertheless, he was not appointed to that job, only because of his religion. As a matter of fact, he was Jewish[14].

At that time, Canadian Forces didn't have any official policy concerning the review of personal characteristics such as religion in the selection of staff to be sent in operations other than peace-keeping operations. Several Staff Officers along with their seniors, in Maritime Command as well as at Department of National Defence (DND) General Headquarters, allegedly discussed the possibility that in the circumstances, the religion of the Appellant could hinder his capacity to perform efficiently the duties as an AA and could also affect his personal safety. After those discussions, it was decided that the Appellant would not be selected for the job[15].

The Court reminds that[16] the protection attributed to the right to equality mentioned in section 15 of the Canadian Charter by referring to the words of Mr. Justice La Forest in the

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13 *Id.*, par. 3.

14 *Id.*, par. 1.

15 *Id.*, par. 8.

16 *Id.*, par. 32.

case of *Andrews* v. *Law Society of British Columbia*[17], which is repeated by Mr. Justice Iacobucci in the case of *Law*:

> "[…] the equality guarantee was designed to prevent the imposition of differential treatment that was likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned", and that was likely to decrease their "confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development."[18]

The Court concluded:

> "The record before the Court establishes that although the decision-makers allegedly felt that the appellant's religion might cause him to be less effective and less safe while carrying out his duties in an Arab state, they made little (if any) attempt to collect evidence that might validate or invalidate their concerns. There seems to have been no real consideration of the political climates of Bahrain or Saudi Arabia or the manner in which a Jewish Canadian officer might be perceived by military officials or citizens of those countries. In fact, one of the staff officers conducting an "appreciation" of the situation admitted to not having been aware of the politics of the region. No efforts were made to ascertain the views of any of the states in the Persian Gulf region. No attempt was made to determine the approaches being taken by other members of the coalition who were deploying forces to the region. In fact, the evidence shows that the United States had more Jewish personnel in the region than the total of all Canadian forces. In short, the analysis seems to have been conducted in a factual and evidentiary vacuum."[19]
>
> "By confining whatever analysis they made to a simplistic "Jewish officer in an Arab state" model, the decision-making officers applied stereotypical thinking and based their decision upon presumed characteristics of both Jews and Arabs. This way of thinking perpetuated the view that the appellant was a less worthy member of the Canadian Forces and therefore of Canadian society as a whole."[20]

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17 *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, p. 197.

18 *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, par. 43.

19 *Liebmann* v. *Canada (Department of National Defence)*, par. 37.

20 *Id.,* par. 38.

It was concluded that Mr. Liebmann's right to equality had been limited under the law and to the benefit of the law, in a discriminatory way, in violation of section 15 of the Canadian Charter.

Discriminatory behaviour akin to racial profiling can be an isolated incident, but it can also be a situation of systemic or institutional discrimination, "resulting from the interaction of practices, decisions or individual or institutional actions having harmful consequences, desired or not, on the members of the groups targeted by section 10 of the Quebec Charter […]"[21]. The Commission on systemic racism in the criminal system in Ontario wrote, in its report:

> "The decision-making processes introduce racialization in the systems when the standards or criteria on which the decisions are based reflect or tolerate prejudices against racialized persons. Criteria and standards are part of the performance standards of any system and can be official and explicit when they are spelled out in laws, policies and procedures. They can also be unmentioned in the laws, policies and procedures. They can also go unmentioned officially and be caused by the accepted ways and means of doing things."[22]

In the document entitled *Proving racial profiling: perspectives for civil cases* published by the Commission, it is explained that "policies, established practices or an organizational culture having effects of discrimination or exclusion on persons belonging to a specific "racialized" group for reasons of security, can end up in demonstrating the existence of racial discrimination or profiling on a systemic or individual basis."[23]

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21 Marie-Thérèse CHICHA, *Discrimination systémique – fondement et méthodologie des programmes d'accès à l'égalité*, Cowansville, Éditions Yvon Blais, 1989, p. 85.

22 *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Toronto, Queen's Printer for Ontario, 1995, p. 56 (co-chairs: D. Cole and M. Gittens).

23 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, by M[e] Michèle Turenne, Cat. 2.120-1.26.1, March 2006, p. 23.

The Commission has recently had to investigate two cases which probably indicate that there was systemic discrimination with overtones of racial profiling within a context of access to employment or to professional training, in the sense that such exclusions of the candidates refer to their religion or to their ethnic origin and are related to written or unwritten guidelines in the aftermath of 9/11.

Cases at the Commission des droits de la personne et des droits de la jeunesse

n *First Case*
Case of *Javed Latif* -and- *Bombardier – Bombardier Aerospace Training Center*

The Complainant is one Javed Latif. He is from Pakistan and he is a Canadian citizen.

