

Chapter 1

Protection Against Discrimination

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Basic Features

It is common for collective agreements to contain provisions prohibiting discrimination against employees. Prohibited grounds of discrimination generally include those found in human rights legislation, such as age, race, religion, sex, sexual orientation, marital and family status, and mental or physical disability, but other grounds such as trade union membership or activity may also be included.

Applicable Legislation

Human rights legislation across Canada¹ prohibits employers from discriminating² against employees based on personal

1 See *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5; *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210; *Manitoba Human Rights Code*, C.C.S.M. c. H175; *New Brunswick Human Rights Act*, R.S.N.B. 2011, c. 171; *Newfoundland and Labrador Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1; *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214; *Northwest Territories Human Rights Act*, S.N.W.T. 2002, c. 18; *Nunavut Human Rights Act*, S.Nu. 2003, c. 12; *Ontario Human Rights Code*, R.S.O. 1990, c. H.19; *Prince Edward Island Human Rights Act*, R.S.P.E.I. 1988, c. H-12; *Quebec Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; *Yukon Human Rights Act*, R.S.Y. 2002, c. 116.

2 On the requirements for proving unlawful discrimination in the human rights context, see the Discussion section in this chapter.

characteristics, or perceived characteristics,³ specified in the legislation, such as age, race, religion, creed, colour, sex, sexual orientation, marital status, family status, national origin, mental or physical disability, etc.

Unionized employees are protected even if the collective agreement contains no express prohibition against discrimination, as the Supreme Court of Canada has said that the substantive rights and obligations of human rights statutes (and other employment-related statutes) are incorporated into every collective agreement over which an arbitrator has jurisdiction.⁴ As a result, redress for human rights violations is available through the grievance and arbitration process, whether or not the collective agreement includes express protections in this regard.

The scope of protection from discrimination, however, will depend on the applicable statutory language and circumstances of the case. Thus, in the 2014 decision in *McCormick v. Fasken Martineau DuMoulin*,⁵ the Supreme Court of Canada unani-

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- 3 The Supreme Court of Canada in the *Montreal (City)* case confirmed that discriminatory conduct based on a subjective *perception* of membership in a protected group (specifically with respect to the characteristic of disability in that case) is equally prohibited. Thus, the statutory protection against discrimination on the basis of disability extends not only to persons with a “real” disability but also persons who are perceived to have a disability and who may in fact have no real functional limitations. See *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, 2000 SCC 27 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, May/June, 2000. See also *Warman v. Kyburz*, 2003 CHRT 18 (CanLII) (Mactavish), in which the Canadian Human Rights Tribunal held that the prohibition against racial discrimination extends to discriminatory conduct based on the perception that an individual belongs to a different race. Some human rights statutes expressly reflect this approach: see, for example, Manitoba’s *Human Rights Code*, s.9(2), which includes “perceived race” as a protected characteristic; and Newfoundland and Labrador’s *Human Rights Act, 2010*, s.9(3), which defines disability to include persons who have “had a disability”, who are “believed to have or have had a disability”, and who have or are believed “to have a predisposition to developing a disability”.
- 4 *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, September/October, 2003.
- 5 *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39 (CanLII), Lancaster’s *Labour Law*, July 2, 2013, eAlert No. 348.

mously held that the prohibition against age-based discrimination in employment in British Columbia's *Human Rights Code* did not apply to an equity partner in a law firm partnership, as the requisite elements of an employment relationship, in particular, "control and dependency", were absent. Accordingly, the province's Human Rights Tribunal had no jurisdiction over the partner's mandatory retirement complaint.⁶

On the other hand, in a 2015 decision⁷ the Ontario Human Rights Tribunal ruled that a former equity partner of a law firm, who alleged discriminatory treatment by her ex-partners based on gender, family status and perceived disability, could proceed with her complaint under the provision of Ontario's *Human Rights Code* which deals with contractual arrangements.⁸ The Tribunal rejected the firm's argument that the provision applied only to the formation of the contract rather than for the duration of the contract, or that the complainant was required to point to specific

6 The principles articulated by the Supreme Court were applied more recently by the Human Rights Tribunal of Ontario in *Di Muccio v. Newmarket (Town)*, 2016 HRTO 406 (CanLII) (Overend), Lancaster's *Municipal Employment Law*, December 22, 2016, eAlert No. 92. The Tribunal in this case dismissed a municipal councillor's complaint that she was discriminated against based on gender, ruling that the complaint was outside the scope of the Ontario *Human Rights Code*'s protections because, as an elected official, she was not in an employment relationship with the Town of Newmarket and the dispute with her fellow council members could not be characterized as "with respect to employment". In particular, the evidence did not satisfy the "control and dependency" test, considering that the Town could not hire or fire councillors, as this power resided with the electorate, and it did not have any authority to sanction them, as this power resided with the Council itself; that it was the Council that set and voted on the level of remuneration, severance, and expense reimbursement; and that the Council was "ultimately responsible" for making all policy decisions, including delegating and directing staff.

7 *Swain v. MBM Intellectual Property Law LLP, Randy Marusyk, and Scott Miller*, 2015 HRTO 1011 (CanLII) (Grant), Lancaster's *Human Rights and Workplace Privacy*, March 9, 2016, eAlert No. 278.

8 Section 3 of Ontario's *Human Rights Code*, R.S.O. 1990 provides as follows: "Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability".

terms as being discriminatory in order to engage the *Code*. The Tribunal also held that, depending on the facts of the case (the nature of the partnership, the ability of the partner to control decision-making, and the conduct of others within the partnership), the protection afforded by the *Code* in the “social area” of employment — *i.e.*, the right to equal treatment “with respect to employment” — could extend to cover the complainant’s partnership relationship with the firm’s partners.⁹ Accordingly, the Tribunal refused to dismiss the complaint on this ground as well.¹⁰

The scope of protection from discrimination in the workplace under human rights legislation was addressed again more recently by the Supreme Court of Canada in *British Columbia*

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- 9 Distinguishing the *McCormick* decision and the B.C. legislation on which it was based, the Tribunal noted that, in Ontario, the protection afforded under the *Code* “is not contingent on establishing ‘employee’ status”; rather “[t]he language of section 5 of the *Code* is broad and general in that it provides a right to equal treatment ‘with respect to employment’”. This protection, the Tribunal pointed out, had been held in previous decisions to encompass a variety of different contexts, including “volunteers, personnel agencies, employer’s clients, union hiring halls and events occurring outside of the physical workplace”. The Tribunal accepted the proposition that, in the partnership context, “the right to ‘contract on equal terms’ and the ‘right to equal treatment with respect to employment’ in the *Code* cannot be construed to protect an associate lawyer who is employed in a large firm from pregnancy (gender) based discrimination but automatically deny her that same protection the day that she enters into a partnership agreement with that same law firm”. In the Tribunal’s view, “[t]he nature of the partnership would need to be scrutinized to determine the degree to which the associate lawyer was able to control decision-making and the conduct of others within the partnership (and the workplace generally), to prevent (and thereby spare herself) from ‘unequal treatment’ on grounds prohibited by the *Code*”.
- 10 Noting that it was sufficient that the applicant had pleaded discrimination in the area of contract, the Tribunal held that if it became necessary to determine whether she was also entitled to invoke the protection of the *Code* “with respect to employment”, an evidentiary record would be required against which to apply the principles outlined in *McCormick*, reconciling those principles with the jurisprudence under the *Code* that extended protections to parties who were not, strictly speaking, “employees”.

Human Rights Tribunal v. Schrenk,¹¹ another decision emanating from British Columbia. In a 6-3 split ruling, the Supreme Court overturned a decision of the B.C. Court of Appeal finding that the province's Human Rights Tribunal lacked jurisdiction over a discrimination complaint filed by an engineer against a site foreman employed at the same worksite, but by a different employer. In the B.C. Court of Appeal's view, while the foreman's conduct (derogatory remarks regarding the engineer's place of birth, religion, and sexual orientation) was offensive, it did not constitute discrimination "regarding employment" within the meaning of the *Human Rights Code* because the foreman was not in a position of control or authority indicative of an employment relationship, and had no ability to impose the unwelcome conduct on the complainant as a condition of the latter's employment. In reversing this decision, the majority of the Supreme Court held that the *Code's* protection against discrimination "regarding employment" is not limited to hierarchical workplace relationships where one person has economic authority over another, but rather extends to discriminatory conduct targeting employees if such conduct has a "sufficient nexus with the employment context". In determining the necessary nexus, the Tribunal must conduct a contextual analysis that considers all relevant circumstances, including such factors as: (1) whether the respondent was integral to the complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work environment was negatively affected.

Prohibited grounds: Age

Mandatory retirement is now prohibited in all jurisdictions as an unlawful form of age discrimination, except where age is found to be a *bona fide* occupational requirement (BFOR);¹²

11 *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 (CanLII), reversing 2016 BCCA 146 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, July 7, 2016, eAlert No. 287.

12 As it has been, for example, for firefighters and police officers: See *Saskatoon (City) v. Saskatchewan Human Rights Commission*, 1989 CanLII 18 (SCC), Lancaster's *Human Rights and Workplace Privacy*, January, 1990; and *Large v. Stratford (City)*, 1995 CanLII 73 (SCC),

or where the legislation allows for age-based distinctions under the provisions of a *bona fide* retirement or pension plan.¹³ A number of jurisdictions also provide for an exemption from the prohibition against age-based discrimination with respect to the terms or conditions of a *bona fide* group or employee insurance plan.¹⁴ As noted, however, protection from employment-related

Lancaster's *Police Employment Law*, November, 1995. In *Baker v. Cambridge (City)*, 2011 HRTO 1167 (CanLII) (Manwaring), Lancaster's *Firefighters/Fire Services Employment Law*, October 24, 2011, eAlert No. 54, the Ontario Human Rights Tribunal upheld as a BFOR an employer's accommodation policy requiring suppression firefighters aged 60 and older to complete a physical fitness test as a condition of continuing to work past age 60.

- 13 All jurisdictions, with the exception of Manitoba, Newfoundland and Labrador, the Yukon and the federal jurisdiction, allow for mandatory retirement under the provisions of a *bona fide* retirement or pension plan. See, for example, s.7(2) of the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, which was applied to a long-term disability plan in *IBEW, Local No. 1007 v. Epcor Utilities Inc.*, 2015 CanLII 62763 (AB GAA) (Smith), Lancaster's *Disability and Accommodation*, June 14, 2016, eAlert No. 236. In B.C. the applicable statutory exemption is s.13(3) (b) of the *Human Rights Code*, R.S.B.C. 1996, c. 210. The exemption was applied more recently in *Yaremy v. Vancouver (City) and Vancouver Fire Fighters' Union, Local 18*, 2015 BCHRT 98 (CanLII) (McCreary), Lancaster's *Human Rights and Workplace Privacy*, April 21, 2016, eAlert No. 284.
- 14 Human rights statutes in Alberta, British Columbia, New Brunswick, Northwest Territories, Nunavut, Ontario, Prince Edward Island, and Saskatchewan all provide for an exemption from the prohibition against age discrimination in respect of the operation of a *bona fide* retirement or pension plan, or the terms or conditions of a *bona fide* group or employee insurance plan, or words to a similar effect. In Ontario, for example, ss.25(2.1) and (2.2) of the *Human Rights Code* provides that "the right . . . to equal treatment in employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder", and that this exception applies "whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer". In Quebec, s.20.1 of the *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, allows for age-based distinctions, but the party seeking to rely on the exemption must demonstrate that it is actuarially warranted: "In an insurance or pension contract, a social benefits plan, a retirement,

age discrimination, including mandatory retirement, will also depend on the language of the statute and circumstances of the case: see the Supreme Court of Canada's decision in *McCormick v. Fasken Martineau DuMoulin* and other cases discussed above.

For clauses and analysis relating to mandatory retirement, age-based distinctions in employee benefit plans, and other forms of age discrimination, see Chapter 6.

Race, colour, ancestry, nationality, place of origin, ethnic origin

Human rights statutes in all jurisdictions expressly prohibit discrimination in employment on the basis of race and on related grounds such as colour, ancestry, nationality, ethnic origin, etc. In some jurisdictions, "perceived race" is also an expressly protected characteristic,¹⁵ although in light of the Supreme Court of Canada's decision in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*,¹⁶ discrimination on the basis of perceived protected characteristics such as race or ethnic origin is likely prohibited in all jurisdictions.¹⁷ Racial

pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis therefor is a risk determination factor based on actuarial data. In such contracts or plans, the use of health as a risk determination factor does not constitute discrimination within the meaning of section 10".

- 15 See Manitoba's *Human Rights Code*, C.C.S.M. c. H175, s.9(2); and *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s.2(1) (m.01(xiii)).
- 16 2000 SCC 27 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, May/June, 2000. The Supreme Court in that case held that the statutory protection against discrimination on the basis of disability extends not only to persons with a "real" disability but also persons who are perceived to have a disability and who may in fact have no real functional limitations.
- 17 See, for example, *Warman v. Kyburz*, 2003 CHRT 18 (CanLII) (Mactavish), in which the Canadian Human Rights Tribunal held that the prohibition against racial discrimination extends to discriminatory conduct based on the perception that an individual belongs to a different race (in that case, a perception that Jews were members of a race, despite evidence led at the hearing to the contrary).

harassment is also prohibited either expressly or as a judicially recognized form of discrimination.¹⁸

While there is no single universal definition of racial discrimination, one approach in the jurisprudence suggests that it may be defined as “a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group [race, ethnic origin, ancestry, etc.], which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society”.¹⁹

A single incident or comment of a racially derogatory nature may be sufficient to constitute racial discrimination or harassment if it is egregious and clearly unwelcome.²⁰ Other relevant factors include the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against.²¹

Religion

Religion is a protected characteristic in all human rights statutes in Canada. Employers accordingly have a duty to accommodate employees’ religious beliefs, and this may affect the

18 *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC). In *Janzen*, the Supreme Court held that harassment (sexual, in that case) is a form of discrimination, whether or not it is defined as such in the legislation.

