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Stewart v. Elk Valley Coal Corp.: The Rehabilitation of Addiction Disability Law in Canada

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

Canadian human rights law prohibits employers from discriminating against employees with disabilities and protects employees' right to workplace accommodation to the point of undue hardship. However, the analysis of the case law illustrates that Canadian legal decision makers have not consistently applied the fundamental human rights laws and principles to cases involving individuals with drug and alcohol addiction disability. *Stewart v. Elk Valley Coal Corp.* provided the Supreme Court of Canada with the opportunity to provide much needed clarity and confirm the correct approach to be applied to claims of discrimination and accommodation on the basis of drug and alcohol addiction. This decision was fatally flawed in its application of the law. Despite this, *Elk Valley* has provided guidance with respect to the principles to be applied in addiction disability cases, resulting in a progressive movement towards the broad, liberal human rights approach to drug and alcohol addiction disability.

Keywords

Disability, Labour, Employment, Discrimination, Accommodation, Undue hardship, Human rights, Addiction, Drugs, Alcohol.

Summary for Lay Audience

Canadian human rights legislation prohibits employers from discriminating against employees on the basis of protected human rights grounds, such as disability, and protects employees' right to workplace accommodation on the basis of their protected characteristic. Under Canadian human rights law, drug and alcohol addiction constitutes a form of disability, attracting human rights protections.

As a human right, the right to be accommodated for a disability must be applied broadly and exceptions should be interpreted narrowly, in order to uphold the fundamental purpose of human rights legislation. The Supreme Court of Canada has affirmed that all protected human rights grounds are to be treated equally and the same discrimination and duty to accommodate analyses apply to all protected grounds. Thus, Canadians suffering from addiction are entitled to equal protection under the law as those with any other protected human rights characteristic.

In 2017, the Supreme Court of Canada released the *Stewart v. Elk Valley Coal Corp.* decision, which failed to apply well-established human rights laws and principles to the termination of an employee with an addiction for violating the employer's drug policy. This thesis provides an extensive survey of the jurisprudence on workplace discrimination and accommodation on the basis of addiction disability, over the last 12 years, and examines the treatment of this particular human rights ground by legal decision makers across Canada. It analyzes whether Canadian legal decision makers have applied and currently apply fundamental human rights laws and principles to cases of drug and alcohol addiction to reveal any discrepancies between the black letter law and the actual application of the law to addiction disability. This research examines whether *Elk Valley* set a precedent or followed a line of decisions on addiction disability that also diverge from well-established human rights law and analyzes the implications of *Elk Valley* on Canadian addiction disability law to determine whether *Elk Valley* is the new legal norm, thereby shifting the direction of Canadian human rights law, or a judicial misstep among the landscape of workplace disability discrimination and accommodation case law that can be corrected in the coming jurisprudence.

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Chapter 1

1 Introduction: Addiction Disability and the Duty to Accommodate

Canadian human rights law prohibits employers from discriminating against employees on the basis of protected grounds,¹ such as age, sex, race, sexual orientation, religion and disability, and protects employees' right to workplace accommodation on the basis of a protected human rights ground. Every single piece of Canadian human rights legislation enshrines disability as a protected human rights ground.² Jurisprudence establishes the acceptance of drug and alcohol addiction as a form of disability and some human rights statutes even define disability to specifically include drug and alcohol dependence.³ Human rights protections extend to drug and alcohol addiction by virtue of the legal recognition of addiction as a form of disability. Under Canadian law, the use of drugs or alcohol constitutes a disability "where an individual has reached a stage of addiction or dependency."⁴ Casual or recreational substance use does not reach this threshold and, therefore, does not receive human rights protections.

¹ The terms "protected human rights ground" and "prohibited ground of discrimination," which appear throughout this thesis, are used interchangeably.

² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*Canadian Charter*]; *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1) [*Canadian HRA*]; British Columbia's *Human Rights Code*, RSBC 1996, c 210, s 13(1); *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(1); *The Saskatchewan Human Rights Code*, RSS 1979, c S-24.1, s 2(1)(m.01)(vii); Manitoba's *The Human Rights Code*, CCSM c H175, s 9(2)(1); Ontario's *Human Rights Code*, RSO 1990, c H19, s 5(1) [*Ontario HRC*]; Quebec's *Charter of Human Rights and Freedoms*, CQLR 2016, c C-12, s 10 refers to "handicap;" Newfoundland and Labrador's *Human Rights Act*, SNL 2010, c H-13.1, s 9(1); New Brunswick's *Human Rights Act*, RSNB 2011, c 171, s 2.1(h)-(i); Nova Scotia's *Human Rights Act*, RSNS 1989 c 214, s 5(1) [*Nova Scotia HRA*]; Prince Edward Island's *Human Rights Act*, RSPEI 1988, c H-12, s 1(1)(d); Nunavut's *Consolidation of Human Rights Act*, SNU 2003, c12, s 7(1) [*Nunavut HRA*]; Yukon's *Human Rights Act*, RSY 2002, c116, s 7(h); and Northwest Territories' *Human Rights Act*, SNWT 2002, c18, s 5(1).

³ *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18 [*Entrop*]; *Handfield v North Thompson School District No 26*, [1995] BCCHR D No 4; *British Columbia v British Columbia Government and Service Employees' Union*, [2007] BCCA 37; *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593; and *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 [*Wright*]. *Canadian HRA*, *supra* note 2, s 25; *Nova Scotia HRA*, *supra* note 2, s 3(1)(vii); and *Nunavut HRA*, *supra* note 2, s 1.

⁴ *Entrop v Imperial Oil Ltd*, [1995] 23 CHRR D/196 at para 24, affirmed in *Entrop*, *supra* note 3.

Of course, an employee's drug or alcohol addiction can be a legitimate concern for employers, especially if the employee is impaired at work. For instance, the impairment of an employee's judgment and ability, especially in a safety sensitive work environment, can pose a serious risk of harm and ultimately threaten the employer's operations. Nevertheless, employers have a legal duty to accommodate employees with an addiction disability to the point of undue hardship. An employer cannot disadvantage, terminate or refuse to employ an individual as a result of their disability, unless it has exhausted available accommodative efforts or the decision is based on a bona fide occupational requirement, thereby fulfilling its legal obligations.

The Supreme Court of Canada (SCC) has repeatedly asserted that human rights legislation must be given a liberal, contextual and purposive interpretation.⁵ As a human right, the right to be accommodated for a disability must be applied broadly and exceptions should be interpreted narrowly, in order to uphold the fundamental purpose of human rights legislation.⁶ The SCC has also affirmed that there is no hierarchy of protected human rights grounds and all grounds are to be treated equally.⁷ Thus, Canadians suffering from drug and alcohol addiction are entitled to equal protection under the law as individuals with any other protected human rights characteristic.

1.1 Fact Pattern

Consider the following case. Mr. S, a plant loader operator in a coalmine with 9 years of service, is involved in a workplace incident. While operating the loader, he hit and broke the mirror of a stationary truck. Pursuant to the employer's drug and alcohol policy, which enabled it to require an employee to undergo testing following a significant workplace incident, the employee's supervisor directed Mr. S to submit to a urine test. He

⁵ *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 551 [*Simpsons-Sears*]; *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at paras 43-44 [*Meiorin*]; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 31 [*Bombardier*].

⁶ *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525 [*Bergevin*].

⁷ *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15.

subsequently tested positive for cocaine and was suspended. The employer met with Mr. S and, during this meeting, he admitted to using cocaine on his days off and indicated that he failed to recognize that he had a drug problem prior to the accident but subsequently came to realize he was addicted. The employer's drug and alcohol policy required employees to disclose dependence issues before any substance-related workplace incident occurred; under this policy, employees disclosing their substance issue or seeking rehabilitative assistance after a workplace incident and positive drug or alcohol test may be subject to termination, considering safety concerns and the importance of deterrence. Accordingly, the employer decided to terminate Mr. S for violating the policy and indicated that it would consider an application for new employment after 6 months and reimburse 50% of his rehabilitation program costs.

The union filed a human rights complaint, alleging that the employer discriminated against Mr. S and fired him due to his addiction. The Tribunal concluded that Mr. S was not terminated because of his addiction but for breaching the employer's drug and alcohol policy, which required him to disclose his addiction before an accident. The Tribunal held that the employee's addiction disability was not a factor in his termination and found no discrimination; the termination, pursuant to the policy, was not imposed due to his disability but because of his failure to stop using drugs and failing to disclose his addiction to the employer prior to the workplace incident. Furthermore, the Tribunal concluded that, imposing a lesser punishment would reduce the deterrent effect of the policy and constitute undue hardship on the employer, in light of its safety responsibilities.

The union appealed this decision. The trial judge concluded that the employer terminated Mr. S for breaching the workplace policy and not for his drug addiction. The employee's addiction was not a factor in his termination and, thus, the termination was not discriminatory. However, the trial judge found that the employer failed to satisfy its duty to accommodate to the point of undue hardship, as the employee's denial led him to think that he had nothing to report under the workplace policy; therefore, the no-risk self-reporting constituted inadequate accommodation.

Both the union and employer appealed this decision in part. The Court of Appeal held that the termination did not amount to discrimination and concluded that the employer accommodated Mr. S to the point of undue hardship.

Mr. S appealed the decision to the SCC. The majority of the Court found sufficient evidence supporting the Tribunal's conclusion that the employer did not terminate Mr. S because of his drug addiction, but for breaching the employer's drug policy. The majority relied on the Tribunal's findings that denial did not prevent Mr. S from disclosing his addiction prior to the accident because he knew he should not take drugs before work, he had the ability to decide not to take them and he had the capacity to disclose his drug use. The SCC majority accepted the Tribunal's conclusion that the employee's addiction was not a factor in his termination. The Court found the Tribunal's decision to be reasonable and dismissed the appeal.

This case is *Stewart v. Elk Valley Coal Corp.*⁸ Although people suffering from addiction disability are entitled to human rights protections under the law, *Elk Valley* reveals that Canadian legal decision makers continue to diverge from the broad, flexible, liberal human rights approach and impose a narrower standard in cases of alleged discrimination on the basis of addiction disability and accept a low standard of direct objective evidence of employers' undue hardship defense, contrary to human rights jurisprudence and principles. Canadian jurisprudence affirms that all human rights are to be treated equally and applied broadly, while exceptions must be narrowly interpreted. Nevertheless, the SCC accepted the conclusion that Elk Valley Coal Corporation terminated Ian Stewart, not because he had an addiction, but because he breached the workplace drug policy, despite the fact that his drug addiction impaired his ability to comply with the drug policy. The *Elk Valley* decision clearly departs from fundamental human rights laws and principles and reflects a lack of understanding of the realities of addiction. This thesis investigates how Canadian legal decision makers apply well-established human rights laws and principles in cases of workplace discrimination and accommodation on the basis

⁸ 2017 SCC 30 [*Elk Valley*].

of drug and alcohol addiction and examines the implications of the *Elk Valley* decision on subsequent addiction disability case law.

1.2 Chapter Overview

1.2.1 Chapter 2: Canadian Human Rights Law

Chapter 2 establishes the foundational framework of this research by providing an overview of Canadian workplace discrimination and accommodation law. The chapter outlines human rights legislation and interpretive principles as well as the pivotal prima facie discrimination and workplace accommodation analyses.

The *Canadian Charter of Rights and Freedoms* specifically protects against discrimination on the basis of disability;⁹ Canada is the first country in the world to include such a protection in its constitution. Canadian human rights legislation prohibit employers from discriminating against employees on the basis of an enumerated protected human rights ground and protect employees' right to workplace accommodation. Under Canadian human rights law, every employer has the duty to accommodate an employee with a protected characteristic, including a drug or alcohol addiction, to the point of undue hardship.

The SCC has consistently confirmed the quasi-constitutional status of human rights legislation¹⁰ and established that human rights statutes must be interpreted in a liberal, contextual and purposive fashion¹¹ and in light of the *Canadian Charter* and its values.¹²

⁹ *Supra* note 2, s 15(1): “Every 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.”

¹⁰ *Béliveau St-Jacques v Fédération des employées et employés de services publics inc*, [1996] 2 SCR 345 at 402, reproduced in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 28; *de Montigny v Brossard (Succession)*, 2010 SCC 51 at para 45; and *Bombardier*, *supra* note 5 at para 30.

¹¹ *Simpsons-Sears*, *supra* note 5 at 551; *Meiorin*, *supra* note 5 at paras 43-44; and *Bombardier*, *supra* note 5 at para 31.

¹² *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 21.

Human rights are to be given a broad interpretation and exceptions to these rights must be interpreted narrowly.¹³

The chapter details the prima facie discrimination test, established by the SCC in *Moore v. British Columbia (Education)*,¹⁴ to be applied in cases of alleged discrimination. In order to establish prima facie discrimination, the employee must demonstrate that they have a protected characteristic, experienced an adverse impact and the protected characteristic was a factor in the adverse impact.¹⁵ Once a prima facie case of discrimination has been established, the burden shifts to the employer to justify the conduct and, if it cannot be justified, discrimination will be found.¹⁶

The employer must prove that it made every reasonable effort to accommodate the employee's disability, short of undue hardship. Applying the *Meiorin* test, the legal decision maker must determine whether the employer sufficiently justified the impugned standard by establishing that it had adopted the standard for a purpose rationally connected to the performance of the job and in an honest and good faith belief that it was necessary to fulfill the legitimate work-related purpose and that the standard is reasonably necessary to accomplish the legitimate work-related purpose.¹⁷ In order to prove that the standard is reasonably necessary, the employer must demonstrate that it is impossible to accommodate the individual without undue hardship.¹⁸

The SCC has provided a non-exhaustive list of factors to consider when assessing an employer's duty to accommodate to the point of undue hardship: financial cost, disruption of a collective agreement, problems with employee morale, interchangeability of the workforce and facilities, size of the employer's operations and safety.¹⁹ Recent

¹³ *Bergevin*, *supra* note 6.

¹⁴ 2012 SCC 61 [*Moore*].

¹⁵ *Ibid* at para 33.

¹⁶ *Ibid*.

¹⁷ *Meiorin*, *supra* note 5 at para 54.

¹⁸ *Ibid*.

¹⁹ *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 at 521.

decisions also indicate the emergence of a seventh factor: legitimate operational requirements of a workplace.²⁰ Legal decision makers must assess the employer's duty to accommodate to the point of undue hardship with common sense and flexibility, in light of the circumstances of the particular case.²¹ The amount of hardship required to satisfy the employer's duty to accommodate must be substantial: "More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable."²²

Safety is the most frequently raised undue hardship factor in disability cases, which will be evident in the cases examined in this thesis. The law indicates that employers cannot make assumptions about disability and safety without conducting an individualized assessment of the employee.²³ Employers must present convincing evidence to substantiate a safety claim because impressionistic or anecdotal evidence regarding the magnitude of risk are inadequate. Claims of anticipated hardships on the basis of proposed accommodations should not be accepted if based solely on speculative or unsubstantiated concern that certain negative consequences might or could follow the employee's accommodation.²⁴ Although safety sensitive and zero-tolerance rules are often features of a modern workplace, they cannot be advanced to defeat a workplace accommodation if a tolerable range of risk would allow an employee to work productively.²⁵

1.2.2 Chapter 3: Understanding Drug and Alcohol Addiction

Chapter 3 provides an overview of drug and alcohol addiction, including its prevalence, symptoms, diagnostic criteria, potential causes, the impact addiction can have on one's

²⁰ Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace," in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 211.

²¹ *Meiorin*, *supra* note 5 at para 63.

²² *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at 984.

²³ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*].

²⁴ *Ibid* at para 41; *Meiorin*, *supra* note 5 at paras 78-79.

²⁵ Lynk, *supra* note 20 at 230-231.

employment and medical treatment. The chapter also establishes the theoretical frameworks for understanding disability generally and drug and alcohol addiction, in particular.

Chapter 3 outlines the three leading models of disability: the biomedical model, economic model and sociopolitical model. The biomedical and economic models characterize disability as an individual pathology²⁶ and are informed by notions of pity, charity and social segregation.²⁷ The biomedical model focuses on the functional abilities and limitations of the individual and the economic model concentrates on their ability to perform occupational roles and skills.²⁸ The sociopolitical model, on the other hand, characterizes disability as a social pathology²⁹ and stresses the importance of the social environment and examines its impact on individuals with disability.³⁰ Unlike the biomedical and economic approaches, the sociopolitical model views disability as a social construct and espouses a human rights approach.³¹

The legal human rights perspective of addiction disability is derived from human rights legislation and jurisprudence. Under Canadian human rights law, drug and alcohol addictions constitute a disability and are afforded human rights protections. The SCC has affirmed that all protected human rights grounds are to be treated equally and subjected to the same discrimination and duty to accommodate analyses. Thus, Canadians suffering from addiction disability are entitled to equal protection under the law. Employers are prohibited from discriminating against individuals on the basis of their drug or alcohol addiction and have a legal duty to accommodate these individuals in the workplace to the point of undue hardship.

²⁶ David Hosking, “Critical Disability Theory” (Paper delivered at the 4th Biennial Disability Studies Conference, Lancaster University, UK, 2-4 September 2008) at 6-7.

²⁷ Lynk, *supra* note 20 at 191.

²⁸ Harlan Hahn, “The Political Implications of Disability Definitions and Data” (1993) 4:2 *Journal of Disability Policy Studies* 41 at 43.

²⁹ Hosking, *supra* note 26 at 6-7.

³⁰ Hahn, *supra* note 28 at 43.

³¹ Lynk, *supra* note 20 at 191.

Traditionally, theories of addiction disability have been divided into the moral model and the medical model. The moral model perceives drug and alcohol addiction as “a choice characterized by voluntary behavior”³² and ultimately a “moral failure.”³³ However, neuroscience research in the past two decades has increasingly supported the notion that addiction is a chronic brain disease. The medical model describes addiction as “a primary, chronic, neurobiologic disease, with genetic, psychosocial, and environmental factors influencing its development and manifestations.”³⁴ Addiction typically involves craving for the substance, loss of control of the amount or frequency of use, the compulsion to use and use despite harmful consequences, including physical, psychological, interpersonal, financial and legal problems.³⁵ Addictions are characterized by an inability to consistently abstain from using the substance and, like many other chronic diseases, often involve cycles of relapse and remission.³⁶ Although the moral model of addiction has largely fallen out of favour amongst healthcare professionals, the stigma associated with drug and alcohol addiction continues to exist. More recently, the biopsychosocial model of addiction has developed to expand on the medical perspective, creating a multidimensional paradigm that recognizes the complex biological, psychological and social components of addiction.

1.2.3 Chapters 4-6: Exploring Addiction Disability Jurisprudence

This thesis provides an extensive survey of the recent jurisprudence on workplace discrimination and employers’ duty to accommodate employees struggling with addiction disability and examines the treatment of this particular human rights ground by legal decision makers across Canada. Adopting the doctrinal method, it analyzes whether

³² Edmund Henden, Hans Olav Melberg & Ole Jørgen Røgeberg, “Addiction: Choice or Compulsion?” (2013) 4:77 *Front Psychiatry* at 1.

³³ Hanna Pickard, Serge Ahmed & Bennett Foddy, “Alternative Models of Addiction” (2015) 6:20 *Front Psychiatry* at 1.

³⁴ Seddon Savage et al, “Definitions Related to the Medical Use of Opioids: Evolution Towards Universal Agreement” (2003) 26:1 *Journal of Pain & Symptom Management* 655 at 662.

³⁵ Marilyn Herie et al, *Addiction: An information guide* (Toronto: Centre for Addiction and Mental Health, 2010) at 2.

³⁶ American Society of Addiction Medicine, “Definition of Addiction” (2019), online: <<https://www.asam.org/resources/definition-of-addiction>>.

Canadian legal decision makers have applied and currently apply fundamental human rights laws and principles to cases of drug and alcohol addiction to reveal any discrepancies between the black letter law and the actual application of the law to addiction disability. Specifically, this research examines whether *Elk Valley* sets a precedent or, rather, follows a line of decisions on addiction disability that also appear to diverge from well-established human rights law and analyzes the implications of the recent SCC decision. This thesis seeks to determine whether *Elk Valley* is the new legal norm, thereby shifting the direction of Canadian human rights law, or a judicial misstep among the landscape of workplace disability discrimination and accommodation case law that can be corrected in the coming jurisprudence.

To uncover and illustrate patterns in the jurisprudence, Chapters 4, 5 and 6 chronologically examine various cases across Canada on workplace discrimination and accommodation on the basis of drug and alcohol addiction, from 2008 to present. As a matter of practicality, this thesis does not review all the relevant decisions released in the past 12 years. I deliberately selected arbitration, tribunal and court cases, across different jurisdictions, decided in favor and against the employee seeking accommodation for their addiction to illustrate the different legal approaches applied to addiction disability in the years prior to and following the release of the 2017 *Elk Valley* decision. The selected cases are representative of the Canadian jurisprudence on addiction disability during these time periods.

The question of whether the *Elk Valley* decision is a judicial misstep is determined by analyzing the decision in light of the fundamental, well-established human rights laws and principles described in Chapter 2 that are meant to be applied to all human rights grounds. Examining the cases released in the wake of the SCC's decision in *Elk Valley* illustrates the current direction of the addiction disability law landscape.

1.2.3.1 Chapter 4: Pre-*Stewart v. Elk Valley Coal Corp.*

In order to establish the legal context necessary to understand *Elk Valley*, Chapter 4 of the thesis analyzes the addiction case law preceding the SCC decision. In Canadian labour law, there have historically been two competing schools of thought on how to approach

workplace misconduct arising from drug and alcohol addiction: the disciplinary approach and the human rights approach. The traditional disciplinary approach, which is rooted in the long-standing arbitral approach to culpable misconduct, assesses whether the employer had just cause to discipline or terminate the employee and whether the disciplinary action was excessive in the circumstances. Under this approach, the employee's addiction is merely considered a mitigating factor in determining the appropriate discipline, and not a trigger for the application of the discrimination analysis and duty to accommodate. The human rights approach, on the other hand, originated from human rights legislation and the statutory grant of power incorporated in labour relations legislation, enabling arbitrators to interpret and apply human rights statutes.³⁷ Applying the human rights approach, the arbitrator seeks to determine whether the employee's misconduct is connected to their addiction disability and, if a compelling connection can be established, the analysis centers on whether the employer fulfilled its duty to accommodate the employee to the point of undue hardship.

The hybrid disciplinary approach developed as a middle ground between the disciplinary and human rights approaches, integrating the traditional disciplinary analysis with accommodation principles, and gained popularity in the context of addiction disability. Under this approach, the legal decision maker applies a disciplinary or just cause analysis to the voluntary, culpable aspects of the employee's misconduct and applies the human rights analysis to the involuntary, non-culpable components causally connected to the disability.³⁸

Chapter 4 analyzes eight cases from 2008 to 2016, prior to the release of the SCC's decision in *Elk Valley: British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*,³⁹ *New Flyer Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-*

³⁷ For example, section 48(12)(j) of the Ontario *Labour Relations Act, 1995*, SO 1995, c 1, Sched A.

³⁸ Brian Etherington, "Recent Developments in the Duty to Accommodate Disabilities" in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook 2012-2013 (Second Series)* (Toronto: Lancaster House, 2012) 403 at 406.

³⁹ 2008 BCCA 357.

Canada), *Local 3003*,⁴⁰ *Wright v. College and Association of Registered Nurses of Alberta (Appeals Committee)*,⁴¹ *Seaspan ULC v. International Longshore & Warehouse Union, Local 400*,⁴² *Canadian National Railway v. Teamsters Canada Rail Conference*,⁴³ [2015] 122 CLAS 319,^[L] [SEP] *Public Service Alliance of Canada v. Saskatchewan Gaming Corp.*,⁴⁴ *Ontario Nurses' Association v. Sunnybrook Health Sciences Centre*⁴⁵ and *McNulty v. Canada Revenue Agency*.⁴⁶ These cases illustrate the divergent approaches that have commonly been applied to addiction cases by legal decision makers across Canada—ranging from the broad, liberal human rights approach, reflecting an understanding and appreciation of the features and challenges of addiction disability, to the narrow, stringent approach, concerned with choice, control and causal connections—and provide the legal background for analyzing and understanding the *Elk Valley* decision.

1.2.3.2 Chapter 5: Analysis of *Stewart v. Elk Valley Coal Corp.*

Elk Valley is the first addiction disability accommodation case to be heard by the SCC. It provided the Court with the opportunity to address the apparent inconsistencies in the legal approach applied to addiction disability cases and offer much needed clarification. Chapter 5 takes an in-depth look at the case of *Elk Valley*. It summarizes and examines the previous decisions of the Human Rights Tribunal, Court of Queen's Bench of Alberta and Court of Appeal of Alberta and the SCC decision, with a particular emphasis on the latter, including the majority, partial dissent and dissenting decisions of the Court. The chapter analyzes the legal reasoning adopted in these decisions from a human rights perspective and with a sociopolitical understanding of addiction, grounded in human rights principles, legislation and jurisprudence and illustrates how the decisions depart

⁴⁰ [2010] MGAD No 43.

⁴¹ *Wright, supra* note 3.

⁴² [2014] BCCAAA No 108.

⁴³ [2015] 122 CLAS 319,^[L] [SEP]

⁴⁴ [2015] SLAA No 27.

⁴⁵ [2016] OLAA No 361.

⁴⁶ 2016 PSLREB 105.

from these fundamental human rights laws and principles and reflect a lack of understanding of the realities of addiction.

In *Elk Valley*, the SCC affirmed the prima facie discrimination test articulated in *Moore* and concluded that no additional requirements are to be imported into the analysis. The SCC asserted that, in order to establish prima facie discrimination, the protected human rights ground must merely be a factor in the adverse impact. Nevertheless, the majority of the Court found sufficient evidence supporting the Tribunal's decision that Stewart was not terminated for his addiction, but for breaching the drug policy, and concluded that it was reasonable for the Tribunal to find no prima facie discrimination. In finding that Mr. Stewart's termination was not discriminatory, based on the superficial distinction that Elk Valley terminated him for breaching the employer's drug policy, and not for his addiction disability, the majority demonstrated faulty legal reasoning and departed from fundamental human rights laws and principles as well as the modern scientific understanding of addiction.

1.2.3.3 Chapter 6: Post-*Stewart v. Elk Valley Coal Corp.*

Now, three years later, many decisions have been decided in the wake of the 2017 *Elk Valley* decision. Chapter 6 explores the addiction disability jurisprudence following the SCC's decision in *Elk Valley* to examine the implications of the decision and the development of new patterns in Canadian addiction disability law. This chapter analyzes five cases that have been decided in the post-*Elk Valley* era: *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*,⁴⁷ *Humber River Hospital v. Ontario Nurses' Association*,⁴⁸ *Regional Municipality of Waterloo (Sunnyside Home) v. Ontario Nurses' Association*,⁴⁹ *Canadian Pacific Railway v. Teamsters Canada Rail Conference*⁵⁰ and *Ontario Nurses' Association v. Cambridge Memorial Hospital*.⁵¹ These

⁴⁷ [2018] OLAA No 119.

⁴⁸ [2018] OLAA No 416.

⁴⁹ [2019] OLAA No 16.

⁵⁰ [2019] 139 CLAS 27.

decisions reveal new trends in the jurisprudence and the future direction of addiction disability law in Canada.

A review of these cases suggests that the *Elk Valley* decision has changed the landscape of addiction law. The decisions illustrate a shift towards a broad, liberal human rights approach to addiction disability. Relying on the SCC's decision in *Elk Valley*, arbitrators and judges have rejected the notion that there must be more than a mere connection between the addiction and adverse impact and the imposition of additional factors and considerations in the prima facie discrimination analysis. In the post-*Elk Valley* era, legal decision makers have required employers to provide objective evidence of their accommodation efforts and alleged undue hardship, even in the context of safety-sensitive workplaces. The legal decisions in the wake of *Elk Valley* have adhered to the well-established human rights approach to discrimination and workplace accommodation and signify a change in the landscape of addiction disability case law.

1.3 Terminology

The terms substance use disorder, substance abuse and substance dependence are commonly used in association with addiction and are adopted by sources cited in this thesis. These different diagnostic terms reflect the changing approach to understanding and diagnosing addiction. The *Diagnostic and Statistical Manual of Mental Disorders* previously categorized substance use issues into two diagnoses: substance abuse and substance dependence. This distinction “was based on the concept of abuse as a mild or early phase and dependence as the more severe manifestation.”⁵² The current edition of the *Diagnostic and Statistical Manual of Mental Disorders* combines the previously separate diagnostic categories of substance abuse and substance dependence into a single

⁵¹ 2019 ONSC 3951.

⁵² American Psychiatric Association, “Substance-Related and Addictive Disorders” (2013), online: < <https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets> > at 1.

disorder called substance use disorder.⁵³ The broad diagnosis of substance use disorder refers to a problematic pattern of drug or alcohol use that results in clinically and functionally significant impairment, such as social, physical, psychological and interpersonal problems. The severity of the disorder is measured on a continuum, ranging from mild to severe.

