

LESSONS FROM *LATIF*: GUIDANCE ON THE USE OF SOCIAL SCIENCE EXPERT EVIDENCE IN DISCRIMINATION CASES

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The Supreme Court of Canada's decision in Latif is important not only for its clarification of the test for establishing prima facie discrimination in human rights cases, but also for its guidance on the use of social science expert evidence in discrimination cases.

This article examines the Supreme Court's decision in Latif, with a particular view to identifying lessons for applicants seeking to establish discrimination via social science expert evidence. In particular, we argue that litigants adducing social expert evidence should ensure to: (a) carefully explain the relevance of the social science expert evidence and link the social science expert evidence to specific material issues in the case; (b) spell out the chain of inferences they wish to draw from circumstantial evidence and explain how the expert evidence increases the strength of those inferences; (c) link the expert evidence to the respondent's lack of a justification; (d) address why expert evidence on a material issue is unavailable (if that is the case); and (e) consider adducing statistical evidence of discrimination when possible.

L'arrêt rendu par la Cour suprême du Canada dans l'affaire Latif est important non seulement en raison des clarifications qu'il apporte relativement aux critères pour l'établissement de la discrimination prima facie dans les affaires de droits de la personne, mais aussi en raison des lignes directrices qu'il donne quant à l'utilisation des témoignages d'experts en sciences sociales dans les affaires de discrimination.

Cet article examine l'arrêt rendu par la Cour suprême dans l'affaire Latif, dans le but particulier d'en tirer des enseignements au profit des demandeurs cherchant à établir l'existence de discrimination au moyen des témoignages d'experts en sciences sociales. Les auteurs soutiennent spécifiquement que les plaideurs qui présentent des témoignages d'experts en sciences sociales devraient veiller à (a) expliquer soigneusement la pertinence du témoignage et mettre en évidence le lien entre le témoignage de l'expert et les questions de fond particulières en l'espèce, (b) indiquer clairement la chaîne des inférences qu'ils souhaitent tirer de la preuve circonstancielle et expliquer la façon dont

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le témoignage de l'expert renforce ces inférences, (c) établir le lien entre le témoignage de l'expert et le manque de justification du défendeur, (d) indiquer les raisons pour lesquelles l'expert ne peut pas témoigner à l'égard d'une question de fond (le cas échéant), (e) envisager de produire des éléments de preuve statistique de discrimination, dans la mesure du possible.

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1. Introduction

The Supreme Court of Canada's decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*¹ is a cautionary tale for human rights complainants. It highlights the challenges facing litigants who have to rely on social science evidence to prove discrimination.

In *Latif*, Quebec's *Commission des droits de la personne et des droits de la jeunesse* ("Commission") sued Bombardier on behalf of Javed Latif, a pilot and Canadian citizen of Pakistani origin, for discrimination based on ethnic or national origin. Bombardier had refused Mr. Latif's participation in a pilot training program in Canada on the sole basis that US authorities

¹ 2015 SCC 39, [2015] 2 SCR 789 [*Latif* SCC].

had refused to grant Mr. Latif security clearance. Given that the decision at issue was that of US authorities, Mr. Latif had no direct evidence of discrimination and had to rely, in part, on social science evidence to prove that the US authorities' decision was discriminatory.

This article draws lessons from *Latif* for human rights complainants. First, we review the Supreme Court's treatment of social science evidence in *Latif*. We then discuss the general challenges facing human rights litigants in proving discrimination and, subsequently, the role of social science evidence in establishing discrimination.

Finally, we examine the lessons from *Latif*. In particular, we argue that litigants adducing social expert evidence should ensure to: (a) carefully explain the relevance of the social science expert evidence and link the social science expert evidence to specific material issues in the case; (b) describe the chain of inferences they wish to draw from circumstantial evidence and explain how the expert evidence increases the strength of those inferences; (c) link the expert evidence to the respondent's lack of a justification; (d) address why expert evidence on a material issue is unavailable (if that is the case); and (e) consider adducing statistical evidence of discrimination when possible.

2. The Decision in *Latif*

A) The Facts

The *Latif* decision exemplifies many difficulties that applicants face in proving discrimination. As previously mentioned, Mr. Latif, a Canadian citizen of Pakistani origin who has been a pilot since 1964, brought a human rights complaint against Bombardier when it refused to provide him flight training at its Canadian flight-training centre. The Commission initiated proceedings against Bombardier before the *Tribunal des droits de la personne* ("Tribunal") based on Mr. Latif's allegations that Bombardier had discriminated against him based on his ethnic or national origin contrary to Quebec's *Charter of Human Rights and Freedoms*.²

Bombardier based its decision to deny Mr. Latif's request for flight training solely on the fact that the United States Department of Justice ("DOJ") denied him a US security clearance in 2004. As such, the Commission and Mr. Latif had to show that Mr. Latif's ethnic or national origin was a factor in the DOJ's decision to deny his security clearance.³ Since the DOJ was not a party to the action and was not subject to discovery,

² CQLR, c C-12.

³ *Latif* SCC, *supra* note 1 at paras 74, 80.

there was no direct evidence the Tribunal accepted about the reason for the DOJ decision. Mr. Latif had to rely on circumstantial evidence.⁴

B) The Tribunal

Before the Tribunal, the Commission's argument depended on three propositions: (1) Bombardier denied Mr. Latif's Canadian licence based on the DOJ's refusal of his security clearance; (2) the DOJ refused Mr. Latif's security clearance because of security measures undertaken following the September 11, 2001, terrorist attacks to "prevent terrorism on US territory"; and (3) "[t]hese [security] measures were aimed directly at, or mainly affected, Arabs or Muslims ... [or] people from Muslim countries, such as Pakistan."⁵

The first two were not in dispute. Bombardier conceded the first proposition. On the second, the Tribunal found, based on the testimony of Bombardier's own fact witnesses, that the objective of these US security measures was to prevent future terrorist attacks and that Bombardier accepted the validity of these objectives.⁶ The third proposition was the decisive one since it involved linking the adverse effect to Mr. Latif's protected characteristic of national or ethnic origin.