19 *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), per McIntyre J.

20 *Pleasant v. Mainline Manufacturing & Installing Inc. and Greeley*, 2005 HRTO 34 (CanLII) (Hendriks), Lancaster’s *Human Rights and Workplace Privacy*, March/April, 2006; *Prestressed Systems Inc. v. LIUNA, Local 625*, 2005 CanLII 63785 (ON LA) (Snow), Lancaster’s *Human Rights and Workplace Privacy*, February 2, 2006, eAlert No. 58; *Brooks v. Total Credit Recovery*, 2012 HRTO 1232 (CanLII) (Hart), Lancaster’s *Human Rights and Workplace Privacy*, December 28, 2012, eAlert No. 199. In contrast, an isolated incident of a racial slur was found not to constitute racial harassment in *Bobb v. Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733 (CanLII) or in *Banwait v. Forsyth*, 2008 BCHRT 81 (CanLII) (Beharrell).

21 *Pardo v. School District No. 43*, 2003 BCHRT 71 (CanLII) (Humphreys).

scheduling of the work week. In *Central Okanagan School District No. 23 v. Renaud*,²² the Supreme Court of Canada held that, when an employee objects to working on a Saturday because of his or her religious beliefs, the employer may be required to accommodate the employee by scheduling a different shift, unless the operation of the employer's business is unduly disrupted or rights of other employees under the collective agreement are significantly impaired. In *Renaud*, there was no evidence that any other employees' rights would have been impaired, since employees were not canvassed to ascertain whether someone would volunteer to switch shifts with Renaud.

In the *Chambly* case,²³ the Supreme Court of Canada held that the employer was required to accommodate an employee's religious beliefs by allowing a paid day off work for a religious holy day. In that case, however, it was not possible for the employer to rearrange the affected employees' work schedules (the employees were teachers), and there was no evidence that permitting a paid leave from work would cause the employer undue hardship. As the Ontario Court of Appeal has confirmed, an employer's duty to accommodate does not mean that an employee must always receive a paid leave of absence when his or her work schedule conflicts with a religious holiday. In *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board*,²⁴ the Court upheld an employer's policy that sought to accommodate the religious leave requirements of minority faiths through scheduling changes. Under the policy, employees were permitted to compress a 15-day work week into 14 days, thereby gaining an additional day off every three weeks. This day off could be banked and subsequently used for religious observance purposes. The Court ruled that this was an adequate form of accommodation and that the employer was not also required to show that a

22 *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), Lancaster's *Human Rights and Workplace Privacy*, October, 1992.

23 *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC).

24 2000 CanLII 16854 (ON CA), Lancaster's *Human Rights and Workplace Privacy*, November/December, 2000.

leave of absence with pay would result in undue economic or other hardship.²⁵

Sex/gender

All human rights statutes in Canada prohibit discrimination on the basis of sex or gender, and as discussed further below, all now extend human rights protections on the grounds of gender identity, and in some jurisdictions, gender expression as well. Sexual harassment is also outlawed, either explicitly or as a result of the ban on discrimination based on sex: see Chapter 2.

The Supreme Court of Canada has confirmed that adverse treatment on the basis of pregnancy is discrimination on the basis of sex. In *Brooks v. Canada Safeway Ltd.*,²⁶ the Court held that it was discriminatory for an insurance plan to pay benefits in respect of absences from work due to illness, but not in respect of absences due to pregnancy. In the Court's view, although pregnancy could not be equated with illness, it was a "valid health-related reason for absence from the workplace". Consequently, employers who extend a benefit in the event of illness must accord the same benefit in the case of pregnancy. In a B.C. award, for example, these principles were applied to

25 Arbitral awards applying the Ontario Court of Appeal's approach to reasonable accommodation in the *Grievance Settlement Board* case include *CUPE, Local 79 v. Toronto (City)* (2003), 117 L.A.C. (4th) 363 (Tacon), in which an Ontario arbitrator held that the use of float days, compressed work weeks and scheduling changes were all reasonable methods of accommodating the observance of religious holidays; and *CUPE, Local 3501 v. Turning Point Youth Services* (2008), 169 L.A.C. (4th) 388 (Herman), Lancaster's *Labour Arbitration*, September 10, 2008, eAlert No. 105, a case in which the grievor sought two days off with pay to observe the holidays Rosh Hoshanah and Yom Kippur. The employer's offer of scheduling changes, a compressed work week, float days, lieu time and other options to allow the requested time off without loss of compensation was held to fulfill its duty to accommodate. The employer was not required to show that it would cause undue hardship to pay the employee for the day off before offering the other options for reasonable accommodation. See also *OPSEU v. Seneca College* (2011), 204 L.A.C. (4th) 381 (Howe), Lancaster's *College and University Employment Law*, May 9, 2011, eAlert No. 44; and *IWA – Canada, Local 500 v. Smurfit-MBI* (2004) 126 L.A.C. (4th) 198 (Gorsky).

26 1989 CanLII 96 (SCC).

hold that a collective agreement clause which provided better vacation entitlements to employees absent from work due to illness than to employees away on maternity leave amounted to sex discrimination.²⁷

Sexual orientation, gender identity and gender expression

Employees in all jurisdictions in Canada are expressly protected under human rights legislation from discrimination on the basis of sexual orientation. See clauses and commentary in Chapter 3.

Moreover, all Canadian jurisdictions now prohibit discrimination on the basis of gender identity,²⁸ thereby extending protection to individuals whose gender identity differs from their birth-assigned sex, such as transsexuals, transgenderists, intersexed persons and cross-dressers.²⁹ With the exception of Manitoba, Saskatchewan and the Northwest Territories, the legislation also provides express protection against discrimination on the ground of gender expression. Prior to the enactment of these provisions, tribunals and courts had extended human rights protection to trans persons under the prohibited ground of sex. In *Vancouver Rape Relief Society v. British Columbia*,³⁰ for example, a British Columbia judge ruled that the provincial Human Rights Tribunal could consider a sex discrimination complaint by a post-operative male-to-female transsexual, since discrimination on the basis of sex includes discrimination on the basis of transsexualism. The Tribunal subsequently determined that the complaint of sex dis-

27 *ICTU, Local 10 v. LSG Sky Chefs*, [1999] B.C.C.A.A.A. No. 290 (QL) (Moore), Lancaster's *Gender, Equity and Work-Life Balance*, November/December, 1999.

28 At the same time that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was amended to include gender identity and gender expression as prohibited grounds of discrimination (June 19, 2017), the *Criminal Code*, R.S.C. 1985, c. C-46, was also amended to add protection on the basis of gender identity and gender expression for the purposes of the *Code's* hate crime provisions.

29 See Ontario Human Rights Commission, *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (April 15, 2014), Lancaster's *Human Rights and Workplace Privacy*, October 21, 2014, eAlert No. 246.

30 2000 BCSC 889 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, July/August, 2000.

crimination was substantiated, a decision which was ultimately overturned by the British Columbia Court of Appeal.³¹ While the Court of Appeal agreed with the Tribunal that denying transsexuals the opportunity to volunteer with the organization constituted *prima facie* discrimination under the province's *Human Rights Code*, it concluded that the "group rights exemption" in s.41 of the *Code* immunized the organization from liability,³² because it had acted in good faith and established a rational connection between its ban on transsexual volunteers and its work.³³

Marital and family status

The Supreme Court of Canada has ruled that discrimination on the basis of marital and family status relates not only to discrimination based on the fact of being married, or single or a parent, but extends to discrimination based on the particular identity of the individual spouse or child. Thus, an employee who

31 *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, January/February, 2006, leave to appeal to S.C.C. denied, [2006] S.C.C.A. No. 365 (QL), Lancaster's *Labour Law*, March 1, 2007, eAlert No. 174. As noted above, however, the B.C. legislature has since amended the province's *Human Rights Code*, R.S.B.C. 1996, c. 210, to add gender identity and gender expression to the list of prohibited grounds in the *Code*. See also *Montreuil v. Canada (Forces canadiennes)*, 2007 CHRT 53 (CanLII) (Doucet), Lancaster's *Human Rights and Workplace Privacy*, February 5, 2008, eAlert No. 112; and *Magnone v. British Columbia Ferry Services Inc.* 2008 BCHRT 191 (CanLII) (Parrack).

32 Section 41(1) of the B.C. *Human Rights Code* provides that "[i]f a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, sexual orientation, gender identity or expression, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons".

33 However, the appellate court rejected the organization's *bona fide* occupational requirement defence, based on the Tribunal's conclusion that the ban on transsexual volunteers was "rationally connected to the Society's work and was adopted in good faith, but was not reasonably necessary to accomplish the Society's purpose".

was dismissed because of the actions of his wife and daughter was found to have been discriminated against on the basis of his marital and family status.³⁴ The Saskatchewan Court of Appeal has taken a similar approach, holding that the dismissal of an employee because of her marriage to a prison inmate constituted discrimination on the basis of marital status, contrary to Saskatchewan's *Human Rights Code*.³⁵ In this regard, it has been held that the strict definition of "common law relationship" as set out in the federal *Income Tax Act* or family law legislation is not binding in human rights cases.³⁶

The courts have confirmed that the proper interpretation of the term "family status" includes not only protection against arbitrary or stereotypical assumptions and distinctions based on family characteristics over which a person has little or no control — *i.e.*, the mere fact of being a parent or parent of a particular child, or *vice versa* — but also the obligations that arise in the context of these relationships, *i.e.*, childcare or eldercare obligations.³⁷ Disagreement remains, however, with respect to the test for establishing discrimination in the context of these obligations, and what is expected of employers to accommodate them. Thus, some adjudicators, drawing on the approach of the B.C. Court of Appeal in *HSABC v. Campbell River*,³⁸ consider that the scope of family status protection must take into account the reality that almost every individual has some family obligation that will be affected by work; accordingly, only employer-initiated changes

34 *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, November/December, 2002.

35 *Saskatchewan (Human Rights Commission) v. Prince Albert Elks Club Inc.*, 2002 SKCA 106 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, September/October, 2002.

36 *Tracey v. 502798 NB Inc. (Melanson's Waste Management Inc.)*, 2007 CanLII 71256 (NB LEB) (Filliter), Lancaster's *Gender, Equity and Work-Life Balance*, April 20, 2007, eAlert No. 13; upheld, 2008 NBQB 390 (CanLII).

37 See, for example, *Canada (Attorney General) v. Johnstone*, 2013 FC 113 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, May 2, 2013, eAlert No. 78; affirmed, 2014 FCA 110 (CanLII), Lancaster's *Headlines*, May 29, 2014.

38 2004 BCCA 260 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, June 30, 2004, eAlert No. 19.

to the terms and conditions of employment that result in a “serious interference with a substantial parental or other family duty or obligation” will amount to *prima facie* discrimination.³⁹

Other adjudicators have rejected the “serious interference” test on the basis that it does not conform with other binding authorities which hold that a complainant need only show adverse treatment on a prohibited ground to show *prima facie* discrimination, and that there is no degree or level of discrimination which must be suffered by the complainant to obtain the protection of human rights legislation. Moreover, to limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace.⁴⁰

In a 2014 ruling, *Canada (Attorney General) v. Johnstone*,⁴¹ the Federal Court of Appeal weighed in on this issue, unanimously holding that an employee must establish four requirements in order to advance a claim for human rights protection and engage the employer’s duty to accommodate to the point of undue hardship:

- (i) that a child is under his or her care and supervision;

39 See, for example, *Gao v. Minco Mining and Minerals Corp.*, [2010] B.C.H.R.T.D. No. 204 (QL) (Neuenfeldt); *Falardeau v. Ferguson Moving (1990) Ltd.*, [2009] B.C.H.R.T.D. No. 272 (QL) (Geiger-Adams), Lancaster’s *Human Rights and Workplace Privacy*, April 1, 2010, eAlert No. 133; and *Evans v. University of British Columbia*, [2007] B.C.H.R.T.D. No. 348 (QL) (Humphreys); upheld, 2008 BCSC 1026 (CanLII), Lancaster’s *Gender, Equity and Work-Life Balance*, October 17, 2008, eAlert No. 25.

40 *Johnstone v. Canada (Attorney General)*, 2007 FC 36 (CanLII), affirmed, 2008 FCA 101 (CanLII); *Seeley v. Canadian National Railway*, 2010 CHRT 23 (CanLII) (Doucet), upheld, 2013 FC 117 (CanLII), affirmed, 2014 FCA 111 (CanLII), Lancaster’s *Headlines*, May 29, 2014. The Federal Court in *Johnstone* based its decision, in part, on the Canadian Human Rights Tribunal’s ruling in *Hoyt v. Canadian National Railway*, 2006 CHRT 33 (CanLII) (Loyd), Lancaster’s *Human Rights and Workplace Privacy*, October 11, 2006, eAlert No. 75.

41 2014 FCA 110 (CanLII), Lancaster’s *Headlines*, May 29, 2014; and the companion decision *Canadian National Railway v. Seeley*, 2014 FCA 111 (CanLII), Lancaster’s *Headlines*, May 29, 2014.

- (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
- (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- (iv) that the impugned workplace rule interferes, in a manner that is more than trivial or insubstantial, with the fulfillment of the childcare obligation.

In adopting this four-part test, the Court considered, but decided not to follow, the approach taken by the B.C. Court of Appeal in its *Campbell River* decision, whereby *prima facie* discrimination requires demonstration of a “serious interference with a substantial parental or other family duty”. Instead, the Court relaxed the threshold of interference to something that is “more than trivial or insubstantial”. On the other hand, the Court narrowed the type of parental obligations qualifying for human rights protection to “those which a parent cannot neglect without engaging his or her legal liability”. In the Court’s view, this approach “avoids trivializing human rights by extending human rights protection to personal choices”. The Court also affirmed the requirement that a claimant make reasonable efforts to find reasonable alternatives — in effect to “self-accommodate” — before advancing a human rights claim.