Over the years, various terms have been used to describe the different stages and severity of addiction. Although “addiction” is not applied as a diagnostic term in the *DSM-5*, it is commonly used to describe severe substance use problems. The term addiction indicates “the most severe, chronic stage of substance-use disorder, in which there is a substantial loss of self-control, as indicated by compulsive drug taking despite the desire to stop taking the drug. In the *DSM-5*, the term *addiction* is synonymous with the classification of severe substance-use disorder.”⁵⁴ Although the *DSM-5* does not refer to addiction as a specific diagnosis, the term is still regularly used amongst the medical community and commonly adopted in legal decisions. Thus, for the purposes of this thesis, I will continue to use the term addiction. However, when a source refers to another term, I will adopt the terminology used in the cited material in order to avoid the misinterpretation of the findings, as the meaning of these terms may vary slightly.

1.4 Thesis Objectives

Canadians suffering from addiction are entitled to equal protection under the law as individuals with any other protected human rights characteristic. Legal decision makers are to treat all protected human rights grounds equally and apply the same legal tests to all protected grounds. However, cases like *Elk Valley* illustrate that legal decision makers diverge from the well-established liberal, broad human rights approach and subject discrimination and accommodation claims on the basis of addiction to a higher standard, thus making it relatively difficult for the employee to have a successful case.

⁵³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Publishing, 2013) [*DSM-5*].

⁵⁴ Nora Volkow, George Koob & Thomas McLellan, “Neurobiologic Advances from the Brain Disease Model of Addiction” (2016) 374:4 *New England Journal of Medicine* 363 at 364.

Human rights law and principles are essentially ineffective if they are not being applied consistently. The inconsistency between the stated law and the application of the law to this particularly vulnerable group is a significant injustice that warrants critical attention. Addressing this issue is the first step to remedying the systemic injustice perpetuated by legal decision makers. The objective is to identify and raise awareness of the disparity between the prescribed law and the actual application of the law in cases involving vulnerable individuals with addiction to spark a conversation about practical solutions to minimize this discrepancy and remedy the apparent differential treatment of addiction disability by the legal system.

Chapter 2

2 Canadian Workplace Discrimination and Accommodation Law

Canadian human rights legislation prohibits employers from discriminating against employees on the basis of enumerated protected grounds, such as age, religion, race, sexual orientation and disability. Although there are some differences between the various statutes, every single piece of Canadian human rights legislation enshrines disability as a protected human rights ground.¹ Canadian human rights law protects against both direct and indirect discrimination. Direct discrimination occurs when an employer adopts a practice or rule, which on its face, discriminates against a person or a group of people on a prohibited ground.² On the other hand, indirect discrimination, also known as adverse effect or constructive discrimination, arises when an employer adopts a rule or standard, for genuine business or economic purposes, which is neutral on its face and applies equally to all employees, but has a discriminatory effect on an employee or group of employees by imposing obligations, penalties or conditions, not imposed on other members of the workforce, due to a special characteristic of the employee or group.³

¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*Canadian Charter*]; *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1) [*Canadian HRA*]; British Columbia's *Human Rights Code*, RSBC 1996, c 210, s 13(1) [*BC HRC*]; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(1) [*Alberta HRA*]; *The Saskatchewan Human Rights Code*, RSS 1979, c S-24.1, s 2(1)(m.01)(vii) [*Saskatchewan HRC*]; Manitoba's *The Human Rights Code*, CCSM c H175, s 9(2)(1) [*Manitoba HRC*]; Ontario's *Human Rights Code*, RSO 1990, c H19, s 5(1) [*Ontario HRC*]; Quebec's *Charter of Human Rights and Freedoms*, CQLR 2016, c C-12, s 10 refers to "handicap" [*Quebec Charter*]; Newfoundland and Labrador's *Human Rights Act*, SNL 2010, c H-13.1, s 9(1) [*Newfoundland HRA*]; New Brunswick's *Human Rights Act*, RSNB 2011, c 171, s 2.1(h)-(i) [*NB HRA*]; Nova Scotia's *Human Rights Act*, RSNS 1989 c 214, s 5(1) [*NS HRA*]; Prince Edward Island's *Human Rights Act*, RSPEI 1988, c H-12, s 1(1)(d) [*PEI HRA*]; Nunavut's *Consolidation of Human Rights Act*, SNU 2003, c12, s 7(1) [*Nunavut HRA*]; Yukon's *Human Rights Act*, RSY 2002, c116, s 7(h) [*Yukon HRA*]; and Northwest Territories' *Human Rights Act*, SNWT 2002, c18, s 5(1) [*NWT HRA*] [collectively cited as Canadian human rights statutes].

² *Ontario Human Rights Commission v Simpsons-Sears Ltd.*, [1985] 2 SCR 536 at 551 [*Simpsons-Sears*].

³ *Ibid.*

In accordance with Canadians' right to be free from discrimination, employers have a duty to accommodate employees with a protected characteristic, such as a disability, to the point of undue hardship. Only some jurisdictions explicitly provide for a duty to accommodate in their human rights statute.⁴ Nevertheless, under Canadian law, every employer has the duty to accommodate an employee with a disability to the point of undue hardship, regardless of whether the relevant human rights statute specifically refers to workplace accommodation.⁵

The jurisprudence provides important guiding principles for the application of these human rights and obligations, including the *Moore* and *Meiorin* tests.⁶ The Supreme Court of Canada (SCC) has confirmed that human rights statutes must be interpreted in a liberal, contextual and purposive fashion⁷ and in light of the *Canadian Charter* and its values.⁸ Human rights are to be given a broad interpretation. Therefore, as a human right, the right to be accommodated for a disability must be applied broadly and exceptions should be interpreted narrowly.⁹ This chapter examines the various pieces of Canadian human rights legislation and interpretive human rights principles as well as explores the legal analyses for prima facie discrimination and the employer's duty to accommodate to the point of undue hardship.

⁴ *Ontario HRC*, supra note 1, ss 17(1)-(2); *Manitoba HRC*, supra note 1, ss 9(1), 12; *NWT HRA*, supra note 1, s 7(4); *Yukon HRA*, supra note 1, s 8(1); and *Nunavut HRA*, supra note 1, s 9(5).

⁵ *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 [*Central Alberta Dairy Pool*]; *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 [*Meiorin*]; and *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 [*Elk Valley*].

⁶ *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*].

⁷ *Simpsons-Sears*, supra note 2 at 551; *Meiorin*, supra note 5 at paras 43-44; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 31 [*Bombardier*].

⁸ *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 21 [*Cooper*].

⁹ *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525 [*Bergevin*].

2.1 Human Rights Legislation and Principles

2.1.1 Federal Legislation

The Parliament of Canada has passed several pieces of legislation promoting equality and human rights. The *Canadian Charter of Rights and Freedoms* is part of the *Constitution Act, 1982*, which forms part of the Constitution of Canada, the supreme law of Canada.¹⁰ The *Canadian Charter* defines the fundamental rights of the Canadian people, including equality rights. The *Charter* applies to government action; it applies to the actions of the Parliament and Government of Canada as well as the legislature and government of each province with respect to all matters within its authority.¹¹ The rights and freedoms guaranteed in the *Canadian Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²

Section 15(1) of the *Canadian Charter* prohibits discrimination: “Every 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.”¹³ As articulated by the SCC, the purpose of section 15 is “to ensure equality in the formulation and application of the law” and “[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹⁴ Although the *Charter* does not specifically refer to employment, this broad equality right is still relevant and important to workplace accommodation cases. Firstly, under the *Canadian Charter*,

¹⁰ Government of Canada, “Guide to the Canadian Charter of Rights and Freedoms” (8 June 2020), online: <<https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html>>.

¹¹ *Supra* note 1, s 32(1): “This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

¹² *Ibid.*, s 1.

¹³ *Ibid.*

¹⁴ *R v Kapp*, 2008 SCC 41 at para 15 [*Kapp*]; citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171 [*Andrews*].

individuals suffering from addiction are entitled to “equal protection and equal benefit of the law” with respect to their human rights.¹⁵ Secondly, the jurisprudence establishes that human rights statutes are to be interpreted in light of the *Charter* and its values.

The *Canadian Human Rights Act*, on the other hand, prohibits federally regulated employers and service providers, including airports, radio and television broadcasters, chartered banks, post offices and federal Crown corporations, from discriminating against employees.¹⁶ Under the *Canadian Human Rights Act*, “the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.”¹⁷ Section 7 provides that, “It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.”¹⁸

The *Canadian Human Rights Act* expressly protects against both direct and indirect discrimination.¹⁹ However, the legislation provides an exception to seemingly discriminatory workplace practices; section 15(1)(a) states that a practice is not deemed to be discriminatory if “any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement,”²⁰ meaning a legitimate workplace rule. The *Act* also explicitly provides for the federally regulated employer’s duty to accommodate. Section 15(2)(a) states that, “For any practice mentioned in paragraph

¹⁵ *Supra* note 1, s 15(1).

¹⁶ Government of Canada, “List of federally regulated industries and workplaces” (12 May 2020), online: <<https://www.canada.ca/en/services/jobs/workplace/federally-regulated-industries.html>>.

¹⁷ *Supra* note 1, s 3(1).

¹⁸ *Ibid.*

¹⁹ *Ibid.*, s 15(8).

²⁰ *Ibid.*

(1)(a) to be considered to be based on a *bona fide* occupational requirement... it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.”²¹ Therefore, under this piece of legislation, the federally regulated employer must demonstrate that accommodating the employee with an addiction disability would impose undue hardship with respect to health, safety or cost.

The *Employment Equity Act* specifically addresses equality in the workplace and requires federally regulated employers—both private sector and certain public sector employers²²—to engage in proactive employment practices to increase the representation of women, people with disabilities, Aboriginal peoples, and visible minorities in the workforce. The purpose of the legislation is:

to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, Aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.²³

The statute acknowledges the vital role accommodation plays in achieving equality in the workplace and expressly enshrines the duty to accommodate.

The *Employment Equity Act* provides that every federally regulated employer must implement employment equity by identifying and eliminating barriers arising from the employer’s systems, policies and practices that are not legally authorized.²⁴ Furthermore, employers have a responsibility to institute positive policies and practices and make reasonable accommodations to ensure that women, people with disabilities, Aboriginal

²¹ *Ibid.*

²² SC 1995, c 44, s 4(1).

²³ *Ibid.*, s 2.

²⁴ *Ibid.*, s 5(a).

peoples and visible minorities achieve a degree of representation in each division of the employer's workforce that reflects their general representation in the Canadian workforce.²⁵ However, the statute provides for broad exceptions, extending beyond the undue hardship defense, and states that:

The obligation to implement employment equity does not require an employer (a) to take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer; (b) to hire or promote persons who do not meet the essential qualifications for the work to be performed; (c) with respect to the public sector, to hire or promote persons without basing the hiring or promotion on merit in cases where the *Public Service Employment Act* requires that hiring or promotion be based on merit; or (d) to create new positions in its workforce.²⁶

The *Employment Equity Act* further limits the scope of its application by stating that only employees who identify themselves to an employer, or agree to be identified by an employer, as an Aboriginal person, a visible minority or a person with a disability are protected under the employment equity provisions.²⁷ This piece of legislation falls short of providing the human rights protections afforded by the *Canadian Charter* and *Canadian Human Rights Act* and the human rights jurisprudence.

2.1.2 Provincial and Territorial Legislation

Every Canadian province and territory has developed and enacted its own human rights legislation, directed at providing individuals with protection against discrimination in various spheres of life, including employment. The purpose of these pieces of legislation is similar: to recognize the dignity and equal and inalienable rights of every person, promote the understanding and mutual respect for the dignity and worth of every person, provide equal rights and opportunities to everyone and essentially prevent discrimination.²⁸ Although these various human rights statutes are not exactly alike, they

²⁵ *Ibid*, s 5(b).

²⁶ *Ibid*, s 6.

²⁷ *Ibid*, s 9(2).

²⁸ Canadian human rights statutes, *supra* note 1, Preamble.

provide similar human rights protections with respect to employment. Ontario's *Human Rights Code* presents a general representation of the protections provided by the provinces and territories' human rights legislation. Important differences between the legislation will be noted.

Each human rights statute states that employers must not discriminate against a person based on a protected human rights ground, enumerated in the particular legislation. For example, Ontario's *Human Rights Code* provides that, "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability."²⁹ Although the protected grounds vary slightly from statute to statute, every single piece of human rights legislation includes disability as a protected ground. Accordingly, an employer cannot refuse to employ, refuse to continue to employ or otherwise discriminate against a person with regard to employment because of their disability.

Some statutes, like Ontario's *Human Rights Code*, specifically address indirect discrimination while others do not. However, as discussed earlier in this chapter, Canadian human rights law protects employees against both direct and indirect discrimination. Therefore, all Canadian human rights legislation applies equally to instances of direct and indirect discrimination, regardless of whether the particular statute expressly addresses indirect discrimination. Ontario's *Human Rights Code* specifically refers to constructive discrimination, also known as indirect or adverse effect discrimination, and provides that a person's right to be free from discrimination is violated "where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group

²⁹ *Supra* note 1, s 5(1). Section 10(1) of the *Code* defines equal treatment to mean, "subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination."

of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.”³⁰

Each statute provides for a bona fide occupational requirement exception.³¹ An employer cannot refuse to employ or refuse to continue to employ a person because of a protected human rights ground unless the refusal is based on a bona fide occupational requirement, a legitimate qualification for performing a particular job. If an employer can demonstrate that the workplace rule in question establishes a necessary requirement for the proper performance of the job, the validity of the rule will be upheld, despite its discriminatory effect.³² The SCC developed a test for determining whether a workplace rule constitutes a bona fide occupational requirement. In order to establish that the prima facie discriminatory standard is a bona fide occupational requirement, the employer must demonstrate that (1) it adopted the particular workplace standard for a purpose rationally connected to the performance of the job; (2) it adopted the standard in an honest and good faith belief that it was necessary for the fulfilment of that legitimate work-related purpose; and (3) the standard is reasonably necessary for the attainment of that legitimate work-related purpose, meaning it would be impossible to accommodate the employee without imposing undue hardship on the employer.³³

³⁰ *Ibid.*, s 11(1).

³¹ *Canadian HRA*, *supra* note 1, s 15(1)(a), *BC HRC*, *supra* note 1, s 13(4), *Alberta HRA*, *supra* note 1, s 7(3) and *NWT HRA*, *supra* note 1, 7(3): “bona fide occupational requirement;” *Quebec Charter*, *supra* note 1, s 20: “required for employment;” *Newfoundland HRA*, *supra* note 1, s 14(2): “good faith occupational qualification;” *NB HRA*, *supra* note 1, s 2.2: “bona fide requirement or qualification;” *PEI HRA*, *supra* note 1, s 6(4): “genuine occupational qualification;” *Yukon HRA*, *supra* note 1, s 10(a): “reasonable requirements or qualifications for the employment;” *Nunavut HRA*, *supra* note 1, s 9(4): “justified occupational requirement;” *Saskatchewan HRC*, *supra* note 1, s 16(7): “reasonable occupational qualification and requirement for employment;” *Ontario HRC*, *supra* note 1, s 11(1) and *Manitoba HRC*, *supra* note 1, s 14(1): “reasonable and bona fide in the circumstances;” and *NS HRA*, *supra* note 1, s 6(f)(ia): “bona fide qualification, bona fide occupational requirement or a reasonable limit.”

³² Canadian Human Rights Commission, “Bona Fide Occupational Requirements (BFORs),” online: <<http://www.chrc-ccdp.gc.ca/historical-perspective/en/browseSubjects/bfors.asp>>.

³³ *Meiorin*, *supra* note 5.

Some jurisdictions, including Ontario, also explicitly provide for a duty to accommodate in their human rights legislation.³⁴ Ontario's *Human Rights Code* states that:

The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.³⁵

The statute prescribes particular undue hardship factors and expressly limits the duty to accommodate to the point of undue hardship analysis to considerations of cost, outside sources of funding and health and safety requirements. However, most of the provinces and territories' human rights statutes do not make reference to a duty to accommodate, let alone specific undue hardship factors,³⁶ thus allowing for more flexibility in the accommodation analysis.

Every employer has the duty to accommodate to the point of undue hardship, regardless of whether the relevant human rights statute specifically refers to workplace accommodation. The *Canadian Charter* essentially embodies a duty to accommodate to the point of undue hardship; even in the absence of a statutory duty to accommodate, no

³⁴ *Ontario HRC*, *supra* note 1, ss 17(1)-(2); *Manitoba HRC*, *supra* note 1, ss 9(1), 12; *NWT HRA*, *supra* note 1, s 7(4); *Yukon HRA*, *supra* note 1, s 8(1); *Nunavut HRA*, *supra* note 1, s 9(5); and *Canadian HRA*, *supra* note 1, s 15(2).

³⁵ *Ontario HRC*, *supra* note 1, s 11(2).

³⁶ Apart from the *Ontario HRC*, three other pieces of legislation include undue hardship factors: *Canadian HRA*, *supra* note 1, s 15(2): "For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost"; *Yukon HRA*, *supra* note 1, s 8(2): "For the purposes of subsection (1) '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"; and *Nunavut HRA*, *supra* note 1, s 1: "'undue hardship' means 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."

piece of Canadian human rights legislation can be interpreted as precluding this duty.³⁷ Canadian jurisprudence, which will be discussed in greater detail below, entrenches employer's legal obligation to accommodate employees.

2.1.3 Interpretive Principles

The SCC has consistently affirmed the quasi-constitutional status of human rights legislation.³⁸ This special status means that human rights statutes prevail over other laws.³⁹ In *Insurance Corporation of British Columbia v. Heerspink*, Chief Justice Lamer, commented on the unique nature of human rights legislation in Canada:

When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.⁴⁰

Furthermore, in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, Justice McIntyre stated that, “Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect.”⁴¹ Accordingly, the SCC has repeatedly declared that human rights legislation must be interpreted in a broad, liberal, contextual and purposive manner⁴² and in light of the *Canadian Charter* and its values.⁴³ This interpretive

³⁷ Anne Molloy, “Disability and the Duty to Accommodate” (1992) 1 Can Labour LJ 23 at 44-45; *Central Alberta Dairy Pool*, *supra* note 5; and *Elk Valley*, *supra* note 5.

³⁸ *Simpsons-Sears*, *supra* note 2; and *Bombardier*, *supra* note 7 at para 30.

³⁹ *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145; *Simpsons-Sears*, *supra* note 2; *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84 [*Robichaud*]; *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554; *Bombardier*, *supra* note 7 at para 30; *Meiorin*, *supra* note 5 at para 43.

⁴⁰ *Ibid* at 157-158.

⁴¹ *Supra* note 2 at 547.

⁴² *Ibid*; *Meiorin*, *supra* note 5 at paras 43-44; *Robichaud*, *supra* note 39 at 89-90; *Bombardier*, *supra* note 7 at para 31; *Béliveau St-Jacques v Fédération des employées et employés de services publics inc.*, [1996] 2 SCR 345 at 402; and *University of British Columbia v Berg*, [1993] 2 SCR 353 at para 26.

⁴³ *Cooper*, *supra* note 8 at para 21 (Lamer CJ, majority, separate judgment): “As I stated in *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, at pp 581-82, if there is some ambiguity with respect to

approach is consistent with the statutory guidelines provided in the federal *Interpretation Act*, which stipulates that statutes are deemed to be remedial and “shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”⁴⁴

The purposive approach is the fundamental approach to Canadian statutory interpretation: “there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁴⁵ In *Canadian National v. Canada (Canadian Human Rights Commission)*, the SCC affirmed that,

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect.⁴⁶

Human rights legislation must be interpreted in a manner that advances the broad policy considerations underlying the statute,⁴⁷ which is essentially the protection of Canadians’ equal rights.

The purposive approach requires analyzing the underlying purpose of the legislation and interpreting the statute in light of its objectives and the particular context. As mentioned

the meaning or scope of a statutory provision, then it should be interpreted in the manner which is most consistent with the *Charter* and the values underlying that document; also see, for example: *Hills v Canada (Attorney General)*, [1988] 1 SCR 513, at p 558; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, at p 660.”

⁴⁴ RSC, 1985, c I-21, s 12.

⁴⁵ Elmer A Driedger, *Construction of Statutes*, 2nd ed (Oxford: Butterworth-Heinemann, 1983) at 87. This excerpt has been approvingly cited in various SCC decisions, including *Canadian National v Canada (Human Rights Commission)*, [1987] 1 SCR 1114; *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385; *R v Hydro-Québec*, [1997] 3 SCR 213; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27; and *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625.

⁴⁶ *Supra* note 45 at 1134.

⁴⁷ *Simpsons-Sears*, *supra* note 2; and *Robichaud*, *supra* note 39 at 89.

above, the general purpose of human rights legislation is to safeguard the equal opportunity for all Canadians to participate in a wide range of socioeconomic spheres.⁴⁸ The Preamble of Ontario's *Human Rights Code* states that the purpose of the legislation is:

to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.⁴⁹

Human rights statutes and the rights enshrined within them, including the employer's duty to accommodate, must be interpreted in light of these statutory objectives.

Human rights legislation must also be given a broad interpretation. Human rights are to be interpreted broadly while statutory exceptions to the exercise of these rights must be narrowly construed.⁵⁰ The provisions that provide defences for discriminatory conduct must be interpreted narrowly so as not to frustrate the fundamental purpose of the legislation, and to give the fullest possible protection against discrimination.⁵¹ Human rights legislation "is often the final refuge of the disadvantaged and the disenfranchised;"⁵² these statutes are meant to protect the rights of disenfranchised people and provide them with an avenue to rectify the injustice perpetrated against them. Therefore, "As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed."⁵³ General terms and concepts must

⁴⁸ David Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1992) 1 CLELJ 1 at 5.

⁴⁹ *Supra* note 1.

⁵⁰ *Brossard (Town) v Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 at 307; *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321 [*Zurich Insurance*]; and *Dickason v University of Alberta*, [1992] 2 SCR 1103 [*Dickason*].

⁵¹ *Dickason*, *supra* note 50 at 1156.

⁵² *Zurich Insurance*, *supra* note 50 at 339.

⁵³ *Ibid.*

also be interpreted flexibly, allowing for provisions in the legislation to be adapted to the changing social conditions and evolving concepts of human rights.⁵⁴

2.1.4 The Meaning of Equality

Equality does not mean treating everyone the same. Canadian courts have rejected the notion of formal equality, in favor of substantive equality.⁵⁵ Formal equality prescribes “equal treatment for those in similar situations and different treatment for those in dissimilar situations”—in other words, “treating likes alike.”⁵⁶ Substantive equality, on the other hand, “recognizes that not all differences in treatment are violations of equality rights and that differences in treatment are sometimes necessary to achieve true equality.”⁵⁷ The *Canadian Charter* and the various pieces of Canadian human rights legislation are aimed at securing substantive equality.⁵⁸

In *Andrews v. Law Society of British Columbia*, Justice McIntyre illustrated the need for and application of substantive equality:

[I]t may be said that a law which treats all identically and which provides equality of treatment between “A” and “B” might well cause inequality for “C”, depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.⁵⁹

⁵⁴ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto & Vancouver: Butterworths, 1994) at 383-384; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*, 2000 SCC 27 at para 29 [*City of Montreal*].

⁵⁵ *Andrews*, *supra* note 14; *Kapp*, *supra* note 14; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497; and *Withler v Canada (Attorney General)*, 2011 SCC 12.

⁵⁶ *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 78.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at para 77.

⁵⁹ *Andrews*, *supra* note 14 at 165 (McIntyre J, dissenting in part).

Substantive equality acknowledges and responds to the differences that particular groups of people may experience, including “patterns of disadvantage” that require a proactive response.⁶⁰ Workplace accommodation, espousing the principles of substantive equality, aims to counteract some of these disadvantages experienced by individuals with a protected human rights characteristic. Workplace policies, standards and practices should strive for substantive equality.

Employers’ duty to accommodate to the point of undue hardship should be interpreted in view of the objectives of the duty to accommodate: providing Canadians with an equal opportunity to employment.⁶¹ The law provides for the bona fide occupational requirement exception; however, in order to preserve the rights of Canadians with disabilities and provide substantive equality, this exception must be applied strictly and sparingly.

2.2 Prima Facie Discrimination Analysis

An overwhelming amount of labour and employment law jurisprudence involves discrimination in the workplace. In *Andrews v. Law Society of British Columbia*, the SCC explained the concept of discrimination:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.⁶²

As previously mentioned, discrimination can either be direct or indirect. [SEP] Although unintentional, indirect discrimination still violates human rights legislation if a person

⁶⁰ Patricia Hughes, “Supreme Court of Canada Equality Jurisprudence and ‘Everyday Life’”(2012) 58 SCLR: Osgoode’s Annual Constitutional Cases Conference 246 at 246.

⁶¹ Lepofsky, *supra* note 48 at 5.

⁶² *Supra* note 14 at 174-175.

with a protected characteristic is subjected to differential and adverse treatment for no justifiable reason.⁶³ Under Canadian human rights law, intention is irrelevant to the prima facie discrimination analysis and both direct and indirect discrimination are treated the same.

It is important to note that not every distinction amounts to discrimination. Discrimination focuses particularly on violations of human dignity—essentially, the arbitrariness of the barriers imposed on people, whether intentionally or unknowingly.⁶⁴ Employment practices, standards and requirements cannot disadvantage employees by “attributing stereotypical or arbitrary characteristics;” the focus should be on employees’ actual abilities, not falsely attributed capabilities.⁶⁵ However, an employer’s conduct cannot be impugned solely on the basis that their actions had a negative impact on an employee with a protected characteristic. Membership to a protected group does not in itself guarantee access to a human rights remedy; there must be a connection between the group membership and the arbitrariness of the disadvantageous standard or conduct, either on its face or indirectly through its impact, in order to trigger the possibility of a human rights remedy.⁶⁶ The SCC subsequently confirmed the use of this approach in *Honda Canada Inc. v. Keays*.⁶⁷

2.2.1 Moore Test

The SCC established the three-part test for determining the presence of prima facie discrimination in *Moore v. British Columbia (Education)*. The *Moore* test reaffirmed the discrimination test first articulated by the SCC in *Simpsons-Sears* and *Central Alberta*

⁶³ *Simpsons-Sears*, *supra* note 2.

⁶⁴ *McGill University Health Centre (Montreal General Hospital) v Syndicat des employes de l’Hopital General de Montreal*, 2007 SCC 4 at para 48.

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at para 49.

⁶⁷ 2008 SCC 39 at para 71.

Dairy Pool.⁶⁸ In order to find prima facie discrimination, the complainant must demonstrate that:

They have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.⁶⁹

Both the employee and employer have the persuasive burden of establishing their case on the balance of probabilities.⁷⁰

The *Moore* test does not mention, let alone require, the employer's knowledge of the employee's protected characteristic. However, the issue of knowledge has been raised in subsequent workplace discrimination cases. In *Telecommunications Workers Union v. Telus Communications Inc.*, the Alberta Court of Appeal affirmed that an employee does not have to demonstrate that the employer was aware of their disability in order to establish a prima facie case of discrimination: "Demonstrating an employer's knowledge of an employee's disability is unnecessary, in a case alleging adverse-effect discrimination. By definition, adverse-effect discrimination is the uniform application of a seemingly neutral employment policy to all employees, regardless of whether some employees have protected characteristics."⁷¹ The Court concluded that the three-part *Moore* test is sufficient to accommodate both cases of indirect and direct discrimination; therefore, knowledge should not be included as an additional element of the prima facie discrimination test.⁷²

More recently, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, the SCC

⁶⁸ *Supra* note 2 at para 23; and *supra* note 5.

⁶⁹ *Moore*, *supra* note 6 at para 33.

⁷⁰ *Simpsons-Sears*, *supra* note 2 at para 27.

⁷¹ 2014 ABCA 154 at para 29.

⁷² *Ibid* at para 29.

clarified the prima facie discrimination test. Although the case refers to the Quebec human rights statute, it is applicable to other human rights legislation. The SCC stated that human rights legislation should generally be interpreted consistently across jurisdictions, unless otherwise specified.⁷³ The Court rephrased the test in *Moore*, adopting the terminology in Quebec's *Charter of Human Rights and Freedoms*, and stated that, in order to establish prima facie discrimination, a plaintiff must prove the following three elements on a balance of probabilities: 1) a "distinction, exclusion or preference," 2) based on a protected ground, 3) which "has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom."⁷⁴ Just as in *Moore*, once the plaintiff establishes prima facie discrimination, the burden shifts to the respondent to justify the conduct on the basis of legislative or judicial defenses and if they fail to do so, discrimination will be found to have occurred.⁷⁵ The analysis is the same for all grounds of alleged discrimination.⁷⁶

The SCC also addressed the issue of causality, which arose in the *Elk Valley* case. In *Bombardier*, the Court held that, in order to find discrimination, the prohibited ground must have contributed to the conduct.⁷⁷ The plaintiff must simply establish a connection between the prohibited ground of discrimination and the distinction, exclusion or preference.⁷⁸ The SCC stated that the terms "connection" and "factor" should be used in relation to the discrimination analysis⁷⁹ and "it is therefore neither appropriate nor accurate to use the expression 'causal connection' in the discrimination context."⁸⁰ Requiring a causal connection between the protected ground and the adverse treatment would impose an inappropriately heavy burden on the plaintiff since human rights

⁷³ *Bombardier*, *supra* note 7 at para 31.

