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Mind Your Own Business Canada! Diplomatic Immunity In The Commercial Context

Foreign missions conduct their business with the assumption that the rules of diplomatic immunity and autonomy under international and domestic legislation are observed and respected in their host countries. However, this diplomatic immunity is not without limits and there are certain exemptions under which Canada exercises jurisdiction, particularly in the commercial sphere.

On March 6, 2014, Justice Smith of the Ontario Superior Court of Justice granted the Royal Embassy of Saudi Arabia in Ottawa leave to appeal a previous court ruling, which held that diplomatic immunity does not extend to an embassy in a breach of contract case that involves the termination of an independent contractor due to the triggering of the "commercial activity" exception under the *State Immunity Act*, RSC 1985, c S-18 (the "*SIA*"). The impending appellate decision will be of great significance to foreign missions in Canada who often employ Canadian citizens and permanent residence and who may be unaware of the commercial activity provision that can effectively nullify their immunity from the courts in Canada.

In *Rawaaj Inc. v. Royal Embassy of Saudi Arabia*, 2014 ONSC 1473 ["*Rawaaj*"], the Plaintiff through its director and sole shareholder, Sayf Alnasr was retained by the Saudi Arabian Embassy's Cultural Bureau (the "Embassy") in August 2011 to serve as an academic advisor. After a couple of months, the Embassy terminated his employment because it determined he

"did not have the skills or attitude required to adequately perform the role of academic adviser." Rawaaj Inc. then sued the Embassy for breach of contract but before filing its defence, the Embassy brought a motion to dismiss the plaintiff's claim on the basis that the suit interfered with Saudi Arabia's autonomy and sovereignty under Canada's *State Immunity Act*. In late December 2013, Justice Kershman dismissed the Embassy's motion by holding that the contractual dispute was a commercial activity and that the plaintiff's role as academic advisor did not touch upon the sovereign affairs of Saudi Arabia. The Embassy then sought leave to appeal that decision, which was granted in part by Justice Smith because of the conflicting case law and also because of the importance of the principle of state immunity to labour relations in Canada.

Under section 3(1) of the *SIA*, a foreign state is immune from the jurisdiction of any court in Canada. The *SIA* defines *foreign state* to include any sovereign or other head of the foreign state, or any political subdivision of the foreign state including any of its departments and agencies. Section 5 of the *SIA* prescribes an exception to state immunity which reads, "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state." And while the *SIA* defines *commercial activity* to mean "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character," there is only a handful of Canadian cases that interpret the definition of *commercial activity*.

The leading authority on this issue is the Supreme Court of Canada ("SCC") decision in *Re Canada Labour Code*, [1992] 2 S.C.R. 50. Here, the SCC held that labour relations at a foreign military base did not constitute a commercial activity and therefore the United States should be immune from the jurisdiction of any domestic tribunal.

While the SCC stated that "a bare contract for employment services… is, in and of itself, generally a commercial activity" and

that "[g]enerally speaking, Canadian employees of foreign sovereign states are entitled to turn to our courts for enforcement of their employment contracts," the Court also noted that "this is not to say that the employment contract falls exclusively within the commercial realm… it can have sovereign attributes as well." In recognizing the dual nature of most international employment contracts, the SCC adopted a contextual approach to determine if the proceedings would impinge on the sovereign aspects of the commercial activity in question.

The SCC pointed out many attributes of an employment relationship that can fall at various points along a spectrum between purely sovereign and commercial activities. For example, the right to be paid is for the most part a commercial aspect of the employment relationship. On the other hand, the right to dismiss an employee without notice for security reasons is a sovereign attribute of the relationship as is the management and operation of the foreign entity. The SCC was aware of the policy concerns surrounding the principles of international comity and reciprocity in that if the effect on commercial activity is merely incidental then the commercial activity exception cannot be triggered; to hold otherwise would broaden the *commercial activity* exception to the point of depriving sovereign immunity of any meaning.

In *Rawaaj*, Justice Smith agreed with the Saudi Arabian Embassy's argument that the SCC decision in *Re Canada Labour Code* conflicts with another Ontario case dealing with similar issues called *Greco v. Holy See (State of the Vatican City)*, [2000] OJ No 5293, which is one of the main reasons he granted leave to appeal. In *Greco*, the court held that the proceedings in Ontario would have a significant impact on the sovereign right of the defendant to control and regulate its own workforce and highlighted the sovereign aspects of the employment contract that relate to the management of personnel including harassment between co-workers, creation and implementation of an anti-

harassment policy by the employer, discipline, control and surveillance of employees, and the work environment generally.

While it is clear that both *Re Canada Labour Code* and *Greco* applied a contextual analysis in deciding whether the commercial activity infringed upon state sovereignty or was merely incidental to it, some clarity on the legal test as it applies to employment contracts and contracts for services with foreign states in Canada will certainly serve to guide embassies in Canada on their labour practices and will also be of great importance generally to the development of the law on state immunity.

The Saudi Arabian Embassy is not the only foreign mission in Ottawa to face the legal challenge of trying to preserve its sovereign rights. Very recently in *McDonald v. United States of America*, 2014 ONSC 1557, a 30-year Canadian employee of the American Embassy in Ottawa was awarded a $240,000 default judgment against the embassy for wrongful dismissal. The U.S. government moved to set the judgment aside on the basis that they did not receive proper notice of the lawsuit. While Ontario Superior Court Justice Ray questioned how U.S. State Department officials could claim they were unaware of the lawsuit, Justice Ray granted the motion noting that the delays were "unintentional" and the embassy had an "arguable defence", but only on the condition that the embassy pay the plaintiff's legal costs and put the $240,000 award in a court trust account within the next 60 days. Ordering a foreign country to pay monies into an Ontario court is in and of itself contrary to the principles enunciated in the *SIA*; however, it remains to be seen whether the American Embassy will attempt to invoke their diplomatic immunity. One thing is clear; the *Rawaaj* decision will certainly serve as an important precedent for the American Embassy's defence strategy. A date has yet to be set for the *Rawaaj* appeal.

by Ruba El-Sayegh

For more information on this topic, please contact:

Ottawa Ruba El-Sayegh 613.232.7171 ext. 240 ruba.el-sayegh@mcmillan.ca

a cautionary note

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