In support of the latter requirement, the Court referred favourably to a number of rulings by other adjudicators who have similarly held that the test for *prima facie* family status discrimination must, as put by one arbitrator, “include an analysis of the steps taken by the employee him or herself to balance their family life and workplace responsibilities”.⁴² This element, the Court explained, “requires the complainant to demonstrate that reason-

42 See, for example, *AUPE v. Government of Alberta* (2010), 192 L.A.C. (4th) 97 (Ponak), Lancaster’s *Human Rights and Workplace Privacy*, June 3, 2010, eAlert No. 138; *OPSEU v. Ontario (Liquor Control Board of Ontario)*, 2012 CanLII 67531 (ON GSB) (R.M. Brown), Lancaster’s *Public Service and Crown Agency Employment Law*, September 23, 2013, eAlert No. 84; and *IBEW, Local 636 v. Power Stream Inc.*, [2009]

able efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible”. Thus, “[a] complainant will . . . be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a *bona fide* childcare problem”. As the Court noted, this determination “is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances”.

While adopted and applied by many adjudicators,⁴³ the *Johnstone* factors have not been universally accepted. Thus, in a 2015 judgment, *SMS Equipment Inc. v. CEP, Local 707*,⁴⁴ Alberta Court of Queen’s Bench justice June Ross rejected the third and fourth factors of the *Johnstone* test, finding them to be a variant of the overly restrictive approach taken in cases such as *Campbell River*, and contrary to the traditional three-part test for *prima facie* discrimination reaffirmed by the Supreme Court of Canada

O.L.A.A. No. 447 (QL) (Jesin), *Lancaster’s Gender, Equity and Work-Life Balance*, December 3, 2009, eAlert No. 33.

43 See also *Flatt v. Canada (Attorney General)*, 2015 FCA 250 (CanLII), *Lancaster’s Federal Labour and Employment Law*, March 2, 2017, eAlert No. 98, leave to appeal to S.C.C. refused, 2016 CanLII 24872 (SCC), in which the Federal Court of Appeal reaffirmed the *Johnstone* test for *prima facie* family status discrimination applicable to human rights complaints initiated under the *Canadian Human Rights Act*.

44 2015 ABQB 162 (CanLII), *Lancaster’s Gender, Equity and Work-Life Balance*, June 18, 2015, eAlert No. 96, affirming, 2013 CanLII 71716 (AB GAA) (Kanee), *Lancaster’s Human Rights and Workplace Privacy*, July 22, 2014, eAlert No. 237. The Court in this case upheld an arbitrator’s ruling that an employer discriminated against a single mother when it refused to accommodate her childcare responsibilities by allowing her to work as a welder apprentice on straight day shifts rather than rotating day and night shifts. Finding no evidence to justify the employer’s rule, particularly as another worker had offered to take the night shifts, Arbitrator Kanee held that the employer’s insistence that she work rotating shifts constituted a failure to accommodate to the point of undue hardship, and ordered the employer to accommodate the grievor by permitting her to work straight days.

in *Moore v. British Columbia (Education)*⁴⁵ (see the Discussion section of this chapter for further commentary on the applicable test for a *prima facie* case). While accepting that application of the test for *prima facie* discrimination should be “flexible and contextual”, as suggested by the Federal Court of Appeal, Ross expressed the view that the three-part *Moore* test still governs; thus, a human rights claimant need only establish that he/she (i) has a characteristic protected from discrimination; (ii) has experienced an adverse impact; and (iii) the protected characteristic was a factor in the adverse treatment. Other adjudicators have similarly departed from the *Johnstone* test, expressing a concern with “the notion that there is a different test for family status discrimination than for other forms of discrimination”.⁴⁶

Disability

Disability-related discrimination is prohibited in all Canadian jurisdictions, as well as discrimination based on perceived disability.⁴⁷ See Chapter 4 for in-depth coverage of disability-related discrimination and accommodation.

Creed

It has been held that the prohibition against discrimination on the basis of “creed” contained in Ontario’s *Human Rights Code* encompasses, at the very least, organized religion that is accompanied by established practices and observances;⁴⁸ however, according to the Ontario Court of Appeal in the *Jazairi* case,⁴⁹ it does not include discrimination on the basis of an indi-

45 2012 SCC 61 (CanLII), Lancaster’s *Labour Law*, January 17, 2013, eAlert No. 337.

46 See, for example, *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 (CanLII) (Scott), Lancaster’s *Gender, Equity and Work-Life Balance*, February 15, 2017, eAlert No. 110.

47 *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, 2000 SCC 27 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, May/June, 2000.

48 *Markovic v. Autocom Manufacturing Ltd.*, 2008 HRTO 64 (CanLII) (Liang), Lancaster’s *Human Rights and Workplace Privacy*, October 8, 2008, eAlert No. 108.

49 *Jazairi v. York University*, 1999 CanLII 3744 (ON CA), Lancaster’s *Human Rights and Workplace Privacy*, July/August, 1999, leave to appeal

vidual's personal political beliefs or opinion, since a person's political opinion regarding a particular issue does not constitute a cohesive belief system. However, the Court in *Jazairi* left open the question of whether a recognized, cohesive system of political thought, such as communism, could constitute a "creed". In one decision, the Ontario Human Rights Tribunal held that "[w]hat identifies a creed is a set of sincerely held religious beliefs and practices", and "[t]hese beliefs and practices need not be based on the edicts of an established church or particular denomination".⁵⁰ Thus, the practice of Falun Gong has been held to constitute a creed within the meaning of the *Code*,⁵¹ while in another case, opposition to Canada's military engagements based on a job applicant's religious beliefs was held to attract protection under the *Code*.⁵²

Political belief

The human rights legislation in British Columbia, Manitoba, Nova Scotia, Prince Edward Island, New Brunswick, the Northwest Territories and Yukon explicitly prohibits discrimination based on political belief, although in P.E.I. the definition of "political belief" is restricted to the tenets of a political party that is at the relevant time registered under the province's *Election Act*. In Newfoundland and Labrador, discrimination based on "political opinion" is barred, while in Quebec discrimination based on "political convictions" is proscribed. Moreover, "political activity" is an illegal ground of discrimination in Manitoba (as is "political association), as well as in New Brunswick, Nova Scotia, and the Yukon.

In British Columbia, the province's Human Rights Tribunal has adopted an expansive definition of the term "political belief", holding that beliefs beyond partisan affiliations fall within the

to S.C.C. denied, [1999] S.C.C.A. No. 448 (QL).

50 *Heintz v. Christian Horizons*, 2008 HRTO 22 (CanLII) (Gottheil).

51 *Huang v. 1233065 Ontario Inc. (c.o.b. Ottawa Chinese Senior Assn.)*, 2006 HRTO 1 (CanLII) (Hendriks).

52 *Cybulski v. Canadian Corps of Commissionaires*, 2014 HRTO 312 (CanLII) (Aterman), Lancaster's *Human Rights and Workplace Privacy*, May 28, 2015, eAlert No. 260.

meaning of the term, as do acts of political expression.⁵³ Employers in that jurisdiction seeking to restrict the political expression of employees will be required to lead cogent evidence of real or potential harm to their operations or other evidence of undue hardship.⁵⁴

Social condition and social origin

Quebec's, New Brunswick's, and the Northwest Territories' human rights legislation prohibits discrimination on the basis of "social condition", while Newfoundland and Labrador, Nova Scotia, Manitoba, Alberta, Prince Edward Island, Yukon and Nunavut prohibit discrimination on the basis of "source of income". "Social condition", in New Brunswick and the Northwest Territories, is expressly defined to include "source of income". Manitoba's legislation proscribes discrimination because of "social disadvantage", defined as "diminished social standing or social regard due to (a) homelessness or inadequate housing; (b) low levels of education; (c) chronic low income; or (d) chronic unemployment or underemployment". In Ontario and

53 *Prokopetz v. Burnaby Firefighters' Union and Burnaby (City)*, 2006 BCHRT 462 (CanLII) (Lyster); *Wali v. Jace Holdings*, 2012 BCHRT 389 (CanLII) (Marion), Lancaster's *Disability and Accommodation*, September 5, 2013, eAlert No. 186.

54 In *Bratzer v. Victoria Police Department*, 2016 BCHRT 50 (CanLII) (Rilkoff), Lancaster's *Human Rights and Workplace Privacy*, June 28, 2016, eAlert No. 286, for example, the Tribunal ruled that a police officer was discriminated against on the basis of political belief when the Victoria Police Department restricted his ability to express support for drug legalization as a member of the non-profit organization Law Enforcement Against Prohibition (LEAP). The Tribunal applied a three-step analysis in upholding the officer's complaint. It found that (1) the officer's beliefs about legalization and decriminalization of all drugs constituted "political belief" within the meaning of the *Code* (which the employer did not dispute), and that the protection of political belief extended to "both the beliefs and their manner of expressions"; (2) in respect of the eight alleged incidents of discrimination by the Department in restricting the officer's expression of political belief, six resulted in adverse consequences for the officer, as required in order to establish *prima facie* case discrimination; and (3) in respect of those six incidents, five constituted illegal discrimination, as the Department was unable to justify them as *bona fide* occupational requirements (BFOR).

Saskatchewan, discrimination on the basis of receipt of social assistance is outlawed, and in Newfoundland and Labrador discrimination is prohibited on the basis of ethnic, national or “social origin”.

Union membership

Labour relations legislation treats discrimination by employers based on union membership or activity as an unfair labour practice.⁵⁵ In this regard, the Supreme Court of Canada has confirmed that forcing a union president to choose between his office and his job, where there is no real conflict, constitutes illegal discrimination.⁵⁶ Unions themselves may also be prohibited under labour relations legislation from discriminating against their own members and from representing bargaining unit members in a discriminatory manner.

Equality rights under the Canadian Charter of Rights and Freedoms

Under s. 15(1), the equality rights guarantee of the *Charter of Rights and Freedoms*,⁵⁷ “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. The guarantee of equality rights, however, is subject to “reasonable limits prescribed by law as can be demonstrably justified in a free

55 Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, s.149; British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, s.6(3); *Canada Labour Code*, R.S.C. 1985, c. L-2, s.94(3); *Manitoba Labour Relations Act*, C.C.S.M. c. L10; s.7; *New Brunswick Industrial Relations Act*, S.N.B. 1973, c. I-4; ss.3(2), 3(3); *Newfoundland and Labrador Labour Relations Act*, R.S.N.L. 1990, c. L-1, ss.24(1), 25; *Nova Scotia Trade Union Act*, R.S.N.S. 1989, c. 475; s.53(3); *Ontario Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s.72; *Quebec Labour Code*, C.Q.L.R. c. C-27, s.14; *P.E.I. Labour Act*, R.S.P.E.I. 1988, c. L-1, s.10(1).

56 *Canadian Broadcasting Corp. v. Canada (Labour Relations Board) (Re Goldhawk)*, 1995 CanLII 148 (SCC), Lancaster’s *Labour Law*, February, 1995, upholding (1990), 91 C.L.L.C. ¶ 16,007 (C.L.R.B.).

57 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

and democratic society”, as set out in s.1 of the *Charter*. Moreover, the scope of application of the *Charter* is limited to government actors, legislation and the common law; hence it does not protect private-sector employees against discrimination, unless the source of the discrimination is a government rule, regulation or statute, or other act of a legislature.⁵⁸

Clauses and Comment

1.1 Discrimination Prohibited

1 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation or stronger disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national origin, political or religious affiliation, sex, physical or emotional handicap, sexual orientation, gender expression, marital status, family status, conviction for an offence for which a pardon has been received, or membership or activity in the Union.

[CUPW and Canada Post]

2 The parties agree that there shall be no discrimination, harassment, interference, restriction, or coercion exercised or practised with respect to any employee in any matter by reason of race, creed, colour, age, sex, marital status, family relationship, number of dependents, nationality, ancestry, place of origin, place of residence, political or religious affiliation or beliefs, sexual preference or orientation, gender, gender identity, gender expression, non-conforming personal behaviour, disability, nor by reason of membership or non-membership in the Association, nor previous or impending exclusion from the bargaining unit, nor lawful activity or lack of activity in the Association. “Non-conforming personal or social behaviour” shall not include failure to conform to the terms of this Agreement or to carry out the duties and responsibilities stipulated herein.

[YUSA and York University]

58 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 1986 CanLII 5 (SCC).

- 3** The Employer and the Union agree that there shall be no discrimination, interference, restriction, coercion, or harassment exercised or practised in any matter concerning the application of the provisions of this Agreement by reason of age, race, creed, colour, national origin, language of origin, ethnic origin, ancestry, citizenship, religious or political affiliation or belief, sex, gender, marital or parental status, number of dependents, sexual orientation, gender identity and expression, personal appearance, mode of dress, place of residence, academic school of thought, record of offences unless the employee's record of offences is a reasonable and *bona fide* qualification because of the nature of employment, disability (including AIDS/HIV status), nor by reason of the employee's non-membership, membership or activity in the Union.

[CUPE and University of Toronto]

- 4** 1. The parties agree not to discriminate against any employee because of religious or political affiliation, or race, colour or national origin, age, sex, marital status (including common-law relationship) or sexual orientation, or disability in accordance with the *Human Rights Code*.
2. There will be no discrimination, intimidation, interference, restraint or coercion exercised or practiced by the Company or its representatives against any employee because of the employee's membership in, or in connection with the Union.
3. There will be no discrimination, intimidation, interference, restraint or coercion exercised by the Union or any of its members against any of the employees of the Company.

