Can Adherence to a Foreign Regulatory Obligation Attract a Claim of Discrimination in Canada? The Supreme Court Provides an Answer

Introduction

When, as child, I would be confronted by my parents for being naughty, in an attempt to escape discipline, I would occasionally respond “It’s not me – the Devil made me do it”. It didn’t work then, and in view of the Supreme Court of Canada’s judgment in Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.,1 a variant thereof, fails, now, in employment discrimination cases. In that judgment, the Supreme Court held definitively that a Canadian company cannot rely solely on the fact that a decision that it took was in furtherance of a decision rendered by a regulatory agency in the United States, as an affirmative defence to a charge of discrimination with respect to rights guaranteed under the Quebec Charter of human rights and freedoms (“Charter”).2 On the other hand, that same Court has clarified what must be proven for any “adverse effect” discrimination claim to succeed, and the process that governs.

Context and Facts

As a major aeronautics manufacturer, Bombardier has training facilities for its aircraft in both Canada and the U.S., and as such must respect U.S. law. Following 9/11, U.S. authorities created the Alien Flight Students Program (“AFSP”)3 pursuant to which flight training/recurrent training under a U.S.-issued pilot’s licence, could not be given to a pilot who did not have American citizenship unless he received an appropriate security clearance. Javed Latif [“the “Complainant”], a Canadian citizen of Pakistani origin, held both U.S. and Canadian pilots’ licences. In 2003, he was offered a position with one airline to fly a Boeing 737 under his U.S. licence. He registered for initial training on that aircraft and was granted U.S. Department of Justice security clearance. The job opportunity, however, evaporated. When, several months later, while in Pakistan, Mr. Latif received an offer from a Canadian company to pilot a Bombardier Challenger 604, he registered for recurrent training on that aircraft under his U.S. license at Bombardier’s Dallas Training Centre. To speed things up Latif also sought recurrent training on that aircraft under his Canadian licence at Bombardier’s Montreal Training Facility. Bombardier received an unfavourable reply to Latif’s security screening request for the Dallas training from the competent U.S. authorities which meant that it could not dispense training under his U.S. licence. No explanation for the U.S. refusal was ever provided, although Latif’s evidence was that he thought that the refusal was due to an identification error. He then contacted Bombardier to proceed to training under his Canadian licence, which he believed was not subject to security screening by U.S. authorities. Bombardier replied that it had to comply with the American authorities denial, for all types of pilot training. It therefore refused to train Mr. Latif under his Canadian licence. When he requested the U.S. authorities review his file, Latif was advised that his denial was part of a process put “in place to protect the national security of

2 CQLR c C-12.
the U.S.. It took until 2008 and other requests under his U.S. licence for training on various other types of aircraft, for him to receive clearance, all but the last request being denied on the grounds that “he posed a threat to aviation or national security in the United States.”

Latif filed an “adverse impact” discrimination claim against Bombardier in Montreal, alleging that it had impaired his right to avail himself of services normally offered to the public because of discrimination based on his religion or his ethnic or national origin, prohibited by the Charter, i.e. his Muslim background and/or Pakistani origin. In so doing, Bombardier had impaired his right to the safeguard of his dignity and reputation without distinction based on one or more of the prohibited grounds, i.e. religion, ethnic, or national origin. At the hearing before the Quebec Human Rights Tribunal [the “Tribunal”], Quebec’s Human Rights Commission [the “Commission”] sought to found its case on racial profiling that it claimed was prevalent in various U.S. agencies and underlay the various exclusions for flight training adopted by that country following 9/11, by presenting expert evidence to the effect that the measures put in place by the U.S. targeted Arabs and Muslims through such racial profiling that it viewed as discriminatory.

All parties agreed that the sole reason for Bombardier’s refusal of training to Latif at its Montreal facility was the denial of U.S. security clearance.

The Tribunal found that Bombardier had relied on a U.S. decision which itself was discriminatory with respect to Complainant’s religion and/or his ethnic or national background. Besides very substantial compensatory, moral and punitive damages, the Tribunal ordered Bombardier to “cease applying or considering […] decisions of the US authorities in ‘national security’ matters when dealing with applications for the training of pilots under Canadian pilots licences.”

The Quebec Court of Appeal determined that the evidence in the file and, in particular, the expert evidence tendered regarding racial profiling, did not create the required “causal connection” between the prohibited discriminatory ground and the refusal of training, and found that the Tribunal had no authority to make the order it did with respect to decisions of the U.S. authorities in national security matters, because the Tribunal’s jurisdiction is limited “to measures that are necessary and reasonable for the purpose of rectifying a problematic situation”. Since by the time the Tribunal rendered its decision, the U.S. authorities had finally approved Latif’s request for security clearance and, indeed, he had received the training he sought, the Tribunal could not use this case “as a pretext for managing the future activities of […] a private entity that is entitled to freedom of contract.” It therefore quashed the Tribunal’s orders.