⁷⁴ *Ibid* at para 35

⁷⁵ *Ibid* at para 63.

⁷⁶ *Ibid* at para 34.

⁷⁷ *Ibid* at para 48.

⁷⁸ *Ibid* at para 52.

⁷⁹ *Ibid* at para 50.

⁸⁰ *Ibid* at para 51.

legislation and jurisprudence focus on the discriminatory effects of conduct, be it direct or indirect, rather than the intention to discriminate.⁸¹

2.3 Workplace Accommodation Analysis

The duty to accommodate is a fundamental legal obligation that arises from human rights legislation as well as SCC decisions and the rulings of human rights tribunals and labour arbitrators. The duty to accommodate requires employers to make every reasonable effort, short of undue hardship, to accommodate an employee with a protected human rights characteristic.⁸² Once an employee establishes a prima facie case that he or she has a disability requiring accommodation, the burden shifts to the employer to prove that it made every reasonable effort, short of undue hardship, to accommodate the employee's disability.

The underlying purpose of workplace accommodation is ultimately to provide Canadians with an equal opportunity to employment. In most cases, the protected ground requiring accommodation constitutes a form of disability.⁸³ Accommodation enables individuals—who, despite their disability, are still capable of fulfilling the essential duties of an occupation—to have the opportunity to achieve and sustain employment. In order to maintain the employment relationship, the employee must still productively perform the core aspects of the job. However, this has been greatly subsumed by the considerable obligations required under the employer's duty to accommodate.⁸⁴ To satisfy these legal obligations, an employer must “be prepared to make changes to the organization of work, to the tools required to perform the particular job, to the assignment of duties for the

⁸¹ *Ibid* at para 49; *Peel Law Association v Pieters*, 2013 ONCA 396 at para 60.

⁸² Michael Lynk, “Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace,” in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 227 [Lynk, “Disability and Work”].

⁸³ *Ibid* at 203.

⁸⁴ *Ibid* at 190.

work position, to the content and application of work policies, and even to the attitudes of the workforce.”⁸⁵

The duty to accommodate applies to all employers and confers broad and substantial obligations on employers as well as unions. The right to workplace accommodation extends to all employees, at all stages of the employment relationship—before being hired to post-termination.⁸⁶ The accommodation process requires involvement from the employer, the employee seeking accommodation and, in the case of a unionized workplace, the union.⁸⁷ All three parties assume legal responsibility for ensuring the success of a workplace accommodation request.⁸⁸ Nonetheless, the primary responsibility lies with the employer because it has control over the workplace and employment policies and practices. Once an employer receives an accommodation request, it must initiate a search for reasonable accommodation.⁸⁹ The union should cooperate with the accommodation process and must not impede the employer’s reasonable efforts to accommodate the employee.⁹⁰ The employee is also expected to participate in the accommodation process. When possible, the employee must communicate his or her needs to the employer and provide the necessary information and details to facilitate accommodation.⁹¹ However, the absence of an employee’s disclosure does not eliminate the duty to accommodate. This situation often arises in the case of drug and alcohol addiction, where the employee does not acknowledge their disability or does not want to disclose this private information to the employer. The employer still has an obligation to take steps to accommodate the employee, if they knew, or should have reasonably

⁸⁵ *Ibid.*

⁸⁶ *City of Montreal*, *supra* note 54.

⁸⁷ *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at 992-995 [*Renaud*]; and *Simpsons-Sears*, *supra* note 2 at 555.

⁸⁸ Lynk, “Disability and Work,” *supra* note 82 at 208.

⁸⁹ *Ibid.*

⁹⁰ *Renaud*, *supra* note 87 at 991

⁹¹ *Ibid* at 974.

known, about the employee's disability and the need for accommodation.⁹² Moreover, the employee cannot refuse a reasonable accommodation proposal.⁹³ The right to workplace accommodation entitles an employee to a reasonable accommodation, not a perfect solution or the accommodation of their choice.⁹⁴

Under Canadian law, employers are required to determine whether existing positions can be modified for the employee or whether other positions in the workplace might be suitable.⁹⁵ When exploring accommodation options, the employer must undergo an investigation process, which involves: 1) determining whether the employee can productively fulfill his or her existing job in its present form; 2) if not, determining whether the employee can perform the core aspects of the original job in a modified form; 3) if not, determining whether the employee can accomplish the duties of another job in its present form; and 4) if not, then determining whether the employee can perform another job in a modified form.⁹⁶ Generally speaking, an employer will have fulfilled its duty to accommodate if it has thoroughly investigated, and has been genuinely incapable to satisfy, all four steps.⁹⁷

2.3.1 *Meiorin* Test

In *Meiorin*, the SCC affirmed that the duty to accommodate must be applied in a generous and liberal fashion and established a three-step test for determining whether a prima facie discriminatory practice or standard constitutes a bona fide occupational requirement and is thus justified under human rights law. This test applies to both cases of direct and indirect discrimination. When assessing the validity of a challenged

⁹² *Sears v Honda of Canada Mfg*, 2014 HRTO 45 at para 114; *ADGA Group Consultants Inc v Lane*, (2008) 91 OR (3d) 649; and *Mellon v Human Resources Development Canada*, [2006] CHR D No 2.

⁹³ *Renaud*, *supra* note 87 at 995.

⁹⁴ *Ibid*; *Simpson-Sears*, *supra* note 2; and Lynk, "Disability and Work," *supra* note 82 at 243.

⁹⁵ Lynk, "Disability and Work," *supra* note 82 at 228-229.

⁹⁶ *Ottawa-Carleton District School Board v Ontario Secondary School Teachers' Federation*, [2005] OLA A No 459.

⁹⁷ Lynk, "Disability and Work," *supra* note 82 at 229.

standard or practice, the legal decision maker must determine whether the employer justified the impugned standard by establishing on the balance of probabilities that:

1. The employer adopted the challenged standard or practice for a purpose rationally connected to the performance of the job;
2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to fulfill the legitimate work-related purpose; and
3. The standard is reasonably necessary to accomplish the legitimate work-related purpose, meaning it would be impossible to accommodate the employee without imposing undue hardship upon the employer.⁹⁸

The employer should be attuned to “the possibility that there may be different ways to perform the job while still accomplishing the employer’s legitimate work-related purpose.”⁹⁹ The SCC provided a list of important questions for employers to ask themselves when considering an accommodation request:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?¹⁰⁰

⁹⁸ *Meiorin*, *supra* note 5 at para 54.

⁹⁹ *Ibid* at para 64.

¹⁰⁰ *Ibid* at para 65.

These questions require the employer to consider whether modifications or alternative approaches could effectively accommodate the employee's needs. Of course, other questions may also be pertinent to this analysis.

2.3.2 Undue Hardship

The third step of the *Meiorin* test—requiring the employer to demonstrate that the standard is reasonably necessary to accomplish the legitimate work-related purpose and that it would be impossible to accommodate the employee without imposing undue hardship—establishes employers' duty to accommodate to the point of undue hardship. In *Central Alberta Dairy Pool*, the SCC developed a non-exhaustive list of factors to consider when assessing the duty to accommodate to the point of undue hardship: financial cost, disruption of a collective agreement, problems with employee morale, interchangeability of the workforce and facilities, size of the employer's operations and safety.¹⁰¹ Recent decisions also indicate the emergence of a seventh factor: legitimate operational requirements of a workplace.¹⁰² Legal decision makers may consider these undue hardship factors, barring any limitations provided in the relevant human rights legislation. For example, as noted earlier, Ontario's *Human Rights Code* specifies that only cost, outside sources of funding and health and safety requirements are to be considered when assessing the duty to accommodate. The relevant undue hardship factors are ultimately balanced with the employee's right to be free from discrimination.

The duty to accommodate must be applied broadly while the undue hardship defense should be given a narrow interpretation. The SCC jurisprudence provides guiding principles for the narrow interpretation of undue hardship factors. Although excessive financial cost may constitute a justification to refuse accommodation, "one must be wary of putting too low a value on accommodating the disabled."¹⁰³ The financial cost must

¹⁰¹ *Supra* note 5.

¹⁰² Lynk, "Disability and Work," *supra* note 82 at 211.

¹⁰³ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 41 [*Grismer*].

impose a significant impact on the employer in order to constitute an undue hardship.¹⁰⁴ *Meiorin* and *Grismer* also establish that a mere statement of excessive cost, without supporting evidence, is not generally sufficient to meet the standard of undue hardship.¹⁰⁵

A reasonable accommodation may override the provisions of a collective agreement, unless the proposed accommodation would significantly interfere with the rights of other employees, such as seniority rights.¹⁰⁶ In *Renaud*, the SCC stated that:

The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures.¹⁰⁷

...

While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.¹⁰⁸

Therefore, the accommodation of one employee cannot interfere with the job interests and entitlements of another, as this will likely constitute undue hardship.

When assessing employee morale, legitimate concerns regarding one's employment rights must be distinguished from concerns premised on stereotypical or discriminatory reactions to the employee with a disability.¹⁰⁹ Furthermore, the proposed accommodation must actually substantially interfere with the rights of the other employees. Employees' objections based on well-grounded concerns that their rights will be impacted must be

¹⁰⁴ See *Council of Canadians with Disabilities v Via Rail*, 2007 SCC 15.

¹⁰⁵ *Meiorin*, *supra* note 6 at para 77; and *Grismer*, *supra* note 103 at para 41.

¹⁰⁶ Lynk, "Disability and Work," *supra* note 82 at 229.

¹⁰⁷ *Renaud*, *supra* note 87 at 984-985.

¹⁰⁸ *Ibid* at 987.

¹⁰⁹ *Ibid* at 988.

considered; however, objections based on attitudes that are inconsistent with human rights are irrelevant to the analysis of undue hardship.¹¹⁰

The interchangeability of the workforce and facilities addresses the flexibility of the employer's operations, which is often linked to the size of the organization. This undue hardship factor involves determining whether the workforce or facilities are large enough, complex enough or adaptable enough to implement a modification without imposing undue hardship.¹¹¹ The SCC acknowledges that it may be easier for a larger operation to accommodate an employee than a smaller operation with fewer resources.¹¹²

Safety is the most frequently invoked undue hardship factor in workplace accommodation cases.¹¹³ It is also often the main defense in addiction disability cases. It is important to understand that an employer's duty to provide a safe workplace cannot simply displace the duty to accommodate an employee with an addiction. In *Meiorin* and *Grismer*, the SCC indicated that zero-tolerance safety rules contravene the duty to accommodate. Safety standards must be applied flexibly and employers must accept that a moderate level of safety risks may be reasonably necessary to ensure the reasonable and successful accommodation of an employee; a workplace safety standard cannot require absolute safety or no risk.¹¹⁴ In order to reach the threshold of undue hardship, the safety risk must be serious.¹¹⁵ The magnitude of the safety risk and those who bear the safety risk are relevant considerations.¹¹⁶

In *Grismer*, the SCC provided that employers cannot make assumptions about disability and safety without conducting an individualized assessment of the employee in

¹¹⁰ *Ibid.*

¹¹¹ Michael Lynk, "The Duty to Accommodate in the Canadian Workplace: Leading Principles and Recent Cases" (2008) Ontario Federation of Labour at 10 [Lynk, "Duty to Accommodate"].

¹¹² *Bergevin*, *supra* note 9.

¹¹³ Michael Lynk, "Work, Physical Disabilities and Accommodation" (Lecture delivered at the Faculty of Law, Western University, 21 January 2016).

¹¹⁴ *Grismer*, *supra* note 103 at para 32.

¹¹⁵ *Ibid.*

¹¹⁶ *Central Alberta Dairy Pool*, *supra* note 5 at 521.

question.¹¹⁷ Employers must present convincing evidence to substantiate a safety claim because impressionistic or anecdotal evidence regarding the magnitude of risk are inadequate. Furthermore, claims of anticipated hardships on the basis of proposed accommodations should not be accepted, if based solely on speculative or unsubstantiated concern that certain negative consequences might or could follow the employee's accommodation.¹¹⁸ Although safety sensitive and zero-tolerance rules are significant features of a modern workplace, they cannot be advanced to defeat a workplace accommodation if a tolerable range of risk would permit an employee to work productively.¹¹⁹

Although it is not yet clearly defined as an undue hardship factor, various arbitration decisions have accepted and endorsed the consideration of a workplace's legitimate operational requirements.¹²⁰ For example, several labour arbitration decisions have indicated that an employer, who has attempted to accommodate an employee struggling with addiction, will have satisfied its duty to accommodate where the employee has made several unsuccessful attempts to return to work and his or her current rehabilitative efforts do not appear to be promising.¹²¹ This instance of undue hardship does not clearly fall within any of the classic *Central Alberta Dairy Pool* factors and suggests the need for alternative considerations. Although it is an inchoate undue hardship factor that has not yet received formal endorsement by the SCC, legal decision makers have expressed a functional need to assess the employer's legitimate operational requirements within the accommodation analysis.¹²²

¹¹⁷ *Grismer*, *supra* note 103.

¹¹⁸ *Ibid*; *Meiorin*, *supra* note 5.

¹¹⁹ Lynk, "Disability and Work," *supra* note 82 at 230-231.

¹²⁰ *Ibid* at 211.

¹²¹ *Ibid* at 212. See *International Forest Products Ltd v Industrial Wood and Allied Workers of Canada, Local 1-3567*, [2001] BCCAAA No 290; *Uniroyal Goodrich Canada Inc v United Steelworkers of America, Local 677*, [1999] OLAA No 278; and *Toronto District School Board v Canadian Union of Public Employees*, [1999] OLAA No 150.

¹²² Lynk, "Disability and Work," *supra* note 82 at 212.

The employer's assessment of an employee requiring accommodation must be based on credible and objective evidence, not fears, myths or stereotypes. For example, in the case of addiction disability, the stigma attached to drug and alcohol addiction should not influence the individualized assessment of the employee's capabilities and ability to return to work following treatment. The rigorous application of these protections ensures the inclusion of employees with mental illness in the workforce.¹²³ It is, therefore, imperative that arbitrators, human rights tribunals and courts uphold this standard.

The duty to accommodate to the point of undue hardship must be assessed with common sense and flexibility, in light of the circumstances of the particular case.¹²⁴ The duty to accommodate must be applied broadly, while exceptions—namely, the undue hardship defense—should be interpreted narrowly: “Courts, labour arbitrators and human rights tribunals are to take a strict approach to exemptions from the duty to accommodate. Exemptions are to be permitted only where they are reasonably necessary to the achievement of legitimate business-related objectives.”¹²⁵ Although there is no single legal definition of undue hardship, the jurisprudence on workplace accommodation clearly indicates that the amount of hardship required to satisfy the employer's duty to accommodate must be substantial: “More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test... What constitutes undue hardship is a question of fact and will vary with the circumstances of the case.”¹²⁶ Legal decision makers are expected to apply this approach to all accommodation cases, regardless of the protected human rights ground at issue.

¹²³ C Tess Sheldon, “It’s Not Working: Barriers to the Inclusion of Workers with Mental Illness Issues” (2011) 29:1 Windsor YB of Access Just 163 at 187.^[L]^[L]^[SEP]

¹²⁴ *Meiorin*, *supra* note 5 at para 63.

¹²⁵ Lynk, “Duty to Accommodate,” *supra* note 111 at 5.

¹²⁶ *Renaud*, *supra* note 87 at 984.

2.4 Conclusion

The laws and principles described in this chapter form the foundation of Canadian human rights law in the realm of employment. The fundamental laws on workplace discrimination and the duty to accommodate to the point of undue hardship are well established and deeply entrenched in Canadian labour and employment law jurisprudence.

The *Moore* and *Meiorin* tests, informed and guided by human rights principles, form the legal analysis of workplace discrimination and accommodation with respect to all protected human rights grounds. Accordingly, these human rights laws and principles should be applied in all cases of alleged discrimination and workplace accommodation, including cases involving drug and alcohol addiction disability. The legal analyses for prima facie discrimination and the duty to accommodate are referred to throughout this thesis and represent a benchmark for the addiction cases examined in Chapters 4, 5 and 6.

Chapter 3

3 Understanding Drug and Alcohol Addiction Disability

Before analyzing the application of workplace accommodation law to cases of drug and alcohol addiction, it is important to first understand what an addiction is and the negative impact this illness can have on a person. Drug and alcohol addiction affects millions of Canadians. It is characterized by a craving for the substance, loss of control of the amount or frequency of use, the compulsion to use the substance and continuous use despite harmful consequences.¹ Canadian human rights law recognizes drug and alcohol addiction as a form of disability and, by virtue of this legal recognition, human rights protections extend to individuals struggling with addiction.

This chapter explores the status of drug and alcohol addiction as a form of disability under Canadian human rights law, presents the three leading conceptual models of disability, in general, and addiction, in particular, and lays the foundational groundwork for understanding addiction disability. It examines the prevalence of drug and alcohol addiction, the impact addiction can have on employment, diagnostic criteria and symptoms of addiction, potential causes, the contentious issue of control with respect to addictive behaviours, stigma and medical treatment.

3.1 Statistics

3.1.1 Prevalence

Drug and alcohol addiction afflicts hundreds of millions of people worldwide. Approximately 5.1% of the world's adult population—about 283 million people—suffer from alcohol use disorder² and about 0.7%—over 35 million people—suffer from drug

¹ Marilyn Herie et al, *Addiction: An information guide* (Toronto: Centre for Addiction and Mental Health, 2010) at 2.

² World Health Organization, *Global status report on alcohol and health 2018* (Geneva: World Health Organization, 2018) at 72. This statistic is based on individuals that are 15 years of age and older.

use disorders.³ Approximately 21.6% of Canadians aged 15 and older—about 6 million people—meet the criteria for substance use disorder, meaning drug or alcohol abuse or dependence, during their lifetime, with about 18.1% of Canadians meeting the criteria for alcohol abuse or dependence.⁴ In terms of drugs, about 6.8% of Canadians experience symptoms of cannabis abuse or dependence in their lifetime and 4% meet the criteria for abuse or dependence of other drugs, such as club drugs, cocaine, heroin, solvents and prescription drugs.⁵ Approximately 4.4% of Canadians meet the criteria for a substance use disorder in a 12-month period, with about 3.2% meeting the criteria for alcohol abuse or dependence, 1.3% experiencing symptoms of cannabis abuse or dependence and 0.7% meeting the criteria for abuse or dependence of other drugs.⁶

Although these statistics are informative, it is important to acknowledge that this data may underestimate the extent of substance use disorders in Canada as the Statistics Canada survey only measures select substance use disorders and does not include people living on reserves, full-time members of the Canadian Forces or institutionalized individuals.⁷ Furthermore, the stigmatization of drug and alcohol addiction may also contribute to the underreporting of substance use problems: “Stigma marks substance use problems as shameful and makes people want to hide their addiction.”⁸ Accordingly, the national rate of drug and alcohol addiction is likely higher than the study suggests.

³ United Nations Office on Drugs and Crime, *World Drug Report 2020*, booklet 2, “Drug Use and Health Consequences” (Vienna: United Nations, 2020) at 11.

⁴ Caryn Pearson, Teresa Janz & Jennifer Ali, “Health at a Glance: Mental and Substance Use Disorders in Canada,” (27 November 2015), online: <<http://www.statcan.gc.ca/pub/82-624-x/2013001/article/11855-eng.htm>>. For the purposes of this study, substance abuse was “characterized by a pattern of recurrent use where at least one of the following occurs: failure to fulfill major roles at work, school or home, use in physically hazardous situations, recurrent alcohol or drug related problems, and continued use despite social or interpersonal problems caused or intensified by alcohol or drugs.” Substance dependence was defined as the occurrence of at least three of the following within a 12-month period: “increased tolerance, withdrawal, increased consumption, unsuccessful efforts to quit, a lot of time lost recovering or using, reduced activity, and continued use despite persistent physical or psychological problems caused or intensified by alcohol or drugs.”

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Herie, *supra* note 1 at 7.

3.1.2 Impact on Employment

Addiction can significantly impact a person's life, including their performance and attendance at work. Drug and alcohol addiction exists across all professions and can affect employees in any industry and at any job level.⁹ Considering the symptoms of addiction, it is not difficult to imagine the negative impact addiction can have on one's employment. Drug and alcohol addiction is "linked to numerous workplace outcomes, including absenteeism, lost productivity, on-the-job accidents and injuries, and workplace violence and harassment."¹⁰ Individuals with substance use disorders, compared to those without substance issues, are more likely to work part-time jobs and are more than twice as likely to be permanently unable to work.¹¹

The detrimental effects of addiction disability not only permeate the specific workplace of the individual struggling with addiction, but also significantly impact the economy as a whole. The lost work productivity attributable to drug and alcohol abuse costs the Canadian economy over \$14 billion per year.¹² Appropriate and effective workplace accommodation, coupled with rehabilitative support, would likely enable employees to return to work sooner and help limit the costs associated with lost productivity.

3.2 Legal Human Rights Perspective

Every Canadian human rights statute protects against discrimination on the ground of disability. These pieces of legislation provide broad definitions of disability to allow for the protection of various physical and mental illnesses and the case law has established

⁹ Mental Health Commission of Canada, Canadian Centre on Substance Use and Addiction & Conference Board of Canada, *Start the Conversation: Problematic Substance Use and the Workplace*, (2018) online: <https://www.mentalhealthcommission.ca/sites/default/files/2018-05/substance_use_brochure_2018_eng.pdf>.

¹⁰ Conference Board of Canada, *Problematic Substance use and the Canadian Workplace*, (Ottawa: Conference Board of Canada, 2016) at 4.

¹¹ Eric Diotte, *Mental Health and Equality Rights: Substance Use Disorders – A Human Rights-Based Analysis using the 2012 Canadian Community Health Survey – Mental Health*, (Ottawa: Canadian Human Rights Commission, 2012) at 10.

¹² Canadian Centre on Substance Use and Addiction, *Canadian Substance Use Costs and Harms Report* (2018), online: <<https://csuch.ca/>>.

the acceptance of drug and alcohol addiction as a form of disability.¹³ Accordingly, individuals struggling with addiction are afforded human rights protections. Employees with a drug or alcohol addiction are entitled to be free from discrimination in the workplace and accommodated to the point of undue hardship.

3.2.1 Legislation

The various pieces of Canadian human rights legislation define disability differently. There are three legislative approaches to defining disability: (1) an explicit and detailed definition of disability;¹⁴ (2) a brief and stripped-down definition of disability;¹⁵ and (3) providing no definition of disability at all,¹⁶ which allows for maximum flexibility and enables legal decision makers to apply a broad and liberal approach to the meaning of disability, unfettered by statutory constraints. Nevertheless, regardless of the particular approach adopted by the human rights statute, the Supreme Court of Canada (SCC) has stated that disability is to be given a broad and encompassing definition, consistent with the liberal and purposive approach to interpreting human rights.¹⁷

¹³ *Entrop v Imperial Oil Ltd*, [1995] 23 CHRR D/196 [*Entrop Board*], affirmed in *Entrop v Imperial Oil Ltd* (2000), 50 OR (3d) 18 [*Entrop*]; *Handfield v North Thompson School District No 26*, [1995] BCCHR D No 4; *British Columbia v British Columbia Government and Service Employees' Union*, [2007] BCCA No 37; *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 [*Tranchemontagne*]; and *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 [*Wright*].

¹⁴ *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 44(1) [*Alberta HRA*]; *The Saskatchewan Human Rights Code*, RSS 1979, c S-24.1, s 2(1)(d.1) [*Saskatchewan HRC*]; *Ontario's Human Rights Code*, RSO 1990, c H19, s 10(1) [*Ontario HRC*]; *Newfoundland and Labrador's Human Rights Act*, SNL 2010, c H-13.1, s 2(c) [*Newfoundland HRA*]; *New Brunswick's Human Rights Act*, RSNB 2011, c 171, s 2 [*NB HRA*]; *Nova Scotia's Human Rights Act*, RSNS 1989 c 214, s 3(1) [*NS HRA*]; *Prince Edward Island's Human Rights Act*, RSPEI 1988, c H-12, s 1(c.1) [*PEI HRA*]; *Yukon's Human Rights Act*, RSY 2002, c 116, s 37 [*Yukon HRA*]; *Northwest Territories' Human Rights Act*, SNWT 2002, c18, s 1(1) [*NWT HRA*]; and *Employment Equity Act*, SC 1995, c 44, s 3 [*EEA*].

¹⁵ *Canadian Human Rights Act*, RSC 1985, c H-6, s 25 [*Canadian HRA*]; and *Nunavut's Consolidation of Human Rights Act*, SNU 2003, c12, s 1 [*Nunavut HRA*].

¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Canadian Charter*]; *British Columbia's Human Rights Code*, RSBC 1996, c 210 [*BC HRC*]; *Manitoba's The Human Rights Code*, CCSM c H175 [*Manitoba HRC*]; and *Quebec's Charter of Human Rights and Freedoms*, CQLR 2016, c C-12 [*Quebec Charter*].

¹⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*, 2000 SCC 27 at paras 46, 48, 71, 76, 81 [*City of Montreal*].

Although the statutory definition of disability varies between jurisdictions and the majority of Canadian human rights statutes do not specifically refer to addiction, drug and alcohol addiction are uniformly protected under each piece of human rights legislation. The *Canadian Human Rights Act* and Nova Scotia and Nunavut's human rights statutes define disability to explicitly include drug and alcohol dependence,¹⁸ whereas other statutes do not expressly include drug and alcohol addiction in their definition of disability.¹⁹ Nevertheless, these definitions are flexible enough to encompass addiction. For example, Ontario's *Human Rights Code*, which provides a more restrictive definition compared to the statutes previously mentioned, designates five different categories of disability:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, *without limiting the generality of the foregoing*, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.²⁰

The wording “without limiting the generality of the foregoing” creates a broad definition of disability and allows for flexibility.²¹ The categories of mental impairment, mental disorder and even physical disability, given the potential physical symptoms associated

¹⁸ *Canadian HRA*, *supra* note 15, s 25; *NS HRA*, *supra* note 14, s 3(1); and *Nunavut HRA*, *supra* note 15, s 1.

¹⁹ *EEA*, *supra* note 14; *Alberta HRA*, *supra* note 14; *Saskatchewan HRC*, *supra* note 14; *Newfoundland HRA*, *supra* note 14; *NB HRA*, *supra* note 14; *PEI HRA*, *supra* note 14; *NWT HRA*, *supra* note 14; and *Yukon HRA*, *supra* note 14.

²⁰ *Supra* note 14, s 10(1).

²¹ *Ibid.* This approach is also reflected in *Alberta HRA*, *supra* note 14; *Saskatchewan HRC*, *supra* note 14; *NB HRA*, *supra* note 14; *NS HRA*, *supra* note 14; *PEI HRA*, *supra* note 14; and *Yukon HRA*, *supra* note 14.

with addiction, can be interpreted as including drug and alcohol addiction. The *Employment Equity Act* and the human rights legislation of Alberta, Saskatchewan, Newfoundland, New Brunswick, Prince Edward Island, the Northwest Territories and the Yukon have adopted similar definitions of disability. Each of these definitions address both physical and mental impairments and are broad enough to encompass addiction.

Although not every piece of human rights legislation specifically states that addiction is a disability, recent jurisprudence recognizes drug and alcohol addiction as a form of disability under human rights law. Thus, human rights protections are extended to drug and alcohol addiction, regardless of whether the relevant statute specifically refers to addiction. Under Canadian human rights law, drug and alcohol addictions are to be treated the same as any other disability or protected human rights ground. Employers are prohibited from discriminating against employees on the basis of their addiction and have a legal duty to accommodate these individuals to the point of undue hardship.

3.2.2 Jurisprudence

In most workplace accommodation cases, the protected characteristic requiring accommodation is a form of disability.²² Canadian legal decision makers have long recognized the disadvantaged position of individuals with disabilities. In *Ontario Nurses' Association v. Mount Sinai Hospital*, the Ontario Court of Appeal acknowledged that, “people with disabilities have historically been undervalued in Canadian society generally, and in the area of employment in particular.”²³ As a group, people with disabilities “suffer from pre-existing disadvantage, vulnerability, stereotyping and prejudice.”²⁴ People who are subject to unfair treatment in society by virtue of personal characteristics or circumstances, such as disability, are often not given equal concern,

²² Michael Lynk, “Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace,” in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 203.

²³ (2005), 75 OR (3d) 245 at para 25 [*Mount Sinai*].