[Unifor and Gates – Windsor Operations]

- 5** Neither the Employer nor the Union will discriminate against any employee with respect to the employee's training, upgrading, promotion, transfer, lay-off, discharge or otherwise because of race, creed, colour, sex, national origin, age, marital status, disability, sexual orientation, family status, or because of membership or non-membership in the Union.

[Unifor and TRW Canada Ltd. Occupant Safety Systems]

6 The University and the Union agree that there will be no discrimination against any employee or prospective employee, by reason of race, colour, creed, disability, national origin, political or religious affiliation, sex, marital status, age, sexual preference or whether she/he has dependents or not. In particular, that there shall be no such discrimination in times of hiring, promotion, wages, discipline, dismissal, or any other conditions of employment.

[CUPE and Simon Fraser University]

In the landmark *Parry Sound* decision,⁵⁹ the Supreme Court of Canada held that the substantive rights and obligations in human rights statutes (and other employment-related statutes) are incorporated into every collective bargaining agreement and establish a “floor beneath which an employer and union cannot contract”. As a result, redress for breaches of human rights legislation is available through the grievance and arbitration process, whether or not the collective agreement includes an express prohibition against discrimination.⁶⁰

While the parties to a collective agreement may not contract out of the requirements of human rights legislation, they may negotiate anti-discrimination provisions which differ from those in human rights legislation, where the effect is to provide greater protection for employees under the agreement, such as by adding other grounds of discrimination or by eliminating a BFOR defence for employers.⁶¹

59 *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, 2003 SCC 42 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, September/October, 2003.

60 See, for example, *AUPE v. Alberta (Solicitor General) (Jungwirth)* (2010), 192 L.A.C. (4th) 97 (Ponak), in which an Alberta arbitration board, applying *Parry Sound*, ruled that a collective agreement provision limiting claims of discrimination to the second step of the grievance procedure did not oust its jurisdiction to hear and determine matters arising out of the *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5.

61 *NAPE v. Green Bay Health Centre*, 1996 CanLII 190 (SCC), Lancaster’s *Human Rights and Workplace Privacy*, July/August, 1996. See also *CUPE, Local 1562 v. Ronald C. MacGillivray Guest Home Corp.* (2004), 128 L.A.C. (4th) 225 (Veniot), Lancaster’s *Labour Arbitration*, January/February, 2005.

1.2 Violation of Human Rights Codes Prohibited

1 In compliance with Part I of the *Canada Labour Code*, and the applicable Human Rights legislation, the parties hereto agree that there will be no discrimination by the Company or the Union, for or against any employee covered by this Agreement.

[IBEW and MTS Allstream Inc.]

2 There shall be no discrimination practised by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, or disability, as defined in section 10(1) of the *Ontario Human Rights Code (OHRC)*.

[OPSEU and Government of Ontario]

3 The Corporation and the Union agree that neither will at any time, act or proceed in any manner contrary to the provisions of *The Employment Standards Act, The Labour Relations Act, The Industrial Standards Act, The Occupational Health and Safety Act, The Ontario Human Rights Code, or the Pay Equity Act* all as amended and any Regulations made thereunder, and both parties will adhere to Council's policy respecting no discrimination on the basis of sexual orientation.

[CUPE and City of Windsor]

4 The Parties hereto subscribe to the principles of the *Human Rights Code*. As stipulated in the *Code*, the Parties will not discriminate against a person with respect to employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offense that is unrelated to the employment or to the intended employment of that person.

[Compensation Employees' Union and Workers' Compensation Board of British Columbia (WorkSafeBC)]

The above clauses incorporate provisions of applicable human rights codes. In certain jurisdictions (B.C., Nova Scotia, Ontario, Quebec and the federal jurisdiction), arbitrators have explicit authority to apply employment-related statutes, including human

rights legislation. As noted above, however, the Supreme Court of Canada in the *Parry Sound* case made it clear that, even in the absence of such statutory authority or an express provision in the collective agreement, grievance arbitrators have the power to enforce the substantive rights and obligations in human rights and other employment-related statutes. Thus, even where explicit authority is not given by statute, arbitrators may decline to enforce provisions of a collective agreement which conflict with human rights legislation, and may apply *Charter* values and principles drawn from human rights legislation in interpreting the collective agreement.⁶² Indeed, the failure to apply human rights principles in construing the provisions of a collective agreement may result in reversible error on judicial review.

1.3 Right to Refuse Work in Discriminatory Workplace

1 The Artist shall not be required to render any services to the Theatre in any theatre or any place where it has been determined that discrimination because of sex, race, colour, or creed or sexual preference or national origin is practised against any Artist, or where such discrimination is practised against any patron as to admission to or seating in a theatre or other place of performance. Where there is a dispute as to whether such discrimination has taken place, the Artist will continue to render his/her services until final determination has been made under the provisions of Article 52:00.

**[Actors' Equity and Professional Association
of Canadian Theatres]**

The above clause entitles an employee to refuse to work in a discriminatory environment.

62 *AUPE, Local 42 v. Alberta Hospital Ponoka* (1994), 46 L.A.C. (4th) 231 (McFetridge), upheld, 1995 CanLII 9051 (AB QB), Lancaster's *Health Care Employment Law*, September/October, 1997. See also *Telus Communications Inc. v. TWU*, [2008] B.C.J. No. 961 (QL) (B.C.S.C.), Lancaster's *Federal Labour and Employment Law*, November 18, 2008, eAlert No. 21.

Discussion

The test for prima facie discrimination under human rights legislation

It is well established that a human rights claimant bears the initial legal burden to establish on a balance of probabilities a “*prima facie* case” of discrimination, whereupon the burden shifts to the respondent to prove a statutory defence or other justification such as a *bona fide* occupational requirement (BFOR).⁶³ If the *prima facie* discriminatory conduct is justified, there is no discrimination.⁶⁴

What constitutes *prima facie* discrimination, however, sufficient to shift the legal and evidentiary burden to the respondent, is a question which has generated substantial jurisprudential debate. Does a human rights claimant simply have to show that he or she has experienced some form of adverse differential treatment related to a protected characteristic? Or is the burden higher than that, requiring proof of what, in discrimination claims under s.15(1) of the *Canadian Charter of Rights and Freedoms*, the courts have referred to as “substantive discrimination”,⁶⁵

63 *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC). The Supreme Court of Canada has reaffirmed this two-step approach more recently in several decisions: see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII), at para. 23, Lancaster's *Headlines*, January 18, 2018; *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), at para. 33, Lancaster's *Labour Law*, January 17, 2013, eAlert No. 337; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (CanLII), at paras. 34-37, Lancaster's *Human Rights and Workplace Privacy*, November 17, 2015, eAlert No. 268. See also discussion in P. Neumann & J. Sack, *Wrongful Dismissal and Employment Law eText* (Toronto: Lancaster House, online), Section 5.2.3.1, Test for Discrimination.

64 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 (CanLII), at para. 50, Lancaster's *Disability and Accommodation*, March 1, 2007, eAlert No. 84; *Bombardier*, cited above, at para. 37; *Moore*, cited above, at para. 33.

65 In *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), the Supreme Court of Canada's seminal ruling on s.15(1) equality rights, the Court held that a claimant under s.15(1) is required to satisfy a two-part

that is, differential treatment that has the effect of “perpetuating prejudice or stereotyping”, or of demeaning the claimant’s “human dignity”?⁶⁶

Many courts and tribunals have resisted the latter approach in light of the perceived additional legal and evidentiary burden a *Charter* equality rights analysis places on human rights claimants to establish *prima facie* discrimination.⁶⁷ In their view, the former

test to establish discrimination: (1) that the law or program creates or permits differential treatment based on an enumerated or analogous ground; and (2) that the differential treatment is discriminatory in a substantive sense, *i.e.*, it creates disadvantage by perpetuating prejudice or stereotyping. The approach found its high water mark in the Supreme Court of Canada’s decision in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), in which the Court elaborated a multi-step “purposive and contextual approach” to s.15(1) discrimination claims, suggesting that discrimination should be defined in terms of the impact of the law or treatment on the “human dignity” of members of the claimant group.

66 In *Law v. Canada (Minister of Employment and Immigration)*, cited above, the Supreme Court stated that “the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration”. In its 2008 ruling in *R. v. Kapp*, 2008 SCC 41 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, May 27, 2009, eAlert No. 120, the Supreme Court acknowledged that difficulties had arisen as a result of the use of “human dignity” as a legal test rather than “the philosophical enhancement it was intended to be”, including the fact that it placed an “additional burden” on equality claimants. The Court, however, reaffirmed that the test for discrimination under s.15(1) of the *Charter* remains the two-part test established in *Andrews*, cited above. The Court did not address the application of this test in the human rights context.

67 Some courts and tribunals have taken the position that it is not appropriate to apply a constitutional definition of discrimination and constitutional equality rights analysis to discrimination claims brought pursuant to provincial or federal human rights legislation: see, for example, *Wignall v. Canada (Department of National Revenue (Taxation))*, 2001 CanLII 8498 (CHRT) (Chicoine); *Nixon v. Vancouver Rape Relief Society*, 2005 BCCA 601 (CanLII), per Saunders J.A. (in *obiter*), leave to appeal to S.C.C. refused, 2007 CanLII 2772 (SCC); and *Canada (Human Rights Commission) v. M.N.R. (F.C.)*, 2004 FC 1280 (CanLII). Others

approach — sometimes referred to in the jurisprudence as the “traditional” *prima facie* discrimination analysis — is the proper one, and it does not import an additional or stand-alone requirement for a claimant to prove arbitrary or stereotypical treatment, or a violation of human dignity, before the burden shifts to the respondent to provide a defence or justification. Rather, it is sufficient if the claimant establishes on a balance of probabilities three elements: (1) that he or she has (or is perceived to have) a protected characteristic; (2) that he or she has experienced an adverse impact or received adverse treatment; and (3) the protected characteristic was a factor in the adverse impact or treatment.⁶⁸ As observed by the B.C. Human Rights Tribunal in a 2010 decision, “the goal of protecting persons from arbitrary, stereotypical or disadvantageous treatment is achieved by ensuring that a prohibited ground is not a factor in the adverse treatment and does not require separate proof by the complainant”.⁶⁹

have restricted the “Charter approach” to cases in which “government overtones” are at play — such as government benefit schemes, *e.g.* parental leave benefits: *OSSTF v. Upper Canada DSB*, 2005 CanLII 34365 (ON SCDC); or legislation, *e.g.* coroner’s inquests under the *Coroner’s Act*: *Ontario (Attorney General) v. Ontario (Human Rights Commission)*, 2007 CanLII 56481 (ON SCDC); or pension and related benefits legislation: *Gwinner v. Alberta (Human Resources and Employment)*, 2002 ABQB 685 (CanLII).

- 68 See, for example, *Health Employers Assn. of British Columbia v. BCNU*, 2006 BCCA 57 (CanLII), at para. 38; *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56 (CanLII), at para. 27, leave to appeal to S.C.C. refused, 2010 CanLII 39671 (SCC). See also *Kerr v. Boehringer Ingelheim (Canada) Ltd.*, 2009 BCHRT 196 (CanLII) (Parrack), Lancaster’s *Disability and Accommodation*, October 16, 2009, eAlert No. 119; *EB and Certain Kimberly Operations Employees v. Cominco Ltd.*, 2001 BCHRT 46 (CanLII) (Parrack); *Nixon v. Vancouver Rape Relief Society*, 2001 BCHRT 1 (CanLII) (MacNaughton), reversed 2003 BCSC 1936 (CanLII), appeal allowed, 2005 BCCA 601 (CanLII), per Saunders J.A. (in *obiter*), leave to appeal to S.C.C. refused, 2007 CanLII 2772 (SCC); *Dame v. South Fraser Health Region*, 2002 BCHRT 22 (CanLII) (Mohammed), at paras. 67-69.
- 69 *Goode v. Interior Health Authority*, 2010 BCHRT 95 (CanLII) (Marion), Lancaster’s *Disability and Accommodation*, February 1, 2011, eAlert No. 141.

Authority for the “substantive discrimination” approach in non-*Charter* human rights cases is frequently traced to the concurring minority reasons of Justice Rosalie Abella in the Supreme of Court of Canada’s *McGill* decision.⁷⁰ In that case, the Court unanimously restored an arbitrator’s ruling that the employer did not violate human rights legislation⁷¹ when it terminated the employment of a disabled worker who had not worked for three years and had no reasonable prospect for recovery. Six members of the Court ruled that, although the termination was *prima facie* discriminatory because it was due to the employee’s disability, the hospital had discharged its duty to accommodate to the point of undue hardship. On behalf of three judges,⁷² Justice Abella held that the question of accommodation did not arise because there was no *prima facie* discrimination. As explained by Abella:

At the heart of [the] definitions [of discrimination] is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.

What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. *It is not enough to impugn an employer’s conduct on the basis that what was done had a negative impact on an individual in a protected group.* Such membership alone does not, without more, guarantee access to a human rights remedy. *It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy.* And it is the claimant who bears this threshold burden.

If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that the *Meiorin* test is engaged and the onus

70 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4 (CanLII), Lancaster’s *Disability and Accommodation*, March 1, 2007, eAlert No. 84.