To make this link, the Commission relied on the expert evidence of Professor Reem Anne Bahdi, a law professor at the University of Windsor. The Tribunal qualified her as an expert in racial profiling in post-9/11 anti-terrorism and security measures. Professor Bahdi gave evidence that a series of facially neutral post-9/11 security programs were discriminatory in their application because they targeted Arabs and Muslims.⁷ The Tribunal relied on the evidence of Professor Bahdi about stereotyping and racial profiling as "background factors" to understand how Bombardier responded to the DOJ's denial of the security clearance.⁸ It used these factors to find that Bombardier had stereotyped Mr. Latif as a "potential terrorist" by accepting the DOJ denial of security clearance at face value without asking any questions or checking with the Canadian authorities.⁹ The Tribunal found that the Commission had discharged its burden of proving discrimination, and after rejecting Bombardier's attempts to rely on statutory defences it awarded Mr. Latif damages.

⁴ *Ibid* at paras 82–84.

⁵ *Quebec (Commission des droits de la personne et des droits de la jeunesse) c Bombardier Inc (Bombardier Aerospace Training Center)*, 2010 QCTDP 16 at paras 274–76, [2011] RJQ 225 [*Latif Tribunal*].

⁶ *Ibid* at paras 296–99.

⁷ *Ibid* at paras 301–03.

⁸ *Ibid* at para 301.

⁹ *Ibid* at paras 301, 304–05, 309.

C) The Quebec Court of Appeal

The Quebec Court of Appeal overturned the Tribunal's decision by finding that the Commission had failed to establish a *prima facie* case. The Court of Appeal particularly criticized the expert report of Professor Bahdi. For the Court of Appeal, Professor Bahdi's report was irrelevant because it did not discuss the precise aviation security program under which the DOJ denied Mr. Latif's licence and because it only addressed programs in force between 2001 and 2003 that ended before the DOJ's denial of Mr. Latif's licence in 2004.¹⁰ The Court of Appeal also criticized the probative value of Professor Bahdi's report, repeatedly noting that her evidence could not support the inferences of discrimination in the case at bar that the Tribunal drew from it.¹¹

D) The Supreme Court of Canada

The Supreme Court essentially accepted the Quebec Court of Appeal's criticisms of Professor Bahdi's expert report. Justices Richard Wagner (as he was then) and Suzanne Côté concluded that Professor Bahdi's expert evidence "was not sufficiently related to the facts of the case" to show that Mr. Latif's ethnic or national origin was a factor in the adverse effect he experienced.¹² They then issued a general caution about expert social science evidence in discrimination cases, stating:

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.¹³

The Court went on to reject the Commission's alternative argument that the Tribunal could have found a *prima facie* case of discrimination based on five other pieces of circumstantial evidence. Justices Wagner and Côté addressed these pieces of evidence in sequence and found that each one was irrelevant, had been misinterpreted by the Tribunal, or was insufficiently strong to support an inference of discrimination.¹⁴ In particular, they declined to give any weight to Bombardier's failure to check with the Canadian authorities

¹⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) c Bombardier Inc (Bombardier Aerospace Training Center)*, 2013 QCCA 1650 at paras 116–17, 122–24, [2013] R.J.Q. 1541 [*Latif* QCCA].

¹¹ *Ibid* at paras 129–34.

¹² *Latif* SCC, *supra* note 1 at para 89.

¹³ *Ibid* at para 88.

¹⁴ *Ibid* at paras 90–97.

or ask the US authorities to explain their reasons, holding these were not relevant at the stage of establishing a *prima facie* case of discrimination, and could only be relevant under the justification stage.¹⁵ Owing to their finding that there was no evidence to support a *prima facie* case of discrimination, Justices Wagner and Côté found that Mr. Latif and the Commission could not prevail.¹⁶

3. The Evidentiary Challenges Facing Human Rights Litigants

As *Latif* demonstrates, human rights litigants face significant evidentiary challenges in proving discrimination given that in many cases direct evidence is unavailable. Unlike early civil rights cases where discrimination was explicit, modern discrimination is often subtler, and may involve unconscious bias that a respondent is not willing to recognize. In cases of direct discrimination, direct evidence is rarely available because it is within the respondent's possession.¹⁷

Given that modern-day discrimination typically manifests itself in an indirect manner, the Supreme Court has also enunciated the test for *prima facie* discrimination in another way, requiring the applicant to establish the following three elements: (1) the applicant has “a characteristic protected from discrimination under the [applicable human rights legislation]”; (2) the applicant has “experienced an adverse impact with respect to the service [in question]”; and (3) the applicant’s “protected characteristic was a factor in the adverse impact.”¹⁸

Adverse impact discrimination “is a wrong cloaked in shades of gray.”¹⁹ It requires “proof of differential treatment,” but it can be challenging for applicants to show at which point on the continuum of differences in treatment discrimination occurs.²⁰ Linking that adverse impact to the protected characteristic can be very challenging.²¹

¹⁵ *Ibid* at para 97.

¹⁶ *Ibid* at para 98.

¹⁷ Pelma J Rajapakse, “An Analysis of the Methods of Proof in Direct Discrimination Cases in Australia” (1998) 20:1 UQLJ 90 at 91 [Rajapakse]; Dominique Allen, “Reducing the Burden of Proving Discrimination in Australia” (2009) 31:4 Syd L Rev 579 at 581 [Allen]; *King v Great Britain-China Centre* (1991), [1991] EWCA Civ 16 at para 36, [1992] ICR 516 [King].

¹⁸ *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at para 33, [2012] 3 SCR 360. See also *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 24, [2017] 1 SCR 591.

¹⁹ Evelyn Braun, “Adverse Effect Discrimination: Proving the *Prima Facie* Case” (2005) 11:1 Rev Const Stud 119 at 120.

²⁰ *Ibid*.

²¹ Colleen Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v B.C.G.S.E.U.*” (2001) 46:2 McGill LJ 533 at 542 [Sheppard].