²⁴ *Ibid.*

respect or consideration.²⁵ Therefore, it is logical to conclude that further differential treatment, which could arise from the imposition of ostensibly neutral workplace standards and policies, “will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.”²⁶

Canadian human rights statutes provide broad definitions of disability to allow for the protection of various physical and mental illnesses and the common law has brought these statutory provisions to life by developing and expanding the interpretation of disability. One of the most notable early addiction cases is *Entrop v. Imperial Oil Ltd.*, where the Ontario Court of Appeal acknowledged that substance abuse and dependence “are each a handicap”—now referred to as disability—under human rights legislation.²⁷ This case involved the appeal of a 1995 Ontario Board of Inquiry decision, which appears to be the first case in Ontario to consider whether alcoholism constituted a handicap.²⁸ The Court of Appeal accepted the Board’s conclusion that substance abuse “fits without difficulty into the definition of ‘handicap’ under the *Code*, as an illness or disease creating physical disability or mental impairment, and interfering with physical, psychological and social functioning,” thus entitling such individuals to human rights protections.²⁹ The Court’s finding that drug and alcohol addiction constitutes a disability under Canadian human rights legislation has been accepted and confirmed by the subsequent jurisprudence.

The case law establishes that employers have an onerous obligation to ensure that employees with drug and alcohol addictions are appropriately accommodated in the workplace. The jurisprudence suggests that employer’s accommodation duty remains operative, even when the employee failed to disclose their disability, violated a last

²⁵ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 63.

²⁶ *Mount Sinai*, *supra* note 23 at para 25, quoting *ibid*.

²⁷ *Supra* note 13 at para 89.

²⁸ *Entrop Board*, *supra* note 13 at para 19.

²⁹ *Entrop*, *supra* note 13 at para 89, quoting *ibid* at para 24.

chance agreement or displayed signs and symptoms of the illness at work.³⁰ As denial and relapse are common elements of addiction, employers must tolerate some interference with the accommodation process, in order to satisfy the duty to accommodate. Furthermore, “While safety sensitive and zero-tolerance rules in the workplace are significant features of a modern workplace, they cannot be advanced to defeat an accommodation if a tolerable range of risk could be employed that would permit an employee with a mental health or addiction disability to productively work.”³¹ Post-discharge evidence of active and successful rehabilitation efforts by terminated employees with an addiction often persuade labour arbitrators that the employer’s accommodation duty has not been exhausted to the point of undue hardship and a productive employment relationship remains possible.³²

The accommodation process also requires the participation and cooperation of the employee seeking accommodation. Given the nature of addiction disability, this involves positive rehabilitative efforts towards recovery. Although denial is a common feature of addiction, employees are expected to acknowledge and address the seriousness of their condition and manage their addiction.³³ Where an employee refuses to take responsibility for his or her actions and is consistently unable to effectively manage their addiction, a legal decision maker may determine that the employer has fulfilled its duty to accommodate, under the circumstances.

Courts have acknowledged the complexities underlying addiction disability and the public perceptions of drug and alcohol addiction. While many disabilities are or appear to be beyond an individual’s control, drug and alcohol addictions are perceived to contain an element of control or “a quasi-voluntary aspect.”³⁴ In *Canada (Attorney General) v. PHS Community Services Society*, the SCC stated that the ability to make some choices

³⁰ Lynk, *supra* note 22 at 230.

³¹ *Ibid* at 230-231.

³² *Ibid* at 231.

³³ *Ibid*.

³⁴ *Ibid* at 233.

with respect to substance use does not negate the finding that “addiction is a disease in which the central feature is impaired control over the use of the addictive substance.”³⁵ Furthermore, the issue of addiction “attracts a variety of social, political, scientific and moral reactions”³⁶ and is associated with “great social stigma.”³⁷ As a result, “People with addictions may face unique experiences of marginalization and disadvantage. These may be due to extreme stigma, lack of societal understanding, stereotyping and criminalization of their addictions.”³⁸

Although drug and alcohol addictions are legally recognized as disabilities, these illnesses continue to be viewed differently from other medical conditions. Marginalization, stigmatization and misunderstanding are the unfortunate realities of many individuals struggling with addiction. Nevertheless, the negative stereotyping of addiction disability has no place in legal decision-making. It is crucial that these negative, external factors do not influence the judicial treatment of addiction disability in workplace accommodation cases.

3.3 Models of Disability

Drug and alcohol addiction are legally recognized as a form of disability, but what is a disability and what are the implications of having a disability? Disability has been defined in various ways; accordingly, different conceptual models of disability have developed over time. This thesis concentrates on three leading formulations of disability: the biomedical model, economic model and sociopolitical model. The biomedical and economic models characterize disability as an individual pathology, whereas the sociopolitical model views disability as a social pathology.³⁹ Both the biomedical and

³⁵ 2011 SCC 44 at para 101 [*PHS*].

³⁶ *Ibid* at para 105.

³⁷ *Tranchemontagne*, *supra* note 13 at para 126.

³⁸ Ontario Human Rights Commission, “Recognizing mental health disabilities and addictions” (18 June 2014), online: <http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/4-recognizing-mental-health-disabilities-and-addictions#_edn39>.

³⁹ David Hosking, “Critical Disability Theory” (Paper delivered at the 4th Biennial Disability Studies Conference, Lancaster University, UK, 2-4 September 2008) at 6-7.

economic models view disability as “individual deformities and limitations, a diminished deviation from the idealized bodily norm” and are informed by notions of pity, charity and social segregation.⁴⁰ While the biomedical model focuses on the individual’s functional abilities and limitations, the economic model concentrates on their ability to perform occupational roles and skills.⁴¹ The sociopolitical model, on the other hand, stresses the importance of the social environment and examines its impact on individuals with disability.⁴² Unlike the biomedical and economic approaches, the sociopolitical model regards disability as a social construct and espouses a human rights approach.⁴³

Models of disability shape and inform public policy, laws and regulations, and vice versa. These theoretical models influence public attitudes, shape legislation and determine the services provided to people with disabilities, all of which can create prejudice and discrimination.⁴⁴ The biomedical and economic models view disability as the deviation from a valued norm or standard and consider disability to be undesirable and focus on minimizing its prevalence and effects. The adoption of these models gives rise to further prejudice, discrimination, marginalization and reduced opportunity for people with disabilities.⁴⁵ As public policy fundamentally shapes both the social structure and built environment, laws and regulations play a fundamental role in determining the skills and attributes that an individual requires to participate in society.⁴⁶ The sociopolitical model illustrates how the social structure and environment precludes certain individuals from participating in society.

⁴⁰ Lynk, *supra* note 22 at 191.

⁴¹ Harlan Hahn, “The Political Implications of Disability Definitions and Data” (1993) 4:2 *Journal of Disability & Policy Studies* 41 at 43 [Hahn, “Political Implications”].

⁴² *Ibid.*

⁴³ Lynk, *supra* note 22 at 191.

⁴⁴ Julie Smart, “Models of Disability: The Juxtaposition of Biology and Social Construction” in Dennis Maki & TF Riggart, eds, *Handbook of Rehabilitation Counseling* (New York: Springer, 2004) 25 at 29.

⁴⁵ *Ibid.*

⁴⁶ Harlan Hahn, “Disability Policy and the Problem of Discrimination” (1985) 28:3 *American Behavioural Scientist* 293 at 296.

Admittedly, there is no general social or legal consensus regarding the meaning of disability and this uncertainty arguably “causes and contributes to the ongoing conflict around policies, programs, laws, and advocacy that are purported to be based on equality and human rights.”⁴⁷ The visible tension in contemporary debates regarding disability arises from this lack of consensus and the different theories that shape the collective understanding of disablement.⁴⁸ These formulations of disability can help explain why there is a discrepancy in the implementation and provision of rights and equality with respect to disability and addiction, in particular.

3.3.1 Biomedical Model

For most of the twentieth century, the predominant paradigm for understanding disability was the biomedical model, which characterizes disability as “an inherent characteristic of a person arising from an objectively identified impairment of the mind or body.”⁴⁹ Remnants of this paradigm are still visible today. The biomedical model presumes that disability is an individual pathology, resulting from biological characteristics,⁵⁰ and identifies the individual’s medical condition as the source of their disadvantage.⁵¹ Under this model, disability is defined as a defect, an unfortunate deviation from the norm:

The most commonly held belief about [this model of] disablement is that it involves a defect, deficiency, dysfunction, abnormality, failing, or medical “problem” that is located in an individual. We think it is so obvious as to be beyond serious dispute that disablement is a characteristic of a *defective person*, someone who is functionally limited or anatomically abnormal, diseased, or pathoanatomical, someone who is neither whole nor healthy, fit nor flourishing, someone who is biologically inferior or subnormal. The

⁴⁷ Marcia Rioux & Fraser Valentine, “Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47 at 47.^[1]

⁴⁸ *Ibid* at 49.

⁴⁹ Hosking, *supra* note 39 at 7.

⁵⁰ Rioux & Valentine, *supra* note 47 at 50.

⁵¹ Hosking, *supra* note 39 at 6.

essence of disablement, in this view, is that there are things *wrong* with people with disabilities.⁵²

Clearly, disability is not a neutral category within the biomedical model; it is a politically loaded term and is essentially “used to identify and stigmatize people and behaviours that are considered abnormal or morally wrong.”⁵³ Under this model, disability is located within the individual and great effort is directed at eliminating the defect and disability.⁵⁴ Accordingly, the individual with a disability constitutes the unit of analysis, for both research and policy purposes, and the individual’s condition is the primary point of intervention.⁵⁵ []
[SEP]

Under the biomedical model, “normal” is the ideal and diagnostic tools and interventions seek to cure or minimize the pathology.⁵⁶ The biomedical model prioritizes the prevention, cure, containment, amelioration and palliation of disability.⁵⁷ Medicine and biotechnology are used to treat disability and biological or genetic intervention and screening serve as preventative measures.⁵⁸ Where the elimination or cure of the disability is not possible, the objective shifts to improving the condition and providing comfort to the individual with a disability, ultimately accepting disadvantage as an inevitable outcome for people with disabilities.⁵⁹ The biomedical model regards disability and its associated costs as an anomaly and a social burden and suggests that the social inclusion of people with disabilities is a private responsibility, rather than a public one.⁶⁰

⁵² Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 61.

⁵³ AJ Withers, *Disability Politics and Theory* (Black Point, Nova Scotia: Fernwood Publishing, 2012) at 41.

⁵⁴ Dianne Pothier & Richard Devlin, “Introduction: Toward a Critical Theory of Dis-Citizenship” in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 1 at 10.

⁵⁵ Rioux & Valentine, *supra* note 47 at 50.

⁵⁶ Withers, *supra* note 53 at 31.

⁵⁷ Lynk, *supra* note 22 at 191.

⁵⁸ Rioux & Valentine, *supra* note 47 at 49.

⁵⁹ *Ibid* at 50-51.

⁶⁰ *Ibid* at 50.

The biomedical model does not account for systemic discrimination or the societal barriers that impact people with disabilities. As a result of the model's focus on the "individualization, privatization, and medicalization of disability," it has remained silent on the issues of discrimination and social justice⁶¹ and "precluded the diagnosis of architectural or other environmental barriers in the treatment of permanent impairments."⁶² The biomedical model is not an interactional model; under this paradigm, "the definition, the 'problem,' and the treatment of the disability are all considered to lie within the individual with the disability."⁶³ It presumes that both the cause of the disability and responsibility for its solution rest with the individual and, therefore, "has the authority to relieve society of any responsibility to accord civil rights to individuals with disabilities."⁶⁴ Rather than addressing and changing the social problems that oppress people with disabilities, the biomedical model seeks to change these individuals and retain the social structure that enables their oppression.⁶⁵ The ultimate goal of the biomedical model is to eliminate or, at the very least, reduce the prevalence of disability—not cure the disadvantage that people with disabilities experience.

3.3.2 Economic Model

The economic model of disability essentially "reduces the definition of disability to an economic dimension"⁶⁶ and views disability through the narrow lens of economic participation and productivity. The model frames disability in terms of the interaction between an individual's impairment and the supply-side conditions of the labour market and, accordingly, regards disability as "a limitation to an employee's repertoire of

⁶¹ Julie Smart & David Smart, "Models of Disability: Implications for the Counseling Profession" (2006) 84 *Journal of Counseling & Development* 29 at 30.

⁶² Hahn, "Political Implications," *supra* note 41 at 44.

⁶³ Smart & Smart, *supra* note 61 at 30.

⁶⁴ *Ibid* at 31.

⁶⁵ Smart, *supra* note 44 at 34.

⁶⁶ *Ibid* at 38.

productive capacities, abilities and skills to adapt to mainstream societal structures.”⁶⁷ Much like the biomedical model, the economic model characterizes disability as an individual pathology, whereby the ability to work is the desired condition and the inability to work is considered deviant.⁶⁸ The economic model presumes that disability limits the amount or type of work an individual is able to perform and renders an individual incapable of participating in the labour force and meaningfully contributing to the economy.⁶⁹

Under the economic model, people with disabilities are viewed “either as past contributors to the economic system and thus deserving of assistance or as outside the economic system and so meriting only charity.”⁷⁰ Individuals who are unable to work and require public resources are labeled as burdens to society.⁷¹ From this perspective, an individual’s sense of worth is reduced to their earning capacity. Although different factors, including the economic climate, may contribute to an individual’s state of unemployment, the economic paradigm views functional limitations and inadequate work skills as the primary barriers preventing people with disabilities from engaging in various types of work.⁷² The economic model postulates that an individual’s ability to work is primarily dependent on their functional capacities and neglects to appropriately assess the prospect of successful workplace accommodation.⁷³ Notions of respect, accommodation and civil rights are subordinate to an individual’s ability to work and contribute to the economy.⁷⁴ The individual with a disability is expected to fulfill the existing occupational

⁶⁷ Lynk, *supra* note 22 at 191.

⁶⁸ Smart, *supra* note 44 at 37.

⁶⁹ Lyn Jongbloed, “Disability Policy in Canada: An Overview” (2003) 13:4 *Journal of Disability & Policy Studies* 203 at 205.

⁷⁰ *Ibid.*

⁷¹ Smart, *supra* note 44 at 38.

⁷² Harlan Hahn, “Toward a Politics of Disability: Definitions, Disciplines, and Policies” (1985) 22:4 *Social Science Journal* 87 [Hahn, “Toward a Politics”].

⁷³ Jongbloed, *supra* note 69 at 205.

⁷⁴ Smart, *supra* note 44 at 37.

requirements and minimal consideration is given to the possibility of altering job expectations and accommodating the needs and skills of the employee with a disability.⁷⁵

The economic model prioritizes economic efficiency and strives to reduce the costs associated with unemployment and limited work productivity arising from disability. Accordingly, reform under this model focuses on rehabilitation and some modest economic integration.⁷⁶ The economic model views disability as “a deficit in human capital that limits labour force participation” and presents strategies for overcoming this shortcoming through individual enhancements.⁷⁷ It does not attempt to modify occupational requirements or the environment to facilitate the participation of individuals with disabilities in the labour force; rather, the model presumes that, if the individual with a disability develops vocational skills, they will be able to adapt to the existing environment and participate in the workforce.⁷⁸

Furthermore, flowing from the underlying notions of charity and pity, the economic model leads to welfare programs for people with disabilities that are unable to work and support themselves. Financial assistance may help improve the circumstances of some individuals with disabilities but these programs do not change or limit the pre-existing barriers that such individuals encounter in society and upon entering the workforce nor do they promote equality and independence. Although the conception of disability involves an economic component, a purely economic understanding unnecessarily and inappropriately simplifies disability, to the exclusion of non-monetary considerations.

⁷⁵ Hahn, “Toward a Politics,” *supra* note 72.

⁷⁶ Lynk, *supra* note 22 at 191.

⁷⁷ Richard Scotch & Kay Schriener, “Disability as a Human Variation: Implications for Policy” (1997) 549 *Annals of the American Academy* 148 at 154.

⁷⁸ Jongbloed, *supra* note 69 at 207.

3.3.3 Sociopolitical Model

The sociopolitical model of disability emerged in the 1970s and challenged the previous paradigms that pathologized disability⁷⁹ by espousing the view that disability is a difference, not an anomaly, arising from the social environment. The model interprets variations in human ability as natural, expected events, not as rationales for restricting the potential of people with disabilities to contribute to society, and examines the broad systemic factors that prevent these individuals from participating in society as equals.⁸⁰ Under this model, disability stems, not from the individual's limitations, but from "the failure of the social environment to adjust to the needs of people with different abilities."⁸¹ The model "separate[s] 'disability' from 'impairment,' defining disability as the oppression imposed on disabled people as a result of [their] impairments."⁸² The model contends that:

(1) disability is a social construct, not the inevitable consequence of impairment, (2) disability is best characterised as a complex interrelationship between impairment, individual response to impairment, and the social environment, and (3) the social disadvantage experienced by disabled people is caused by the physical, institutional and attitudinal (together, the 'social') environment which fails to meet the needs of people who do not match the social expectation of 'normalcy.'⁸³

The sociopolitical model defines disability as "a form of social injustice attributable to the stigmatizing attitudes and discriminatory practices in the larger society"⁸⁴ and ultimately traces the source of inhospitable environments to negative social attitudes towards people with disabilities. People with disabilities are "subjected to prejudice and discrimination on the basis of visible or labeled physical differences" and these social

⁷⁹ *Ibid* at 203.

⁸⁰ Rioux & Valentine, *supra* note 47 at 52.

⁸¹ Jongbloed, *supra* note 69.

⁸² Withers, *supra* note 53 at 5.

⁸³ Hosking, *supra* note 39 at 7.

⁸⁴ Lynk, *supra* note 22 at 191.

attitudes of the non-disabled majority give rise to the various environmental restraints encountered by people with disabilities.⁸⁵

The sociopolitical model criticizes the biomedical and economic models for locating disability solely within the affected individual and ignoring society's role in creating unnecessary barriers for people with disabilities.⁸⁶ By viewing disability as a product of the interaction between people and their surroundings, the model shifts the emphasis away from the individual's abilities and limitations to the barriers created by the social, cultural, economic, and political environment.⁸⁷ The sociopolitical approach regards disability as a consequence of the existing social structure and suggests that disability can be remedied by removing the social barriers⁸⁸ and enhancing the participation of people with disabilities in the community, including the workforce.⁸⁹

The SCC has expressly endorsed and adopted the sociopolitical model and this approach has since formed the foundation of the human rights framework for understanding and the legal treatment of disability. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, the SCC acknowledged the importance of “a multi-dimensional approach that includes a socio-political dimension:”

By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap”. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.⁹⁰

⁸⁵ Hahn, “Political Implications,” *supra* note 41 at 47.

⁸⁶ Lynk, *supra* note 22 at 191.

⁸⁷ Hahn, “Toward a Politics,” *supra* note 72.

⁸⁸ Rioux & Valentine, *supra* note 47 at 51.

⁸⁹ Jongbloed, *supra* note 69.

⁹⁰ *City of Montreal*, *supra* note 17 at para 77.

The SCC accepts that disability results from the interaction between an individual's impairment and the social environment,⁹¹ thus adopting the view of disability as a social construct.

Under the sociopolitical model, disability arises from the various societal barriers that restrict people with disabilities from participating in economic and social domains. Thus, the treatment of disability is achieved through the reformulation of economic, social and political policies as well as increased individual control of services and supports.⁹² From this perspective, the elimination of systemic social, economic and physical barriers along with the recognition and acceptance of disability as an inherent part of society, rather than an aberration, help facilitate prevention.⁹³ In order to effect change, policies must target the environment, not just the functional or economic capabilities of people with disabilities.⁹⁴ Under the sociopolitical model of disability, the social structure represents the unit of analysis for research and policy-making and the social, environmental, and economic structures of society constitute the primary points of intervention.⁹⁵ The sociopolitical model regards the social inclusion of people with disabilities as a public responsibility and, accordingly, directs the community to provide the supports and assistance required to enable their social, political and economic integration, self-determination and legal and social rights.⁹⁶

3.4 Models of Addiction

The biomedical, economic and sociopolitical models of disability provide a framework for understanding disability in general but do not account for the distinct features inherent to drug and alcohol addiction, in particular. Nevertheless, these models have influenced and formed the foundation for the development of addiction-specific paradigms. The

⁹¹ *Ibid* at paras 78-79.

⁹² Rioux & Valentine, *supra* note 47 at 52.

⁹³ *Ibid*.

⁹⁴ Hahn, "Toward a Politics," *supra* note 72.

⁹⁵ Rioux & Valentine, *supra* note 47 at 52.

⁹⁶ *Ibid* at 51-53.

moral, medical and biopsychosocial models of addiction build upon the broad conceptual models of disability to address the unique aspects and complexities of addiction, including the issues of choice and control.

Theories of addiction have traditionally been divided into the moral model and the medical model. The moral model, much like the biomedical model of disability, views addiction as a personal defect.⁹⁷ From this perspective, addiction is considered to be “a refusal to abide by some ethical or moral code of conduct” and freely chosen behavior that is both wrong and irresponsible.⁹⁸ The moral model of addiction has largely fallen out of favour amongst healthcare professionals; however, the stigma associated with drug and alcohol addiction continues to exist. The medical model, on the other hand, characterizes addiction as a chronic brain disease and acknowledges the influence of genetic, psychosocial and environmental factors.⁹⁹ The model “proposes that addictions are a disease like any other disease and are not a symptom or manifestation of any other underlying psychological or physical process.”¹⁰⁰ The biopsychosocial model of addiction builds on the medical perspective to create a multidimensional paradigm that recognizes the biological, psychological and social elements of addiction.

The jurisprudence reflects an oscillation between the moral and medical models of addiction. Legal decisions in favor of reinstating and accommodating individuals with an addiction invariably adopt the medical model, not the moral perspective, and view addiction as a legitimate illness and compulsion. Although the medical model legitimizes addiction as a disease, it primarily focuses on biological factors and continues to locate disability within the individual. What appears to be missing from the addiction jurisprudence is an equivalent of the sociopolitical model of disability that defines

⁹⁷ Hanna Pickard, Serge Ahmed & Bennett Foddy, “Alternative Models of Addiction” (2015) 6:20 *Front Psychiatry* at 1.

⁹⁸ Dennis Thombs, “Moral Model” in Gary Fisher & Nancy Roget, eds, *Encyclopedia of Substance Abuse Prevention, Treatment, & Recovery* (Thousand Oaks, California: Sage Publications, 2009) 561 at 561.

⁹⁹ Herie, *supra* note 1 at 4.

¹⁰⁰ David Borsos, “Models of Addiction” in Gary Fisher & Nancy Roget, eds, *Encyclopedia of Substance Abuse Prevention, Treatment, & Recovery* (Thousand Oaks, California: Sage Publications, 2009) 10 at 10.

addiction as a socially constructed disadvantage. The fields of psychology, social work and counseling have embraced the biopsychosocial model of addiction, which resembles the sociopolitical model of disability. It neither portrays addiction as a moral failing nor a purely biological phenomenon, but rather an interaction between the various dimensions of an individual's biological, social, psychological, spiritual and cultural environment,¹⁰¹ thereby providing a more comprehensive view of the complex processes underlying addiction disability.

3.4.1 Moral Model

The moral model of addiction became prevalent in the first half of the twentieth century, before the proliferation of the scientific developments enabling the neurobiological study of addiction.¹⁰² The moral model views addiction as “a choice characterized by voluntary behaviour under the control of the addict.”¹⁰³ The model portrays addiction as a character defect—a sign of irresponsibility, impulsiveness or lack of willpower—and not a disease. This characterization associates addiction with weakness and deviance and ultimately perpetuates the stigma surrounding the illness. Addiction is seen as a “moral failure,” for which individuals are held responsible and judged accordingly.¹⁰⁴ Although the medical community has generally abandoned the moral model of addiction, this perspective, along with its stigmatizing effects, still lingers today.

With the rise of evidence supporting the view that addiction is a chronic brain disease, the medical model of addiction has largely displaced the use of the moral model within the scientific community; however, some medical professionals and academics continue to support the view that addiction is a voluntary choice, rather than a compulsion fueled by

¹⁰¹ James Bethea, “Biopsychosocial Model of Addiction” in Gary Fisher & Nancy Roget, eds, *Encyclopedia of Substance Abuse Prevention, Treatment, & Recovery* (Thousand Oaks, California: Sage Publications, 2009) 129 at 129.

¹⁰² Pickard, Ahmed & Foddy, *supra* note 97 at 1.

¹⁰³ Edmund Henden, Hans Olav Melberg & Ole Jørgen Røgeberg, “Addiction: Choice or Compulsion?” (2013) 4:77 *Front Psychiatry* at 1.

¹⁰⁴ Pickard, Ahmed & Foddy, *supra* note 97 at 1.

a disease.¹⁰⁵ Under the moral model, individuals with addictions are viewed as “selfish and hedonistic and personally responsible for creating suffering for themselves and others” and, thus, deserve the various health, social, employment and legal problems they encounter.¹⁰⁶

The moral model utilizes the notion of volition to distinguish addiction from other disabilities and medical conditions:

[W]hile symptoms of typical diseases such as Alzheimer’s or cancer are biologically based and non-voluntary in the sense that they do not develop as the result of decision-making processes but are beyond the person’s capacity to volitionally influence, this is not so in the case of the repetitive drug-oriented behavior of addicts. Although this behavior is the most prominent symptom of addiction, its development is clearly affected by decisions made and is volitionally influenced. It is flexible, adaptable, and involves elements of planning.¹⁰⁷

The moral model suggests that the initial choice to consume drugs or alcohol signifies that the development of an addiction is fundamentally a choice and thus disproves the notion that addiction is a disease. However, many other chronic illnesses, such as heart disease and diabetes, also have risk factors, like obesity and diet, that arguably involve similar decision-making processes. Consequently, the notion of choice and control are contentious issues that are often raised in addiction disability cases.

Advocates of the moral model argue that the medical model obscures the element of choice¹⁰⁸ and suggests that the categorization of addiction as a brain disease “excuse[s] personal irresponsibility and criminal acts instead of punishing harmful and often illegal behaviors.”¹⁰⁹ However, the harmful effects and criminality of drug use does not detract

¹⁰⁵ Gene Heyman, “Addiction and choice: theory and new data” (2013) 4:31 *Front Psychiatry* at 4.

¹⁰⁶ Thombs, *supra* note 98 at 561.

¹⁰⁷ Henden, Melberg & Røgeberg, *supra* note 103 at 2.

¹⁰⁸ Sally Satel & Scott Lilienfeld, “Addiction and the Brain-Disease Fallacy” (2013) 4:141 *Front Psychiatry* at 2.

¹⁰⁹ Nora Volkow, George Koob & A Thomas McLellan, “Neurobiologic Advances from the Brain Disease Model of Addiction” (2016) 374:4 *New England Journal of Medicine* 363 at 364.

from the scientific evidence that addiction is a chronic brain disease. By placing so much emphasis on personal choice, this perspective fails to acknowledge and appreciate the inherent complexities underlying drug and alcohol addiction and mistakenly simplifies the notion of addiction. The moral model fails to account for the various genetic, biological, psychological, sociological and environmental factors that have been linked to the development of addiction and this omission ultimately detracts from the accuracy and applicability of the model.

The moral model places the primary focus—and ultimately, blame—on the individual, rather than external factors that may trigger the development of an addiction. Framing addiction as a character defect perpetuates the misperceptions and social stigma attached to this illness. The notion that addiction is a choice and a moral defect continues to pervade public perceptions of drug and alcohol addiction. These sentiments are even apparent in legal decisions involving individuals with addiction.¹¹⁰ The stigma associated with drug and alcohol addiction ultimately perpetuates the gap between neurobiological facts and findings and public perceptions of addiction:

The most beneficent public view of drug addicts is as victims of their societal situation. However, the more common view is that drug addicts are weak or bad people, unwilling to lead moral lives and to control their behavior and gratifications. To the contrary, addiction is actually a chronic, relapsing illness, characterized by compulsive drug seeking and use... The gulf in implications between the ‘bad person’ view and the ‘chronic illness sufferer’ view is tremendous. As just one example, there are many people who believe that addicted individuals do not even deserve treatment. This stigma, and the underlying moralistic tone, is a significant overlay on all decisions that relate to drug use and drug users.¹¹¹

The medical model, on the other hand, aims to reduce the stigma attached to drug and alcohol addiction by redirecting the focus from the individual’s deficiencies to the neurobiological underpinnings and predispositions of addiction.

¹¹⁰ For example, *British Columbia (Public Service Agency) v British Columbia Government and Service Employees Union*, 2008 BCCA 357; *Wright*, *supra* note 14; and *Cambridge Memorial Hospital v Ontario Nurses’ Association*, [2017] OLA No 22.

¹¹¹ Alan Leshner, “Addiction is a Brain Disease, and it Matters” (1997) 278:5335 *Science* 45 at 45.

3.4.2 Medical Model

Scientific developments in the latter half of the twentieth century enabled the discovery and understanding of the neurobiological underpinnings of addiction. As the ability to examine neurobiological phenomena improved, the medical model “became scientific orthodoxy, increasingly dominating addiction research and informing public understandings of addiction”¹¹² and advancements in neuroscience demonstrated the need for addiction to be “redefined by what’s going on in the brain.”¹¹³ Over the past two decades, addiction research has increasingly produced evidence supporting the notion that addiction is a brain disease.¹¹⁴ This finding has laid the foundation for the medical model of addiction.