71 Quebec’s *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12.

72 The concurring judges in the minority were Chief Justice Beverley McLachlin and Justice Michel Bastarache.

shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination.⁷³

In the 2010 decision *Ontario (Disability Support Program) v. Tranchemontagne*,⁷⁴ the Ontario Court of Appeal attempted to reconcile the two approaches, holding that the essential elements of the test for discrimination under both Ontario's *Human Rights Code* and the *Charter* are those first established by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*⁷⁵ and affirmed by that court subsequently in *R. v. Kapp*,⁷⁶ namely: (1) Does the law (or conduct at issue) create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? The Court of Appeal specifically noted that, like s.15 of the *Charter*, the right to equal treatment without discrimination on a prohibited ground in Ontario's *Human Rights Code* "involves a guarantee of equal treatment in a substantive sense".⁷⁷ While showing a *prima facie* case of discrimination thus involves demonstrating a distinction based on a prohibited ground that creates a disadvantage by perpetuating prejudice or stereotyping (as per the reasons of Justice Abella in *McGill*), the Court clarified "that does not mean that is a free-standing requirement".⁷⁸ Rather, because there are fundamental differences between the *Code* and the *Charter*, "the precise nature of the evidence to be led and the stringency of the test to be applied to establish discrimination may vary and ultimately will depend significantly on the context". In the words of the Court:

In the human rights context, in most instances, it will be evident that a *prima facie* case of discrimination has been established based solely on the claimant's evidence showing a distinction based on a prohibited

73 At paras. 48-50 [emphasis added].

74 2010 ONCA 593 (CanLII).

75 1989 CanLII 2 (SCC).

76 2008 SCC 41 (CanLII), *Lancaster's Human Rights and Workplace Privacy*, May 27, 2009, eAlert No. 120.

77 In this regard, the Court cited the Supreme Court of Canada's decisions in *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC) and *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (SCC).

78 Citing as authority for this proposition the B.C. Court of Appeal's decision in *Armstrong*: see discussion which follows.

ground that creates a disadvantage (in the sense of withholding a benefit available to others or imposing a burden not imposed on others). An inference of stereotyping or of perpetuating disadvantage or prejudice will generally arise based on that evidence alone.

However, in other instances a more nuanced inquiry may be necessary to properly assess whether a distinction based on an enumerated ground that creates a disadvantage actually engages the right to equal treatment under the *Code* in a substantive sense.

In both instances, the Court noted that “the goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by perpetuating prejudice is actually incorporated into two stages of the *prima facie* case analysis: (i) determining whether the treatment in issue truly creates a disadvantage; and (ii) determining whether the protected ground or characteristic truly played a role in creating the disadvantage”.⁷⁹ This is similar to the reasoning of the B.C. Court of Appeal in *Armstrong v. British Columbia (Ministry of Health)*,⁸⁰ in which the Court stated that “the goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the [traditional] *prima facie* test”, *i.e.*, in demonstrating that the claimant’s protected characteristic was a factor in the adverse impact or treatment she or he experienced.

79 At para. 104. In two rulings since *Tranchemontagne*, however, *Shaw v. Phipps*, 2012 ONCA 155 (CanLII) and *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII), the Ontario Court of Appeal did not refer to the two-part *Charter* test for discrimination, and instead adopted the traditional three-part human rights analysis endorsed by the Supreme Court in its 2012 ruling in *Moore*. In neither case did the Court make reference to substantive discrimination other than to acknowledge in *Peel Law Association* that the “*prima facie* case test defines what is necessary to establish substantive discrimination”: see para. 65. The third element of that test, the Court noted, requires only “that there be a ‘connection’ between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a ‘factor’ in the adverse treatment”: see para. 59. Both of these cases, however, involved allegations and evidence of direct racial discrimination and thus the inference of stereotyping or perpetuating disadvantage or prejudice presumably arose on the basis of this evidence alone, as the Court explained it could in *Tranchemontagne*.

80 2010 BCCA 56 (CanLII), leave to appeal to S.C.C. refused, 2010 CanLII 39671 (SCC).

Three Supreme Court of Canada cases decided since *Tranchemontagne* have presumably ended further debate regarding the elements of the test for establishing *prima facie* discrimination under human rights legislation. In the 2012 *Moore v. British Columbia (Education)* decision,⁸¹ and more recently in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*⁸² and *Stewart v. Elk Valley Coal Corp.*,⁸³ the Court confirmed that the analysis to be applied in human rights cases is the traditional three-part test for *prima facie* discrimination applied in cases such as *Armstrong*; that is, in order to show *prima facie* discrimination and shift the burden to the respondent to justify his/her/its conduct, a human rights claimant must simply show (1) that he or she has (or is perceived to have) a protected characteristic; (2) that he or she has experienced an adverse impact; and (3) that the protected characteristic was a factor in the adverse impact.⁸⁴ Indeed, in *Elk Valley*, the Court expressly rejected any alteration of the test to add a stand-alone requirement to show “arbitrariness or stereotyping”. As stated by Chief Justice McLachlin:

I see no basis to alter the test for *prima facie* discrimination by adding a fourth requirement of a finding of stereotypical or arbitrary decision-making. The goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment. The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination. Requiring otherwise would improperly focus on “whether a discriminatory attitude exists, not a discriminatory impact”, the focus of the discrimination inquiry . . .⁸⁵

Differences of opinion remain, however, with respect to the legal and evidentiary requirements for satisfying the third

81 2012 SCC 61 (CanLII), Lancaster’s *Labour Law*, January 17, 2013, eAlert No. 337.

82 2015 SCC 39 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, November 17, 2015, eAlert No. 268.

83 2017 SCC 30 (CanLII), Lancaster’s *Headlines*, January 18, 2018.

84 *Elk Valley*, at para. 24; *Moore*, at para. 33; *Bombardier*, at paras. 34-37.

85 At para. 4.

element of the test for *prima facie* discrimination — *i.e.*, showing that a protected characteristic was a factor in the adverse impact — in cases of *indirect* discrimination, where the courts have said there is no need to prove *intent* to discriminate if the *effect* of the treatment complained of is discriminatory.⁸⁶ These differences are highlighted in the recent *Elk Valley* decision, in which the Supreme Court of Canada split (6-3) on the question of whether an employer’s decision to discharge an employee with a previously undisclosed cocaine dependency for breaching the employer’s drug policy following a workplace accident amounted to *prima facie* discrimination: see discussion in the following section.

Prima facie discrimination in cases of disability-related misconduct

Elk Valley is only the most recent of several appellate decisions in which the courts have split on the question of the proper legal and evidentiary requirements to establish *prima facie* discrimination in cases involving employees who have a substance dependency and who are disciplined or discharged for misconduct that is influenced by their dependency. In a controversial 2008 ruling of the B.C. Court of Appeal, known as the *Gooding* case,⁸⁷ a majority of the Court, purporting to apply the traditional three-part discrimination analysis in the case of an alcohol-addicted liquor store manager fired for stealing liquor, held that no *prima facie* discrimination had been established, as there was no suggestion in the evidence “that [the grievor’s] alcohol dependency played any role in the employer’s decision to terminate him” or that the grievor’s “termination was arbitrary and based on preconceived ideas concerning his alcohol dependency”. Rather, in the majority’s view:

It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is

86 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC).

87 *BCGEU v. British Columbia (Public Service Agency)*, 2008 BCCA 357 (CanLII) (“*Gooding*”), leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 460 (QL), *Lancaster’s Human Rights and Workplace Privacy*, December 8, 2008, eAlert No. 113.

irrelevant if that admitted dependency played no part in the employer's decision to terminate his employment and he suffered no impact for his misconduct greater than that another employee would have suffered for the same misconduct.

While the majority's conclusion was clearly based in part on the fact that the employer had no knowledge of the grievor's alcohol dependency at the time it terminated his employment, it also found no suggestion that the grievor's disability played any role in the employer's refusal to accede to the grievor's subsequent request for the imposition of a lesser penalty.

The majority's decision in *Gooding* marked a clear departure from two earlier decisions of the same Court, *Kemess Mines Ltd. v. IUOE, Local 115*⁸⁸ and *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C.N.U.*,⁸⁹ in both of which the Court held that *prima facie* discrimination was established on the basis of a link between the prohibited ground (disability) and the workplace misconduct leading to the adverse consequence, without regard to whether the employer's decision to impose the adverse consequence took into account the employee's disability. In *Health Employers Assn.*, for example, the B.C. Court of Appeal held that the link necessary to ground a *prima facie* case was evident in the arbitrator's finding that the employee's theft and dishonesty, for which he was fired, were caused by his addiction.⁹⁰ In her dissenting opinion in *Gooding*, Justice Pamela Kirk-

88 2006 BCCA 58 (CanLII), Lancaster's *Disability and Accommodation*, March 14, 2006, eAlert No. 62. In *Kemess*, the B.C. Court of Appeal endorsed the arbitral "hybrid" analysis in cases involving a mix of voluntary or culpable misconduct, and involuntary or non-culpable misconduct caused, at least in part, by mental illness and/or drug or alcohol addiction. This approach requires the arbitrator to apply a disciplinary or just cause analysis to the culpable aspects of the misconduct, and a human rights analysis — including an assessment of the employer's duty to accommodate — to the non-culpable aspects. See the discussion in Section 4.1, under *Disability-related misconduct*.

89 2006 BCCA 57 (CanLII), Lancaster's *Disability and Accommodation*, March 14, 2006, eAlert No. 62.

90 In both *Kemess* and *Health Employers Assn.*, however, the employer was aware of the employee's drug addiction issue at the time of termination. Moreover, these were decided before the Supreme Court of Canada's ruling in *McGill* (note 70, above). In contrast, in *Gooding*, the dismissed employee revealed his problem with alcohol dependency

patrick, relying on both decisions, similarly found that a *prima facie* case had been made out because the grievor's dismissal was based on his thefts, which were in turn related to his disability, *i.e.* his disability was a factor in his dismissal.

The Alberta Court of Appeal has similarly divided on the legal and evidentiary requirements for *prima facie* discrimination in cases of addiction-related misconduct, most recently in *Elk Valley*, in which a majority upheld the dismissal of a cocaine-dependent employee.⁹¹

after the employer had already discharged him for theft. The majority in *Gooding* also expressly relied upon Justice Abella's definition of *prima facie* discrimination, in particular, the need to show a link between the protected characteristic and the arbitrariness of the disadvantaging criterion or conduct, in the *McGill* decision.

- 91 See *Wright v. College and Assn. of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, November 14, 2012, eAlert No. 195; and *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225 (CanLII), Lancaster's *Disability and Accommodation*, October 26, 2015, eAlert No. 223. In the *Wright* decision, for example, a case involving two opioid-dependent nurses disciplined for stealing narcotics, a majority of the Court, citing the *McGill* and *Tranchemontagne* decisions in support, held that a *prima facie* case of adverse-effects discrimination requires more than merely a link between a protected characteristic and an adverse effect: "[A]n important component in the analysis is whether the treatment is in fact stereotypical or arbitrary, and whether it affronts concepts of human dignity. Not any nexus or connection, no matter how remote, is sufficient". The *Gooding* decision, in the majority's view, showed that the fact that an employee's criminal conduct was motivated (or caused) by his addiction does not elevate the employer's decision to dismiss to the level of discrimination, "because the decision to dismiss for theft was not arbitrary or based on preconceived stereotypes". Similarly, according to the majority, the evidence confirmed that the College's decision to lay professional disciplinary charges, and the subsequent finding of misconduct, were not motivated by the employees' addiction, but rather by their conduct. While there may have been a connection between the employees' actions and their disability, it was insufficient to make the College's actions discriminatory in law. In a dissenting opinion, however, Justice Ronald Berger rejected the addition of any requirement to show arbitrariness or stereotyping to the test for *prima facie* discrimination. Thus, as held by the B.C. Court of Appeal in *Kemess*, an employee's disability need only be "a factor" in the adverse treatment, and not "the sole or overriding factor". As summarized by Justice Berger: "Misconduct that is causally connected to the disability, and which results in adverse treatment of an individual, is *prima facie* discrimination. As a result of the [employee's]

On June 15, 2017, the Supreme Court of Canada released its judgment in the *Elk Valley* case, a majority of the Court dismissing the appeal and upholding the decision of the Alberta Human Rights Tribunal at first instance.⁹² Writing for six judges in the majority, Chief Justice Beverley McLachlin held that the Tribunal had properly applied the three-part test for *prima facie* discrimination endorsed by the Court in *Moore* and *Bombardier*.⁹³ In McLachlin’s view, on the evidence before it — specifically, evidence which it found demonstrated that the employee had the capacity to comply with the employer’s policy, and to “make rational choices in terms of his drug use” — the Tribunal had reasonably concluded that the reason for the employee’s dismissal was breach of the policy, not his drug addiction. Dismissing the argument that the addiction was a factor in the termination because denial was part of the addiction, and prevented the employee from disclosing his addiction prior to the accident, McLachlin stated: “While Mr. Stewart may have been in denial about his addiction, he knew he should not take drugs before working, and he had the ability to decide not to take them as well as the capacity to disclose his drug use to his employer. Denial about his addiction was thus irrelevant in this case”. In the majority’s view, “[t]he connection between an addiction and adverse treatment cannot be assumed and must be based on evidence”. As explained by McLachlin C.J.:⁹⁴

In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis

It was the Tribunal’s task to determine whether the reason for the termination of employment or the impact of the Policy on Mr. Stewart

disability, the standard or rule being equally applied, imposes ‘penalties or restrictive conditions not imposed on other members’”.

92 *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII), Lancaster’s *Headlines*, January 18, 2018.

93 See discussion above, at pp. 32-33.

94 At paras. 39-43.

established a *prima facie* case of discrimination. There is ample evidence to support the Tribunal's conclusion that there was no *prima facie* case and, therefore, no basis to overturn it.

Where, as here, a tribunal concludes that the cause of the termination was the breach of a workplace policy or some other conduct attracting discipline, the mere existence of addiction does not establish *prima facie* discrimination. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation. Again, to take an example given by the majority of the Court of Appeal, if a nicotine-addicted employee violates a workplace policy forbidding smoking in the workplace, no sanction would be possible without discrimination regardless of whether or not that employee had the capacity to comply with the policy.