The frequent absence of direct evidence linking the protected characteristic to the differential treatment or the adverse impact often forces complainants to rely on circumstantial evidence of discrimination. As the Court of Appeal for Ontario has recognized, applicants must then invite the court to draw inferences from that evidence to conclude that discrimination has occurred.²² Complainants may supplement this circumstantial evidence with expert evidence that can provide context to assist the court in drawing inferences. However, experts are not always available for the precise matter at issue.²³

4. The Role of Social Science Evidence in Discrimination Cases

Social science evidence can play a crucial role in assisting complainants to establish discrimination. It identifies the relationships of cause and effect and the outcome probabilities of certain events.²⁴ Social science evidence assists courts in three ways. First, it can provide “social authority” to establish or interpret the law.²⁵ Second, it can provide “social fact” research to resolve a specific issue in a proceeding (such as consumer surveys in trademark litigation).²⁶ Third, social science can be “social framework” evidence used to construct a frame of reference or “background context for deciding factual issues crucial to [resolving specifics].”²⁷ However, the Supreme Court has melded all three categories into “social fact” to mean:

[S]ocial science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case: see, e.g., C. L’Heureux-Dubé, “Re-examining the Doctrine of Judicial Notice in the Family Law Context” (1994), 26 *Ottawa L. Rev.* 551, at p. 556. As with their better known “legislative fact” cousins, “social facts” are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence.²⁸

For instance, the Supreme Court accepted expert evidence on the psychological effects of battering on wives and common law partners in *R v Lavallee* because it found the evidence would assist the jury to determine the

²² *Pieters v Peel Law Assn*, 2013 ONCA 396 at para 72, 116 OR (3d) 80 [*Pieters*].

²³ *R v Koh* (1998), 42 OR (3d) 668 at para 41, 116 OAC 244; Katherine Swinton, “What Do the Courts Want from the Social Sciences?” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 187 at 200 [Swinton].

²⁴ Justice Claire L’Heureux-Dubé, “Re-examining the Doctrine of Judicial Notice in the Family Law Context” (1994) 26:3 *Ottawa L Rev* 551 at 568 [L’Heureux-Dubé].

²⁵ John Monahan & Laurens Walker, “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law” (1985) 134:3 *U Pa L Rev* 477 at 488.

²⁶ L’Heureux-Dubé, *supra* note 24 at 556.

²⁷ *Ibid.*

²⁸ *R v Spence*, 2005 SCC 71 at para 57, [2005] 3 SCR 458.

adjudicative facts. Justice Bertha Wilson wrote that the average trier of fact could not appreciate the adjudicative facts without “help to understand it” from social science experts.²⁹ Without such assistance, the trier of fact might draw incorrect conclusions from the adjudicative facts based on “common knowledge” that was actually based on myths and stereotypes.³⁰

However, social fact evidence is relegated to a supporting role of the trier of fact’s determination of the adjudicative facts. For instance, in *Lavallee*, the expert evidence could provide background knowledge to assist the jury. But it was ultimately up to the jury to decide whether events that a battered woman subjectively experienced as “life threatening” were reasonable in the context of the adjudicative facts about the relationship.³¹ Likewise, in *R v Abbey*, Justice David Doherty faulted a Crown expert on urban street gang culture for addressing reasons the accused placed a tattoo on his face, since this strayed into the realm of the trier of fact.³² Instead, the Crown expert should have been restricted to providing evidence about the potential meanings attributed to the tattoo in urban street gang culture. It would then be up to the trier of fact to decide whether to link these “social facts” about tattooing to the adjudicative facts about the particular accused.³³ In *Pearl v Peel Regional Police Services*, Justice Doherty insisted that expert social fact evidence of racial profiling could assist the trier of fact in deciding whether to draw inferences of racial profiling, but that it could not dictate the trier of fact’s findings of adjudicative facts.³⁴

Human rights tribunals have generally applied these judicial standards when considering expert evidence. Tribunals are not bound by the formal rules of evidence.³⁵ However, they have still applied the general test for the admissibility of expert evidence set out in *R v Mohan* and most recently in *White Burgess Langille Inman v Abbott and Haliburton Co* in evaluating expert social fact evidence of discrimination.³⁶ Accordingly, expert evidence that is merely helpful but not “necessary” under the *Mohan/White Burgess*

²⁹ [1990] 1 SCR 852 at 871–72, 55 CCC (3d) 97 [*Lavallee*].

³⁰ *Ibid* at 872–73.

³¹ *Ibid* at 882.

³² 2009 ONCA 624 at paras 68–70, 97 OR (3d) 330 [*Abbey*].

³³ *Ibid* at paras 68–70.

³⁴ (2006), 217 OAC 269 at para 96, 39 MVR (5th) 123 [*Pearl*].

³⁵ See *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 15(1); *Human Rights Code*, RSBC 1996, c 210, s 27.2(1); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 30(2).

³⁶ *Nassiah v Peel Regional Police Services Board*, 2006 HRTO 18 at paras 34–35, 57 CHRR D/38 [*Nassiah*]; *McKay v Toronto Police Services Board*, 2009 HRTO 876 at para 12, [2009] OHRTD No 870; *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 [*Mohan* cited to SCR]; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182.

framework would be excluded.³⁷ Multiple tribunals have stressed that the distinction between “helpful” and “necessary” may be more apparent than real and that evidence that contextualizes the issues in dispute may still be necessary.³⁸ After all, the Court in *Mohan* stressed that necessity should not be judged too strictly and that its real meaning is whether the information is likely to be outside the experience and knowledge of the trier of fact.³⁹ This led the Human Rights Tribunal of Ontario to conclude in *Nassiah v Peel Regional Police Services Board* that the assessment of “necessity” is more relaxed in the human rights context than in a criminal case.⁴⁰

In keeping with this more relaxed approach, tribunals have frequently rejected attempts by respondents to argue that expert social fact evidence is inadmissible. Recent tribunal decisions have rejected the argument that expert social fact evidence fails the necessity prong of the *Mohan/White Burgess* test because human rights tribunals are experts on discrimination, a rationale that appeared in some previous tribunal decisions.⁴¹ Instead, tribunals have distinguished between the expert’s knowledge of the social phenomenon of racism and the tribunal’s expertise in the law of discrimination and human rights.⁴² Moreover, in *Nassiah*, the tribunal rejected the respondent’s attempt to argue that an expert on racial profiling would be impermissibly opining on the ultimate issue in a racial profiling case. The tribunal insisted that expert evidence could assist the trier of fact to determine the adjudicative facts by providing ready-made inferences.⁴³