The medical model departs from the moral model and defines addiction as a chronic brain disease, caused by neurobiological changes arising from continuous drug or alcohol use¹¹⁵ and characterized by compulsive and relapsing substance use “over which the addict has little or no control.”¹¹⁶ The medical model shifts the attention from the individual to the neurobiological underpinnings of addiction and “challenges deeply ingrained values about self-determination and personal responsibility that frame drug use as a voluntary, hedonistic act.”¹¹⁷

3.4.2.1 Role of the Brain in Addiction

Under the medical model, addiction is characterized as a chronic brain disease. The Canadian Society of Addiction Medicine, a national organization of medical professionals and scientists in the field of substance use disorders, defines addiction as:

¹¹² Pickard, Ahmed & Foddy, *supra* note 97 at 1.

¹¹³ American Society of Addiction Medicine, “ASAM Releases New Definition of Addiction: Addiction Is a Chronic Brain Disease, Not Just Bad Behaviour or Bad Choices” (Chevy Chase, Maryland: American Society of Addiction Medicine, 2011) at 2 [ASAM, “Release”].

¹¹⁴ Volkow, Koob & McLellan, *supra* note 109 at 363.

¹¹⁵ Pickard, Ahmed & Foddy, *supra* note 97 at 1.

¹¹⁶ Henden, Melberg & Røgeberg, *supra* note 103 at 1.

¹¹⁷ Volkow, Koob & McLellan, *supra* note 109 at 364.

A primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behaviour. Clinically, the manifestations occur along biological, psychological, sociological and spiritual dimensions. Common features are change in mood, relief from negative emotions, provision of pleasure, pre-occupation with the use of substance(s) or ritualistic behaviour(s); and continued use of the substance(s) and/or engagement in behaviour(s) despite adverse physical, psychological and/or social consequences. Like other chronic diseases, it can be progressive, relapsing and fatal.¹¹⁸

Similarly, the Centre for Addiction and Mental Health—Canada’s largest mental health and addiction teaching hospital and one of the world’s leading research centres with respect to addiction and mental health—describes addiction as “a primary, chronic, neurobiologic disease, with genetic, psychosocial, and environmental factors influencing its development and manifestations. It is characterized by behaviors that include one or more of the following: impaired control over drug use, compulsive use, continued use despite harm, and craving.”¹¹⁹

The medical model emphasizes the relationship between addiction and brain function to promote the understanding of addiction as a brain disease. The overwhelming evidence demonstrating the neurobiological changes associated with drug and alcohol addiction appears to support the medical model.¹²⁰ Scientific research has uncovered connections between addiction and the regulatory, reward, motivation, memory and related circuitry of the brain.¹²¹ In particular, addiction has been linked to:

the desensitization of reward circuits, which dampens the ability to feel pleasure and the motivation to pursue everyday activities; the increasing strength of conditioned responses and stress reactivity, which results in increased cravings for alcohol and other drugs and negative emotions when these cravings are not sated; and the weakening of the brain regions

¹¹⁸ Canadian Society of Addiction Medicine, *Canadian Addiction Medicine Bulletin* (2002) 7:2 at 7. This definition was adopted by the SCC in *PHS*, *supra* note 35.

¹¹⁹ *Herie*, *supra* note 1 at 4, citing Seddon Savage et al, “Definitions Related to the Medical Use of Opioids: Evolution Towards Universal Agreement” (2003) 26:1 *Journal of Pain & Symptom Management* 655 at 662.

¹²⁰ Volkow, Koob & McLellan, *supra* note 109 at 363.

¹²¹ American Society of Addiction Medicine, “A Description of Addiction” (Chevy Chase, Maryland: American Society of Addiction Medicine, 2011) at 1 [ASAM, “Description”].

involved in executive functions such as decision making, inhibitory control, and self-regulation that leads to repeated relapse.¹²²

The “altered signaling in prefrontal regulatory circuits, paired with changes in the circuitry involved in reward and emotional response, creates an imbalance that is crucial to both the gradual development of compulsive behavior in the addicted disease state and the associated inability to voluntarily reduce drug-taking behavior, despite the potentially catastrophic consequences.”¹²³ These changes in brain circuitry may even persist beyond detoxification and rehabilitation; the prevalence of repeated relapses and continuous cravings reflect the lasting behavioural effects of these brain changes.¹²⁴

3.4.2.2 Symptoms and Diagnostic Criteria

The behavioural symptoms associated with drug and alcohol addiction can be simply described as craving for the substance, loss of control over the amount or frequency of use, the compulsion to use and use despite harmful consequences, including physical, psychological, interpersonal, financial and legal problems.¹²⁵ The presence of harmful consequences and the loss of control over one’s drug or alcohol use are telling signs of problematic substance use.¹²⁶ The harmful consequences associated with substance use can range from mild to severe—experiencing a hangover or being late for work the next day to homelessness and acute disease.¹²⁷ Addictions are characterized by an inability to consistently abstain from using the substance and this difficulty may persist in the recovery process. Like other chronic diseases, drug and alcohol addiction often involves cycles of relapse and remission.¹²⁸

¹²² Volkow, Koob & McLellan, *supra* note 109 at 363.

¹²³ *Ibid* at 367.

¹²⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington, VA: American Psychiatric Publishing, 2013) at 483 [DSM-5].

¹²⁵ Herie, *supra* note 1 at 2.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ ASAM, “Description,” *supra* note 121 at 5.

The *DSM-5*, an “authoritative guide to the diagnosis of mental disorders”¹²⁹ that is used by health professionals across the world, provides a framework for diagnosing substance-related and addictive disorders. The *DSM-5* combines the previously separate categories of substance abuse and substance dependence into a single disorder—substance use disorder—measured on a continuum ranging from mild to severe.¹³⁰ The *DSM-5* provides distinct substance use disorder diagnoses based on nine different classes of substances: alcohol; cannabis; hallucinogens; inhalants; opioids; sedatives, hypnotics, and anxiolytics; stimulants; tobacco; and other substances.¹³¹ The same overarching diagnostic criteria apply to the various categories of substance use disorder but some symptoms are less salient for certain classes of substances and withdrawal symptoms are not specified for hallucinogens or inhalants.¹³²

The *DSM-5* groups the symptoms associated with substance use disorder into four categories: impaired control, social impairment, risky use and pharmacological indicators, meaning tolerance and withdrawal.¹³³ The *DSM-5* defines substance use disorder as the occurrence of at least two of the following criteria within a 12-month period:

1. The substance is often taken in larger amounts or over a longer period of time than intended;
2. There is a persistent desire or unsuccessful effort to decrease or control use of the substance;
3. A great deal of time is spent on activities to obtain the substance, use the substance or recover from its effects;
4. Craving or a strong desire or urge to use the substance;

¹²⁹ American Psychiatric Association, “*DSM-5*: Frequently Asked Questions,” online: <<https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions>>.

¹³⁰ American Psychiatric Association, “*DSM-5* Fact Sheets,” online: <<https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets>>.

¹³¹ *Supra* note 124 at 481.

¹³² *Ibid* at 483.

¹³³ *Ibid*.

5. Recurrent use of the substance resulting in a failure to fulfill major obligations at work, school or home;
6. Continued use of the substance despite experiencing persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of its use;
7. Discontinuation or reduction of participation in important social, occupational, or recreational activities because of substance use;
8. Recurrent use of the substance in situations where it is physically hazardous;
9. Continued use of the substance despite the individual knowing that they have a persistent or recurrent physical or psychological problem that is likely caused or exacerbated by the substance;
10. Tolerance, characterized by either a need for markedly increased amounts of the substance to achieve intoxication or the desired effect, or a markedly diminished effect when continuing to use the same amount of the substance; or
11. Experiencing withdrawal symptoms¹³⁴ or taking the substance or a similar substance to relieve or avoid withdrawal.¹³⁵

The *DSM-5* acknowledges that substance use disorders vary in terms of severity. Substance use disorders are classified as mild, moderate, or severe, depending on the number of diagnostic criteria met. If an individual meets two or three of the aforementioned criteria, they are considered to have a mild substance use disorder; a person who meets four or five of the *DSM-5* criteria is considered to have a moderate substance use disorder and an individual who satisfies six or more criteria has a severe case of substance use disorder.¹³⁶

¹³⁴ *Ibid* at 484. Withdrawal symptoms vary across the classes of substances, and separate criteria sets for withdrawal are provided. Withdrawal symptoms for alcohol, for example, include hand tremors, insomnia, nausea or vomiting, hallucinations, psychomotor agitation, anxiety and seizures.

¹³⁵ *Ibid* at 483-484.

¹³⁶ *Ibid* at 484.

3.4.2.3 Theorizing Causes of Addiction

The medical model of addiction calls attention to the biological and genetic factors previously ignored by the moral model, and emphasizes the scientific evidence revealing significant neurobiological changes in individuals that develop addiction.¹³⁷ People generally drink alcohol and use drugs because they “stimulate the brain in ways that ‘feel good’” and this immediate rewarding experience induces people to continue using the substance.¹³⁸ Of course, not everyone who uses drugs or alcohol become addicted. Approximately 10% of individuals exposed to addictive drugs actually develop severe symptoms of addiction.¹³⁹ Although long-term exposure to drugs and alcohol is necessary for the development of addiction, it is not sufficient in itself. Under the medical model, addiction is thought to develop in vulnerable individuals when repeated drug or alcohol use triggers a biological change, related to the impairment of brain reward circuits and physiological stress responses,¹⁴⁰ that results in an overwhelming urge to use the substance.

Susceptibility to addiction varies between individuals. Many different genetic, environmental, social and developmental factors contribute to a person’s unique susceptibility to drug or alcohol use, continuing substance use and experiencing the progressive changes in the brain that characterize addiction.¹⁴¹ The medical model particularly focuses on the role of genetics in the development of addiction. The model acknowledges that some people may inherit a vulnerability to the addictive properties of alcohol or drugs: “Some individuals have relatively low predisposition to developing addiction with drug exposure and may use drugs repeatedly in a manner that produces reward without the development of addiction, whereas others rapidly develop addiction

¹³⁷ Volkow, Koob & McLellan, *supra* note 109 at 367-368.

¹³⁸ Herie, *supra* note 1 at 8.

¹³⁹ Volkow, Koob & McLellan, *supra* note 109 at 367-368.

¹⁴⁰ Savage, *supra* note 119 at 657.

¹⁴¹ Volkow, Koob & McLellan, *supra* note 109 at 367.

following minimal exposure to rewarding drugs.”¹⁴² Nevertheless, many individuals who possess a genetic vulnerability do not actually develop an addiction.¹⁴³ Other factors have been found to increase an individual’s vulnerability to addiction, including family history of addiction, early exposure to drug use, socially stressful environments with limited available support and certain mental illnesses, such as mood disorders, psychoses and anxiety disorders.¹⁴⁴

Although biology and genetic predispositions play an important role in the development of addiction, the presence of these factors is not determinative:

Like many other chronic conditions, such as diabetes, cardiovascular disease, and asthma, addiction is a multidimensional disease. Although a neurobiological predisposition is thought to be important to the evolution of addiction, psychological and social factors are also important, particularly as they shape patterns of risky drug use in vulnerable individuals and sustain drug use over time. In addition, many studies suggest that stress may be a critical element in the development of addiction in some settings. Psychosocial factors are also important influences on recovery from addiction.¹⁴⁵

Drug and alcohol addictions have a biological component but it is clear that various factors underlie its development and manifestation.

3.4.2.4 Notion of Personal Choice and Control in Addiction

In the early nineteenth century, loss of control came to be recognized as the defining feature of the addiction.¹⁴⁶ Neuroscientific research has indicated that people with addictions lack decision-making capacity.¹⁴⁷ Accordingly, the issue of control and the

¹⁴² Savage, *supra* note 119 at 657.

¹⁴³ Herie, *supra* note 1 at 8.

¹⁴⁴ Volkow, Koob & McLellan, *supra* note 109 at 367.

¹⁴⁵ Savage, *supra* note 119 at 657.

¹⁴⁶ Marilyn Clark, “Conceptualising Addiction: How Useful is the Construct?” (2011) 1:13 *International Journal of Humanities & Social Science* 55 at 56.

¹⁴⁷ Daniel Buchman, Wayne Skinner & Judy Illes, “Negotiating the Relationship Between Addiction, Ethics and Brain Science” (2010) 1:1 *AJOB Neuroscience* 36.

capacity to make decisions still remains a part of the discussion surrounding addiction. This is especially evident in workplace accommodation cases involving addiction disability. Dr. Raju Hajela, an addiction medicine specialist and former president of the Canadian Society of Addiction Medicine, has stated that, “the disease creates distortions in thinking, feelings and perceptions, which drive people to behave in ways that are not understandable to others around them. Simply put, addiction is not a choice. Addictive behaviors are a manifestation of the disease, not a cause.”¹⁴⁸ Thus, the argument that individuals struggling with drug and alcohol addiction are in full control of their substance use is contrary to the very essence of an addiction.

In light of the medical model, “Describing addiction as a reflection of moral character and choice takes us back to an earlier, more ignorant time. Science now shows that addiction, including alcoholism, is not a simple phenomenon.”¹⁴⁹ Granted, the development of an addiction requires the initial decision to consume drugs or alcohol; however, this is not a feature unique to addiction. The risk factors associated with many different chronic diseases involve behavioural choices. Only a fraction of individuals who drink alcohol or use drugs actually become addicted. Similarly, not everyone who is overweight, a known risk factor for various health conditions, develops diabetes or heart disease, for example. The development of a drug or alcohol addiction stems from multiple causes, such as an individual’s particular tolerance to drugs and alcohol, brain inhibitory circuits and genetic predispositions, rather than character flaws.¹⁵⁰ In this sense, as articulated by Dr. Richard Soper, former director of the American Society of Addiction Medicine, “Addiction is a disease, just like asthma, diabetes and heart disease”¹⁵¹ and should be treated as such. Furthermore, “No one plans to become addicted. People may think that they can handle their substance use and that they only use

¹⁴⁸ ASAM, “Release,” *supra* note 113 at 2.

¹⁴⁹ Richard Soper, “Addiction: Character Defect or Chronic Disease?” (13 March 2014), *The ASAM Magazine*, online: <<https://www.asam.org/resources/publications/magazine/read/article/2014/03/13/addiction-character-defect-or-chronic-disease>>.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

when they want to. But when they want to change the way they use, they may find it's not that simple."¹⁵² Diseases, including addiction, arise from the presence and interaction of various risk factors and predispositions, some of which may be completely out of the person's control.

Many of the central features of addiction undermine the notion that an individual assumes control over their addiction and freely makes choices regarding behaviour associated with their addiction. Current addiction science indicates that it is not always possible for people struggling with addiction to simply "make better choices" with respect to their substance use.¹⁵³ As illustrated above, several of the *DSM-5* criteria for substance use disorder reflect a lack of control or, at the very least, impaired control over substance use. The first *DSM-5* criterion provides that the individual "may take the substance in larger amounts or over a longer period than was originally intended" and the second criterion indicates that they may experience "multiple unsuccessful efforts to decrease or discontinue use,"¹⁵⁴ thus demonstrating an inability to effectively control or limit their use. Furthermore, the ninth *DSM-5* criterion provides that individuals with addictions may continue to use the substance, despite acknowledging that they have a physical or psychological problem likely caused or exacerbated by their substance use. Some individuals are aware that their substance use has become problematic, but still continue to use despite wanting to stop, while others may not even recognize that their substance use is out of control and causing problems. This denial, which is also a common feature of addiction, "may simply be a lack of awareness or insight into the situation."¹⁵⁵ Regardless of whether or not the individual recognizes that they have a problem, the inability to control or limit their substance use is a sign of addiction.¹⁵⁶

¹⁵² Herie, *supra* note 1 at 1.

¹⁵³ Soper, *supra* note 149.

¹⁵⁴ *Supra* note 124 at 483.

¹⁵⁵ Herie, *supra* note 1 at 3.

¹⁵⁶ *Ibid.*

A person without substance use issues would likely find it quite easy to go a day without drinking alcohol or using drugs. However, this feat can be extremely difficult for individuals struggling with drug and alcohol addiction. The Centre for Addiction and Mental Health notes that the immediate positive effects of consuming drugs and alcohol can make it difficult for a person to limit their substance use.¹⁵⁷ People may rely on the effects of drugs or alcohol to provide some semblance of short-term relief from difficult and stressful life events or painful emotions. After using the substance, the person may temporarily feel better, have more confidence and forget about his or her problems, whereas the negative consequences associated with the substance may not be obvious or acknowledged for an extended period of time.¹⁵⁸ When people use alcohol or drugs to change or escape the way they feel, the substance use can become a habitual coping mechanism that is difficult to break.¹⁵⁹ Individuals with an addiction may come to genuinely “believe that they cannot function or make it through the day without drugs.”¹⁶⁰ A person who develops physical dependence may also experience distressing symptoms of withdrawal upon attempts to stop using the substance. Continued substance use, especially heavy use, can also give rise to neurobiological and physiological changes that further perpetuate the addictive behaviors. These changes to the brain may be lasting and explain why people continue to crave drugs and alcohol long after they have stopped using the substance and commonly experience relapses.¹⁶¹

3.4.3 Biopsychosocial Model

Canadian jurisprudence on the duty to accommodate employees with addictions appears to either reflect the moralistic perspective or, at best, the medical, brain disease model of addiction. Although the medical model has provided a greater understanding of the biological and genetic underpinnings of addiction and “legitimizes addiction as a medical

¹⁵⁷ *Ibid* at 5.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

condition,” it has been critiqued for promoting neuro-essentialist thinking as well as categorical notions of responsibility and free choice and undermining the complexity of addiction.¹⁶² By concentrating on the neurobiological features and processes that are inherently located within the individual, the medical model primarily places the focus within the person with an addiction, as opposed to external factors. Reductive, neurobiological explanations of addiction preclude a comprehensive understanding of the additional influence of psychological, social, cultural and other factors and the various complex processes underlying the development of addiction.¹⁶³ It also “implies simplistic categorical ideas of responsibility, namely that addicted individuals are unable to exercise any degree of control over their substance use.”¹⁶⁴

As illustrated by the sociopolitical model of disability, social factors play an important role in the development and manifestation of disability. However, these factors are not thoroughly considered under the moral and medical models of addiction. Although the SCC has endorsed the sociopolitical model of disability, the jurisprudence reveals that legal decision makers have not adopted this approach, which lays the very foundation of the human rights framework, to addiction disability cases. The biopsychosocial model, a sociopolitical-like model specific to addiction, has already been adopted and supported in the fields of psychology, social work and counseling¹⁶⁵ and could be implemented to remedy this apparent gap in Canadian human rights law.

3.4.3.1 Complex Interaction of Multiple Factors

The biopsychosocial model recognizes the deficiencies in the moral and medical models of addiction and acknowledges that, “the etiology of addiction is complex, variable, and multifactorial” and involves the interaction between various genetic, biological,

¹⁶² Buchman, *supra* note 147 at 36.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Bethea, *supra* note 101 at 129.

psychological, sociocultural and environmental factors.¹⁶⁶ The biopsychosocial model of addiction looks beyond neurobiology and “places the individual in his or her social environment and integrates his or her life narrative.”¹⁶⁷ Adopting “a holistic, systems approach,” the model identifies the influence and dynamic interaction of the various dimensions of the individual’s biological, social, psychological, spiritual and cultural environment and appreciates that the particular combinations, interactions and influence of each factor will be different for each individual.¹⁶⁸ The biopsychosocial model acknowledges the complexities underlying the development of addiction and postulates that addiction is caused by a combination of these various factors. No single factor causes addiction. By recognizing and emphasizing the influence of these once ignored external factors, the biopsychosocial model provides an alternative to “a forced choice between brain disease and condition of a weak will.”¹⁶⁹

Although the biopsychosocial model asserts that addiction is not a purely neurobiological phenomenon, it does not deny the influence of biological and genetic characteristics and processes. The model acknowledges that some individuals may be genetically or biologically predisposed to developing an addiction. Such a predisposition can arise from a combination of genes, changes in brain chemistry or a deficiency in the ability to metabolize alcohol or drugs.¹⁷⁰ Nevertheless, the presence of a biological predisposition is not determinative. In fact, the National Institute on Drug Abuse estimates that genetics account for approximately 30% of the cause of an individual’s addiction, while environmental factors account for the remaining 70%.¹⁷¹ An individual’s biological predisposition can either be triggered or offset by an accumulation of these other factors, such as psychological stressors, positive support systems and role models. Thus, it is important to acknowledge and examine the influence of non-biological factors.

¹⁶⁶ *Ibid.*

¹⁶⁷ Buchman, *supra* note 147 at 40.

¹⁶⁸ Bethea, *supra* note 101 at 129.

¹⁶⁹ Buchman, *supra* note 147 at 40.

¹⁷⁰ Borsos, *supra* note 100 at 12.

¹⁷¹ *Ibid.*

Research suggests that an individual's social environment and certain personality traits or psychological characteristics may predispose or contribute to the development of an addiction. Although it is difficult to determine causation—and particularly, whether the personality trait preceded the addiction or the addiction led to the personality trait—some characteristics are often shared by individuals with addictions, such as anxiety, depression, impulsivity, low self-esteem, a low tolerance for frustration or stress, poor coping skills and poor interpersonal relationship skills.¹⁷² Similarly, an individual's sociocultural environment and relationships play a role in their susceptibility to developing an addiction: “Social norms regulate behaviour and may act as informal mechanisms of social control. Social groups construct norms that affect individual behaviour, prevalence, and substance use patterns. Group membership in which substance use is socially acceptable, encouraged, or perhaps coerced is significantly associated with patterns of use.”¹⁷³ Family, peer and community values and attitudes toward prosocial activities and alcohol and drug use interact with family, peer and community supports and social stressors, such as poverty, family conflict, peer pressure and lack of emotional support.¹⁷⁴ The biopsychosocial model acknowledges that an individual's predisposition and development of an addiction depends on the interaction of various dynamic factors.

3.4.3.2 Social Construction

The emphasis traditionally placed on the biological characteristics of an individual fails to acknowledge the role of various social, cultural and political factors involved in the development of addiction. Much like the sociopolitical model of disability, the biopsychosocial model attempts to remedy this gap and emphasizes the social components underlying addiction. The biopsychosocial model endorses the examination of “society's role as an antecedent to addiction” and the development of subsequent

¹⁷² *Ibid.*

¹⁷³ Buchman, *supra* note 147 at 37.

¹⁷⁴ Bethea, *supra* note 101 at 129.

problems.¹⁷⁵ Although addiction involves biological components and processes, it is important to recognize that the identification and meaning of addiction disability are ultimately “framed by changing social, cultural and political values.”¹⁷⁶ Ideas commonly held with respect to mental illnesses are “cultural artifacts”—the products of the social construction of the particular era—that “shape and mold the community’s generalized reality orientation in subtle and unseen ways” and, thus, “reinforce and reproduce the constellations of power, wealth, and influence within their respective societies.”¹⁷⁷ Accordingly, addiction disability and the lived experience of individuals with addictions must be examined in light of the social context and climate.

Drug and alcohol addictions undoubtedly pose very real limitations and can severely impair an individual’s ability to function and perform day-to-day activities, such as going to work. Drug and alcohol addiction generally requires medical intervention, workplace accommodation as well as personal efforts to achieve and maintain sobriety. Individuals with addictions are also expected to manage their disability and cooperate with prescribed treatment in order to retain their job. In addition to these challenges, individuals struggling with addiction also encounter the negative perceptions, stereotypes and stigma pervasively associated with drug and alcohol addiction. The social perceptions of drug and alcohol addiction shape and influence the experience of people with addictions and can pose a barrier to their meaningful participation in society, including employment. In this sense, addiction and some of the limitations experienced by individuals with addictions are socially constructed.

Despite the recent focus on mental health initiatives and the resulting increased awareness and acceptance of mental illness, addiction continues to be stigmatized and misunderstood by society. Moralistic sentiments remain deeply embedded in the social dialogue surrounding addiction disability. Addiction remains a stigmatizing label and

¹⁷⁵ Franklin Truan, “Addiction as a Social Construction: A Postempirical View” (1993) 127:5 *Journal of Psychology* 489 at 494.

¹⁷⁶ Howard Kushner, “Toward a cultural biology of addiction” (2010) 5:1 *BioSocieties* 8 at 9.

¹⁷⁷ Truan, *supra* note 175 at 495, citing Philip Cushman, “Why the Self Is Empty: Toward a Historically Situated Psychology” (1990) 45:5 *American Psychologist* 599 at 601.

“the loss of control attributed to the state of addiction is considered deviant behaviour outside societal norms.”¹⁷⁸ Individuals struggling with addiction disability may be viewed as morally defective or weak, irresponsible, deviant, dishonest and untrustworthy. These misconceptions fuel the stigma and negative stereotypes attached to addiction and result in discrimination against individuals with addictions and, consequently, barriers to their social inclusion. For instance, the termination of an employee upon the discovery of their addiction or the employer’s resistance to accommodate an employee in recovery is a result of discrimination, fueled by the negative stereotypes and misconceptions about addiction. These socially constructed notions obstruct opportunities to participate in society, including acquiring and maintaining employment. The imposition of an ostracizing societal attitude toward addiction heightens the adversity and challenges experienced by such individuals.¹⁷⁹

3.4.3.3 Notion of Personal Choice and Control in Addiction

One of the primary critiques of the medical model of addiction is its all-or-nothing approach to characterizing an individual’s ability to control their addictive behaviours. Although the impairment of decision-making capabilities is an important feature of addiction, the medical model’s emphasis on total lack of control is inappropriate and inaccurate, as it appears to view control as binary and static. Control should be conceptualized on a spectrum; an individual’s ability to exercise self-control can change day to day and may even increase and decrease throughout the day. The ability to abstain or limit use in certain instances does not eliminate the existence of the addiction disability or its role in the adverse impact experienced by the individual, and should not be relied upon to negate human rights protections. The subsequent chapters demonstrate how this flawed, all-or-nothing approach to understanding personal choice and control has been adopted by legal decision makers in addiction disability cases to dismiss the

¹⁷⁸ K Klaue, “Drugs, addiction, deviance and disease as social constructs” (1999) L1:1-2 United Nations Office on Drugs and Crime Bulletin on Narcotics at 6.

¹⁷⁹ *Ibid* at 7.

discrimination and accommodation claims of individuals who appear to display some restraint with respect to their addictive behaviours.

The medical model's reliance on neurobiological factors does not fully resolve the dispute regarding the volitional nature of addiction. The biopsychosocial model provides a more nuanced approach and strives to "contextualize the individual" in order to provide a better understanding of responsibility and control within the particular context of addiction.¹⁸⁰ The model recognizes the various complex processes underlying decision-making and "does not portray people as only controlled by the state of their brains."¹⁸¹ Under this perspective, an individual's "[a]ddictive behaviours are neither viewed as controlled or uncontrolled but as difficult to control a matter of degree."¹⁸² The biopsychosocial model acknowledges that, "While making a decision is itself a mental act, a mental act or event does not cause behaviour alone, but is one part of the complex process between neuronal firing and action."¹⁸³ The intention to use drugs or alcohol does not in itself cause the individual to use the substance. Other factors are necessarily involved: "Action, subjective experience of action, and consequently responsibility for action is mediated by many factors, including psychological phenomenon such as an individual's emotional processes."¹⁸⁴

While the biopsychosocial model acknowledges the issues of control and decision-making concerning addictive behaviors, it challenges the view that people struggling with addiction are completely enslaved by their brain, rendering them incapable of controlling their actions at all times. Buchman, et al. describe the various processes underlying decision-making in the context of addiction:

The brain responds to particular social cues that may provide instant pleasure, or regulate biological homeostasis, such as relief from

¹⁸⁰ Buchman, *supra* note 147 at 37.

¹⁸¹ *Ibid* at 40.

¹⁸² *Ibid*.

¹⁸³ *Ibid* at 39.

¹⁸⁴ *Ibid*.

withdrawal (Li and Sinha 2008). Brain systems that moderate feeling, memory, cognition, and engage the individual with the world influence the decision to consume or not consume a drug, or participate in a specific behaviour or series of actions. Accordingly, this cybernetic brain-environment interaction may trigger strong somatic signals such as desire, urge and anticipation (Verdejo-Garcia and Bechara 2009). In effect, this process may limit autonomy as it allows for “preference reversals” (Levy 2007a) to occur in situations where an individual would rather not use.