It is, of course, open to a tribunal to find that an addiction was a factor in an adverse distinction, where the evidence supports such a finding. The question, at base, is whether at least one of the reasons for the adverse treatment was the employee's addiction. If the Tribunal in this case had found, on the evidence, that the employer terminated Mr. Stewart's employment, or that the Policy adversely affected him, because, either alone or among other reasons, he was addicted to drugs, *prima facie* discrimination would have been made out. However, in the Tribunal's view, the evidence did not support that conclusion. As a result, [the employee] did not establish a *prima facie* case of discrimination.

In a strongly worded dissenting opinion supported by two other judges, Justice Clément Gascon disagreed with the majority's disposition of the *prima facie* discrimination issue. In Gascon's view, the majority's acceptance of the Tribunal's approach to the third element of the test — which he referred to as the “contribution” criterion — fundamentally ignored the Court's prior jurisprudence emphasizing the primacy of “discriminatory effect, not discriminatory intent”,⁹⁵ and the principle that the contribution criterion “addresses the relationship between the ground and the harm, not between the ground and the intent to cause harm”.⁹⁶ The majority's reasons, Gascon noted, deviated from the established approach in three ways: (1) they failed to detect the Tribunal's misunderstanding of the “factor” test for contribution; (2) they implicitly affirmed erroneous legal principles that the

95 At para. 79.

96 At para. 85.

Tribunal relied upon in its reasoning; and (3) they improperly imported justificatory considerations into the *prima facie* discrimination analysis.

On the first point, Gascon noted that the majority had improperly deferred to the Tribunal's finding that the employee's addiction was not a factor in his dismissal. In his view, the Tribunal's decision showed that it was not concerned with whether drug addiction contributed, at least in part, to the dismissal, but rather with whether the addiction was (1) an irrepressible factor in the employee's dismissal, *i.e.* a factor which was completely beyond his control (an improper approach, in Gascon's view); and (2) a factor in the employer's decision to dismiss (*i.e.* the intent requirement rejected by the Court's jurisprudence). In light of these errors, the Tribunal's conclusion that the employee's addiction was not a factor in the harm he had suffered (*i.e.* dismissal) was based on misapprehensions of principle and was therefore undeserving of deference. Moreover, the Tribunal's finding that the employee "had the capacity to make choices" about drug use only meant that he maintained some residual control over his choice to use drugs, not that he maintained complete unimpaired control over that choice.⁹⁷

On the second point, in Gascon's view, the majority's reasons implicitly affirmed erroneous legal principles relied upon by the Tribunal, which included limiting its inquiry to discriminatory intent rather than discriminatory effect, and relying on a "choice"

97 Referring to the majority's "notional spectrum" of the degree of an addiction's impact on an individual's self-control (*i.e.*, no impact; full impact; and somewhere in-between these two extremes), Gascon further opined that "if we are to truly accept that a protected ground being 'a factor' in a complainant's harm is sufficient to constitute *prima facie* discrimination, then only the 'no impact' portion of the spectrum would fail to qualify as *prima facie* discrimination". Inclusion of the "some impact" portion of the spectrum within the scope of *prima facie* discrimination, in Gascon's view, recognized that addiction — *i.e.* impaired ability to resist using a specific drug — "entails, as a matter of fact and logic, a diminished ability to resist using that drug"; however, this approach does not eliminate the requirement that the complainant first prove a sufficient degree of drug dependence in order to qualify as addiction-disabled.

and “formal equality” paradigm, despite expressly recognizing the validity of indirect discrimination claims.

Lastly, Gascon took issue with the majority’s suggestion that *prima facie* discrimination should be narrowly construed to preserve the enforceability of drug and alcohol policies, a suggestion reinforced by the majority’s example of “nicotine-dependent employees smoking inside offices without being sanctioned by their employer, who is handcuffed by over-generous human rights legislation, thus resulting in unenforceable workplace policies”.⁹⁸ In Gascon’s view, this approach improperly imported justificatory considerations — like the importance of the workplace policy and its legitimate aims — into the *prima facie* discrimination analysis. Further, “it exaggerate[d] the implication of finding such policies *prima facie* discriminatory by claiming that they would be unenforceable (‘no sanction would be possible without discrimination’: reasons of McLachlin C.J., at para. 42), when, in reality, they would simply need to be justified as relating to *bona fide* occupational requirements”.

With respect to the Tribunal’s reasons, Gascon identified four conceptual errors in the Tribunal’s application of human rights principles and its analysis of the contribution issue, which in his view the majority either downplayed or ignored altogether: (1) requiring the employee to make prudent choices to avoid discrimination; (2) limiting the employee’s protections to an assurance of formal equality; (3) requiring the employee to prove that he was treated arbitrarily or stereotypically; and (4) requiring the employee to prove a causal relationship between his ground and harm. Gascon further noted that while the Tribunal’s stated finding was that Mr. Stewart’s “addiction was not a factor in his termination” — a correct statement of the legal test — in fact, its reasons indicated that the finding it actually made was that the employee’s “addiction was not ‘a factor’ in the employer’s decision to dismiss him, *i.e.* the company did not intentionally discriminate against Mr. Stewart’s addiction”, which was the wrong legal test. In Gascon’s words: “Under the proper test — *i.e.* whether the ground was a factor in the harm — the evidence before the Tribunal could not support its conclusion that [the

98 At para. 42.

employee]’s drug dependence did not contribute to his termination”.⁹⁹ While the employee was not wholly incapacitated by his addiction and maintained some residual control over his choices, in Gascon’s opinion this merely diminished the extent to which his dependence contributed to the dismissal; it did not eliminate it as “a factor”.¹⁰⁰ Consequently, the dismissal was *prima facie* discriminatory.

At no point in her reasons on behalf of the majority did McLachlin C.J. reply to any of the concerns identified by Gascon regarding the Tribunal’s approach to the “factor” element of the test for *prima facie* discrimination, preferring instead to dispose of the appeal primarily on the basis of the evidence presented and a deferential standard of review. Moreover, McLachlin made no attempt to address the rift in appellate jurisprudence on this issue, exemplified in cases such as the *Gooding* decision,¹⁰¹ in which the courts have disagreed on whether *prima facie* discrimination may be established simply on the basis of a link between the prohibited ground (disability) and the workplace misconduct leading to the adverse consequence, without regard to whether the employer’s decision to impose the adverse consequence took into account the employee’s disability. As a result, this issue will likely continue to be litigated.

Bona fide occupational requirement (BFOR)

Once a complainant has established a *prima facie* case of discrimination on a prohibited ground, the onus then shifts to the respondent to prove a statutory defence or other justification such

99 As explained by Gascon (at para. 117): “In my view, drug addiction was at least one, if not the central, factor in Mr. Stewart’s termination for drug use. The Tribunal found, and both parties’ experts opined, that addiction means ‘impaired control’ over drug use The Tribunal also found that Mr. Stewart was drug-dependent with respect to cocaine Both experts agreed that Mr. Stewart was unaware of his drug dependence at the time of the incident Accordingly, Mr. Stewart had an impaired ability to comply with the Policy in two respects: (1) it prohibited drug use, which he uniquely and inordinately craved; and (2) it provided accommodation to drug-addicted persons, which he appears to have denied being a symptom of his addiction”.

100 See para. 118.

101 See discussion above.

as a *bona fide* occupational requirement.¹⁰² In order to justify a discriminatory rule, standard or practice as a BFOR, the Supreme Court of Canada in the *Meiorin*¹⁰³ case held that an employer must show on a balance of probabilities that:

1. the rule, standard or practice was adopted for a purpose rationally connected to the performance of the job;
2. the rule, standard or practice was adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. the rule, standard or practice is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *Meiorin*, the Supreme Court adopted a “unified approach” to claims based on discrimination. As a result, the test for a BFOR is the same whether the discrimination is direct, *i.e.* intended, or the result of a neutral rule or practice, *i.e.* “adverse effect” discrimination.

The duty to accommodate: employer, employee and union duties

As indicated, where the requirements for *prima facie* discrimination are established, the onus switches to the employer to demonstrate that the rule or standard at issue constitutes a BFOR

102 *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC). See discussion in P. Neumann & J. Sack, *Wrongful Dismissal and Employment Law eText* (Toronto: Lancaster House, online), Section 5.2.3.1, Test for Discrimination.

103 *BCGEU v. British Columbia (Public Service Employee Relations Commission)* (“*Meiorin*”), 1999 CanLII 652 (SCC), Lancaster’s *Gender, Equity and Work-Life Balance*, September/October, 1999. The Supreme Court of Canada reaffirmed the three-step *Meiorin* test for justifying a BFOR in its *Hydro-Québec* decision: *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, Local 2000*, 2008 SCC 43 (CanLII), Lancaster’s *Disability and Accommodation*, August 8, 2008, eAlert No. 111.

under the three-part test in *Meiorin*, including that it is impossible for the employer to accommodate the individual without undue hardship. The duty to accommodate has both a procedural and substantive component. The procedural component requires the employer to make inquiries with respect to the employee's situation, and to conduct an individualized assessment to determine whether it can accommodate the employee's protected characteristic or needs.¹⁰⁴ The substantive component requires the employer to offer, if it can do so without incurring undue hardship, a "reasonable" accommodation proposal (see commentary in the next section on the "undue hardship" standard). While an employer thus has both procedural and substantive obligations in complying with the duty to accommodate, there is a difference of opinion as to whether breach of the procedural duty can independently give rise to employer liability, that is, in the absence of a breach of the substantive duty to accommodate.¹⁰⁵ More recently, several courts have rejected the notion that there is an independently actionable procedural duty to accommodate.¹⁰⁶

Ordinarily the employer must initiate the accommodation process and make the first accommodation proposal, as the employer is usually in the best position to determine how the employee can be accommodated without undue interference to the operation of

104 See, for example, *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII) (Keene), Lancaster's *Human Rights and Workplace Privacy*, April 28, 2010, eAlert No. 135; *Rajotte v. President of the Canadian Border Services Agency*, 2009 PSST 25 (CanLII) (Giroux), Lancaster's *Human Rights and Workplace Privacy*, June 24, 2010, eAlert No. 141.

105 Some human rights tribunals have held that where the breach of the procedural duty has its own adverse consequences, including offending the complainant's dignity and self-worth, there exists discrimination for which the complainant has "an independent right to a remedy": see *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII) (Mullan), upheld, 2008 CanLII 39605 (ON SCDC), Lancaster's *Human Rights and Workplace Privacy*, November 7, 2008, eAlert No. 110.

106 *Emergency Health Services Commission v. Cassidy*, 2011 BCSC 1003, Lancaster's *Human Rights and Workplace Privacy*, December 13, 2011, eAlert No. 174; *Canada (Attorney General) v. Cruden*, 2013 FC 520 (CanLII), Lancaster's *Federal Labour and Employment Law*, October 8, 2013, eAlert No. 61, affirmed, 2014 FCA 131 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, October 21, 2015, eAlert No. 267.

its business.¹⁰⁷ The employee, in turn, has a duty to facilitate a reasonable accommodation proposal from the employer, which includes the provision of relevant information.¹⁰⁸ The proposal need not be the ideal or preferred solution for the employee — such as an employee’s preferred shift schedule — as “[t]he employee cannot expect a perfect solution”.¹⁰⁹ On the other hand, as held by one Tribunal, offering accommodation in the form of a very different position with lower pay, for which the employee has no experience or training, without considering any other viable options, is not a reasonable accommodation proposal.¹¹⁰

The union, too, has a role to play, by assisting in the accommodation process.¹¹¹ This may include waiving normal seniority rights to facilitate an accommodation proposal, if the proposal does not give rise to “significant interference with the rights of

107 *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), Lancaster’s *Human Rights and Workplace Privacy*, October, 1992.

108 See, for example, *OPSEU v. Ontario (Liquor Control Board of Ontario)*, 2012 CanLII 67531 (ON GSB) (R.M. Brown), Lancaster’s *Public Service and Crown Agency Employment Law*, September 23, 2013, eAlert No. 84, in which the Ontario Grievance Board ruled that the union did not present sufficient evidence to make out a *prima facie* case that the refusal to transfer a liquor store employee to his home community constituted a failure to accommodate his disability and family status. The grievor in this case had refused to provide his current address, any details about his wife’s work hours or employer, any evidence to substantiate his parents’ medical condition, or any details regarding his daughter’s childcare arrangements. The Board, accordingly, granted the employer’s motion to dismiss the claim.

109 *Ottawa-Carleton Public Employees’ Union, Local 503 v. Ottawa (City)* (2010), 196 L.A.C. (4th) 322 (Schmidt), Lancaster’s *Municipal Employment Law*, September 16, 2010, eAlert No. 34. See also *TWU v. Telus* (2012), 226 L.A.C. (4th) 34 (Steeves), Lancaster’s *Gender, Equity and Work-Life Balance*, February 22, 2013, eAlert No. 67.

110 *Rawleigh v. Canada Safeway Ltd.*, 2009 AHRC 6 (CanLII) (Chomey), Lancaster’s *Human Rights and Workplace Privacy*, June 24, 2010, eAlert No. 141.

111 *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), Lancaster’s *Human Rights and Workplace Privacy*, October, 1992; *Regina (City) v. Kivela*, 2006 SKCA 38 (CanLII), Lancaster’s *Disability and Accommodation*, May 31, 2006, eAlert No. 67; *St. John’s (City) v. Human Rights Commission*, 2011 NLTD 83 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, November 11, 2011, eAlert No. 170.

others” in the bargaining unit.¹¹² If the union has agreed to collective agreement provisions that discriminate on the basis of a prohibited ground, and it does nothing to prevent the discriminatory treatment of employees under those provisions, it may be found jointly liable with the employer for the damages caused.¹¹³ For further discussion of the scope of the duty to accommodate, see Chapter 4 – Section 4.1, Job Rights of Disabled Employees.