According to his Complaint, Mr. Latif has been a pilot for over 40 years. In 1991, he obtained an airline pilot certificate from the Federal Aviation Administration (FAA)[24].

In 2001, Mr. Latif decided to suspend his career as an airline pilot in order to go in business. Since his projects didn't work as planned, he wanted to go back to piloting in 2003. For that, he had to get a new certificate. He applied to the FAA and was accepted for training in Miami, in November - December 2003, shortly after the enactment of the *« Vision 100-Century of Aviation*

[24] The Federal Aviation Administration (FAA) is the government body responsible for regulating and controlling civil aviation in the USA. It reports to the United States Department of Transportation. Along with the European Joint Aviation Authorities, the FAA is one of two main world agencies that certify new planes, equipment and training of civil aviation pilots. It was created in 1958 from existing organizations that had been operating since 1926.

In the field of air control, it creates the regulations governing the coexistence of civil and military air traffic.

It keeps up-to-date data on airport safety, follow-up on the safety of planes and operators, air incidents and accidents that must be the subject of public reports published by the NTSB (National Transportation Safety Board). It also publishes the NOTAM (Notices to Airmen) that inform on a global level all pilots as to the flying conditions and the events that could jeopardize safety, [On line]. http://fr.wikipedia.org/wiki/Federal_Aviation_Administration

Reauthorization Act »[25] which gives specific guidelines concerning foreign candidates. Mr. Latif then decided not to get that training in Miami.

In February 2004, a Quebec Company offered Mr. Latif a contract as a pilot. That contract stated that he would be piloting Challenger airplanes made by Bombardier. Even though Mr. Latif had previously piloted that kind of plane, he had to get a new licence, since he had not piloted planes for a long time. He did apply for training with *Bombardier Aerospace Training Center* (BATC), and that application was turned down.

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[25] *Vision 100-Century of Aviation Reauthorization Act*, Public Law 108-176, December 12, 2003:

SEC. 612. FLIGHT TRAINING.

(a) "[…] A person operating as a flight instructor, pilot school, or aviation training center or subject to regulation under this part may provide training in the operation of any aircraft having a maximum certificated takeoff weight of more than 12,500 pounds to an alien (as defined in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3))) or to any other individual specified by the Secretary of Homeland Security only if—

''(1) that person has first notified the Secretary that the alien or individual has requested such training and submitted to the Secretary, in such form as the Secretary may prescribe, the following information about the alien or individual :

''(A) full name, including any aliases used by the applicant or variations in spelling of the applicant's name;

''(B) passport and visa information;

''(C) country of citizenship;

''(D) date of birth;

''(E) dates of training; and

''(F) fingerprints collected by, or under the supervision of, a Federal, State, or local law enforcement agency or by another entity approved by the Federal Bureau of Investigation or the Secretary of Homeland Security, including fingerprints taken by United States Government personnel at a United States embassy or consulate; and

''(2) the Secretary has not directed, within 30 days after being notified under paragraph (1), that person not to provide the requested training because the Secretary has determined that the individual presents a risk to aviation or national security." (our emphasis)

[On line].
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ176.108.pdf

According to Bombardier, Mr. Latif's application referred to a specific training which, once completed, was recognized in the USA.

Bombardier indeed has a certificate delivered by the US Federal Aviation Administration (FAA) giving it the right to provide such training. However, the FAA must first approve any training request, through the *Secretary of Homeland Security*[26].

It looks as though the *Secretary of Homeland Security* enjoys much discretion when it comes to approving candidates and did not have to justify its decision. The refusal on the part of the FAA and of the *Secretary of Homeland Security* was therefore not justified in that case and the Complainant is still ignorant of the reasons.

Mr. Latif therefore decided to apply only for a Canadian accreditation. He renewed his pilot licence with Transport Canada in April 2004. Afterwards, he asked BATC to attend flight training. Once again, Bombardier refused. That time, the FAA had nothing to say since it was strictly for a Canadian accreditation. However, Bombardier refers again to FAA in its efforts to explain its refusal.

Bombardier explains that it has an operating certificate to give the training for FAA certification, in consideration of which it assumed it must abide by the laws and regulations enforced in the USA:

> "In order to be able to continue holding its US operating certificate, Bombardier must abide by all applicable US laws and regulations, failing which such certificate may be

[26] The *United States Secretary of Homeland Security* is a member of the US President's Office and the head of the US Department of Homeland Security which is responsible for the internal security of the country.

That function, as well as the Department for which the holder is responsible, were created in the aftermath of 9/11. The new Department was initially created from components of other Departments involved in internal security, such as the US Coast Guard or the Federal Emergency Management Agency (FEMA).