Furthermore, tribunals have been willing to accept expert testimony even if it does not bear on the precise matter at issue. In *Nassiah*, the tribunal admitted Professor Norman Scot Wortley’s testimony even though he had not studied the police forces in question and his specialization in police stops was not relevant to the facts of the case.⁴⁴ Likewise, in *McKay v Toronto Police Services Board* the Tribunal admitted Professor Charles Smith as an expert in racial profiling despite his lack of expertise on the specific matter of Indigenous racial profiling at issue in the case.⁴⁵

³⁷ See *Radek v Henderson Development (Canada) Ltd*, 2004 BCHRT 340 at para 32, [2004] BCHRTD No 364.

³⁸ *Ibid* at para 33; *Johnson v Halifax (Regional Municipality) Police Service*, [2003] NSHRBID No 2 at para 93, 48 CHRR D/307 (NS Bd Inq) [*Johnson*].

³⁹ *Supra* note 36 at 23.

⁴⁰ *Supra* note 36 at para 36.

⁴¹ See *Omoruyi-Odin v Toronto District School Board*, [2002] OHRBID No 21 at para 55, 45 CHRR D/140.

⁴² *Johnson, supra* note 38 at para 92; *Nassiah, supra* note 36 at para 34.

⁴³ *Nassiah, supra* note 36 at paras 38–39.

⁴⁴ *Ibid* at para 32.

⁴⁵ 2011 HRTD 499 at paras 88–89, 72 CHRR D/143 [*McKay*].

Tribunals have also relied on admissible expert evidence to explain social facts. For instance, in *Nassiah*, the tribunal accepted Professor Wortley's social science evidence on racial profiling concerning the general phenomenon that police apply heightened scrutiny to a post-stop investigation if the suspect is Black.⁴⁶ The tribunal subsequently used this social framework to infer from the evidence that the police officer treated the complainant differently because of her race, as the police officer had applied heightened scrutiny to an investigation of a minor offence.⁴⁷ Similarly, in *McKay*, the Tribunal accepted Professor Jonathan Rudin's expert testimony that negative police attitudes towards Indigenous people can influence police conduct of investigations and lead police to adopt an "arrest first" approach.⁴⁸ The Tribunal then relied on this social framework to find that the police officer adopted this "arrest first" approach and discriminated against the complainant on the basis of race because the facts indicated that the decision to arrest the complainant was a rash decision.⁴⁹

5. Lessons from *Latif*

Latif is an example of the challenges of relying on social science evidence, and therefore offers lessons to human rights litigants. Litigants can draw several lessons from *Latif*. In particular, they must ensure that they: (a) carefully explain the relevance of the social science expert evidence and link the social science expert evidence to specific material issues in the case; (b) describe the chain of inferences they wish to draw from circumstantial evidence and explain how the expert evidence increases the strength of those inferences; (c) link the expert evidence to the respondent's lack of a justification; (d) address why expert evidence on a material issue is unavailable (if that is the case); and (e) consider adducing statistical evidence of discrimination when possible.

A) Lesson #1: Carefully Explain the Relevance of Social Science Evidence

First, litigants must ensure that they carefully explain the relevance of the social science they wish to adduce.

In *Latif*, the relevance of Professor Bahdi's evidence was at issue. The Quebec Court of Appeal ruled that her evidence was irrelevant. While the Supreme Court did not use the word "relevance" when discussing her evidence, it referred to a requirement that evidence of discrimination

⁴⁶ *Nassiah v Peel Regional Police Services Board*, 2007 HRTO 14 at paras 133–34, 61 CHRR D/88.

⁴⁷ *Ibid* at para 166.

⁴⁸ *McKay*, *supra* note 45 at para 103.

⁴⁹ *Ibid* at paras 192–94.

“be tangibly related” to the adjudicative facts.⁵⁰ This parallels the Quebec Court of Appeal’s assertion that Professor Bahdi’s evidence comprised “*généralités*.”⁵¹ That the Supreme Court did not consider Professor Bahdi’s expert report when it discussed the five items of circumstantial evidence relied upon by the Commission suggests that it may have considered the report irrelevant.⁵²

Relevance is a basic requirement of admissibility. Like all evidence, expert evidence must be relevant to a material issue in the case to be admissible.⁵³ The Supreme Court has stated that to be relevant, evidence must have “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence.”⁵⁴ Human rights tribunals have sometimes dismissed expert evidence on the basis that it is irrelevant. For instance, in *Omoruyi-Odin v Toronto District School Board*, the Ontario Human Rights Commission sought to adduce evidence from Dr. Paul Carr, an expert in anti-racist education, in an employment discrimination claim against a school board.⁵⁵ The board of inquiry held that while Dr. Carr’s evidence was relevant to the quality of the services provided by the school board to Black parents and students, it was not relevant to the issue of whether Black employees of the school board faced discrimination.⁵⁶

Relevance is a flexible concept that permits a party to build up a chain of inferences linking primary evidence to a material issue in the case. As Justice Doherty of the Court of Appeal for Ontario has highlighted, “relevance is situational and depends not only on the ultimate issue in the case ... but also on the other factual issues which either of the litigants raises as relevant to the ultimate issue.”⁵⁷ Because of this flexible definition, it is well established that plaintiffs can build a chain of inferences from primary evidence to the ultimate question of fact. For instance, in *R v Watson*, a leading case on relevance, the Court of Appeal for Ontario held that evidence that the deceased always carried a gun could support a three-step chain of inferences that linked it to the ultimate issue of whether the accused was a part of a plan to kill the deceased.⁵⁸ Likewise, in *R v P(R)*, Justice Doherty admitted evidence of the deceased’s mental state even though this required several

⁵⁰ *Latif* SCC, *supra* note 1 at para 88.

⁵¹ *Latif* QCCA, *supra* note 10 at para 126.