Undue hardship

Whether accommodation causes the employer undue hardship in any given case involves a factual determination dependent upon the individual circumstances of the affected employee(s) and the employer.¹¹⁴ The factors to be considered will vary from case to case and may include, among others, financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities, and the size of the employer’s operation.¹¹⁵ The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute, and “should be applied with common sense and flexibility in the context of the factual situation presented in each case”.¹¹⁶

112 *Renaud*, cited above. See also Mitchnick & Etherington, *Leading Cases on Labour Arbitration*, 2nd ed. (Lancaster House, looseleaf and online), Chapter 19.4, The Contest between Seniority and Human Rights.

113 *Syndicat du transport de Montréal – CSN v. Commission des droits de la personne et des droits de la jeunesse*, 2010 QCCA 165 (CanLII), Lancaster’s *Gender, Equity and Work-Life Balance*, April 6, 2010, eAlert No. 37. See also *Regina (City) v. Kivela*, 2006 SKCA 38 (CanLII), Lancaster’s *Disability and Accommodation*, May 31, 2006, eAlert No. 67.

114 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l’Hôpital general de Montréal*, [2007] 1 S.C.R. 161, Lancaster’s *Labour Law*, February 6, 2007, eAlert No. 172.

115 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC). See, for example, *Rennie v. Peaches and Cream Skin Care Ltd.*, 2006 AHRC 13 (CanLII) (Baergen), Lancaster’s *Gender, Equity and Work-Life Balance*, March 27, 2007, eAlert No. 7.

116 *BCGSEU v. British Columbia (Public Service Employee Relations Commission) (“Meiorin”)*, 1999 CanLII 652 (SCC), Lancaster’s *Gender, Equity and Work-Life Balance*, September/October, 1999.

In some jurisdictions, the statutory duty to accommodate prescribes the factors that can be considered in determining what constitutes “undue hardship”. In Ontario, for example, these are limited to “cost, outside sources of funding . . . and health and safety requirements”.¹¹⁷ In the federal jurisdiction, the *Canadian Human Rights Act* similarly limits undue hardship to considerations of “health, safety and cost”.¹¹⁸ On the other hand, Nunavut’s *Human Rights Act* defines “undue hardship” to mean “excessive hardship as determined by evaluating the adverse consequences of a provision in this Act that requires a duty to accommodate, by reference to such factors as (a) health and safety; (b) disruption to the public; (c) effect on contractual obligations; (d) cost; and (e) business efficiency”.¹¹⁹ Similarly, Yukon’s *Human Rights Act* states that “ ‘undue hardship’ shall be determined by balancing the advantages and disadvantages of the provisions by reference to factors such as (a) safety; (b) disruption to the public; (c) effect on contractual obligations; (d) financial cost; (e) business efficiency”.¹²⁰

Whether the statutory prescription of undue hardship factors means that adjudicators are restricted to applying the prescribed factors, or whether they may take notice of other factors which have been set out in caselaw — such as disruption of a collective agreement, or problems of morale of other employees — remains unclear.¹²¹ Two decisions of the Federal Court of Canada

117 See ss.11(2), 17(2) and 24(2) of the *Human Rights Code*, R.S.O. 1990, c. H.19.

118 See s.15(2) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

119 S.Nu. 2003, c. 12.

120 R.S.Y. 2002, c. 116.

121 Examples of cases that limited the undue hardship analysis to the prescribed criteria include *London Civic Employees, Local 107 v. Ingersoll (Town)* (2003), 122 L.A.C. (4th) 402 (Williamson); and *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII) (Keene), Lancaster’s *Human Rights and Workplace Privacy*, April 28, 2010, eAlert No. 135. Cases adopting a more expansive undue hardship analysis, including factors other than the statutory ones, include *IWA, Local 2693 v. Bowater Canadian Forest Products Inc., Local 2693*, [2003] O.L.A.A. No. 597 (QL) (Surdykowski); and *Adamson v. Air Canada*, 2014 FC 83 (CanLII), reversed on other grounds, 2015 FCA 153 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, December 22, 2015, eAlert No 270.

reaching opposite conclusions on this issue reflect the divide in the jurisprudence.¹²²

In all cases, the employer bears the legal and evidentiary burden of establishing undue hardship.¹²³ Undue hardship cannot be established by “impressionistic or anecdotal evidence”, or “speculative or unsubstantiated concern that certain adverse consequences ‘might’ or ‘could’ result if the claimant is accommodated”.¹²⁴ Tribunals have, for example, rejected undue hardship claims based on speculative concerns that a proposed accom-

122 In a 2011 ruling, Justice Anne Mactavish of the Federal Court concluded that, as a matter of statutory interpretation and the application of human rights principles (specifically, that defences to the exercise of human rights must be narrowly construed), the prescribed criteria of “health, safety and cost” in s.15(2) of the *Canadian Human Rights Act* were intended by Parliament to be an exhaustive list of factors to be applied in an accommodation analysis: see *Air Canada Pilots Association v. Kelly*, 2011 FC 120 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, May 25, 2011, eAlert No. 160, appeal allowed on other grounds, 2012 FCA 209 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, October 9, 2012, eAlert No. 191, leave to appeal to S.C.C. denied, 2013 CanLII 15565 (SCC). At the same time, Mactavish proceeded to clarify that other matters, “such as employee morale and mobility, interference with other employees’ rights, and disruption of a collective agreement”, may be relevant in an accommodation analysis, provided they are of a “sufficient gravity as to have a demonstrable impact on the operations of an employer in a way that relates to health, safety or cost”. Contrast Mactavish’s ruling with the 2014 ruling of Justice Peter Annis in *Adamson v. Air Canada*, 2014 FC 83 (CanLII), appeal allowed on other grounds, 2015 FCA 153 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, December 22, 2015, eAlert No. 270, leave to appeal to S.C.C. denied, 2016 CanLII 12161 (SCC). Annis specifically disagreed with the analysis and conclusions of Justice Mactavish, holding instead that an accommodation analysis encompassed by s.15(2) of the Act is not limited to the hardship factors specifically enumerated therein.

123 See, for example, *Devaney v. ZRV Holdings Ltd. and Zeidler Partnership Architects*, 2012 HRTO 1590 (CanLII) (Eyolfson), Lancaster’s *Gender, Equity and Work-Life Balance*, November 2, 2012, eAlert No. 64.

124 *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC). See, for example, *Rawleigh v. Canada Safeway Ltd.*, 2009 AHRC 6 (CanLII) (Chomey), Lancaster’s *Human Rights and Workplace Privacy*, June 24, 2010, eAlert No. 141; and *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII) (Keene), Lancaster’s *Human Rights and Workplace Privacy*, April 28, 2010, eAlert No. 135.

modation will create a ripple-effect of dissatisfaction among other employees, or lead to the employer being overwhelmed with requests for accommodation by other employees in the same situation.¹²⁵

Minor interferences with the rights of other employees, such as work scheduling changes, or additional administrative burdens on the employer, have been held not to amount to undue hardship.¹²⁶ On the other hand, more substantial interferences with collective agreement rights, such as the interruption of a job posting, the placement of an employee in a position for which he or she is unsuitable, or the displacement or laying-off of a qualified senior incumbent in order to facilitate an accommodation proposal, are more likely to be found to constitute undue hardship. In all cases, before seeking an accommodation that interferes with the collective agreement rights of other workers, the employer has an obligation to show that there are no reasonable alternatives (*i.e.* without undue hardship) to accommodate within the parameters of the collective agreement.¹²⁷

In *Hydro-Québec*,¹²⁸ the Supreme Court of Canada clarified that, while the purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without

125 *Seeley v. Canadian National Railway*, 2010 CHRT 23 (CanLII) (Doucet), upheld, 2013 FC 117 (CanLII) and 2014 FCA 111 (CanLII).

126 *CAW, Local 1941 v. Siemens VDO Automotive Inc.*, [2006] O.L.A.A. No. 492 (QL) (Watters), *Lancaster's Disability and Accommodation*, January 15, 2007, eAlert No. 82.

127 *Hamilton Police Assn. v. Hamilton Police Services Board*, 2005 CanLII 20788 (ON SCDC), *Lancaster's Disability and Accommodation*, eAlert No. 45; *CEP, Local 76 v. MacMillan Bloedel (Powell River)* (1998), 75 L.A.C. (4th) 34 (MacIntyre); *TWU v. Telus* (2012), 226 L.A.C. (4th) 34 (Steeves), *Lancaster's Gender, Equity and Work-Life Balance*, February 22, 2013, eAlert No. 67; *UFCW, Local 617P v. Colonial Cookies* (1999), 82 L.A.C. (4th) 101 (Rayner), *Lancaster's Disability and Accommodation*, September/October, 1999; *IWA – Canada, Local 500 v. Smurfit-MBI* (2004), 125 L.A.C. (4th) 192 (Springate), *Lancaster's Disability and Accommodation*, September 15, 2004, eAlert No. 26.

128 *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, Local 2000*, 2008 SCC 43 (CanLII), *Lancaster's Disability and Accommodation*, August 8, 2008, eAlert No. 111.

undue hardship, the purpose is not “to completely alter the essence of the contract of employment, that is, the employee’s duty to perform work in exchange for remuneration”. Thus, the employer “does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work”.

For further discussion on the topic of undue hardship, see Chapter 4 – Section 4.1, Job Rights of Disabled Employees.

Employer liability

Employers may be held directly or vicariously liable for discriminatory acts perpetrated against their employees by supervisors, co-workers, students, customers, and others with whom employees interact in the course of their work, particularly where the employer fails to respond, or respond promptly, to the situation.¹²⁹ Accordingly, it has been held that the failure to conduct a prompt, thorough and fair investigation into allegations

129 *Robichaud v. The Queen*, 1987 CanLII 73 (SCC). See also *Bouraoui v. Ottawa Valley Cleaning and Restoration*, 2014 HRTO 1303 (CanLII) (Debané), Lancaster’s *Human Rights and Workplace Privacy*, February 3, 2015, eAlert No. 250; *OPSEU v. Ontario (Ministry of Community Safety and Correctional Services)*, 2010 CanLII 81917 (ON GSB) (Albertyn), Lancaster’s *Public Service and Crown Agency Employment Law*, March 15, 2011, eAlert No. 53; *Gough v. C.R. Falkenham Backhoe Services*, 2007 NSHRC 4 (CanLII) (Hodder), Lancaster’s *Human Rights and Workplace Privacy*, November 1, 2007, eAlert No. 97, affirmed, 2008 NSCA 38 (CanLII); *Matheson v. Presbytery of Prince Edward Island*, 2007 CanLII 60951 (PE HRC) (Sherman), Lancaster’s *Gender, Equity and Work-Life Balance*, October 26, 2007, eAlert No. 16; *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10 (QL) (Hubbard), Lancaster’s *Human Rights and Workplace Privacy*, September/October, 1998; *Uzoaba v. Correctional Service of Canada*, 1994 CanLII 1636 (CHRT) (MacTavish), Lancaster’s *Human Rights and Workplace Privacy*, October, 1994; *Commission des droits de la personne du Québec c. Commission scolaire Deux-Montagnes*, 1993 CanLII 1202 (QC TDP) (Rivet), Lancaster’s *Human Rights and Workplace Privacy*, May, 1993; *Greensides v. Saskatchewan (Human Rights Commission)*, 1993 CanLII 8953 (SK QB), Lancaster’s *Human Rights and Workplace Privacy*, November, 1993.

of workplace discrimination or harassment is compensable in damages,¹³⁰ including, where the facts warrant it, damages for past and future income loss, pension loss, the costs of continuing treatment, and non-pecuniary damages such as pain and suffering.¹³¹

The Ontario *Human Rights Code* provides an exception to the principle of vicarious liability of employers in cases of harassment on prohibited grounds.¹³² However, the province's Divisional Court has ruled that the employer may nevertheless incur liability for harassment perpetrated by individual employees, officers or agents if management staff, upon becoming aware of the harassment, failed to take appropriate steps to prevent it, thereby creating a poisoned work environment.¹³³ Liability may also attach if the individual responsible for the harassment is a "directing mind" of the company.¹³⁴

130 *Laskowska v. Marineland of Canada Ltd.*, 2005 HRTO 30 (CanLII) (Garfield), Lancaster's *Human Rights and Workplace Privacy*, January 17, 2006, eAlert No. 57. See also *DC v. Canada Post Corp. & RT*, 2012 CHRT 29 (CanLII) (Garfield), Lancaster's *Gender, Equity and Work-Life Balance*, February 19, 2014, eAlert No. 80; *DN v. Toronto (City)*, 2010 HRTO 1023 (CanLII) (Hart), Lancaster's *Municipal Employment Law*, September 29, 2010, eAlert No. 35.

131 See, for example, *CUPE, Local 38 v. Calgary (City)*, 2013 CanLII 88297 (AB GAA) (Smith), Lancaster's *Municipal Employment Law*, July 21, 2014, eAlert No. 72; *OPSEU (Ranger) v. Ontario (Ministry of Community Safety and Correctional Services)*, 2013 CanLII 50479 (ON GSB) (Leighton), Lancaster's *Human Rights and Workplace Privacy*, January 30, 2014, eAlert No. 220; *Greater Toronto Airports Authority v. PSAC, Local 0004*, 2011 ONSC 487 (CanLII), Lancaster's *Labour Arbitration*, October 13, 2011, eAlert No. 145.

132 See s.46.3(1) of the *Code*.

133 *Ontario Human Rights Commission v. Farris*, 2012 ONSC 3876 (CanLII). See also *Baker v. Twiggs Coffee Roasters*, 2014 HRTO 460 (CanLII) (Carey), Lancaster's *Gender, Equity and Work-Life Balance*, July 10, 2014, eAlert No. 87.