> suspended. Section 612 of the Vision 100-Century of Aviation Reauthorization Act (Public Law 108-176, December 12, 2003) prohibits flight schools, such as the Bombardier Aerospace Training Centre which are regulated by the FAA from providing flight training to a foreign student (i.e. a non US citizen) unless the Secretary of Homeland Security first determines that the student does not cause a threat to aviation or national security."

The operating certificate of BATC as issued by the FAA to Bombardier states the following:

> "Upon finding that its organization complies in all respects with the requirements of the Federal Aviation Regulations relating to the establishment of an Air Agency, is empowered to operate an approved Training Center in accordance with the Training Specifications issued herewith, and may conduct training courses with respect to the following Parts of the Federal Aviation Regulations."
>
> "We regret that we are unable to train you a tour facility. Our decision is based on consultations with the United States federal Aviation Administration, Transportation Security Administration, United States Department of Justice and our legal department. Any customer who has received a denial to train from any of the above governmental agencies is subject to this denial for all pilot training. Our policy at Bombardier is to comply with and abide by all applicable laws, regulations, directives, policies and decisions emanating from the above governmental agency that has issued the denial." (our emphasis)

In the case of the second refusal, the one concerning the application for training for the Complainant's Canadian licence, Bombardier adds that 68 % of students registered under BATC are interested in an FAA accreditation. Since it does not want to risk losing its operating certificate, which would also mean the loss of the majority of its clients, it has adopted a policy of respecting standards and decisions of the FAA and of the *Secretary of Homeland Security* at all times:

> "The procedure that Mr. Latif had to follow prior to receiving training at the [BATC] is no different from the procedure that has to be followed by all non-US citizens requiring training services from our facility or any other FAA authorized training facility. In fact, following the events of September 11, 2001, Bombardier has trained over 32 students of Muslim or Middle East origin who had to go through the same procedure as Mr. Latiff. Mr. Latiff was not treated differently than anybody else."

A request for the cessation of discriminatory practices by Bombardier and in order to gain redress (damages) in favour of Mr. Latif for the violation of his rights as protected under the Quebec Charter, was filed by the Commission before the Tribunal des droits de la personne.

As can be seen in many cases of racial profiling or discrimination, the facts are subtle and take an insidious form. In the present case, it means that one must prove that the Complainant's religion or that its national or ethnic origin did indeed have an impact on the decision not to allow him test flights for a Canadian licence.

Indeed, the Commission suggests that the refusal of the *Secretary of Homeland Security* is based on ethnic or national origin or on religion, in connection with the events of 9/11 that rekindled and strengthened the systemic discrimination problem against certain ethno-cultural groups.

The Commission's brief dated June 11, 2007[27], contains the following words:

> "Bombardier's refusal is based on the refusal of the US F.A.A. and of the *United States Department of Justice*, even if they have no jurisdiction on the granting of a Canadian licence […]. (par. 20)
>
> Bombardier's refusal is discriminatory since it is based on a decision that is *prima facie* discriminatory […]. (par. 21)"

The Commission also reminds the reader of the main facts in support of its submissions:

- Mr. Latif is from Pakistan and he is a Muslim.
- The American act entitled "*Vision 100-Century of Aviation Reauthorization Act*" enforced by the *Secretary of Homeland Security* is consecutive to the events of 9/11/2001.

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[27] Canada, Province de Québec, District de Montréal, Tribunal des droits de la personne, N° 500-53-000262-079.

- The US decision to refuse training for an American licence after enactment of the Act is not motivated.
- The FAA had accepted Mr. Latif's application for training in the USA, less than two months before the coming into effect of the Act.
- Mr. Latif was an experienced pilot and nothing in the past could demonstrate that he could constitute a danger.
- Mr. Latif had, for several years, piloted a Challenger as well as other types of planes.

The main conclusions sought by the Commission in its brief were the following:

> "CONDEMN the Defendant to pay to the Complainant, Mr. Javed Latif, an amount of fifty thousand dollars ($50,000.00), broken down as follows:
>
> a) Twenty-five thousand dollars ($25,000.00) in moral damages;
>
> b) Fifteen thousand dollars ($15,000.00) in lost opportunities;
>
> c) Ten thousand dollars ($10,000.00), in punitive damages.
>
> ORDERS the defendant to cease implementing or respecting standards and decisions of the *United States Department of Justice* and of the *United States Federal Aviation Administration* in the processing of training requests of pilots leading to a Canadian licence or to any licence not involving the right to fly in the USA.
>
> ORDER the Defendant to allow the Complainant, Mr. Javed Latif, to attend the pilot training session leading to a Canadian licence or not involving the right to fly in the USA."

n *Second Case at the Commission*
Gérald Darguste and Bell Helicopter Textron Canada Ltd

The Complainant was born in Haiti on December 14, 1967. He arrived in Canada a few months later and became a Canadian citizen in 1979. He does not have Haitian citizenship any more since Haiti refuses double citizenship. He has served in the Canadian Armed Forces and has been honoured for his work.

