

CRIMINAL OFFENCES AND DISCRIMINATION IN HIRING: CAN EMPLOYERS REFUSE TO HIRE AN EMPLOYEE DUE TO A PARDONED CRIMINAL OFFENCE?

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In *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, the majority of the Supreme Court of Canada held that employers may not discriminate in hiring an employee solely based on a pardoned criminal offence, even if the position clearly necessitates good moral character (e.g. Police work).

The Facts:

In 1990, S.N. was caught shoplifting approximately \$200 of goods from a department store. She was 21 years old at the time. In 1991, she pleaded guilty to a charge of theft in summary conviction proceedings and was conditionally discharged pursuant to s. 730 (then 736) of the *Criminal Code*. Pursuant to section 6.1(b) of the *Criminal Records Act*, the criminal record of a person conditionally discharged is sealed after three years have elapsed. As a result, S.N. received a statutory pardon for the offence and her criminal record was sealed.

In May 1995, four years after pleading guilty to the offence, S.N. applied for a job as a police officer with the *Service de police de la Communauté urbaine de Montréal* (SPCUM). S.N. did not disclose her prior criminal record (owing to her statutory pardon). However, SPCUM discovered the applicant's prior record and investigated further. SPCUM obtained the police reports, statements and court record of the offence. Through its review, SPCUM determined that since the S.N. was an adult when she shoplifted and since the crime was deliberate, S.N. was not of "good moral character", a criterion required by Quebec's *Police Act* and a by-law pertaining to standards for hiring police officers.

In November 1995, SPCUM rejected S.N.'s application. She contacted SPCUM to inquire why her application was rejected. In response to her inquiry, a personnel officer informed S.N. that she did not satisfy the "good moral character" criterion as she had previously been charged with shoplifting. The applicant informed the officer that she had since been pardoned. Nonetheless, SPCUM maintained its decision.

Judicial History:

S.N. filed a complaint with Quebec's Human Rights Commission alleging that SPCUM had breached section 18.2 of Quebec's *Charter of Human Rights and Freedoms* (the "*Charter*"), which requires that no one refuse to hire a person because of a criminal offence: "if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence". Despite the protection provided by section 18.2, section 20 allows employers to make distinctions in hiring, if the distinction is based on qualifications required by employment. In other words, discrimination on the basis of a pardoned offence is permissible if the job requirement is a *bona fide* occupational requirement (a BFOR). Quebec's Human Rights Tribunal found that SPCUM had infringed section 18.2 of the *Charter* and awarded \$5000 to

S.N. for moral damages. The Quebec Court of Appeal upheld the Tribunal's decision, and the City of Montreal appealed to the Supreme Court of Canada.

The Supreme Court of Canada Decision:

In a 6-2 decision, the Supreme Court of Canada upheld the decision of Quebec's Human Rights Tribunal and found that SPCUM had discriminated against S.N. The Supreme Court dismissed the City's argument that the prohibition in section 18.2 of Quebec's *Charter* did not apply to police work since police work was not "employment". The Supreme Court also rejected the City's argument that a statutory pardon automatically granted from the passage of time was excluded from the meaning of "pardon" as found in section 18.2 of Quebec's *Charter*. The Supreme Court found that a statutory or administrative pardon was meant to have the same effect as a pardon granted by royal prerogative. The purpose of legislating such statutory pardons was to eliminate the arduous process of applying for a pardon for those found guilty and conditionally discharged (as opposed to those convicted of an offence).

In the remainder of the decision, the Supreme Court focused on whether or not SPCUM had rejected S.N. due to her prior criminal record. In considering this question, the Supreme Court balanced two competing rights: the right for the employee to be free from discrimination and the right to the employer to require job applicants to satisfy all BFOR's.

Writing for the majority, Madam Justice Deschamps noted that the *Police Act* and the hiring standards by-law identified "good moral character," and "not having a criminal record" as separate hiring criterion. As such, using the facts giving rise to a pardoned offence as the sole reason for rejecting an application would render the different hiring requirements redundant. Despite this point, Justice Deschamps openly rejected the argument that a pardon completely erases the past. Justice Deschamps stated as follows at paragraph 24:

[T]o accept the respondent's argument that the facts giving rise to a conviction may not be considered in assessing whether a candidate is of good moral character would mean that a pardon would not only restore the convicted person's reputation but would also erase the past, which is not the case.

Justice Deschamps found that an employer is "entitled to consider the facts that resulted in a finding of guilt in assessing whether a candidate has the qualifications required for a job". However, a pardoned criminal offence is not sufficient to establish an employee lacks "good moral character".

The Supreme Court found that there is a presumption that a pardon restores moral integrity and therefore a finding of guilt should no longer adversely reflect on a person's character following a pardon. Accordingly, while an employer may consider the facts giving rise to a finding of guilt, the conclusion that a person is unfit for a job must not be "based on the mere fact of a finding of guilt". To counter the positive effect of a pardon as it reflects on a person's character, further evidence of "delinquent behaviour" or "lack of probity" must be adduced in addition to the facts giving rise to the finding of guilt.

In conclusion, the Supreme Court found in favour of S.N., for reasons summarized by Justice Deschamps at paragraph 37:

The appellant cannot apply the good moral character criterion in this case because it has alleged no facts other than the ones that resulted in the finding of guilt in respect of which [the applicant] was pardoned. Those facts did not have to be disregarded in reviewing S.N.'s application, but they could not serve as the sole basis for rejecting it. The SPCUM made no real inquiry that would have enabled it to justify its decision. In the circumstances, the HRT's finding that S.N.'s application was rejected owing to the mere fact that she had been found guilty of a criminal offence must be upheld.

Commentary:

Employers must bear in mind that a pardoned offence may not be the sole reason for refusing to hire an employee, even when there is a straightforward connection between the job being sought and the offence. This decision demands that employers act cautiously when considering a job applicant's pardoned criminal offence. Employers should review the applicant extensively beyond the pardoned offence. Employers must evaluate other pertinent information including incompatibilities that may be far less serious than possessing a criminal record. In the event an employer elects not to hire a candidate in part due to a pardoned offence, the employer should be prepared to establish that the decision is not based solely on the stigma attached to the finding of guilt of the offence.

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