The degrees in which self-control is exerted, free choice is realized and desired outcomes achieved are dependent on these complex interacting biopsychosocial systems... Accordingly, the matrix of a person’s socio-historical context, life narrative, genetics, and relationships with others influence intention, decision, and action, and thus shape the brain. Autonomy, therefore, is not adequately defined just by the events in the brain or the “quality” of the decision being made. As Gillett (2009) remarks, “a decision is...not a circumscribed event in neuro-time that could be thought of as an output, and an intention is not a causal event preceding that output, but both are much more holistically interwoven with the lived and experienced fabric of one’s life” (p. 333).¹⁸⁵

A complex combination of various biological, psychosocial and systemic factors, including brain processes, somatic mechanisms along with the ethical rules and norms that govern society, and the nature of this interaction guide an individual’s behavior and may, accordingly, explain why it is so difficult for some individuals to refuse drugs and alcohol in the face of increasingly negative consequences.¹⁸⁶

The biopsychosocial model contextualizes the responsibility placed on individuals with addictions and recognizes society’s role in facilitating substance use issues.¹⁸⁷ From the biopsychosocial perspective, the issue of control is contextual, and not categorical. Given the spectrum of substance use problems, it is appropriate to also characterize an individual’s related decision-making capacity along a spectrum. Therefore, an individual’s decision-making capacity is neither completely present nor completely

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid* at 40.

¹⁸⁷ *Ibid.*

absent, but rather, may be impaired in certain contexts and to varying degrees.¹⁸⁸ The addiction does not render a person completely incapable of making decisions at all times. However, a person's ability to exercise some self-control in some circumstances does not necessarily render the person "in control" of their addictive behaviours or diminish the legitimacy of their addiction.

3.5 Treatment and Recovery

The workplace accommodation process is inescapably intertwined with the employee's rehabilitative efforts and prognosis. Many accommodation cases centre on whether the individual has complied with prescribed treatment and the prognosis of their recovery. Thus, it is important to touch on addiction treatment, the prevalence of relapses and the general prognosis of the disease.

Drug and alcohol addiction can be successfully treated and managed, just like other chronic diseases.¹⁸⁹ Rehabilitative interventions can help people stop using drugs and alcohol and resume productive lives. Effective treatment "enables people to counteract addiction's powerful disruptive effects on their brain and behavior and regain control of their lives."¹⁹⁰ Studies show that the brain can recover, at least partially, after prolonged abstinence.¹⁹¹ The medical model of addiction has cultivated the development of behavioural interventions targeting the restoration of brain circuitry impacted by addiction, such as strategies to strengthen the salience of healthy rewards and mitigate stress reactivity.¹⁹²

Research indicates that combining treatment medications, where applicable, with behavioural therapy is generally the most effective way to ensure successful

¹⁸⁸ *Ibid* at 39.

¹⁸⁹ National Institute on Drug Abuse, *Drugs, Brains, and Behaviour: The Science of Addiction* (Bethesda, Maryland: National Institute on Drug Abuse, 2020) at 22 [NIDA, *Drugs, Brains, and Behaviour*].

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid*.

¹⁹² Volkow, Koob & McLellan, *supra* note 109 at 368.

rehabilitation.¹⁹³ Medications, such as methadone, buprenorphine and naltrexone, are available for the treatment of opioid drug and alcohol addiction; these medications aid the recovery process by reducing withdrawal symptoms and cravings.¹⁹⁴ Behavioural treatments, such as cognitive behavioural therapy, “help engage people in drug abuse treatment, provide incentives for them to remain abstinent, modify their attitudes and behaviors related to drug abuse, and increase their life skills to handle stressful circumstances and environmental cues that may trigger intense craving for drugs and prompt another cycle of compulsive abuse.”¹⁹⁵ Of course, there is no one ideal approach to treating addiction. Treatment plans must be tailored to the particular individual’s needs and circumstances, including the severity of the addiction, their motivation to change and the availability of support from family and friends.¹⁹⁶

Addiction treatment services vary in terms of length and intensity. Some are community-based and others are residential. The various treatment options include withdrawal management, counselling, day or residential treatment, recovery homes, support groups, like Alcoholics Anonymous, and aftercare, which aims to help people who have already completed a treatment program to return to the community and avoid relapse.¹⁹⁷ The Centre for Addiction and Mental Health acknowledges the value of the different approaches and notes their distinctions:

While all types of treatment services can be effective,^[1] a person’s specific circumstances influence which approach makes the most sense. People using community treatment services live at home and come to an agency for services. In general, community services are more willing to work with people who continue to use substances while they are in treatment. In contrast, people in residential programs live at a treatment facility for a set period. These programs typically require abstinence from all nonprescribed substances during people’s stay. Treatment approaches and

¹⁹³ NIDA, *Drugs, Brains, and Behaviour*, *supra* note 189 at 24.

¹⁹⁴ Herie, *supra* note 1 at 21.

¹⁹⁵ National Institute on Drug Abuse, *Principles of Drug Addiction Treatment: A Research-Based Guide (Third Edition)* (Bethesda, Maryland: National Institute on Drug Abuse, 2018) at 38.

¹⁹⁶ Herie, *supra* note 1 at 18.

¹⁹⁷ *Ibid* at 22-23.

philosophies about addiction do vary within different services and agencies.¹⁹⁸

Therefore, although the fundamental goals underpinning addiction treatment services are similar, each person's road to recovery will inevitably be different.

Due to the chronic nature of addiction, relapses are very common in the recovery process. However, relapses do not necessarily mean that treatment has failed. The treatment of chronic illnesses often involves changing deeply embedded behaviours. For a person recovering from drug or alcohol addiction, returning to substance use does not necessarily indicate failed rehabilitation, but rather, suggests that their treatment must be reinstated or adjusted.¹⁹⁹ Relapses are not unique to drug and alcohol addiction. As a matter of fact, the relapse rates for addiction are similar to relapse rates for other chronic illnesses, such as diabetes, hypertension and asthma, which, much like addiction, also have physiological and behavioural components.²⁰⁰ According to an American study, approximately 40% to 60% of people treated for alcohol or drug addiction return to substance use within one year of their discharge from treatment.²⁰¹ Comparably, approximately 30% to 50% of adult patients with type 1 diabetes and 50% to 70% of adult patients with hypertension or asthma experience the recurrence of symptoms that require additional medical care in order to reestablish remission.²⁰² The similar recurrence rates across these various chronic illnesses illustrate that relapse is a common feature of many different medical conditions and suggests that drug and alcohol addiction should be treated like any other chronic illness.²⁰³

¹⁹⁸ *Ibid* at 22.

¹⁹⁹ NIDA, *Drugs, Brains, and Behaviour*, *supra* note 189 at 23.

²⁰⁰ *Ibid*: A Thomas McLellan et al, "Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation" (2000) 284:13 *Journal of the American Medical Association* 1689.

²⁰¹ McLellan, *supra* note 200.

²⁰² *Ibid*.

²⁰³ NIDA, *Drugs, Brains, and Behaviour*, *supra* note 189 at 23.

3.6 Conclusion

This chapter has outlined the common manifestations of drug and alcohol addiction and the various conceptualizations of addiction disability, through the lens of the biomedical, economic and sociopolitical models of disability and the moral, medical and biopsychosocial models of addiction. These models advance distinct notions of drug and alcohol addiction and perceptions of those who struggle with substance use issues. The moral model is seriously problematic, as it portrays addiction as a moral defect and a voluntary choice, perpetuating the negative public perceptions and stigma associated with addiction disability. Although the medical model recognizes important biological factors, it is one-dimensional and depicts addiction as a biological abnormality within the individual. The biopsychosocial model provides the most suitable and complete representation of addiction disability. It neither portrays addiction as a moral flaw nor a purely biological condition, but rather an interaction between the various dimensions of an individual's biological, social, psychological, spiritual and cultural environment. The biopsychosocial perspective acknowledges the complex processes underlying addiction disability and offers a more comprehensive view of the disability than the other two models.

It is clear that drug and alcohol addiction can severely impair an individual's ability to participate in society, particularly maintaining productive employment. Accordingly, an employee with an addiction will likely require workplace accommodation during as well as after rehabilitation. However, in many cases, the employer fails to fulfill its duty to accommodate to the point of undue hardship. The following three chapters illustrate how the issues of choice, control, denial and relapse are commonly raised in addiction disability cases and add a layer of complexity to the discrimination and accommodation analyses. The subsequent chapters examine whether these fundamental laws and human rights principles are consistently applied in the addiction disability context.

Chapter 4

4 Pre-*Stewart v. Elk Valley Coal Corp.* Jurisprudence

In Canadian labour law, there have been three competing schools of thought on how to approach workplace misconduct arising from addiction: the disciplinary approach, the human rights approach and the hybrid disciplinary approach. The traditional disciplinary approach—rooted in the long-standing arbitral approach to culpable misconduct—determines whether the employer had just cause to discipline or terminate the employee and whether the disciplinary action was excessive, in the circumstances. Under this approach, the arbitrator acknowledges the applicability of the duty to accommodate but generally regards it as a mitigating factor, once the grievor’s culpability has already been determined.¹ The employee’s addiction disability is merely considered a mitigating factor in determining the appropriate discipline, and not a trigger for the application of the discrimination analysis and the employer’s duty to accommodate. The human rights approach, on the other hand, originated from human rights legislation and the subsequent statutory grant of power, incorporated in labour relations legislation, enabling arbitrators to interpret and apply human rights statutes.² The arbitrator seeks to determine whether the employee’s misconduct is connected to their underlying addiction disability and, if a compelling connection can be established, the analysis focuses on whether the employer fulfilled its duty to accommodate to the point of undue hardship—not the employee’s culpability. The hybrid disciplinary approach—evidenced in *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees’ Union*,³ which is discussed in this chapter—developed as a middle ground between the disciplinary and human rights approaches and integrates the traditional disciplinary analysis with accommodation principles. Under the hybrid analysis, the legal decision maker applies a

¹ Michael Lynk, “Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace,” in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 232 [Lynk, “Disability and Work”].

² For example, in Ontario, section 48(12)(j) of the *Labour Relations Act, 1995*, SO 1995, c 1, Sched A, provides arbitrators with this power.

³ 2008 BCCA 357 (Huddart J) [*Gooding*].

disciplinary or just cause analysis to the voluntary, culpable aspects of the employee's misconduct and a human rights analysis to the involuntary, non-culpable components causally connected to the disability.⁴

This chapter examines eight cases from 2008 to 2016, prior to the release of the Supreme Court of Canada's (SCC) decision in *Stewart v. Elk Valley Coal Corp.*:⁵ *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union, New Flyer Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3003*,⁶ *Wright v. College and Association of Registered Nurses of Alberta (Appeals Committee)*,⁷ *Seaspan ULC v. International Longshore & Warehouse Union, Local 400*,⁸ *Canadian National Railway v. Teamsters Canada Rail Conference*,⁹ *Public Service Alliance of Canada v. Saskatchewan Gaming Corp.*,¹⁰ *Ontario Nurses' Association v. Sunnybrook Health Sciences Centre*¹¹ and *McNulty v. Canada Revenue Agency*.¹² This is clearly not an exhaustive list of all the addiction cases during this time period; however, these decisions are representative of the Canadian case law on addiction at that time. These eight cases across Canada illustrate the divergent approaches commonly applied to addiction cases by legal decision makers, ranging from the broad, liberal human rights approach, reflecting an understanding and appreciation of the features and challenges of addiction disability, and the narrow, stringent approach, concerned with choice, control and causal connections.

⁴ Brian Etherington, "Recent Developments in the Duty to Accommodate Disabilities" in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook 2012-2013* (Second Series) (Toronto: Lancaster House, 2012) 403 at 406.

⁵ 2017 SCC 30 [*Elk Valley*].

⁶ [2010] MGAD No 43 (Peltz) [*New Flyer*].

⁷ 2012 ABCA 267 (Slatter J) [*Wright*].

⁸ [2014] BCCAAA No 108 (Lanyon) [*Seaspan*].

⁹ [2015] 122 CLAS 319 (Silverman) [*Canadian National Railway*].

¹⁰ [2015] SLAA No 27 (Comrie) [*Saskatchewan Gaming*].^[1]^[2]^[SEP]

¹¹ [2016] OLAA No 361 (Jesin) [*Sunnybrook*].

¹² 2016 PSLREB 105 (Jaworski) [*McNulty*].

In each of the eight cases, the employer—or in the case of *Wright*, the professional regulatory body—contended that it had not disciplined the employee for their addiction, but rather the employee’s misconduct, which resulted from their addiction—be it excessive absenteeism, theft or impairment at work. Of course, the presence of an addiction does not fully shield an employee from discipline for serious misconduct; there must be a connection between the addiction and prohibited behaviour. The existence and strength of such a connection is a point of contention in many addiction cases.

The first three cases examined in this chapter—*Gooding*, *New Flyer* and *Wright*—were released prior to the establishment of the *Moore* test;¹³ however, a similar approach to prima facie discrimination existed at the time.¹⁴ In all eight cases, the first two requirements of the prima facie discrimination analysis were not challenged: the employee had a drug or alcohol addiction, constituting a disability under the relevant human rights legislation, and the employee experienced an adverse impact in the form of disciplinary action. The point of contention comes down to the third element of prima facie discrimination: establishing a connection between the employee’s addiction and the adverse impact. Similarly, where the legal decision maker finds prima facie discrimination, the first two elements of the *Meiorin* test¹⁵ are conceded and the analysis subsequently centers on the third step of the test: demonstrating the policy or standard is reasonably necessary to accomplish its legitimate work-related purpose.

The SCC developed the *Moore* and *Meiorin* tests to standardize the approach for analyzing instances of discrimination and the duty to accommodate to the point of undue hardship. Although the *Moore* and *Meiorin* tests should be applied equally and uniformly to all cases of discrimination and accommodation, the following cases demonstrate the different approaches applied by Canadian arbitrators, courts and tribunals to addiction

¹³ *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*].

¹⁴ *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 [*Simpsons-Sears*]; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489; *Health Employers Association of British Columbia v British Columbia Nurses’ Union*, 2006 BCCA 57; and *Kemess Mines Ltd v International Union of Operating Engineers, Local 115*, 2006 BCCA 58.

¹⁵ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union*, [1999] 3 SCR 3 [*Meiorin*].

disability. The jurisprudence reveals that these legal tests have at times been misinterpreted and misapplied in the context of addiction.

Prior to examining the eight addiction disability cases, this chapter briefly summarizes the legal concept of standard of review, which is the level of deference given by a court when reviewing the decision of a lower court, tribunal or arbitration decision. The laws and principles concerning standard of review are pertinent to the appealed decisions discussed in this chapter as well as Chapters 5 and 6.

4.1 Standard of Review

In *Dunsmuir v. New Brunswick*, the SCC affirmed the two standards of review: the standards of correctness and reasonableness.¹⁶ Until very recently, determining the appropriate standard of review depended on various factors, including (1) the presence or absence of a privative clause, typically in the enabling statute of an administrative tribunal, stating that its decisions are final and not subject to review, indicating the need for deference; (2) the purpose of the tribunal as determined by its enabling statute; (3) the nature of the issue under consideration, and; (4) the expertise of the decision maker.¹⁷ In its December 2019 *Canada (Minister of Citizenship and Immigration) v. Vavilov* decision, the SCC affirmed that the standard of review analysis begins with the presumption that the standard of reasonableness applies in all cases.¹⁸ However, this presumption can be rebutted where the legislation indicates that a different standard is to apply or where the rule of law requires the standard of correctness to apply—namely, in cases that raise constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between administrative bodies.¹⁹

¹⁶ 2008 SCC 9 at para 34 [*Dunsmuir*].

¹⁷ *Ibid* at para 65.

¹⁸ 2019 SCC 65 at para 10 [*Vavilov*].

¹⁹ *Ibid* at para 17.

4.1.1 Reasonableness Standard

The reasonableness standard is concerned with the presence of justification, transparency and intelligibility within the decision-making process and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”²⁰ Reasonableness is a deferential standard of review that recognizes that certain questions and issues “do not lend themselves to one specific, particular result.”²¹ Under the reasonableness standard, reviewing courts are to give due consideration to the original decision makers’ determinations.²² The policy of deference espoused by the reasonableness standard “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” that the reviewing courts simply do not possess.²³

Prior to the presumption of the application of reasonableness standard, prescribed in *Vavilov*, the standard of review analysis involved the examination of various factors. The reasonableness standard typically applied to questions of fact, discretion and policy as well as questions of mixed fact and law, where the legal issues cannot be readily isolated from the factual issues.²⁴ Although questions of law generally attract the correctness standard, issues of general law within the original decision maker’s area of expertise fell under the standard of reasonableness.²⁵ The presence of a privative clause in an administrative tribunal’s enabling statute, a provision that eliminates or restricts the scope of judicial review, also suggested the need to apply deference.²⁶

²⁰ *Dunsmuir*, *supra* note 16 at para 47.

²¹ *Ibid.*

²² *Ibid* at para 49.

²³ *Ibid*, quoting D J Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004) 17 *Can J Admin L & Prac* 59 at 93.

²⁴ *Ibid* at para 53.

²⁵ *Ibid* at para 55.

²⁶ *Ibid.*

In *Vavilov*, the SCC addressed two fundamental flaws that make a decision unreasonable: internally incoherent reasoning and not being justified in light of the relevant legal and factual constraints.²⁷ In order to be reasonable, a decision must be based on rational and logical reasoning.²⁸ A decision is “unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis.”²⁹ The use of logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise, may also call into question the internal rationality of a decision.³⁰ Ultimately, the reviewing court must be satisfied that the reasoning “adds up.”³¹ Furthermore, a reasonable decision must be justified with respect to the legal and factual constraints relevant to the decision.³² The SCC listed a number of factors that are generally relevant in evaluating the reasonableness of a decision: the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts the decision maker may consider, the submissions of the parties, the past practices and decisions of the administrative body and the potential impact of the decision on the individual to whom it applies.³³

4.1.2 Correctness Standard

The correctness standard, on the other hand, does not require the reviewing court to apply deference to the decision maker’s determinations and reasoning process. Rather, a reviewing court will undertake its own legal analysis of the issue and determine whether the original decision was correct.³⁴ If the reviewing court disagrees with the decision, it

²⁷ *Supra* note 18 at para 101.

²⁸ *Ibid* at para 102.

²⁹ *Ibid* at para 103.

³⁰ *Ibid* at para 104.

³¹ *Ibid*.

³² *Ibid* at para 105.

³³ *Ibid* at para 106.

³⁴ *Dunsmuir*, *supra* note 16 at para 50.

will substitute the previous determination with its own opinion of the correct answer to the question.³⁵

The standard of correctness typically applies to questions of law. A question of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” attracts the correctness standard; given “their impact on the administration of justice as a whole, such questions require uniform and consistent answers.”³⁶ Accordingly, constitutional issues and questions directly related to the administrative bodies’ jurisdiction and the scope of its powers are held to the standard of correctness.³⁷

4.2 *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees’ Union*

This case concerned the termination of Brian Gooding, a long-time manager of a rural provincial liquor store, who began stealing alcohol from the store upon developing an addiction to alcohol. He stole alcohol several times a week for approximately one year and, when the employer confronted Gooding about the thefts, he admitted to stealing alcohol from work and advised the employer that he struggled with an alcohol addiction. In response, the employer informed Gooding of the Employee Assistance Program. He subsequently entered into a rehabilitation program and remained abstinent. The employer terminated Gooding for “wilfully” committing the thefts and fundamentally breaching the employer’s trust.³⁸ The union grieved his termination.

Gooding’s termination was originally upheld at arbitration. The arbitrator accepted the expert evidence indicating that individuals struggling with addiction act involuntarily in the theft of their substance of choice but Gooding ultimately knew it was wrong to steal

³⁵ *Ibid.*

³⁶ *Ibid* at para 60; *Toronto (City) v CUPE*, 2003 SCC 63 at para 62.

³⁷ *Dunsmuir*, *supra* note 16 at paras 58-59.

³⁸ *Supra* note 3 at para 26.

from his employer.³⁹ Accordingly, the arbitrator found Gooding's behavior to be culpable and applied the traditional disciplinary approach to the case, as opposed to the human rights approach. The arbitrator considered Gooding's alcohol addiction to be a mitigating factor but concluded that the addiction did not overcome the seriousness of the misconduct and upheld his termination.⁴⁰ The union sought a judicial review of this decision.

The British Columbia Labour Relations Board overturned the arbitration award and remitted the case back to the arbitrator, directing him to apply the new hybrid legal analysis, developed in the 2002 *Fraser Lake Sawmills Ltd. v. IWA-Canada, Local 1-424* decision,⁴¹ for addressing the culpable and non-culpable elements of addiction-related misconduct.⁴² This analysis required the arbitrator to apply a disciplinary, or just cause analysis, to the culpable aspects of the misconduct and a human rights analysis to the non-culpable aspects.⁴³ Applying the hybrid approach, the arbitrator found a connection between Gooding's addiction and the thefts and determined that the employer had not fulfilled its duty to accommodate.⁴⁴ Accordingly, the arbitrator ordered the employer to reinstate Gooding to a non-supervisory position. The employer appealed the decision to the British Columbia Court of Appeal (BCCA).

On appeal, the employer argued that the arbitrator erred in finding prima facie discrimination, asserting that:

[H]uman rights law should not allow an employee to rely on his addiction as a legal defence to termination and as a shield to any form of discipline,

³⁹ *British Columbia v British Columbia Government and Service Employees' Union*, [2000] BCCAAA No 164 at paras 53-54 (Lanyon).

⁴⁰ *Ibid* at para 65.

⁴¹ [2002] BCLRBD No 390 [*Fraser Lake*].

⁴² *Government of the Province of British Columbia v British Columbia Government and Service Employees' Union*, [2002] BCLRBD No 210 (Watters).

⁴³ *Fraser Lake*, *supra* note 41.

⁴⁴ *British Columbia v British Columbia Government and Service Employees' Union*, [2007] BCCAAA No 37 at para 104 (Lanyon).

simply because there is some connection between the misconduct and the disability. The employer would limit the protection offered by discrimination laws to addicted employees who engage in misconduct to cases where the discipline imposed was based on stereotypical or prejudicial beliefs, or cases where the addiction rendered the employee entirely unable to control his or her own behaviour.⁴⁵

However, requiring an individual to be entirely unable to control his or her behavior would set an extremely high bar and effectively limit human rights protections to only those with the most severe cases of addiction. The union argued that the employer's restrictive definition of prima facie discrimination did not account for instances of indirect discrimination, which must be considered.⁴⁶ Furthermore, the employer claimed that the arbitrator erred in his assessment of the duty to accommodate by not giving weight to "the irreparable breach of the employment relationship constituted by Mr. Gooding's theft," and that requiring the employer to maintain the employment relationship would amount to undue hardship.⁴⁷

On behalf of the BCCA majority, Justice Huddart, with Justice Tysoe concurring, held that the *Human Rights Code*⁴⁸ did not require the employer to accommodate an employee who has committed theft at work, because he suffered from an alcohol dependency, stating that:

I can find no suggestion that Mr. Gooding's alcohol dependency played any role in the employer's decision to terminate him or in its refusal to accede to his subsequent request for the imposition of a lesser penalty. He was terminated, like any other employee would have been on the same facts, for theft. The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour", and may have a greater

⁴⁵ *Gooding*, *supra* note 3 at para 48.

⁴⁶ *Ibid* at para 49.

⁴⁷ *Ibid* at para 63.

⁴⁸ RSBC 1996, c 210. Section 13 states that, "(1) A person must not (a) refuse to employ or refuse to continue to employ a person, or (b) discriminate against a person regarding 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 offence that is unrelated to the employment or to the intended employment of that person... (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement."

temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.⁴⁹

The majority relied on three SCC decisions indicating the importance of demonstrating the stereotypical or arbitrary nature of the discriminatory conduct:⁵⁰ *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*,⁵¹ *Honda Canada Inc. v. Keays*⁵² and *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*.⁵³ Justice Huddart found no evidence of stereotypical or arbitrary decision-making to substantiate Gooding's claim of discriminatory conduct⁵⁴ and, thus, found no prima facie discrimination. She acknowledged that, "his conduct may have been influenced by his alcohol dependency" but ultimately concluded that this connection was "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."⁵⁵ The BCCA majority allowed the employer's appeal and remitted the matter of whether Mr. Gooding's dismissal was excessive to the original arbitrator.⁵⁶ Gooding appealed the BCCA decision to the SCC but the SCC refused leave to appeal.⁵⁷

The majority decision disregarded the clear connection between Gooding's alcohol addiction and the reason for his termination: theft of alcohol. Although the *Moore* test had not yet been established, the prevailing discrimination analysis resembled the approach later adopted in *Moore* and simply required the disability to be a factor in the

⁴⁹ *Gooding*, *supra* note 3 at para 11. The majority decision notably made no mention of standard of review.

⁵⁰ *Ibid* at paras 12-14.

⁵¹ 2007 SCC 4 at para 53.

⁵² 2008 SCC 39 at para 71.

⁵³ 2008 SCC 43 at para 13.

⁵⁴ *Supra* note 3 at para 15.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* at para 18.

⁵⁷ *British Columbia v British Columbia Government and Service Employees' Union*, [2008] SCCA No 460.

termination, not a causal or direct factor.⁵⁸ Furthermore, the determination that any other employee would have been terminated for the same misconduct appears to accept the antiquated concept of formal equality, which prescribes equal treatment for those in similar situations; this is contrary to the SCC's rejection of formal equality, in favor of substantive equality—the notion that differential treatment may be necessary for certain groups of people to achieve equal status in society.⁵⁹ According to human rights laws and principles, Gooding should not have been terminated for the theft of alcohol, as it was clearly fueled by his addiction disability, unless the employer could establish it accommodated him to the point of undue hardship. Despite these flaws, the approach of the BCCA majority in *Gooding* has been applied in subsequent cases, including *Wright, Bish v. Elk Valley Coal Corp.*⁶⁰ and *Cambridge Memorial Hospital v. Ontario Nurses' Association*,⁶¹ which are examined in this thesis.

In dissent, Justice Kirkpatrick affirmed that, given the evidence establishing a connection between Gooding's addiction and the theft of alcohol, it was reasonable to infer that his addiction was related to his termination for theft—the stated reason for his termination; therefore, Gooding established prima facie discrimination.⁶² Justice Kirkpatrick also concluded that the arbitrator did not err in finding the employer failed to satisfy its duty to accommodate to the point of undue hardship, considering Gooding's rehabilitation efforts and positive prognosis and the fact that the employer made no effort to accommodate him, aside from merely informing him of the employee assistance program.⁶³

⁵⁸ *Gooding*, *supra* note 3 at paras 3-9.

⁵⁹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *R v Kapp*, 2008 SCC 41; *Withler v Canada (Attorney General)*, 2011 SCC 12; and *Ontario (Disability Support Program) v Trchemontagne*, 2010 ONCA 593.

⁶⁰ 2012 AHRC 7.

⁶¹ [2017] OLAA No 22.

⁶² *Supra* note 3 at para 61.

⁶³ *Ibid* at para 67.

The majority remitted the issue of whether Gooding's termination was excessive under the circumstances to the arbitrator. In light of the BCCA's finding of no prima facie discrimination, the arbitrator did not apply the human rights approach. The arbitrator determined that Gooding engaged in particularly egregious misconduct, as he frequently committed theft over a long period of time, the thefts were premeditated and, as a store manager, he occupied a position of trust. The arbitrator concluded that Gooding's alcohol addiction and his subsequent recovery were not sufficient factors to mitigate his dismissal, given the seriousness of his misconduct.⁶⁴ The arbitrator held that Gooding's termination was not excessive in the circumstances and dismissed the grievance.

4.3 New Flyer Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3003

Jose Salvador, a machine operator for New Flyer Industries Ltd., experienced attendance and disciplinary problems related to his drug and alcohol addiction throughout much of his employment with the company. The employer's Merit/Demerit Plan provided that, "An employee who accumulates a minimum of one hundred (100) demerit points shall be discharged and deemed to have been discharged for just cause."⁶⁵ In 2003, Salvador committed multiple infractions and informed the employer that he struggled with an addiction. He attended a rehabilitation day program under accommodation by the employer. In December 2005 and February 2008, Salvador committed various infractions—refusal of an order, reporting to work under the influence and absenteeism in 2005 and refusal of an order and failure to comply with the rules in 2008—which put him over the 100 demerit threshold for automatic termination under the Plan. However, the employer accommodated Salvador by providing him with addiction rehabilitation treatment in 2006 and a last chance agreement—an agreement between the employer,

⁶⁴ *British Columbia v British Columbia Government and Service Employees' Union*, [2009] BCCA 300, No 70.

⁶⁵ *Supra* note 6 at para 52.

union and grievor, extending the grievor's employment based on specific terms and conditions—in 2008.

Salvador continued to experience attendance issues in 2008 and 2009. In the meetings addressing his excessive absenteeism, Salvador acknowledged the problem but did not mention his addiction to the employer. The attendance issues continued and, in December 2009, the employer issued Salvador a written warning for failure to attend work. He came to work the next day but appeared to be intoxicated and subsequently tested positive for cocaine. This incident put Salvador over 100 demerit points and the employer terminated his employment. The union grieved the termination, claiming that it was unjust and the employer had not fulfilled its duty to accommodate.

