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Supreme Court of Canada Clarifies Proof Required for a Discrimination Claim

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Introduction

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (CanLII) [Bombardier], the Supreme Court of Canada (the “SCC”) clarified both the requirements of *prima facie* proof in discrimination claims and the standard of proof required when a claim of discrimination is raised.

The case was based on a claim of discrimination by a pilot, who was a Canadian citizen of Pakistani origin. Bombardier ran two training centres for pilots, one in Dallas, Texas, and one in Montreal. Bombardier holds a training certificate from the U.S. Federal Aviation Administration which permits the company to train U.S. pilots. The U.S. government has, since the terrorist attacks of 2001, required all pilots who wish to be trained at an approved training centre to go through a screening procedure, in order to be eligible to receive training. The pilot in *Bombardier* did not pass the screening and, therefore, was not granted clearance by the U.S. government.

Because Bombardier’s licence from the American Federal Aviation Administration required its approved training centres to train only pilots who had obtained clearance, Bombardier refused to train the pilot under either his U.S. or Canadian licence. The pilot claimed that Bombardier discriminated against him based on racial profiling. The pilot took the position that the American clearance refusal was based on racial profiling amounting to discrimination against Arabs, Muslims or people from Muslim countries. Bombardier took the position that its refusal to train the pilot related strictly to the lack of a clearance certificate and was not based on racial profiling. The Commission des droits de la personne et des droits de la jeunesse (the “Tribunal”) found that Bombardier had discriminated against the pilot and the Quebec Court of Appeal overturned that decision.

Racial profiling defined

The SCC noted that the Quebec *Charter of human rights and freedoms* (the “Charter”) was to be considered special quasi-Constitutional legislation, similar to human rights codes in other provinces. The SCC then went on to consider the meaning of “racial profiling” and adopted the following definition:

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 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



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particular, of their racial, ethnic, national or religious background, whether actual or presumed. [Emphasis added.] (Emphasis added by SCC.)

Requirements of a *prima facie* case

The SCC then went on to outline the three elements necessary to establish a *prima facie* case of discrimination. First, a plaintiff must demonstrate the existence of differential treatment. Second, a plaintiff must establish that the differential treatment is based on one of the prohibited grounds provided in the legislation. Finally, a plaintiff must demonstrate that the differential treatment affects the exercise of a right or freedom guaranteed pursuant to the *Charter*.

In *Bombardier*, the SCC spent some time dealing with the second element because there was a dispute in the case law as to whether the necessary link had to rise to the level of being considered a “causal connection”. The SCC determined that a better approach was to require the plaintiff to demonstrate that there was a “connection” between the differential treatment and the prohibited ground. In other words, it was necessary to show that the prohibited ground was a “factor” in the differential treatment.

It should be noted that the wording of the third element as set out by the SCC is linked to the structure of section 10 of the Quebec *Charter*, which requires exercise of human rights and freedoms without distinction based on the prohibited grounds. In other provinces, such as Ontario, this final requirement would be linked to the requirement that the discrimination is related to one of the topics covered by human rights, such as services, accommodations, employment or other protected spheres of public life. This is no more than a recognition that human rights codes cannot protect individuals from discrimination in all spheres of their lives, such as personal choices relating to friendship, marriage or other non-public spheres of activity.

Standard of proof of a *prima facie* case

The SCC went on to settle the dispute between the parties in *Bombardier* about whether or not the standard of proof for a *prima facie* case was something less than the usual standard of proof on the balance of probabilities. The SCC concluded that, despite the distinct burdens of proof in a discrimination case, the three elements of discrimination necessary to demonstrate a *prima facie* case had to be established on a balance of probabilities.

The SCC then reviewed the Tribunal’s decision to come to the conclusion that the Tribunal made the finding that Bombardier’s decision was based on racial profiling without appropriate evidence. Although there was some expert evidence about the U.S. government’s approach to Muslims of Middle Eastern origin, and the social climate in the United States, after the terrorist attacks of 2001, there was no proof that the screening procedure was based on ethnic or national origin. In a point that will be relevant to general claims of racial profiling or systemic discrimination, the SCC noted at paragraph 88:

It cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the *Charter*. In practice, this would amount to reversing the burden of proof in discrimination matters. Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.

In the result, the SCC determined that there was insufficient evidence to demonstrate that the decision not to train the pilot was based on racial profiling.

Tribunal's remedial authority

Although the previous finding was sufficient to dispose of the matter, the SCC did go on to make some comments about the mandatory order that the Tribunal had made against Bombardier. The Tribunal had required Bombardier to cease relying upon U.S. screening decisions to determine the eligibility of pilots to take training. Bombardier challenged the Tribunal's authority to make such a mandatory order. The SCC noted that the particular order against Bombardier would fall with the finding that discrimination had not occurred, but did go on to consider the propriety of such an order. The SCC determined that a careful reading of the provisions of the *Charter*, and a large and liberal interpretation of the legislation, led to the conclusion that, where it was consistent with the public interest, a mandatory order could be made. The mandatory order must be based on a connection with the dispute submitted to the Tribunal, be supported by relevant evidence and be appropriate in light of all the circumstances.

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