134 See, e.g., *DW v. 2252466 Ontario Inc. o/a The Grounds Guys*, 2014 HRTO 1591 (Bhattacharjee), Lancaster's *Disability and Accommodation*, March 14, 2015, eAlert No. 216; *ATU, Local 107 v. Hamilton (City)*, 2013 CanLII 62266 (ON LA) (Waddingham), Lancaster's *Human Rights and Workplace Privacy*, September 29, 2014, eAlert No. 244; *HV v. Ben Wicks Pub & Bistro and DD*, 2013 HRTO 695 (CanLII) (Bhattacharjee), Lancaster's *Gender, Equity and Work-Life Balance*, November 7, 2013,

Discriminatory conduct by the union

As unions are subject to human rights legislation, they may be held jointly liable with the employer if a provision in a collective agreement or letter of understanding discriminates on a prohibited ground. Thus, in a case where a negotiated buyout program discriminated on the ground of disability, by excluding employees whose absence during the qualifying period was due to illness or injury, the Alberta Court of Appeal determined that the union had taken part in the creation of the program, and was equally responsible for its discriminatory effect.¹³⁵

Can an employer rely on a union's passive acquiescence in discriminatory contract terms to estop the union from grieving those same terms? A board of arbitration in Manitoba held that, as one of the important objectives of human rights legislation is the protection of Canadians from discrimination in the workplace, estoppel cannot be invoked to prevent a determination of whether human rights (in this case, of non-Christian teachers) have been violated.¹³⁶ The doctrine of estoppel applies to contractual rights, the board held; it has no application to a breach of human rights legislation.

The interplay between a union's *Charter* rights to freedom of expression and freedom of association, and the right of individuals not to be discriminated against by a union, was considered by the Ontario Court of Appeal in the 2015 *Taylor-Baptiste*

eAlert No. 76. For a Saskatchewan case in which joint liability was held to flow from the harasser's status as a "directing mind", see *JS v. RE and Shirwill Enterprises Ltd.*, Lancaster's *Gender, Equity and Work-Life Balance*, November/December, 2003.

135 *Canada Safeway Ltd. v. Alberta (Human Rights and Citizenship Commission)*, 2003 ABCA 246 (CanLII), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 448 (QL). On the other hand, in *UFCW, Locals 175 & 633 v. Metro Ontario Inc.*, 2015 CanLII 50986 (ON LA) (Gray), a cash buyout pursuant to the terms of a "voluntary exit program" was held to be a type of compensation from which it was permissible to exclude inactive employees, including those on long-term disability leave, the payment being described as "compensation for an employee's giving up a future wage stream".

136 *St. James Assiniboia Teachers' Assn. v. St. James Assiniboia School Division No. 2* (2001), 95 L.A.C. (4th) 262 (Graham), Lancaster's *Human Rights and Workplace Privacy*, March/April, 2001.

decision.¹³⁷ The Court in that case upheld a determination by the Human Rights Tribunal of Ontario¹³⁸ that derogatory comments on a union blog accusing a female manager of nepotism and incompetence, while sexist and offensive, did not constitute conduct “with respect to employment” or “in the workplace” as required to engage the protection of the province’s *Human Rights Code*.¹³⁹ The blog at issue was operated by the union’s president during a period of labour unrest and intense collective bargaining. The offending entries included one authored by the president, and one anonymously penned but approved for posting by the president. On appeal (from the Ontario Divisional Court’s decision, dismissing an application for judicial review), the complainant did not challenge the Tribunal’s finding that the blog posts were not made “in the workplace” within the meaning of s.5(2) of the *Code*. Instead, the appeal focused on the Tribunal’s conclusion that the impugned comments, on the specific facts of the case, were not “with respect to employment” within the meaning of s.5(1) of the *Code*. In making this determination, the Tribunal held that, in its role as an administrative tribunal exercising a statutory discretion, it was appropriate to rely on relevant *Charter* values, in this case the union president’s *Charter* expression and association rights,¹⁴⁰ as an interpretive aid, and to balance these rights against the complainant’s competing statutory right to be free from discrimination. The Tribunal summarized its reasoning as follows:

137 See *Taylor-Baptiste v. OPSEU*, 2015 ONCA 495 (CanLII), Lancaster’s *Public Service and Crown Agency Employment Law*, March 17, 2016, eAlert No. 109, leave to appeal to S.C.C. refused, 2016 CanLII 34004 (SCC), affirming *MTB v. OPSEU*, 2014 ONSC 2169 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, February 23, 2015, eAlert No. 251.

138 *Taylor-Baptiste v. OPSEU*, 2012 HRTO 1393 (CanLII) (Wright), Lancaster’s *Human Rights and Workplace Privacy*, October 31, 2012, eAlert No. 193, request for reconsideration dismissed, 2013 HRTO 180 (CanLII) (Wright).

139 Section 5(1) of the *Code* prohibits discrimination “with respect to employment”. Section 5(2) prohibits harassment “in the workplace”.

140 Respectively, ss.2(b) and 2(d) of the *Charter*.

Considering all [the] circumstances, I conclude that [the union president] did not discriminate against the applicant with respect to employment. His postings were made on issues of union-management concern, and while they relied upon sexist language, they were not gratuitous attacks unrelated to union business. There were no *Code*-based reverberations in the workplace and the applicant's principal concern was about the bringing of her personal life into the workplace. The applicant, as a manager, is a person with relative power in the workplace relationship with employees. Most important, union comments on workplace issues are constitutionally protected expression of opinion and exercise of freedom of association, and close to the core of those rights. Taking all this into account, I find that the respondents did not discriminate against the applicant with respect to employment.¹⁴¹

The Court of Appeal agreed. Moreover, it held that the Tribunal had reasonably balanced the relevant *Charter* values with the anti-discrimination objectives of the *Code* in determining that the president's blog posts did not amount to discrimination "with respect to employment" in violation of s.5(1) of the *Code*.

Systemic discrimination

In the *Action Travail des Femmes* case,¹⁴² the Supreme Court of Canada, drawing on Justice Rosalie Abella's *Report of the Commission on Equality in Employment*,¹⁴³ endorsed a definition of systemic discrimination as discrimination that "results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination". As the Court noted, the discrimination is then "reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job' ". Thus, "[t]o combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged". The Court in that case upheld an order of the Canadian Human Rights Tribunal imposing an "employment equity program" on the Canadian National Rail-

141 At para. 40.

142 *Canadian National Railway v. Canada (Canadian Human Rights Commission (Action Travail des Femmes))*, 1987 CanLII 109 (SCC).

143 Justice Rosalie Silberman Abella, October, 1984 (Abella Report).

way Company to address the problem of systemic discrimination in the hiring and promotion of women within the company. A finding of systemic discrimination has also been upheld by British Columbia's Court of Appeal in respect of employees whose disabilities contributed to their progression through a workplace attendance management program.¹⁴⁴ As the Quebec Court of Appeal has pointed out in another case,¹⁴⁵ statistical evidence, though not indispensable, is often useful in establishing the disproportionate exclusion of a group, from which an inference of systemic discrimination may be drawn.

In some jurisdictions, such as Ontario,¹⁴⁶ affirmative action programs which give preference to certain groups may be shielded from charges of "reverse discrimination" under human rights legislation, provided that approval is obtained from the appropriate human rights commission. Similarly, s.15(2) of the *Canadian Charter of Rights and Freedoms* provides that the guarantee of equality rights under s.15(1) does not preclude affirmative action programs. Moreover, in a number of jurisdictions, human rights tribunals have express authority to impose affirmative action programs on employers who have violated provisions of human rights legislation.¹⁴⁷ This remedial power has limits, however. In *Université Laval v. Commission des droits de la personne et des droits de la jeunesse*,¹⁴⁸ the Quebec Court of Appeal held that the province's Human Rights Tribunal did not

144 *Coast Mountain Bus Co. Ltd. v. CAW, Local 111*, 2010 BCCA 447 (CanLII), Lancaster's *Disability and Accommodation*, January 19, 2011, eAlert No. 140.

145 *Gaz metropolitain inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201 (CanLII). See also *Tanisma v. Montréal (Ville de)*, 2013 QCCS 2479 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, April 29, 2014, eAlert No. 227; *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 (CanLII), Lancaster's *Human Rights and Workplace Privacy*, October 29, 2010, eAlert No. 146.

146 *Human Rights Code*, s.14.

147 See, e.g., *Canadian Human Rights Act*, s.53(2)(a); *B.C. Human Rights Code*, s.37(2)(c)(ii); *Manitoba Human Rights Code*, s.43(2)(e); *Quebec Charter of Human Rights and Freedoms*, s.88; *Saskatchewan Human Rights Code*, s.47; *Nunavut Human Rights Act*, s.34(3)(a)(viii)).

148 2005 QCCA 27 (CanLII), Lancaster's *College and University Employment Law*, July/August, 2005.

have jurisdiction to impose one form of compensation system over another where neither was itself inherently discriminatory. Rather, in that case, it was the existence of two different pay/compensation systems for employees in male- and female-dominated jobs which was the source of the discriminatory treatment. As a result, the Court concluded that the Tribunal's remedial jurisdiction in the circumstances was limited to ordering the cessation of the discriminatory acts, prohibiting the use of a system that was discriminatory, and ordering temporary measures to prevent similar acts in the future.¹⁴⁹

Human rights remedies

Human rights tribunals (and by extension labour arbitrators) have wide-ranging remedial powers, including the power to make declarations and to order monetary and non-monetary relief to rectify discrimination and other human rights violations. The aim of a human rights remedy is generally to “make whole” the complainant, that is, restore the complainant as far as reasonably possible to the position that he or she would have been in had the discriminatory acts not occurred.¹⁵⁰ Monetary remedies may include compensation for wage loss, expenses and other direct financial losses suffered by the complainant (special damages), as well as compensation for intangible losses such as injury to dignity, feelings and self-respect (general damages). In assessing the appropriate quantum of an award of general damages for injury to dignity, feelings and self-respect, tribunals have considered factors such as humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the complainant; the experience of victimization; the vulnerability of the complainant; and the seriousness of the offensive treatment.¹⁵¹ The courts

149 See also *CUPE, Local 1999 v. Lakeridge Health Corp. and the Pay Equity Hearings Tribunal*; *CUPE, Local 1734 v. York Region District School Board and the Pay Equity Hearings Tribunal*, 2012 ONSC 2051 (CanLII), Lancaster's *Gender, Equity and Work-Life Balance*, July 10, 2012, eAlert No. 61, holding that pay equity legislation does not require the harmonization of wage grids but only of the top pay rates in an establishment.

150 See, for example, *Islam v. Big Inc.*, 2013 HRTO 2009 (CanLII) (Keene); and *Khan v. 820302 Ontario*, 2010 HRTO 265 (CanLII) (Whist).

151 *Sanford v. Koop*, 2005 HRTO 53 (CanLII) (Gottheil).

have recognized that there is no ceiling on awards of general damages, and tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the human rights legislation by effectively creating a “licence fee” to discriminate.¹⁵² On the other hand, in awarding damages, the tribunal must exercise its discretion on a “principled basis” and ensure there is a causal link between the discriminatory practice and the loss claimed.¹⁵³

Non-monetary remedies may include declaratory orders, reinstatement without loss of seniority,¹⁵⁴ promotion, an offer of employment, an apology or expression of regret,¹⁵⁵ and/or a letter of reference. “Public interest” or systemic remedies may include directing the employer to develop non-discriminatory policies and procedures, to implement proactive measures to eliminate discriminatory barriers, and to implement education and training programs on human rights law requirements, possibly in consultation with a qualified consultant or the Human Rights Commission (in those jurisdictions that have one).¹⁵⁶ Tribunals generally

152 *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), Lancaster’s *Human Rights and Workplace Privacy*, November 7, 2008, eAlert No. 110; *Shelter Corp. v. Ontario (Human Rights Commission)*, 2001 CanLII 28414 (ON SC).

153 *Canadian National Railway v. Seeley*, 2013 FC 117 (CanLII), Lancaster’s *Human Rights and Workplace Privacy*, November 7, 2013, eAlert No. 218, citing *Chopra v. Canada (Attorney General)*, 2007 FCA 268 (CanLII).

154 See, for example, *Canadian National Railway v. Seeley* (FC), cited above.

155 See, for example, *Nkwazi v. Canada (Correctional Service)*, 2001 CanLII 6296 (CHRT) (Mactavish). On the other hand, the B.C. Human Rights Tribunal has refused to order an “expression of regret” out of the concern that such expressions are not sincere, and are thus of no value to the complainant: *Cavanaugh v. Sea to Sky Hotel and Mohajer (No. 2)*, 2010 BCHRT 209 (CanLII) (Beharrell).

156 See, for example, *Canadian National Railway v. Seeley* (FC), cited above; *Hutchinson v. British Columbia (Ministry of Health)*, [2004] B.C.H.R.T.D. No. 55 (QL). See also Human Rights Legal Support Centre, “Non-financial remedies” and “Public interest remedies” excerpted from *What remedies are available to me at the Human Rights Tribunal of Ontario?*

have no authority, however, to require that such systemic remedies be subject to the approval of the complainant.¹⁵⁷

Checklist

- Does the collective agreement expressly prohibit discrimination on the grounds enumerated in human rights legislation? Does it supplement the applicable legislation with additional grounds on which discrimination in the workplace and in the administration of the collective agreement is disallowed?
- Does the collective agreement require equal pay for equal work, or equal pay for work of equal value? Does it prohibit sexual and other forms of harassment? Does it provide for affirmative action programs to redress historical inequities in hiring and promotion practices?
- Does the collective agreement specify the circumstances in which the usual job posting or bumping procedures may be set aside in order to facilitate an accommodation?
- Does the collective agreement address the retention of seniority where an employee is accommodated outside his or her classification or department, or outside the bargaining unit altogether?

¹⁵⁷ *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII), Lancaster's *Headlines*, May 29, 2014.