

## Case In Point

# Supreme Court of Canada on Prima Facie Discrimination and a Plaintiff's Burden of Proof

**Date:** November 13, 2015

The Supreme Court of Canada recently overturned a decision of the Québec Human Rights Tribunal ("Tribunal") which found that Bombardier had discriminated against a pilot, Mr. Latif, by refusing to provide him with training on certain Bombardier aircraft after U.S. authorities denied his security clearance. The unanimous Court found that there was insufficient evidence to establish that Mr. Latif's ethnic or national origin played a role in the decision made by U.S. authorities.

Mr. Latif had filed a complaint against Bombardier, arguing that the U.S. authorities' decision was the result of racial profiling and that Bombardier discriminated against him by relying on that decision, contrary to the Québec *Charter of human rights and freedoms* ("Québec Charter").

The issue before the Court was whether or not the Tribunal had sufficient evidence to establish a connection between Bombardier's denial and a prohibited ground of discrimination. The key evidence before the Tribunal included:

- i. an agreement between the parties that Bombardier's refusal to provide training to Mr. Latif was based solely on the fact that the U.S. authorities had not issued him a security clearance; and
- ii. expert evidence showing that the U.S. authorities had engaged in racial profiling since September 11, 2001.

The Tribunal found that the U.S. authorities' decision with respect to Mr. Latif was made in the context of racial profiling, and that Bombardier's denial thus had the effect of creating a distinction based on one of the prohibited grounds under the Québec *Charter*. It concluded on this basis that there was *prima facie* proof of discrimination, and ordered Bombardier to "cease applying or considering the standards and decisions of the U.S. authorities in 'national security' matters when dealing with applications for the training of pilots under Canadian pilot's licences."

However, the Québec Court of Appeal found that the Tribunal erred in finding that there was a causal connection between the exclusion and a prohibited ground because there was no proof that the U.S. authorities' decision was itself discriminatory, and set the decision aside.

On further appeal, the Supreme Court of Canada considered the degree of proof needed to establish *prima facie* discrimination, and whether the order against Bombardier was justified. The Court set out the following test to establish a case of *prima facie* discrimination under the Québec *Charter*:

- **Differential Treatment** – The plaintiff must prove that a decision, measure or conduct affects him or her differently from others to whom it may apply.
- **Connection** – The plaintiff must establish that the distinction, exclusion or preference in question is "based" on one of the protected grounds of discrimination. In discussing this branch of the test, the Court concluded that the term "causal connection" is no longer appropriate in the discrimination context – all that is required is that the plaintiff show a "connection" or "factor" between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains. The Court then went on to find that while the proof required of a plaintiff is of a simple "connection" or "factor" it must still be proven on a balance of probabilities.
- **Affect** – The plaintiff must show that the distinction, exclusion or preference affects the full and equal exercise of a right or freedom guaranteed to the plaintiff.

The Supreme Court of Canada upheld the Québec Court of Appeal's decision, finding that there was insufficient proof that Mr. Latif's ethnic or national origin was a factor in the U.S. authorities' decision.

The Court's decision in this case clarifies that the standard of proof which normally applies in civil cases also applies to establishing a *prima facie* case of discrimination – in other words, there is no relaxation of the complainant's obligation to prove his or her case and meet the applicable standard of proof. In determining whether or not a complainant has established a *prima facie* case of discrimination, the Tribunal will require evidence that is tangibly related to the impugned decision or conduct. Accordingly, presumptions based on social context alone will be insufficient when analyzing a decision against a single member of the group.

In discussing these issues, the Court cautioned against a company blindly complying with discriminatory decisions of a foreign authority or third party. Although this was not the case here, blind compliance to discriminatory decisions may expose an organization to liability under human rights legislation where there is evidence of a connection between the prohibited ground and the foreign decision in question.