The union asserted that the employer “failed to take sufficient initiative and interest in the grievor's medical condition, contrary to its human rights law obligation” and could have helped him avoid termination.⁶⁶ Knowing that Salvador had a history of addiction, the employer should have made regular inquiries with respect to his addiction and provided ongoing offers of support.⁶⁷ The union claimed that the employer had not sufficiently accommodated Salvador and that he should be reinstated with conditions. The employer contended that it accommodated Salvador to the point of undue hardship and was now legally entitled to terminate the employment relationship, given work scheduling and safety concerns. The employer also pointed to evidence suggesting a poor prospect for improvement.

The arbitrator assessed whether the employer met its obligation to accommodate Salvador to the point of undue hardship and whether he met his obligation as an employee to participate in the accommodation process. The arbitrator accepted that, although the employer knew he struggled with addiction and previously required accommodation for his disability, Salvador “was not forthcoming about his needs at the material times” and, therefore, the employer, treating the 2008 attendance infractions as a

⁶⁶ *Ibid* at para 3.

⁶⁷ *Ibid* at para 44.

regular attendance management problem, was restricted in the types of accommodation it could offer.⁶⁸ However, given the employer's knowledge of Salvador's lengthy addiction history and related workplace misconduct, the employer should have at least inquired about his health when he began missing work again. The arbitrator noted that, although the employer failed to fulfill its obligation to inquire in this instance, it had accommodated Salvador on various occasions and gave him another chance after his excessive absenteeism in 2008.

The arbitrator found no medical evidence to support the grievor's assertion that he was able to return to work. Accordingly, the arbitrator concluded that he was unable to make a positive conclusion about the grievor's health and ability to return to work:

The grievor in the present case was emotionally distraught during part of his testimony and did not present a picture of good health. He lacks a support network and has been estranged from his family. His testimony denying a cocaine problem was unconvincing and troubling. He stopped attending AA in May 2010 and has not engaged in any addiction program since that time. He is not involved in work or other regular productive activity. His pattern of denial and inability to take personal responsibility for his illness continued right up to the final workplace incident on December 18, 2009. His promise to do better if reinstated is no doubt heartfelt but *I find that objectively there is no reasonable prospect of a successful return to work at this time* [emphasis added].⁶⁹

The arbitrator held that the employer fulfilled its accommodation duty, by protecting Salvador's employment on multiple occasions and facilitating his addiction treatment, and that any further accommodation would constitute undue hardship.⁷⁰ He denied the grievance and did not interfere with the deemed just cause termination of the grievor.

⁶⁸ *Ibid* at para 58.

⁶⁹ *Ibid* at para 66.

⁷⁰ *Ibid* at para 67.

4.4 *Wright v. College and Association of Registered Nurses of Alberta (Appeals Committee)*

Wright concerned the discipline of two nurses, Genevieve Wright and Mona Helmer, by the College and Association of Registered Nurses of Alberta for stealing narcotics from work and falsifying records to cover up the thefts. Both nurses had been diagnosed with an opioid addiction and there was no indication that it impaired their ability to perform their nursing duties. Wright and Helmer appealed the College's decision to charge them with unprofessional conduct and claimed that, in light of their addiction disability, their conduct was not and should not be deemed "unprofessional."⁷¹ The nurses asserted that the medical evidence established a connection between their addiction and conduct and, thus, the disciplinary proceedings were discriminatory. The College asserted that the nurses were not being disciplined for their addiction, but for their criminal conduct,⁷² and that they were treated as any nurse who stole drugs from work.⁷³

Helmer was initially caught forging narcotic prescriptions in 1997 and, following treatment for her addiction, she returned to work under supervision. In 2008, Helmer relapsed and began stealing narcotics from the hospital again. The Hearing Tribunal accepted the addictions specialist's conclusion that there was "a plausible connection between the opioid dependence and the behavior of the member."⁷⁴ Nevertheless, the Hearing Tribunal applied the disciplinary approach of the BCCA majority in *Gooding* and asserted that, while the "conduct may have been influenced by her drug dependency... the prosecution was for the theft and fraud just as is the case in the *Gooding* decision."⁷⁵ The Tribunal found the nexus between Helmer's addiction and her behavior to be insufficient, stating: "There was volition, planning and choices made by Ms. Helmer. While there is some connection no doubt, it is not the mental or physical

⁷¹ *Supra* note 7 at paras 3-4.

⁷² *Ibid* at paras 12, 21.

⁷³ *Ibid* at paras 12, 23.

⁷⁴ *Ibid* at para 11.

⁷⁵ *Ibid* at para 13.

disability that is the issue in Ms. Helmer’s case, it is the theft and fraud.”⁷⁶ The Tribunal found Helmer guilty of professional misconduct, imposed a reprimand and suspended her nursing registration, pending compliance with rehabilitative treatment. The Hearing Tribunal also ordered Helmer to pay \$39,000 for costs incurred by the College for the disciplinary proceedings. Helmer appealed the Tribunal’s decision to the Appeals Committee. The Appeals Committee agreed that there was an insufficient link between the disability and misconduct and, thus, found no discrimination. In the alternative, even if there was *prima facie* discrimination, the duty to accommodate did not extend to tolerating theft.⁷⁷ The Appeals Committee affirmed the Tribunal’s finding of professional misconduct, imposed sanctions and cost award; it also awarded an additional \$16,000 for costs of the appeal.

Wright acknowledged consuming large quantities of Percocet to cope with pain related to a medical condition. An opinion letter from an addictions specialist, attached to the agreed statement of facts, asserted that her “uncharacteristic behaviour of stealing opioids was entirely due to her untreated Opioid Dependence, at the time, in the context of chronic pain.”⁷⁸ Nevertheless, the Hearing Tribunal concluded that Wright had sufficient mental capacity to control her actions and recognize that what she was doing was wrong:

The member had control of her situation, and even though satisfying a drug addiction may have been a cause of the thefts of drugs and falsification of records, continuance of this thievery and falsification of records was not the only answer to the member’s addiction. It is not as if the member had ceased to function rationally and lost the ability to think and organize her practice, as evidenced by her exemplary employee evaluation. ...This Tribunal does accept that the *Human Rights Citizenship and Multiculturalism Act* applies to CARNA as it is governed by the *Health Professions Act* but does not agree that this member was discriminated against due to her illness by this process. She has been treated the same as any other nurse who steals drugs.⁷⁹

⁷⁶ *Ibid* at para 12.

⁷⁷ *Ibid* at para 18.

⁷⁸ *Ibid* at para 20.

⁷⁹ *Ibid* at para 23.

The Hearing Tribunal asserted that her addiction disability would be considered in determining the appropriate sanction.⁸⁰ The Tribunal concluded that Wright was guilty of professional misconduct, ordered a reprimand and suspended her license until she provided medical proof that her addiction was sufficiently controlled; conditions were also placed on her future employment.

Wright appealed the decision to the Appeals Committee, arguing that the medical opinion that her conduct was entirely caused by her addiction was uncontradicted and should have been accepted by the Tribunal. The Appeals Committee concluded that the Hearing Tribunal implicitly rejected the evidence that the addiction was the sole cause of her conduct, as there was evidence demonstrating that she knew what she was doing and acted, at least partly, with volition.⁸¹ The Appeals Committee concluded that, in order to be discriminatory, the treatment must be arbitrary, and disciplining a member for criminal conduct is not arbitrary.⁸² Following the *Gooding* approach, the Appeals Committee found no discrimination and asserted that Wright's addiction was to be considered in determining the appropriate discipline.⁸³ The Appeals Committee found the Tribunal's decision to be reasonable and ordered Wright to pay \$10,000 for costs of the appeal.

Wright and Helmer appealed the findings of the Appeals Committee directly to the Court of Appeal of Alberta (ABCA). They claimed that the Committee erred in its application of human rights principles and challenged the cost awards. On appeal, the ABCA analyzed whether: the College was required to use alternative procedures, as opposed to its disciplinary procedures; the College correctly applied the human rights legislation; the College discriminated against the appellants and, if so, were its actions reasonable and justifiable; and the costs awards were reasonable.⁸⁴ The ABCA applied the standard of correctness to the application of the human rights legislation, as it was "a question of law

⁸⁰ *Ibid* at para 23.

⁸¹ *Ibid* at para 25.

⁸² *Ibid* at para 26.

⁸³ *Ibid*.

⁸⁴ *Ibid* at para 30.

of general importance to the legal system” and the College had no expertise in human rights law,⁸⁵ and applied the standard of reasonableness to the issue of costs.⁸⁶

The appellants argued that, in light of their addiction, the College should not have taken disciplinary action, as more appropriate procedures were available—namely, the College’s Alternative Complaints Resolution procedure and its ability to deal with “incapacity” under section 118 of the *Health Professions Act*, which enables the complaints director to suspend the disciplinary proceedings of an incapacitated member.⁸⁷ The College responded that the appellants were ineligible for the alternative process due to the criminal nature of the complaints, the medical evidence indicated that the nurses were not incapacitated with respect to their ability to perform their job and the complaints director had wide discretion in choosing the remedial process.⁸⁸ The ABCA majority, composed of Justices Slatter and Ritter, asserted that the professional organization’s decision to apply its disciplinary process was not reviewable for mere unreasonableness; in order to elicit judicial intervention, the error “must likely approach an abuse of process.”⁸⁹ The majority concluded that it was not unreasonable, let alone an abuse of process, for the complaints director to decline to use the Alternative Complaints Resolution Process because the appellants were not eligible for the process, as the regulations specifically excluded criminal complaints.⁹⁰ The majority indicated that the extent to which the human rights issues might demand the use of alternative procedures should be considered separately, under the duty to accommodate.⁹¹

The majority found it was reasonable for the Hearing Tribunal and Appeals Committee to conclude that the decision to invoke the disciplinary proceedings was not *prima facie*

⁸⁵ *Ibid* at para 34.

⁸⁶ *Ibid* at paras 34-35.

⁸⁷ *Ibid* at para 41; RSA 2000, c H-7.

⁸⁸ *Ibid* at paras 43, 45.

⁸⁹ *Ibid* at para 47.

⁹⁰ *Ibid* at para 48.

⁹¹ *Ibid* at para 49.

discriminatory, given that: the criminal conduct underlying the discipline was distinct from any personal characteristic of the appellants; although “the conduct of the appellants was caused by their addiction, and without that addiction they would not have stolen drugs,” there was no indication that “theft is predominantly caused by addictions, nor that addictions generally result in theft;” the College had no discriminatory intent or motivation in laying the charges; the objective standard of criminal behaviour was not based on stereotypical thinking or attributed characteristics; and criminal standards are not arbitrary, they are objectively based on social norms.⁹² The majority concluded that:

It was the theft and forgery that were the subject of the disciplinary charges; how those acts came to be committed was irrelevant to the College. *The College would have laid disciplinary charges as a result of theft of narcotics, whether the member was an addict or not.* On this point the appellants’ argument falters at a factual level. Both of the Hearing Tribunals found as a fact that the appellants were not being disciplined for their disability, but rather for their conduct. *The finding was that the appellants’ disability did not play any role in the decision to proceed with the prosecutions. Further, the Hearing Tribunals rejected any argument that the thefts were solely caused by addiction.* Those findings were upheld by the Appeals Committee, and they demonstrate no reviewable error [emphasis added].⁹³

It is evident the majority accepted the notion of formal equality based on equal treatment and erroneously required the addiction to be the sole cause of the misconduct as well as discriminatory intent. Furthermore, the majority emphasized that discipline for criminal conduct was not arbitrary or based on stereotypical thinking;⁹⁴ however, these elements are not required for establishing prima facie discrimination. Reflecting floodgates reasoning, the majority also opined that the potential consequences of excusing criminal behaviour on the basis of addiction would be “far-reaching.”⁹⁵ Despite acknowledging a connection between the addiction and thefts—the legal threshold for demonstrating prima facie discrimination—the majority found no discrimination: “The fact that the appellants’

⁹² *Ibid* at para 58.

⁹³ *Ibid* at para 62.

⁹⁴ *Ibid* at para 64.

⁹⁵ *Ibid* at para 66.

conduct was motivated or caused at some level by the addiction does not raise the College's proceedings to the level of discrimination in law."⁹⁶

With respect to the issue of accommodation, the majority stated that the imposed sanctions "were clearly sensitive to the appellants' circumstances" and indicated that, "To the extent that accommodation was called for, it was adequately represented in these sanctions. Even if there was a duty to accommodate that does not entitle the appellants to a complete exemption from the disciplinary process."⁹⁷ Eliminating access to disciplinary procedures in the case of stolen drugs and forged records "would likely amount to undue hardship."⁹⁸ The majority also found the cost awards to be reasonable under the circumstances and dismissed the appeals. Wright and Helmer appealed the BCCA decision to the SCC but the SCC dismissed the application for leave to appeal.⁹⁹

Justice Berger dissented from the majority decision and found many errors in the Appeals Committee's decision. Citing the SCC's rejection of identical treatment as a means to achieving equality, Justice Berger rejected the finding that the discipline did not constitute discrimination because all nurses who steal were treated alike, regardless of their addiction.¹⁰⁰ He also rejected the view that the test for prima facie discrimination required arbitrariness or stereotyping in order to find discrimination.¹⁰¹ Justice Berger held that both the Tribunal and Appeals Committee erred by requiring the addiction to be the sole reason for the misconduct, as the protected ground only needs to be a factor, not a sole or overriding factor, in the adverse treatment, in order to constitute prima facie discrimination.¹⁰² Justice Berger concluded that:

⁹⁶ *Ibid* at para 67.

⁹⁷ *Ibid* at para 69.

⁹⁸ *Ibid* at para 71.

⁹⁹ *Wright v College and Association of Registered Nurses of Alberta*, [2012] SCCA No 486.

¹⁰⁰ *Supra* note 7 at para 107.

¹⁰¹ *Ibid* at para 117.

¹⁰² *Ibid* at para 121.

Because Ms. Wright and Ms. Helmer have a disability and the medical evidence proves a nexus between that disability and their theft of narcotics, both tribunals erred in not conducting a human rights analysis. *They failed to appreciate the nature of adverse effect discrimination, failed to appreciate that the prohibited ground does not have to be the sole ground for the adverse treatment before a human rights analysis is engaged and failed to treat the Appellants' addiction as a disability. Properly applied, a human rights analysis demonstrates that proceeding on a culpable basis under the HPA is prima facie discriminatory [emphasis added].*¹⁰³

Justice Berger rejected the College's claim that accommodation occurred in the discipline phase of the process, as this was too late and failed to remedy the discrimination: "The imposition of a lesser sanction on the basis of the Appellants' disability does not as a matter of law mitigate the discipline of the Appellants on a prohibited ground. Mere acknowledgment of the Appellants' addiction disability is insufficient."¹⁰⁴ The Tribunal and Appeals Committee failed to conduct a proper human rights analysis and did not fully consider the possibility of accommodation.¹⁰⁵ Justice Berger indicated that he would have quashed the Appeal Committee's decision, remitted the matter to the Committee "for resolution in a manner consistent with this judgment" and set aside the cost awards.¹⁰⁶

4.5 Seaspan ULC v. International Longshore & Warehouse Union, Local 400

The grievor worked as a deckhand at Seaspan and had a long history of drug and alcohol addiction. In 2006, the grievor experienced a relapse after approximately 14 years of sobriety. He disclosed his addiction to the employer and entered into a residential addiction treatment program. Upon returning to work, he signed a Return to Work Agreement and Contingency Monitored Recovery Agreement, which required him to abstain from drugs and alcohol for two years, submit to testing and continue treatment.

¹⁰³ *Ibid* at para 125.

¹⁰⁴ *Ibid* at para 126.

¹⁰⁵ *Ibid* at para 130.

¹⁰⁶ *Ibid* at para 134.

The grievor successfully completed the two-year program but relapsed in May 2009 and February 2010. He was accommodated on both occasions and returned to his safety sensitive position, subject to continued abstinence, monitoring and treatment. The grievor relapsed again in January 2011 and subsequently entered into a last chance agreement, which provided that “any positive alcohol or drug test, or substantive breach of the monitoring agreement or treatment recommendations, will result in the immediate termination of [GH]’s employment” and that the agreement satisfied the employer’s duty to accommodate.¹⁰⁷ While off work for a knee injury, the grievor tested positive for alcohol in a random drug test in August 2013. The employer terminated him following the positive test result, pursuant to the last chance agreement. The union grieved the termination, claiming that it amounted to discrimination and the employer failed to accommodate the grievor to the point of undue hardship. The employer argued that the last chance agreement provided for immediate termination and the agreement fulfilled its duty to accommodate.

The arbitrator—notably, the same arbitrator that heard the *Gooding* grievance—relied on the jurisprudence establishing that last chance agreements cannot nullify the employer’s duty to accommodate and are thus unenforceable in this respect.¹⁰⁸ The arbitrator accordingly applied a human rights analysis to the grievance. He concluded that prima facie discrimination had been established, as the employer clearly stated that the grievor’s termination flowed directly from the last chance agreement, which provided that a positive alcohol or drug test would result in immediate termination; therefore, his “drug and alcohol addiction was not only a factor but the primary factor in the termination.”¹⁰⁹ The arbitrator found that Seaspan’s Substance Use Policy, aimed at providing a drug and alcohol free workplace and help to employees with addiction, was adopted for a purpose

¹⁰⁷ *Supra* note 8 at para 20.

¹⁰⁸ *Ibid* at para 68; *Milazzo v Autocar Connaissanceur Inc.*, [2005] CHRD No 3 at para 34; *Black v Gaines Pet Foods*, [1993] OJ No 2973; *Re Canadian Pacific Railway Company and Canadian Counsel of Railway Operating Unions (United Transportation Union)* (2002), CROA Decisions No 3269; and *Etobicoke (Borough) v Ontario (Human Right Commission)*, [1982] 1 SCR 2002 at 213.

¹⁰⁹ *Supra* note 8 at para 74.

rationally connected to the performance of the job and in an honest and good faith belief that it was necessary to fulfill the legitimate purpose.

The last chance agreement stated that the employer had satisfied its duty to accommodate the grievor to the point of undue hardship. However, the arbitrator recognized that “under the law, this claim, standing alone, does not satisfy the duty to accommodate”¹¹⁰ and determined that assessing the duty to accommodate requires a global examination of the grievor’s circumstances, including past accommodation efforts as well as the grievor’s prognosis. The arbitrator emphasized the following factors: the grievor self-disclosed all instances of relapse; he never reported to work while impaired; there was no evidence he used drugs at work; there was no evidence the grievor committed any workplace misconduct as a result of his alcohol or drug use or that he posed a safety risk; and the grievor’s doctor indicated that the new comprehensive treatment plan, which also treated his other mental health conditions, increased the likelihood of prolonged abstinence and determined that he could satisfy the demands of his safety sensitive position.¹¹¹

The arbitrator found that accommodating the grievor’s four relapses in four years, while in a safety-sensitive position, satisfied the employer’s duty to accommodate. He then went on to consider the prospect of reinstatement in a non-safety sensitive position:

It is at this point in respect to the duty to accommodate that I give significant weight to the circumstances of his past relapses — that he self-disclosed, that he never reported to work impaired, that there is no evidence of the use of alcohol or drugs at the workplace, and that there has been no workplace incident arising from drugs or alcohol... Thus, in view of these *off-duty relapses*, which have not resulted in any workplace misconduct, I have determined that the Grievor is to be reinstated to a position that is not safety sensitive.¹¹²

The arbitrator concluded that the employer had fulfilled its duty to accommodate to the point of undue hardship with respect to safety-sensitive work but not with respect to non-

¹¹⁰ *Ibid* at para 84.

¹¹¹ *Ibid* at paras 94-95.

¹¹² *Ibid* at para 99.

safety sensitive work. The arbitrator ordered the grievor's reinstatement, subject to the previously imposed return to work conditions. However, he held that the grievor was not entitled to reimbursement for lost wages, in accordance with the last chance agreement.

4.6 *Canadian National Railway v. Teamsters Canada Rail Conference*

Canadian National Railway concerned the termination of a long-serving locomotive engineer with a history of addiction. In July 2014, the grievor operated a train from Manitoba to Minnesota and was subject to random alcohol testing by the U.S. Federal Railroad Administration and tested positive for alcohol, contrary to both the Canadian Rail Operating Rules and the CN Drug and Alcohol Policy. Rule G of the Operating Rules provided that, "The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty is prohibited" and the Policy stated that, "Any employee whose breath alcohol concentration is over 0.04 or who tests positive for illegal drugs would be considered in violation of this policy."¹¹³ The grievor admitted to consuming alcohol while on duty and the employer consequently terminated him for violating Rule G.

The employer claimed that the grievor's termination was warranted because he consumed alcohol while on duty in a safety sensitive position, which threatened the safety of himself, his crew and the public. The employer also raised the fact that the grievor did not report his alcohol addiction or seek assistance through the employer's support services until his termination; the employer suggested that disclosing his addiction after violating the policy was a self-serving tactic. The union, on the other hand, contended that the employer discriminated against the grievor due to his addiction disability. The union pointed to the grievor's history of alcohol addiction and rehabilitative treatment during his employment with CN: in 2006, the grievor contacted the company's employee assistance program with respect to his addiction and completed a residential treatment program, attended Alcoholics Anonymous (AA) meetings for the next two years and

¹¹³ *Supra* note 9 at para 3.

suffered a relapse in 2009, at which time he took himself out of service for two months and resumed attending AA meetings. The grievor confirmed that the 2014 incident was a relapse and acknowledged the seriousness of his behavior. Upon his termination, the grievor attended AA meetings and maintained his sobriety.

The arbitrator acknowledged the seriousness of the grievor's misconduct, given the safety critical work environment, but also considered the substantial and ongoing evidence of the grievor's rehabilitation efforts as well as the letter from his rehabilitation counselor, confirming his participation in and commitment to recovery.¹¹⁴ Adopting a broad human rights approach, the arbitrator examined all the evidence and, despite the safety sensitivity of the workplace, gave considerable weight to the grievor's 37-year employment record and his successful rehabilitative efforts, notwithstanding the relapses. The arbitrator concluded that, "In view of the grievor's long service, the requirements to accommodate the grievor to the point of undue hardship under the *Canadian Human Rights Act*,¹¹⁵ the grievor's continuing and ongoing rehabilitation efforts and the relevant *CROA&DR* jurisprudence,¹¹⁶ reinstatement with conditions is appropriate."¹¹⁷ The arbitrator ordered the grievor's reinstatement, subject to conditions, including continued abstinence, random drug and alcohol testing and regular attendance of AA meetings, with no loss of seniority but without compensation for any lost wages or benefits. The arbitrator affirmed that noncompliance with the conditions would result in termination.

4.7 *Public Service Alliance of Canada v. Saskatchewan Gaming Corp.*

Saskatchewan Gaming concerned the termination of Ms. AB, a casino dealer with a drug addiction. In 2008, Ms. AB developed an addiction to crack cocaine. She obtained

¹¹⁴ *Ibid* at para 13.

¹¹⁵ RSC 1985, c H-6.

¹¹⁶ Arbitrator Silverman referenced cases where there was evidence of clear and compelling rehabilitation efforts and the arbitrator ordered reinstatement with return to work conditions, including *Canadian Pacific Railway v Teamsters Canada Rail Conference*, [2011] 111 CLAS 362 and *Canadian Pacific Railway and Teamsters Canada Rail Conference*, [2014] 119 CLAS 138.

¹¹⁷ *Supra* note 9 at para 14.

rehabilitative treatment for her cocaine addiction in the summer of 2008 and remained sober for several months but experienced a relapse and continued to use crack cocaine until the termination of her employment. As a result of her drug use, Ms. A.B.'s absenteeism from work far surpassed the average absenteeism rate of employees at the Saskatchewan Gaming Corporation. She used drugs on payday and would typically be absent from work for the shift she expected to receive her pay as well as the next day to recover from the previous day's drug use. The employer issued several warnings indicating that her employment could be terminated as a result of her continued, excessive absenteeism. Ms. AB disclosed her drug addiction to the employer on several occasions and stated that it impacted her ability to improve her attendance. The employer indicated that it required further medical information from her physician with respect to her disability. Ms. AB's family physician indicated that she did not have a disability; however, the physician testified that she never treated Ms. AB for addiction and thought the question was in reference to her shoulder injury.¹¹⁸ With no substantive improvement in her work attendance and the absence of medical documentation indicating she suffered from a medical disability, the employer decided to terminate Ms. AB's employment in October 2013. The union grieved her dismissal. Following her termination, Ms. AB stopped using cocaine, attended a recovery program and maintained perfect attendance at her subsequent job.

The employer contended that it had terminated Ms. AB for frustration of the employment contract, due to her excessive absenteeism, and, therefore, her termination should be upheld. The employer claimed it sufficiently warned Ms. AB that her job would be in jeopardy if she did not improve her attendance and argued that it had fulfilled its duty to accommodate by seeking a physician's diagnosis. The union claimed that the employer discriminated against Ms. AB by terminating her employment due to addiction-related absences and by failing to accommodate her to the point of undue hardship. The union asserted that the warnings given to Ms. AB did not clearly communicate attendance goals and the employer failed to provide a final warning that she would be terminated if her

¹¹⁸ *Supra* note 10 at para 43.

attendance did not improve.¹¹⁹ Furthermore, Ms. AB was able to maintain regular work attendance after receiving treatment. The union contended that Ms. AB's employment should be reinstated.

The arbitrator concluded that the employer's repeated warnings concerning Ms. AB's attendance record did not constitute a final warning: "Ms. AB was told over and over again only that she 'could' be terminated, but there was never any real and final warning that she 'would' be terminated if her absenteeism did not improve."¹²⁰ Had the employer given a clear and effective final warning of an imminent termination, Ms. AB might have consulted with the union and raised the question of her drug addiction and whether an accommodation would be considered.¹²¹ Accepting the evidence provided by Ms. AB and an addiction expert, the arbitrator concluded that Ms. AB's excessive absenteeism was a result of her drug addiction. Thus, the employer discriminated against Ms. AB by terminating her due to absences caused by an addiction disability.

The arbitrator acknowledged the realities of addiction, including denial and relapse, and the impact it can have on an employee's ability to identify the need for accommodation:

In summary, an employee suffering from a drug addiction that is not in recovery or has relapsed may, as a symptom of his or her disease and therefore beyond his or her control, lie to his or her employer about the status of their recovery, deny the existence of any drug problem, and continue to do or say anything necessary to maintain the flow of employment income that supports the addiction...

Accordingly, if the employee is suffering from the disability of addiction, and is either not in recovery or has relapsed, and the evidence shows that such employee has failed to disclose this fact to the employer, then that employee cannot necessarily be expected to cooperate any further with the employer in identifying the need for accommodation. The duty of an employee to assist in the identification of the need for accommodation will be exhausted in these circumstances.¹²²

¹¹⁹ *Ibid* at para 68.

¹²⁰ *Ibid* at para 84.

¹²¹ *Ibid* at para 87.

¹²² *Ibid* at paras 114-115.

The arbitrator concluded that Ms. AB fully satisfied her duty to assist and cooperate in the identification of her addiction disability by raising the matter with her employer. She disclosed her addiction and, under the circumstances, the employer knew or, at the very least, should have known she had a drug addiction.¹²³ The employer did not further investigate Ms. AB's condition and consequently failed to fulfill its duty to accommodate. The arbitrator held that the termination was invalid and ordered Ms. AB's reinstatement, subject to conditions, including random drug testing and attendance performance, the breach of which would result in immediate termination.

4.8 *Ontario Nurses' Association v. Sunnybrook Health Sciences Centre*

Sunnybrook addressed the termination of a nurse who stole narcotic drugs from the hospital she worked at, in order to support her drug addiction, and falsified medical records to conceal the thefts. Upon being confronted by the hospital with evidence of discrepancies in the narcotic records, the nurse denied stealing any hospital drugs. The employer terminated the grievor for the theft of narcotics and gross misconduct relating to nursing protocols. The union grieved the dismissal. On the first day of the arbitration hearing, the grievor admitted to the thefts, acknowledged that she had an addiction and apologized to the hospital for her misconduct. Following her termination, the grievor sought treatment for her drug addiction and maintained abstinence. Her physicians indicated she could return to work under certain conditions and restrictions regarding her access to drugs in the hospital.

The employer's medical expert perceived addiction as a choice and asserted that the addiction did not cause the grievor to steal drugs.¹²⁴ On the other hand, the grievor's treating addictions specialist stated that the cravings associated with addiction are "very strong" and "persons who otherwise have no inclination toward criminal behaviour may

¹²³ *Ibid* at para 126.