⁵² *Latif* SCC, *supra* note 1 at paras 90–97.

⁵³ *Abbey*, *supra* note 32 at para 84.

⁵⁴ *R v White*, 2011 SCC 13 at para 36, [2011] 1 SCR 433 [footnotes omitted].

⁵⁵ *Supra* note 41.

⁵⁶ *Ibid* at paras 47–48, 51.

⁵⁷ *R v P(R)*, 58 CCC (3d) 334, 1990 CarswellOnt 2696 at para 11 (WL Can) (H Ct J) [P(R)].

⁵⁸ 30 OR (3d) 161, 1996 CarswellOnt 2884 at paras 41–44 (WL Can) (CA).

inferential steps to make it more likely that the accused committed the crime.⁵⁹

Clearly outlining the chain of inferences that an applicant wishes the tribunal to draw from expert evidence may counter charges that such evidence is irrelevant. For instance, in *Latif* it is difficult to accept the Quebec Court of Appeal's conclusion that Professor Bahdi's report was not relevant. The report provided evidence of a climate of racial profiling in post-9/11 US and racial profiling in certain post-9/11 national security programs. Viewed as a matter of logic and human experience, a national climate of racial profiling present in national security-related programs seem to make it more likely that racial profiling was present in this aviation security program. This evidence, in turn, could make it more likely that the decision to refuse Mr. Latif a licence was discriminatory.

Reliance on specific evidentiary concepts such as similar fact evidence to support their chain of inferences may also help applicants avoid charges of irrelevance. For instance, in *Latif* both the Quebec Court of Appeal and the Supreme Court stressed that the programs discussed in Professor Bahdi's report terminated in 2003.⁶⁰ Yet this should not automatically render the report irrelevant. In human rights cases, as in civil cases generally, an applicant may introduce evidence about the respondent's conduct on other occasions to show differential treatment and prove discrimination indirectly through previous misconduct, which may be admissible as similar fact evidence. It is then open to the respondent to rebut this similar fact evidence by showing it changed its past discriminatory practices.⁶¹ Of course, the party seeking to adduce similar fact evidence must satisfy the trial judge on a balance of probabilities that the probative value of the evidence in relation to a particular issue outweighs its potential prejudicial effect for it to be admissible.⁶² Still, it will be easier for applicants to satisfy this test in human rights cases since the prejudicial effect that respondents face will usually

⁵⁹ *Supra* note 57 at para 12.

⁶⁰ *Latif* QCCA, *supra* note 10 at para 140; *Latif* SCC, *supra* note 1 at para 87.

⁶¹ Béatrice Vizkelely, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 148, 154 [Vizkelely].

⁶² *R v Handy*, 2002 SCC 56 at paras 55, 110, [2002] 2 SCR 908. *Handy* is a criminal case but Canadian courts have held that the general principles governing the admissibility of similar fact evidence in criminal cases apply to civil cases. See *Greenglass v Rusonik*, 18 ACWS (2d) 505, 1983 CarswellOnt 2011 at paras 42–46 (WL Can) (CA); *Cammack v Hill*, 63 OR (3d) 47 at paras 7–9, [2002] OTC 1005 (Sup Ct J) [*Cammack*]; Sidney N Lederman et al, *The Law of Evidence in Canada*, 4th ed (Markham, Ont: LexisNexis Canada, 2014), §11.229 [Lederman et al].

be at a lower level than in criminal cases, and human rights tribunals are subject to relaxed rules of admissibility of evidence.⁶³

For instance, in *Radek v Henderson Development (Canada) Ltd*, the complainant adduced evidence about individuals' experiences and the practices of security personnel at the mall that was the site of the alleged discrimination. The British Columbia Human Rights Tribunal noted that evidence of guards' conduct and individuals' experiences that fell outside the time period of the alleged discrimination was not directly probative.⁶⁴ However, the tribunal held that it was admissible as similar fact evidence since it showed the security guards' patterns of conduct in applying the respondents' policies.⁶⁵ The tribunal relied on this similar fact evidence in concluding that the respondents had discriminated against the complainant on the basis of race and disability.⁶⁶

The lens of similar fact evidence could have assisted the Tribunal and the courts to appreciate the significance of Professor Bahdi's evidence in *Latif*. It was arguable that the racial profiling in post-9/11 national security programs showed a pattern of conduct by the US government that made it more likely that the DOJ had engaged in the same pattern of racial profiling. Moreover, Bombardier never called evidence to show that the DOJ altered its past discriminatory practices. This is particularly telling in light of the evidence before the Tribunal showing that the DOJ's own Policy Guidance to Ban Racial Profiling, which was in force at all material times, made an explicit exception permitting racial profiling for national security matters.⁶⁷ Neither the parties, the Tribunal, nor the courts appear to have used the lens of similar fact evidence in *Latif*, but it could have been a useful tool for the Commission and Mr. Latif to demonstrate the relevance of Professor Bahdi's evidence.

Latif is a lesson to applicants to articulate clearly how the expert evidence they adduce relates to material issues in the case. They should spell out the inferences they wish the court to draw from the expert evidence to avoid charges of irrelevance or over-generalization and use evidentiary categories such as similar fact evidence to show how their evidence is relevant. By so doing, applicants can show that their expert evidence meets the well-established legal test for logical relevance to a material issue.

⁶³ *Cammack*, *supra* note 62 at para 9; *Vizkelety*, *supra* note 61 at 156, n 5 (and cases cited therein); *Latif* SCC, *supra* note 1 at paras 67–68.

⁶⁴ *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 at para 61, 52 CHRR D/430 [*Radek*].

⁶⁵ *Ibid* at para 62.

⁶⁶ *Ibid* at paras 606–07.

⁶⁷ *Latif* Tribunal, *supra* note 5 at para 203.

B) Lesson #2: Using Social Science Evidence to Support Drawing Inferences from Circumstantial Evidence

Applicants should spell out the chain of inferences they wish the tribunal to draw from circumstantial evidence and explain to the tribunal how their expert evidence increases the strength of those inferences.