As part of his studies at l'École des Moulins in the field of composite materials, the Complainant was hoping to participate in an internship program offered by Bell Helicopter Textron Canada Ltd (hereinafter referred to as BHTCL). The internship was to take place from March 13 to 24, 2006, at BHTCL, in Mirabel. The Complainant was one of the 15 (out of 34) students selected for the internship. On March 13, 2006, he was however advised that he couldn't participate in the internship since his place of birth was Haiti.

BHTCL's refusal is based on a provision of the contract signed with the US Government in which it undertook to respect the rules spelled out under the *U.S. International Traffic in Arms Regulations* (ITAR)[28].

In accordance with certain provisions spelled out in those rules, BHTCL promised not to reveal any technical or defence service data to a Canadian citizen with dual citizenship, or who was born in one of the condemned countries (Belarus, China, North Korea, Cuba, Haiti, Iran, Liberia, Libya, Myanmar, Somalia, Sudan, Syria, Vietnam).

We quote BHTCL's own words: "Sanctions in cases of violation of obligations under ITAR are quite important. Those sanctions include considerable financial penalties as well as banishment by the US State Department".

As for the extraterritorial application of American standards in Canada and in Quebec, the Commission states that one cannot prevent the United States from enacting its laws. On the other hand, Canadian, Quebec or foreign companies, whether or not they are subsidiaries of US or foreign companies having a place of business in Quebec, are covered by the Charter and cannot enforce any discriminatory regulation. Therefore, a contract containing a discriminatory

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[28] International Traffic in Arms Regulations (ITAR), Official Version, Published April 1, 2007 (22 CFR 120-130).

provision within the meaning of the Charter is against public policy, even if that contract is governed by US laws. Section 3081 of the *Quebec Civil Code*[29] reads as follows:

> "Art. 3081. The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations."

We must also remind that it could be argued that we are in violation of the rules and regulations of the *International Covenant on Economic, Social and Cultural Rights*[30].

See in this respect the following sections:

Section 2

> "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status."

Section 6

> "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding, fundamental political and economic freedoms to the individual."

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29 L.Q. 1991, c. 64.

30 A.G. Res. 2200 A (XXI), December 16, 1966, ratified by the United States and by Canada.

That case ended with a confidential out-of-court settlement following the filing of a complaint with the Commission by the Complainant.

At the same time, we are aware that the Federal Government is presently negotiating with the USA concerning previous contracts passed with DND and other federal bodies affecting federal civil and military employees and using technical data under ITAR control. Any discrimination based on origin or on any other ground prohibited under the Charters would be replaced by thorough security checks. Eventually, the system would be extended to the private sector and cover those enterprises in Canada that obtain contracts with DND for the maintenance of Canadian or US military material requiring the use of American technology.

In such a context, the Commission is considering recommending [31] that the Quebec Government urge the Federal Government to enter into talks with the United States in order to negotiate a Cooperation Agreement under ITAR. The purpose of such an agreement would be to replace any discrimination based on ethnic or national origin in those contracts by increased security checks of persons working for those companies in Quebec, under US licence, in civil or military matters.

CONCLUSION

The two cases the Commission has investigated are a clear demonstration of the import into Canada of American policies and practices with discriminatory consequences.

[31] Charter, section 71, al. 2, par. 7.

Sherry F. Colb[32] sums up the situation very well as she comments on racial profiling in the context of the fight against terrorism:

> "[...] It would, of course, be irrelevant if profiling were to prove as ineffective in the war on terrorism as it has been in the war on drugs... It may also be that terrorists from now on will consciously choose people falling outside of any profiled groups to carry out their atrocious objectives.
>
> [...]
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> The United States Supreme Court, in one of its most despised opinions, *Korematsu* v. *United States* [323 U.S. 214 (1944)], upheld the internment of Japanese Americans after Japan's attack on Pearl Harbour in 1941 [...]
>
> Very few people today defend this nation's treatment of Japanese Americans. In part, this is because there appeared to have been no credible grounds – other than pure racial animus and fear – for directing suspicion at the U.S. population subject to internment.
>
> But in part, condemnation of *Korematsu* may also stem from the belief that a denial of equality on the basis of race is simply wrong, no matter how effective it might be in realizing important objectives. And the objective defended in *Korematsu* – winning World War II and defeating the Nazis – was theoretically no less compelling than the present need to protect the country from terrorism."

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[32] Sherry F. COLB, professor in Newark at Rutgers Law School, *The New Face of Racial Profiling : How Terrorism Affects the Debate,* October 10, 2001, [On line]. http://writ.news.findlaw.com/colb/20011010.html