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4 Supra note 1, at par. 16.
5 Ibid at par. 17.
6 Ibid at par. 25.
7 Ibid at par. 101.
8 Ibid.
What the Supreme Court Decided

I. International Law Aspects

Although it dismissed the appeals brought by both the Commission and Latif himself and confirmed that Bombardier had not discriminated against him, the Supreme Court made it clear that its conclusion “does not mean that a company can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability under the Charter.” It decided that there simply was no evidence of a connection between any of the prohibited grounds as set out in Section 10 of the Charter and the U.S. decision that Bombardier applied. Had there been such evidence, its decision would have been quite different. Hence, the “it wasn’t me, it was the other guy” defence or what I term “the devil made me do it” claim won’t be sufficient to exclude liability – not now, not ever!

Inferentially, the Supreme Court, like the Tribunal, rejected the argument that the financial consequences of a hypothetical revocation of Bombardier’s FAA accreditation could be the basis of a defence to a discrimination claim. While undue hardship might well support a refusal to accommodate, it cannot serve as an affirmative defence to a truly discriminatory practice of a foreign government.

The Supreme Court, however, established a number of other principles of equally far-reaching importance.

II. The Evidentiary Process in Discrimination Cases

i. The Supreme Court reaffirmed that discrimination legislation, whether entitled Charter, Code or Statute, because it deals with basic human rights, is considered quasi-constitutional in nature, and is to be interpreted liberally and purposefully. Furthermore, whatever their legislative origin, provincial or federal, absent specific legislative direction to the contrary, they are all to be interpreted in the light of one another, when similar terms are used. Finally, the process of analysis and its consequential shifting burdens of proof apply throughout.

ii. The Court identified that the first step in the process is for a Complainant to establish prima facie an evidentiary basis for discrimination, i.e. (1) a “distinction, exclusion or preference”, that (2) has the effect of impairing a Charter right (3) on the basis of one of the prohibited grounds of discrimination. The Complainant need not prove that the prohibited ground alleged was the only or exclusive factor leading to the impugned decision. It would be sufficient that appropriate evidence be tendered that there was a “connection” between the decision and the prohibited ground. The presence of a prohibited ground as but one of several factors poisons the entire process and might well lead to a conclusion of discrimination.13

9 Ibid par. 99.
10 Ibid pars. 31-32.
11 Ibid par. 31.
12 Ibid pars. 46, 47, 49-51.
13 Ibid par. 51: “A close relationship is not required in a discrimination case under the Charter, however. To hold otherwise […] could impose too heavy a burden on the plaintiff […] It is therefore neither appropriate nor accurate to use the expression ‘causal connection’.”
iii. Any reference to the term “prima facie” does not reduce by one iota the civil burden of proof that Complainant must satisfy. Indeed, the Courts endorsed Bombardier’s position that the proof required is proof that “in itself, where no contradiction is shown, is complete and sufficient... to establish, on a balance of probabilities, a connection between the decision whose basis is challenged and the prohibited... ground of discrimination.”14 “The reference to the expression prima facie refers only to the fact that is the first step of the process and doesn’t alter the applicable degree of proof that is required from the Complainant to transfer the onus to the Defendant to justify the conduct, nor relax the obligation to satisfy the Tribunal by all the evidence tendered of the “connection” between the prohibited discrimination ground and the decision contested on balance of probabilities.

iv. The Supreme Court recognized the dynamism of discrimination law, and left open the opportunity for courts and tribunals to “take note of new forms of discrimination as they emerge in our society”.15 It noted that while the proof offered in support of a complainant’s position may vary from case to case, and that the nature of how the discrimination is said to have arisen may be factually different, “the application of a given legal test must be based on the same elements and the same degree of proof in every case [...] in order to maintain the uniformity, integrity and predictability of the law.”16 Context which is to be taken account recognizes the varied circumstances that allow a Complainant to meet the evidentiary burdens required, but doesn’t alter the legal test that always and invariably applies.