In *Latif*, the Supreme Court appeared to stress the distinction between “direct evidence” and “circumstantial evidence,” noting that the Tribunal was forced to rely on circumstantial evidence because there was no direct evidence.⁶⁸ This was also evident in the reasons of the Quebec Court of Appeal, which repeatedly stressed that the Tribunal drew inferences not supported by the evidence and did not meet the requirement of Quebec civil law that inferences from circumstantial evidence be “serious, precise and concordant.”⁶⁹ Moreover, the Supreme Court considered Professor Bahdi’s expert report and the five items of circumstantial evidence in isolation from each other.⁷⁰ It also appeared to consider the five items of circumstantial evidence in isolation from each other, since it dismissed each piece of circumstantial evidence in turn.⁷¹

The Supreme Court’s approach to circumstantial evidence of discrimination in *Latif* is troubling. Contrary to the stress the court placed on the distinction between circumstantial and direct evidence, it is well established that in civil cases circumstantial evidence is treated as any other evidence, and the strength of the inference that can be drawn from it is a question for the trier of fact.⁷² Circumstantial evidence alone can support a criminal conviction, and in the civil context a trier of fact can infer causation solely from circumstantial evidence, even where there is inconclusive or contrary expert evidence.⁷³ It is well established that, even in the criminal context, the court must look at the circumstantial evidence as a whole. Courts have analogized circumstantial evidence to a rope comprising several cords to make the point that several pieces of circumstantial evidence may be

⁶⁸ *Latif* SCC, *supra* note 1 at para 84.

⁶⁹ *Latif* QCCA, *supra* note 10 at paras 129–31; *Civil Code of Quebec*, art 2804.

⁷⁰ *Latif* SCC, *supra* note 1 (“The Commission argues that even without Ms. Bahdi’s expert report” at para 90).

⁷¹ *Ibid* at paras 90–97.

⁷² Lederman et al, *supra* note 62, §2.86.

⁷³ *R v John* (1970), [1971] SCR 781 at 789, 15 DLR (3d) 692 [*John*]; *British Columbia (Workers’ Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 at para 38, [2016] 1 SCR 587.

sufficiently strong to support a desired inference even where a single piece alone would be insufficient.⁷⁴

The emphasis on direct evidence is especially burdensome in human rights cases. The Court of Appeal for Ontario has repeatedly held that racial profiling must almost always be proven by inferences from circumstantial evidence as direct evidence is rarely available, a principle that Human Rights Tribunal of Ontario has also accepted.⁷⁵ It is noteworthy that the US Supreme Court has stated that circumstantial evidence should be treated the same as direct evidence in discrimination cases, and that it may sometimes be more persuasive than direct evidence.⁷⁶ Many scholars have cautioned against treating in isolation pieces of circumstantial evidence, as this can deprive such evidence of its full potential because the probative value of each item of circumstantial evidence taken alone will not always be evident.⁷⁷

A holistic approach to circumstantial evidence is even more important in the appellate and judicial review contexts. The Supreme Court itself has repeatedly cautioned courts against engaging in such parsing of the evidence when reviewing the decisions of administrative tribunals.⁷⁸ As Justice David Stratas has written extra-judicially, in *Latif* the Court essentially ignored the standard of review and provided its own interpretation of the facts, even though the legislative regime vested the Tribunal, not the courts, with decision-making power.⁷⁹ Likewise, in a civil context, the task of a court reviewing inferences from circumstantial evidence is to determine whether the inference is rationally possible. If it is and the trier of fact concludes that it is more probable than the other possible inferences, then there is no basis for an appellate or reviewing court to interfere.⁸⁰

⁷⁴ *John*, *supra* note 73 at 793; *Jerome v Anderson*, [1964] SCR 291 at 300, 44 DLR (2d) 516; *Lederman et al*, *supra* note 62, §2.85. The source of this analogy is *R v Exall* (1866), 4 F & F 922 at 929, 176 ER 850 at 853.

⁷⁵ *R v Brown* (2003), 64 OR (3d) 161 at para 44, 170 OAC 131; *Peart*, *supra* note 34 at para 95; *McKay*, *supra* note 45 at para 125.

⁷⁶ *Desert Palace Inc v Costa* (2003), 539 US 90 at 100.

⁷⁷ *Rajapakse*, *supra* note 17 at 96; Michael J Zimmer, "A Chain of Inferences Proving Discrimination" (2008) 79:4 U Colo L Rev 1243 at 1292; Jonathan Hunyor, "Skin-deep: Proof and Inferences of Racial Discrimination in Employment" (2003) 25:4 Syd L Rev 535 at 549 [Hunyor].

⁷⁸ *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458.

⁷⁹ David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 31.

⁸⁰ *Pieters*, *supra* note 22 at para 92; *Bruce v Bruce*, [1947] OR 688, 1947 CarswellOnt 73 at para 16 (WL Can) (CA); *Vizkeleky*, *supra* note 61 at 142.

The cautious and skeptical treatment of circumstantial evidence by the Quebec Court of Appeal and the Supreme Court in *Latif* highlights the potential importance of expert evidence for applicants. The Tribunal itself stated that it relied on Professor Bahdi's expert evidence of racial profiling as "background factors" to explain specific adjudicative facts such as how Bombardier representatives leapt to the conclusion that Mr. Latif was a potential terrorist without making any inquiries of US or Canadian authorities.⁸¹ Had the Supreme Court not dismissed Professor Bahdi's report before considering the circumstantial evidence, it may have affected the Court's treatment of that circumstantial evidence. The lesson for applicants is to both describe the chain of inferences they wish the tribunal to draw from circumstantial evidence and to explain to the tribunal how their expert evidence increases the strength of those inferences.

C) Lesson #3: Linking Social Science Evidence to the Respondent's Absence of a Justification

Latif is also a lesson for applicants to use expert evidence to highlight the significance of the absence of a justification. In *Latif*, the Supreme Court suggested that Bombardier's failure to check with Canadian or US authorities would not assist Mr. Latif in making out a *prima facie* case of discrimination but would only be relevant at the justification stage.⁸²

It is not clear why Bombardier's failure to seek an explanation or the DOJ's failure to provide one should only be relevant at the justification stage. For instance, in *Pieters v Peel Law Association*, the Court of Appeal for Ontario recognized that if the applicant can establish a *prima facie* case, the respondent could either call evidence to rebut that *prima facie* case or establish a statutory defence of justification.⁸³ If the respondent declines to provide a justification that rebuts the *prima facie* case, the court may take the respondent's silence to infer the absence of an explanation.⁸⁴ As the Court of Appeal noted and numerous scholars have stated, this is an appropriate response to the well-recognized fact that the respondent is the best placed to explain or justify its behaviour. It also follows the ordinary rules of evidence.⁸⁵ It is noteworthy that the House of Lords has also followed this approach.⁸⁶ Drawing the inference of the absence of an explanation from the respondent's silence does not require inverting the applicant's legal burden

⁸¹ *Latif* Tribunal, *supra* note 5 at paras 301, 305.

⁸² *Latif* SCC, *supra* note 1 at para 97.

⁸³ *Supra* note 22.

⁸⁴ *Ibid* at paras 63–79.

⁸⁵ *Ibid* at para 72; Allen, *supra* note 17 at 595; Hunyor, *supra* note 77 at 543; Rajapakse, *supra* note 17 at 101.

⁸⁶ *Glasgow City Council v Zafar*, [1997] UKHL 54, [1998] 2 All ER 953 at 958 [*Zafar*], citing *King*, *supra* note 17.

of proof. The Supreme Court appeared to be concerned that requiring an explanation would shift the legal burden of proof from the applicant to the respondent, an issue it devoted considerable attention to in *Latif*.⁸⁷ However, this concern should not be fatal to considering the respondent's failure to provide an explanation at the *prima facie* case stage of the analysis.

While the Supreme Court properly insisted that the applicant meet his legal burden to demonstrate all three elements of *prima facie* discrimination on a balance of probabilities, it confused this concept of a legal burden of proof with that of an evidential burden.⁸⁸ As Justice John Sopinka explained in the medical malpractice case of *Snell v Farrell*, if the plaintiff adduces evidence and the defendant provides no explanation or evidence to the contrary, the defendant risks the court drawing an adverse evidentiary inference.⁸⁹ This rule is referred to as an evidential or tactical burden, but is just "an ordinary step in the fact-finding process."⁹⁰ Since the respondent is best placed to provide an explanation, the court may be justified in drawing an adverse inference against a respondent who declines to provide an explanation even if the applicant has adduced little affirmative evidence.⁹¹ The Court of Appeal for Ontario and the United Kingdom's House of Lords have applied this same approach to discrimination cases.

Expert evidence may also amplify the effect of a respondent's failure to provide an explanation. For instance, in *Latif* the Tribunal relied on expert evidence as "background factors" to assess the significance of Bombardier's failure to seek an explanation by checking with the US or Canadian authorities. Bombardier's unquestioning acceptance of the DOJ decision as proof that Mr. Latif was a "potential terrorist" took on added significance given Professor Bahdi's evidence about racial profiling and stereotyping.⁹²

Applicants should both push for a more robust approach to the respondent's failure to provide a justification and use expert evidence to amplify the effect of such a failure. Applicants may wish to draw the attention of tribunals and reviewing courts to the distinction between burden of proof and evidential burden, and stress that drawing an adverse inference from the absence of an explanation differs from reversing the burden of proof. Applicants should also argue that expert evidence about racial profiling, prejudice, and stereotypes may carry more weight when connected to other circumstantial evidence and the respondent's absence of a justification.

⁸⁷ *Latif* SCC, *supra* note 1 at paras 64–65, 97.

⁸⁸ *Ibid* at para 65.

⁸⁹ [1990] 2 SCR 311, 72 DLR (4th) 289 [*Snell* cited to SCR].

⁹⁰ *Ibid* at 329–30.

⁹¹ *Pieters*, *supra* note 22 at paras 68–73; *Zafar*, *supra* note 86 at 958, citing *King*, *supra* note 17.

⁹² *Latif* Tribunal, *supra* note 5 at paras 301, 305.

D) Lesson #4: Addressing the Unavailability of Precise Expert Evidence

Latif is also a cautionary tale for applicants who adduce expert evidence that cannot address the precise program or system at issue.

A key factor in both the Quebec Court of Appeal and the Supreme Court decisions to dismiss Professor Bahdi's expert evidence was that they did not address the specific aviation security program at issue in the case. Neither court addressed the cost difficulties that complainants can experience in accessing expert evidence or the frequent unavailability of expert evidence on the specific program or matter at issue. Nor did the Tribunal, the Quebec Court of Appeal, or the Supreme Court discuss whether there were any experts with knowledge of the precise aviation security program.

Expert evidence of discrimination on the precise matter or program at issue may not always be available. As Justice George Finlayson recognized in *R v Koh*, expert evidence of discrimination may be unavailable not because the complainant failed to adduce readily available evidence but because there is a paucity of evidence.⁹³ Social science research agendas are not shaped by the demands of litigation and, as a result, the material available may be only indirectly on point for a case. Applicants are always free to commission a study on the precise matter at issue.⁹⁴ But the cost of this may be prohibitive, particularly for litigants who are self-represented or who are not assisted by a provincial human rights commission or legal clinic.

However, there are principles of the law of evidence that applicants may wish to have recourse to. It is a general rule of civil evidence that the court will look to the "proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."⁹⁵ In discrimination claims under section 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court has recognized that a claimant cannot be expected to prove matters that cannot be within its knowledge to make out a section 15 claim.⁹⁶ Likewise, as discussed earlier, expert evidence that does not address the precise program at issue but addresses the respondent's past conduct may still be relevant and admissible as similar fact evidence. Applicants may wish to draw the attention of tribunals and reviewing courts to these principles to show that they cannot be expected to produce expert

⁹³ *Supra* note 23 at para 24.

⁹⁴ Swinton, *supra* note 23 at 200–01.

⁹⁵ *Snell*, *supra* note 89 at 328, citing *Blatch v Archer*, 98 ER 969 at 970, (1774) 1 Cowp 63.

⁹⁶ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 80, 170 DLR (4th) 1 [*Law*].

evidence that does not exist, or that evidence that does not address the precise program at issue should be admissible as similar fact evidence.