v. The Supreme Court then looked at the evidence tendered before the Tribunal. It decided, like the Quebec Court of Appeal, that the Tribunal’s finding that there had been discrimination by the U.S. authorities and, laterally, by Bombardier in relying upon the American decision, was an unwarranted syllogism i.e. that because Latif had been born in Pakistan and was a Muslim and because U.S. authorities, generally, in many instances in other programs targeted Arabs or Muslims, inter alia those from Pakistan, then Latif was a victim of discriminatory racial profiling on the part of U.S. authorities with Bombardier acting as a conduit for their decision. The Court of Appeal held that the evidence in the record did not support a conclusion that the U.S. authorities had acted in a discriminatory manner. The Supreme Court went one step farther, holding that, as there was no evidence available to the Tribunal that would reasonably allow it to find that ethnic origin or nationality was an operative factor in the decision, the Tribunal’s decision was unreasonable and, hence, in accordance with the revised standard of appellate intervention, reversible.17 Indeed, the Court stated that the expert evidence to the effect that racial profiling was prevalent in certain other U.S. national security-related programs was far from persuasive in the case at bar. In particular, the Court held that one cannot presume “solely on the basis of a social context of discrimination against a group” that a given decision is necessarily based on

14 Ibid par. 58.
15 Ibid par. 34.
16 Ibid par. 69.
17 In Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, the Supreme Court narrowed very substantially the grounds which would allow the Quebec Court of Appeal to reverse a judgment of the Tribunal pursuant to s. 132 of the Charter. It held that even though the process be by way of appeal rather than judicial review, the reviewing court would have no greater leeway than available in judicial review of other administrative or quasi-judicial decisions. In essence, if the judgment attached is transparent, articulates its motivation in an intelligible manner and flows from the evidence, it ought not to be reversed, even if the reviewing court considers it to be in error, unless the error is such that it provides a result that the statute cannot be said to have intended.
prohibited grounds. Not only would such practice amount to reversing the burden of proof in discrimination cases and creating differential evidentiary thresholds, but it would circumvent the rule that even if evidence is circumstantial, it “must nonetheless be tangibly related to the impugned decision or conduct.” Since the expert evidence was not sufficiently related to the facts of the case – indeed, the Court of Appeal found that the expert’s report did not refer to the only national security-related program the AFSP Program, at issue in the case – such evidence could not create any connection between the decision of the U.S. authorities on which Bombardier relied and Complainant’s ethnic, religious or national origins. Although made in another context, the Court’s reference to the Tribunal’s own admission that it did not know the process, criteria or objective reasons that resulted in the refusal by U.S. authorities to give Mr. Latif security clearance, and its overall conclusion that discrimination had been proven, could not reasonably stand, particularly in the light of Latif’s own testimony that he was informed by U.S. authorities that he was denied security clearance as a result of an identification error. Indeed, the Court found the Tribunal’s decision speculative when it stated that even if the American decision had resulted from an identification error, that error had “on a balance of probabilities, been caused by discriminatory programs and racial profiling, given that the security screening process could lead to ‘false positives’.” Finding that neither the expert evidence nor the circumstantial evidence could support any reasonable conclusion that the American decision to deny the security clearance was connected to Mr. Latif’s ethnic background or to his national origin, it found that the Complainant had not met the evidentiary burden required from the get-go.

Remediation

i. The Supreme Court did not endorse the position of the Court of Appeal that seemed to limit the remedial powers of the Tribunal to compensation for the prejudice suffered by Complainant. The Court recognized the public interest role of both the Commission and the Tribunal and the right in appropriate circumstances for the Tribunal, supported by relevant evidence, to make broader types of remedial orders more conducive to satisfying this public interest dimension. As the Court put it “[i]f the Tribunal had been right to find that Mr. Latif had been discriminated against, the fact that Mr. Latif had finally received his security clearance from the U.S. authorities would not necessarily have addressed the source of the problem, insofar as the evidence had established the existence of a discriminatory organizational policy. In this sense, an order by the Tribunal might then have been necessary in the public interest in order to prevent discrimination against others.”

Why This Judgment Matters

Certainly, for those whose operations or professional practice involve adherence to regulatory requirements of multiple jurisdictions (e.g. the transportation, defense and communications industries, for instance), this case must be studied with care. On the other hand, on a more general level, it clarifies the burden that is upon all Complainants in discrimination cases to show a factual but neither a “causal” nor an “exclusive” connection between the alleged

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18 Supra note 1, par. 88.
19 Ibid.
20 Ibid pars. 83.
21 Ibid par. 103.
22 Ibid par. 105.
offending conduct and the discriminatory ground invoked. Absent evidence on balance of probabilities of the connection between the two, a charge of discrimination will fail and Defendant will have no obligation to bring forward any defence in the nature of, for instance, a *bona fide* occupational requirement. However, this case highlights that, in appropriate cases where “systemic” or “organizational” discrimination has been made out, remediation may go far beyond remedying the Complainant’s own and immediate concerns. It also highlights that the commercial consequences that result from not following the dictates of foreign statutory or regulatory obligations that have “long-arm” application beyond the foreign entity’s borders do not diminish by one iota the exigencies of Canadian domestic human rights law. All in all, a case that requires careful consideration.

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N.B.: The views expressed herein are those of the author and do not represent the opinions of RSS, its other partners or employees.