Latif shows that applicants should address whether the expert evidence addresses the precise matter at issue head-on. Applicants should attempt to find an expert who can comment on the precise issue, including by commissioning a study. If no expert is available and it is impossible for cost or other reasons to commission a study on the precise issue, the applicant should explain to the tribunal why this is the case and indicate that they have selected the expert whose expertise is the closest to the precise issue. Applicants should also clearly outline to the tribunal the inferences they invite the court to draw to link the expert evidence to the specific matter at issue, and should consider whether to frame expert evidence that does not address the precise program as similar fact evidence.

E) Lesson #5: Consider Using Expert Statistical Evidence

Finally, *Latif* indicates that, where possible, litigants should adduce expert statistical evidence to demonstrate discrimination.

In *Latif*, the Commission and Mr. Latif suffered from their failure to adduce expert statistical evidence and Bombardier's reliance on such evidence. Mr. Latif and the Commission called no expert statistical evidence, and instead argued that statistical evidence was unnecessary.⁹⁷ In contrast, Bombardier called Bernard Siskin, a PhD in applied statistics, as an expert witness. Mr. Siskin provided statistical evidence that there was no racial profiling in the decision-making process.⁹⁸ The Quebec Court of Appeal relied in part on Mr. Siskin's evidence when it dismissed the evidence of Professor Bahdi.⁹⁹ While the Supreme Court did not specifically refer Mr. Siskin's evidence, it came to the same conclusions as his expert report did and its analysis of the five items of circumstantial evidence that the Commission relied on bears a striking similarity to the Tribunal's summary of Mr. Siskin's report.¹⁰⁰

Failure to adduce expert statistical evidence can disadvantage applicants. Mr. Latif and the Commission were correct that statistical evidence does not have to establish discrimination.¹⁰¹ However, an applicant's failure to adduce statistical evidence may put it at a disadvantage, especially when the

⁹⁷ *Latif* Tribunal, *supra* note 5, Appendix—"Authorities as cited by the Plaintiff", numbers 15–17.

⁹⁸ *Ibid* at paras 209–10, 212–16.

⁹⁹ *Latif* QCCA, *supra* note 10 at paras 119, 128.

¹⁰⁰ *Latif* SCC, *supra* note 1 at paras 91–96; *Latif* Tribunal, *supra* note 5 at paras 212–16.

¹⁰¹ *Law*, *supra* note 96 at para 77; *Radek*, *supra* note 64 at para 513.

respondent adduces such evidence. Respondents can use statistical evidence to show that alleged disparities cannot justify a finding of discrimination, to show that disparities are due to legitimate qualification requirements, and generally to rebut any statistical evidence adduced by the applicant.¹⁰² For instance, in *Latif* the Supreme Court dismissed Mr. Latif's non-expert evidence that four candidates Bombardier had refused based on the DOJ denial of a security clearance were from Arab or Muslim countries by referring to statistical evidence that Bombardier had adduced.¹⁰³

Conversely, reliance on statistical evidence can greatly assist applicants in proving discrimination. Especially in cases of adverse effect discrimination, statistical proof can be useful to quantify the effect of a standard or rule on one group compared to another and to identify general patterns of conduct. It can both help complainants establish a *prima facie* case by serving as circumstantial evidence of discrimination in direct discrimination cases and direct evidence of discrimination in adverse effects cases.¹⁰⁴ Even where the statistical evidence is limited, it can be very useful for complainants to combine the available statistical evidence with qualitative evidence of discrimination.¹⁰⁵ For instance, in the oft-cited *Action Travail* case, where the Supreme Court first recognized the concept of "systemic discrimination," the complainant combined testimony from 13 employees and applicants describing experiences of sex discrimination with statistical evidence of sex discrimination and expert testimony interpreting that statistical evidence.¹⁰⁶ The Tribunal's findings of fact and conclusion that the employer's hiring practices constituted systemic discrimination were unchallenged on appeal to the Supreme Court, where the only issue was the remedy.¹⁰⁷

Applicants should thus consider adducing statistical evidence of discrimination when possible, especially if the respondent intends to adduce such evidence. Applicants should link statistical evidence to qualitative evidence of discrimination and explain how the pieces of evidence taken together support inferences of discrimination. The Supreme Court's treatment of the one item of non-expert statistical evidence that Mr. Latif adduced in *Latif* should not make applicants reluctant. It must

¹⁰² Vizkelely, *supra* note 61 at 181–82.

¹⁰³ *Latif* SCC, *supra* note 1 at para 94.

¹⁰⁴ Vizkelely, *supra* note 61 at 174, 176–77.

¹⁰⁵ Sheppard, *supra* note 21 at 546; Vizkelely, *supra* note 61 at 192; John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 213 at 224–26.

¹⁰⁶ *CN v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at 1119–25, 40 DLR (4th) 193 [*Action Travail*]; *Action travail des femmes v Canadian National* (1984), 5 CHRR D/2327 at paras 19684, 19882 (discussing the views of experts).

¹⁰⁷ *Action Travail*, *supra* note 106 at 1132.

be remembered that the Court had ruled there was no direct evidence, dismissed the value of the expert report, and rejected all four other items of circumstantial evidence. Given more favourable circumstantial evidence and a court accepted expert report, even such evidence of limited statistical significance could give rise to inferences of discrimination.

6. Conclusion

While *Latif* is a cautionary tale for human rights applicants who rely on social science expert evidence to establish discrimination, it also provides lessons for applicants that can help them avoid pitfalls and improve their ability to make out a *prima facie* case of discrimination.

Social science evidence can be useful for applicants, but *Latif* suggests that applicants should ensure that they clearly link social science expert evidence to specific material issues in the case, outline the chain of inferences they wish the tribunal to draw from it, and connect it to the circumstantial evidence and adjudicative facts. Applicants considering adducing social framework evidence should be prepared to explain why expert evidence on the precise matter at issue is unavailable. Applicants should also adduce statistical evidence, especially where respondents are likely to rely on such evidence, and to link qualitative evidence of discrimination to statistical analysis.