¹²⁴ *Supra* note 11 at para 31.

commit such behaviour in order to feed their addiction.”¹²⁵ The employer argued that the thefts constituted a fundamental breach of trust, destroying the employment relationship. Furthermore, the employer claimed that no position within the hospital could meet the conditions imposed by the College of Nurses of Ontario because narcotics were readily available, even in units where drugs were not administered to patients, and the possibility of relapse constituted undue hardship on the employer.¹²⁶ The union contended that the grievor’s termination for theft constituted indirect discrimination based on her addiction disability and argued for her reinstatement, relying on the evidence that she acknowledged her addiction, was working hard to maintain sobriety, fully cooperated with the treatment program and was capable of returning to work.¹²⁷

The arbitrator acknowledged that having an addiction does not fully shield an employee from discipline for misconduct; a “causal link” between the addiction and misconduct in question triggers the employer’s duty to accommodate to the point of undue hardship.¹²⁸ Adopting a generous medical-human rights approach, the arbitrator accepted that addiction is in fact a disease, the nurse’s addiction was directly connected to the thefts, and, in such circumstances, employers have a duty to accommodate.¹²⁹ He also acknowledged that the impaired ability to control cravings, theft, dishonesty, denial and shame are all features of addiction.¹³⁰ The arbitrator concluded that, in cases like this one, “where the evidence establishes that an employee suffers from an addiction to drugs and the employee not only is unable to resist use of drugs while at work, but is also unable to resist the urge to divert those drugs from the Employer, *the employee must be treated as any other employee suffering from a disability;*” the employer must accommodate the

¹²⁵ *Ibid* at para 34.

¹²⁶ *Ibid* at para 39.

¹²⁷ *Ibid* at paras 40-41.

¹²⁸ *Ibid* at para 43.

¹²⁹ Michael Lynk, “Substance Addiction at Work: Recent Trends in the Law” (2017) [unpublished, Western University Faculty of Law] at 12 [Lynk, “Substance Addiction”].

¹³⁰ *Supra* note 11 at para 52.

employee to the point of undue hardship.¹³¹ In this case, the termination of the grievor's employment constituted discrimination.

The arbitrator provided insightful guidance for assessing addiction cases in light of the employer's duty to accommodate: "[W]here the addicted employee is in remission, is fully cooperative in accepting recommended treatment and acknowledges the extent of addiction and the improper behaviours that have occurred as a result, efforts can then be made to determine whether accommodation of the employee's disability can be accommodated."¹³² Fully appreciating the grievor's individual circumstances and prognosis, the arbitrator placed importance on the fact that the grievor eventually acknowledged the extent of her addiction and related misconduct, was in remission and continued the recommended treatment.¹³³ The arbitrator directed the employer to reinstate the nurse, subject to conditions recommended by the doctor and imposed by the College of Nurses. Compensation was not requested nor awarded.

Although the grievor in this case was reinstated, it is important to note that similar grievances, involving the termination of a nurse with a drug addiction for stealing drugs from her employer, have resulted in starkly different outcomes. In *Royal Victoria Regional Health Centre v. Ontario Nurses' Association*¹³⁴ and *Cambridge Memorial Hospital v. Ontario Nurses' Association*¹³⁵ the arbitrators found no discrimination and dismissed the grievances. However, both these cases have since been judicially reviewed by the Ontario Divisional Court and overturned.¹³⁶ The Court's decision in *Cambridge Memorial Hospital v. Ontario Nurses' Association* is discussed in Chapter 6.

¹³¹ *Ibid* [emphasis added].

¹³² *Ibid* at para 53.

¹³³ *Ibid* at para 55.

¹³⁴ [2016] OLAA No 373.

¹³⁵ *Supra* note 61.

¹³⁶ *Ontario Nurses' Association v Royal Victoria Regional Health Centre*, 2019 ONSC 1268; and *Ontario Nurses' Association v Cambridge Memorial Hospital*, 2019 ONSC 3951.

4.9 *McNulty v. Canada Revenue Agency*

Mary Ann McNulty began working at the Canada Revenue Agency (CRA) in 1989 as a clerk and advanced to senior programs officer in 2010. In 2014, the employer terminated her employment for submitting forged medical certificates, resulting in an irreparable breach of trust. McNulty filed a grievance, alleging the employer discriminated against her, and sought reinstatement. The employer denied the grievance and it was referred to the Public Service Labour Relations and Employment Board.

McNulty often missed work and failed to notify the employer of her absences. The manager provided the grievor with a letter to remind her of the administrative conditions and mechanisms related to requests and authorization for leaves, including the requirement to notify her immediate supervisor and provide a medical certificate and that the failure to comply with these measures could result in progressive discipline, up to and including termination. The manager asked McNulty whether there was anything the employer could do to help but she stated that there were no issues and she would be back at work. Nevertheless, McNulty continued to be absent from work and often called in sick. She generally did not have a medical certificate and submitted the documentation much later, sometimes weeks later. The employer directed the grievor to undergo a fitness to work evaluation in order to determine the cause of her absences and provide some insight into possible accommodation. The physician's report indicated that the grievor was fit to work on a full-time basis and did not specify any limitations, aside from the stipulation that she be allowed to take breaks.

McNulty submitted 16 medical certificates from May 2013 to March 2014 from ten different doctors and a physiotherapy clinic. The manager became suspicious when she received two undated certificates from the physiotherapy clinic in March 2014. The CRA determined that the certificates were falsified and initiated an investigation. In April, the grievor told her employer that she suffered from alcoholism and forged the certificates because she had been too drunk to go to the doctor. She revealed that she had been treated for alcohol abuse in the past and had been sober for years but relapsed about two years prior, when members of her family became ill. The grievor told the employer that she wanted to stop drinking and sought treatment. She admitted to the investigator that

she had been sick as a result of her drinking and forged the 16 medical certificates because she was not sober enough to go to the doctor's office to obtain them legitimately. The employer determined that these 16 medical certificates were used to claim 216 hours of sick leave with pay, worth roughly \$9,300 before deductions, and 218.5 hours of sick leave without pay.¹³⁷ The investigation report indicated that McNulty expressed remorse and a desire to regain the trust of her managers and colleagues.

At the disciplinary meeting, the grievor indicated that she had not realized the seriousness of her actions when she forged the notes and did not consider it to be fraud. The CRA Director General testified that the grievor revealed that she was not under the influence of alcohol when she forged the certificates but was sometimes hungover and had always been sober when submitting the notes to her manager.¹³⁸ The grievor stated that she forged the medical certificates while intoxicated, hungover and sober.¹³⁹ Weeks later, the employer decided to terminate the grievor's employment. The employer contended that the grievor had not apologized for her behaviour, failed to show remorse or accept responsibility for her actions and instead blamed management as well as her personal circumstances. In making its decision, the employer considered the seriousness and repetitive nature of the grievor's misconduct, her performance and length of employment with the CRA as well as the agency's values, including integrity, professionalism and respect, and ultimately concluded that McNulty had irreparably breached its confidence and trust.¹⁴⁰

McNulty stated that she was diagnosed with an alcohol dependency following her arrest for impaired driving in 2004. In February 2005, she completed a 28-day outpatient rehabilitation program and continued to be monitored by medical professionals. The grievor remained sober until she relapsed in late 2011; during this time, multiple members of the grievor's family had passed away and experienced serious health issues.

¹³⁷ *Supra* note 12 at para 43.

¹³⁸ *Ibid* at para 45.

¹³⁹ *Ibid* at para 48.

¹⁴⁰ *Ibid* at para 52.

She continued to be monitored by medical professionals until the fall of 2012. McNulty indicated that she abstained from drinking when her daughter visited; she would drink all day from Monday to Friday and abstain over the weekend to recover. Following her termination, McNulty attended an outpatient program for over a month but stopped, as her mother's health declined and she needed to care for her. The grievor sought medical assistance, maintained her sobriety and attended Alcoholics Anonymous twice a week.

The CRA argued that McNulty's repeated misconduct warranted termination. The employer asserted that it did not matter whether the hybrid or human rights approach was applied, as the nexus between the misconduct and disability remained the focus.¹⁴¹ Relying on *Gooding, Wright and Bish v. Elk Valley Coal Corp.*,¹⁴² the employer contended that, "not just any nexus or cause is sufficient."¹⁴³ The CRA terminated McNulty's employment because she forged medical certificates to obtain sick leave, not because of her disability.¹⁴⁴ The employer accepted that the grievor had a disability but asserted that there was no nexus between her disability and the misconduct: "There was only a bald assertion that they are connected. The grievor said she stayed at home because she was intoxicated and that she did not obtain a legitimate medical certificate because she could not drive;"¹⁴⁵ the grievor had other options available to her, other than forging a medical certificate, such as speaking to a doctor or her manager.¹⁴⁶ The employer asserted that alcohol did not cause McNulty to forge and submit the medical certificates, as she had not forged medical certificates in 2004 when she drank heavily.¹⁴⁷ The CRA submitted that the grievor provided insufficient medical evidence to establish a medical defense and failed to seek treatment.

¹⁴¹ *Ibid* at para 98.

¹⁴² 2013 ABQB 756.

¹⁴³ *Supra* note 12 at para 101.

¹⁴⁴ *Ibid* at para 103.

¹⁴⁵ *Ibid* at para 108.

¹⁴⁶ *Ibid* at para 110.

¹⁴⁷ *Ibid* at para 112.

McNulty argued that the CRA discriminated against her on the basis of her disability and failed to accommodate her. The grievor contended that the investigation was flawed, as it did not consider the medical information related to her disability. Although some form of discipline was warranted, termination was excessive under the circumstances. McNulty cooperated with the employer's investigation, she admitted to her misconduct and the investigation report indicated that she showed remorse for her actions. Furthermore, McNulty had 25 years of service with the CRA and sought medical treatment following her termination. She requested reinstatement, subject to conditions regarding her continued treatment.

The arbitrator began his analysis by outlining "the usual basis for adjudicating issues of discipline," as set out in *William Scott & Co. v. C.F.A.W., Local P-162*,¹⁴⁸ which involves determining: whether the grievor committed misconduct; if so, whether the discipline imposed by the employer was appropriate in the circumstances; and, if not, what alternative penalty would be just and equitable.¹⁴⁹ The arbitrator found that McNulty's actions amounted to serious misconduct and went on to examine her addiction disability as a mitigating factor. He asserted that the grievor had the burden to prove that "her disability was a factor in the employer's decision to terminate her employment"¹⁵⁰ and the addiction disability was a causal factor in her misconduct.¹⁵¹ However, requiring the grievor to demonstrate that the employer considered her disability in its decision to terminate effectively imported the requirement of direct discrimination into the prima facie discrimination analysis, contrary to human rights law. The arbitrator determined that the employer terminated McNulty for forging the medical certificates, not for her addiction disability,¹⁵² and found insufficient evidence to support the argument that the grievor's addiction should mitigate the penalty imposed:

¹⁴⁸ [1976] BCLRBD No 98.

¹⁴⁹ *Supra* note 12 at para 153.

¹⁵⁰ *Ibid* at para 166.

¹⁵¹ *Ibid* at para 167.

¹⁵² *Ibid* at para 186.

I have no expert evidence that alcohol dependency would remove any inhibitions or control that the grievor should otherwise have had with respect to the actions she undertook to acquire the leave by fraudulent means. Indeed, while the grievor suggested that sometimes she had been intoxicated or hung-over when she typed the forged medical certificates, she had been sober when she handed them to her supervisor.¹⁵³

Although she forged the medical certificates for her addiction-related absences, the arbitrator concluded that McNulty failed to establish that her misconduct was causally related to her disability and did not demonstrate *prima facie* discrimination.¹⁵⁴ Despite finding no discrimination, the arbitrator went on to comment on the duty to accommodate and indicated that, “It is both hard to envision and difficult to comprehend the grievor’s suggestion that the CRA should have accommodated her when it appears from the evidence before me that she had been resolute in concealing her disability and in thwarting any attempt at accommodation from the CRA.”¹⁵⁵

In assessing the conflicting evidence regarding the grievor’s remorsefulness, the arbitrator utilized the grievor’s past deceptive behaviour related to her disability—namely, lying to the employer about being sick, seeing a medical professional and obtaining medical certificates, misleading her family physician about her drinking problem and lying to her supervisor by indicating that everything was fine—to characterize the grievor as untruthful.¹⁵⁶ The arbitrator failed to recognize that denial and deception are common features of addiction and assessed McNulty’s behaviour in isolation from her disability:

I find particularly troubling the grievor’s excuse for not obtaining legitimate medical certificates, which was that she was either too intoxicated or too hung-over to drive. At first blush, one might consider that a somewhat commendable action, within an otherwise dreadful situation; however, when looked at a little closer, it is really meaningless and self-serving and is a way of avoiding responsibility for her actions.

¹⁵³ *Ibid* at para 188.

¹⁵⁴ *Ibid* at para 189.

¹⁵⁵ *Ibid* at para 184.

¹⁵⁶ *Ibid* at para 193.

*Had she not been intoxicated or severely hung-over, she would not have missed work; ergo, she would not have required a medical note and would not have had to see a doctor. I have never seen or heard of a situation in which an employee has shown up at a doctor's office and asked for a note to excuse him or her from work because he or she was too intoxicated or was hung-over. What is particularly disquieting about this in the grievor's situation is that if she really needed to see her family doctor, she had a sister who lived close by and who could drive; but more troubling is that the grievor's family physician's office was within walking distance of her home [emphasis added].*¹⁵⁷

Contrary to the human rights approach, the arbitrator's assessment of the grievor's drinking and related misconduct was devoid of any appreciation of the impact an alcohol addiction may have on an individual and their behaviour.

Considering the grievor's testimony and the employer's evidence, the arbitrator concluded that, "while the grievor might have said that she is sorry and remorseful for her conduct, her past behaviour suggests that she is not always truthful and that she tends to blame others and not accept responsibility for her actions" and accepted the employer's evidence on this point.¹⁵⁸ The arbitrator found the grievor's evidence regarding her rehabilitative efforts indicated that she "ha[d] not pursued rehabilitation in a meaningful way"¹⁵⁹ and also concluded that her work performance, length of service and cooperation with the investigation were not sufficient to convince him to alter the penalty. He held that McNulty's misconduct warranted termination and dismissed the grievance.

4.10 Conclusion

Historically, in Canadian labour law, the competing approaches towards workplace misconduct arising from drug and alcohol addiction have been the traditional disciplinary approach, rooted in the long-standing arbitral approach to culpable misconduct, and the human rights approach, originating from human rights legislation and the subsequent statutory grant of power incorporated in labour relations legislation enabling arbitrators to

¹⁵⁷ *Ibid* at para 196.

¹⁵⁸ *Ibid* at para 197.

¹⁵⁹ *Ibid* at para 200.

interpret and apply human rights statutes. Under the disciplinary approach, the arbitrator determines whether the employer had just cause to discipline or terminate the employee and whether the disciplinary action was excessive under the circumstances. The duty to accommodate is typically regarded as a mitigating factor once the grievor's culpability has been determined.¹⁶⁰ Consequently, under this approach, the employee's addiction disability is treated as a mitigating factor in determining the appropriate discipline, as opposed to a trigger for the application of the prima facie discrimination analysis and the duty to accommodate to the point of undue hardship. In contrast, the human rights approach strives to determine whether there is a connection between the employee's misconduct and their addiction disability. If a compelling connection can be established, the human rights analysis centres on whether the employer fulfilled its duty to accommodate the employee to the point of undue hardship, rather than the employee's culpability.

The hybrid disciplinary approach developed as a middle ground between the disciplinary and human rights approaches, integrating the traditional disciplinary analysis with accommodation principles. This approach arose from concerns about abandoning the application of culpability to workplace misconduct, particularly in addiction cases where there appears to be a quasi-voluntary aspect.¹⁶¹ Under the hybrid analysis, the legal decision maker applies a disciplinary or just cause analysis to the voluntary, culpable aspects of the employee's misconduct and applies a human rights analysis to the involuntary, non-culpable components that are causally connected to the employee's disability.¹⁶²

The SCC has repeatedly affirmed that human rights statutes must be interpreted in a liberal, contextual and purposive fashion¹⁶³ and human rights are to be given a broad

¹⁶⁰ Lynk, "Disability and Work," *supra* note 1 at 232.

¹⁶¹ *Ibid* at 233.

¹⁶² Etherington, *supra* note 4 at 406.

¹⁶³ *Simpsons-Sears*, *supra* note 14 at 551; *Meiorin*, *supra* note 15 at paras 43-44; and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 31.

interpretation. To establish prima facie discrimination, the employee must simply demonstrate that they have an addiction, they experienced an adverse impact and the addiction was in some way a factor in the adverse impact.¹⁶⁴ Regardless of whether or not it intended to discriminate against the employee, the employer has the onus of demonstrating that it cannot accommodate the employee without giving rise to undue hardship.¹⁶⁵ The employer must present convincing objective evidence to substantiate its undue hardship claim and justify limiting the employee's right to be free from discrimination and accommodated in their workplace. The human rights approach to addiction disability—illustrated in *New Flyer, Seaspan, Canadian National Railway, Sunnybrook* and *Saskatchewan Gaming*—is most in line with these human rights laws and principles.

The traditional disciplinary approach has largely fallen out of favor in the past ten years, as it has no regard for human rights; however, elements of this approach have remained in the addiction jurisprudence. The tension in the addiction case law during this period has been between the human rights approach and the hybrid approach. The development of the hybrid model provided an alternative to the full-bore human rights analysis, maintaining elements of the traditional labour relations approach. Nevertheless, this approach is premised on principles that are both contrary to human rights law and the sociopolitical model of disability.

Contrary to the sociopolitical model of disability, endorsed by the SCC, the hybrid model espouses a biomedical concept of disability by focusing on individual pathology, as opposed to the social and built environment. Emphasizing the culpability of one's behaviour, the hybrid model seeks to derive a finding of legal fault from the medical principle that the capacity to control addiction-related compulsions varies amongst individuals,¹⁶⁶ thus focusing on the element of choice in their behaviour.¹⁶⁷ The

¹⁶⁴ Moore, *supra* note 13 at para 33.

¹⁶⁵ Meiorin, *supra* note 15 at para 54.

¹⁶⁶ Richard Coleman, "The Clash between Traditional Labour Law and Contemporary Human Rights: Evaluating the Hybrid Approach to Employee Addiction," *Labour Arbitration Yearbook 2011-2012* (Toronto: Lancaster House, 2012) 183 at 183.

examination of an individual's culpability under this model introduces the consideration of factors, such as choice and control, that are irrelevant to the human rights analysis and creates a stricter, narrower test for individuals with addiction disability. This consequently detracts attention from the effects of the addiction on the individual and emphasizes concepts of legal responsibility and fault, ultimately eclipsing the duty to accommodate.¹⁶⁸ The hybrid model has failed to provide a principled and consistent approach towards the accommodation standards reflected in the human rights jurisprudence, namely *Meiorin* and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*.¹⁶⁹

In an attempt to blend the disciplinary and human rights approaches, the hybrid model ultimately subordinates fundamental human rights law to labour law principles:

Employers are understandably concerned to maintain their ability to discharge problem employees. The conceptual difficulty with the hybrid approach, and the root of all of its weaknesses — analytical and legal — is the attempt to address those concerns by interpolating the idea of degrees of culpability within a human rights context, and by attempting to balance labour law against human rights law without regard to the established legal hierarchy. It is not a matter of molding human rights law to the employment context, but of ensuring that the employment context complies with human rights law. That is the legal requirement in Canada and not a matter of predilection.

The answer to the problem of addicted employees who commit employment offenses does not lie in bypassing or diminishing human rights law, but in applying that law properly and consistently, utilizing the concepts and tools provided by the courts within the human rights paradigm, especially undue hardship.¹⁷⁰

¹⁶⁷ *Ibid* at 194.

¹⁶⁸ *Ibid* at 195.

¹⁶⁹ [1999] 3 SCR 868. Lynk, "Disability and Work," *supra* note 1 at 233.

¹⁷⁰ Coleman, *supra* note 168 at 211.

Unfortunately, Canadian legal decision makers have opted to adopt this flawed approach, contrary to human rights laws and principles. The dilution and misinterpretation of fundamental human rights law is evident in the addiction disability jurisprudence.

Under Canadian human rights law, prior to terminating the employment of an individual with an addiction, the employer “must prove that their condition adversely affects their work, has not responded to efforts to accommodate and is not, in the foreseeable future, likely to improve.”¹⁷¹ Where the workplace misconduct is attributable to the individual’s addiction and the evidence demonstrates that they are committed to rehabilitation and a positive employment relationship can be re-established, most arbitrators are inclined to give another chance.¹⁷² However, this is not always the case. The flexible, liberal human rights approach, consistent with well-established human rights laws and principles, is not always applied. Some Canadian legal decision makers continue to diverge from this approach and impose a narrower standard in cases of alleged discrimination on the basis of addiction disability and accept a low standard of direct objective evidence of employers’ undue hardship defense, contrary to human rights jurisprudence and principles. Placing the focus on blame and culpability, either consciously or subconsciously, distorts the human rights analysis and elicits the imposition of additional factors and stricter standards.

As evidenced in *Gooding*, *Wright* and *McNulty*, some decisions fail to regard addiction as a disability garnering human rights protections, resulting in the misapplication—specifically, an inappropriately narrow interpretation—of the *Moore* and *Meiorin* tests, in favour of a disciplinary approach. Certainly, there are cases, like *Seaspan*, *Canadian National Railway*, *Sunnybrook* and *Saskatchewan Gaming*, that reflect a broad and generous human rights approach and uphold the employer’s duty to accommodate to the point of undue hardship. The *New Flyer* decision also reflects the difficult balancing of the grievor’s human rights with the likelihood of successful remission and return to work;

¹⁷¹ David Beatty, Donald Brown & Adam Beatty, *Canadian Labour Arbitration*, 5th ed, 7:6150 — Drug and alcohol addiction (Toronto: Thomson Reuters Canada, 2020).

¹⁷² *Ibid.*

although the arbitrator ultimately decided not to reinstate the grievor's employment, this conclusion arose from the particular circumstances of the case—namely, the employer's multiple attempts at accommodation and the grievor's poor prognosis for recovery and return to work—and not a rejection of the human rights approach. *Wright* and *Sunnybrook*, two cases involving a nurse stealing narcotics from her employer, illustrate how similar facts and circumstances can lead to starkly different outcomes. The difference appears to lie in the approach adopted by the legal decision maker: "Running like a constant thread through these reinstatement rulings is the application of a more liberal and generous approach towards the definition of disability in human rights law, and the acceptance of some of the current medical thinking regarding addictions."¹⁷³

A segment of the addiction case law departs from the *Moore* and *Meiorin* tests and fundamental human rights principles. As evidenced in this chapter, some legal decision makers require the employee to establish more than a simple connection between the addiction and imposed discipline, contrary to *Moore*, and do not properly assess the accommodation duty in compliance with *Meiorin* and based on objective evidence. Furthermore, some decisions incorrectly accept formal equality, as opposed to substantive equality, and require direct discrimination as well as discriminatory intent, stereotyping and arbitrary decision-making on behalf of the employer, thus making it more difficult to establish prima facie discrimination. Although addiction disability is recognized as a protected human rights ground, claims of discrimination have been dismissed on the basis that the addiction did not reach a level of compulsiveness rendering the individual completely unable to make decisions and recognize their wrongdoing, importing elements of the disciplinary approach.

Prior to *Elk Valley*, there was no common approach amongst legal decision makers to assessing issues of discrimination and accommodation with respect to addiction disability. Of course, addictions are complex and present unique features and characteristics that are not shared by most disabilities and these differences appear to

¹⁷³ Lynk, "Substance Addiction," *supra* note 129 at 17-18.

have contributed to the apparent difficulty in establishing a standard approach towards addiction disability:

... addiction is a disease; diseases and the manifestation of disease are by definition not culpable, and by law must be accommodated; but negative workplace behaviour is normally considered culpable and subject to discipline. Furthermore, there are elements of the disease of addiction which legitimately differentiate addiction from most other disabilities, including components of denial and relapse, both of which may be affected by the manner in which the suffering employee is dealt with. In addition, there is a widespread perception that an element of choice and self-control is involved in addiction that is not present in other disabilities, which legitimately pits the excuse of compulsion against the effect of enabling, and more controversially, against the concepts of personal responsibility and blame. All of this contributes to the challenge of reconciling the clash between traditional labour law and contemporary human rights.¹⁷⁴

Individuals are also expected to have some degree of awareness of their addiction disability and be committed to recovery. Consequently, arbitrators have had difficulty reconciling accommodation principles with the traditional workplace and arbitral approaches towards an employee's personal responsibility for their misconduct and recovery.¹⁷⁵ In some cases, this difficulty resulted in the adoption of an approach that failed to adhere to human rights laws and principles, in favor of a disciplinary-focused approach. In the pre-*Elk Valley* era, the addiction disability jurisprudence was inconsistent, creating uncertainty in the law, and *Elk Valley* provided the SCC with the opportunity to offer clear guidance and affirm the proper approach to be applied in such cases.

¹⁷⁴ Coleman, *supra* note 168 at 185.

¹⁷⁵ Lynk, "Disability and Work," *supra* note 1 at 232.

Chapter 5

5 *Stewart v. Elk Valley Coal Corp.*

Ian Stewart, an employee of Elk Valley Coal Corporation's (Elk Valley) coalmine near Hinton, Alberta, had an accident at work while operating a truck. Pursuant to the company's drug and alcohol policy, Stewart underwent a urine test, which indicated he had cocaine in his system at the time. Elk Valley's subsequent investigation revealed that Stewart suffered from a drug addiction. Nevertheless, the company decided to terminate his employment. Brent Bish, Vice President of the United Mine Workers of America, Local 1656, filed a complaint with the Human Rights Tribunals of Alberta (Tribunal), on behalf of Stewart, claiming that Elk Valley discriminated against Stewart on the basis of his addiction, contrary to the *Alberta Human Rights Act*.¹

The Tribunal concluded that Elk Valley terminated Stewart for violating the company's drug and alcohol policy, and not for his drug addiction.² Although Stewart's addiction impaired his ability to comply with the workplace policy, the Tribunal held that the addiction was not a factor in his termination and, therefore, Elk Valley did not discriminate against Stewart. Stewart appealed the Tribunal's decision to the Court of Queen's Bench of Alberta (ABQB). The ABQB agreed that Elk Valley did not prima facie discriminate against Stewart on the basis of his addiction but found that the employer failed to accommodate him to the point of undue hardship.³ Both Stewart and Elk Valley appealed this decision to the Court of Appeal of Alberta (ABCA), which held that Elk Valley did not discriminate against Stewart and had fulfilled its accommodation duty.⁴

Stewart appealed the ABCA decision to the Supreme Court of Canada (SCC), requesting the Court to review the Tribunal's judgment. The SCC granted leave to appeal, making

¹ RSA 2000, c A-25 5, s 7 [*Alberta HRA*].

² *Bish v Elk Valley Coal Corp*, 2012 AHRC 7 (Chrumka) [Tribunal].

³ *Bish v Elk Valley Coal Corp*, 2013 ABQB 756 (Michalyshyn J) [ABQB].

⁴ *Stewart v Elk Valley Coal Corp*, 2015 ABCA 225 [ABCA].

Stewart v. Elk Valley Coal Corp. the first addiction disability accommodation case to be heard by the highest court in the country.⁵ *Elk Valley* provided the SCC with the opportunity to address the apparent inconsistencies in the legal approach applied to addiction disability cases and provide much needed clarification with respect to the appropriate approach.

The SCC affirmed the prima facie discrimination test articulated in *Moore v. British Columbia (Education)*⁶ and asserted that stereotypical or arbitrary decision-making is not a requirement for establishing prima facie discrimination and that the protected human rights ground must merely be a factor in the adverse impact. The majority of the Court found sufficient evidence supporting the Tribunal's decision that Stewart was not terminated for his addiction, but for breaching the drug policy, and concluded that it was reasonable for the Tribunal to find no prima facie discrimination.

This chapter provides a summary of the facts in *Elk Valley* and analyzes the various levels of decisions respecting this case, with a particular emphasis on the SCC decisions—the majority, partial dissent and dissent. It examines the decisions from a human rights perspective and with a biopsychosocial understanding of addiction, grounded in human rights principles, legislation and jurisprudence, and explores the implications of the SCC majority decision. The legal reasoning in the SCC majority decision is faulty; in finding that Mr. Stewart's termination was not discriminatory, based on the superficial distinction that Elk Valley terminated him for breaching the employer's drug policy, and not for his addiction disability, the majority departed from fundamental human rights laws and principles as well as the modern scientific understanding of addiction.

5.1 Facts

Ian Stewart began working for Cardinal River Operations Limited (Cardinal River), the predecessor of Elk Valley Coal Corporation, in September 1996. Stewart operated trucks

⁵ 2017 SCC 30 [*Elk Valley*].

⁶ 2012 SCC 61 [*Moore*].

and wheel loaders in the course of his employment at the coalmine and, from July to November 2005, he worked as a plant loader operator. Stewart was a member of the United Mine Workers of America, Local 1656 (Union) and covered by the collective agreement between Elk Valley and the Union.

In 2000, the Union and the predecessor employer jointly agreed to an alcohol and drug policy. This policy was subject to review and modification. In May 2005, Elk Valley unilaterally implemented an amended “Alcohol, Illegal Drugs & Medications Policy” (Policy), which committed Elk Valley to “providing a safe work environment.”⁷ Stewart and other employees attended a training session, where Elk Valley officials explained the new Policy, and the employees signed a form indicating receipt and understanding of the Policy. The Policy stated that the use or possession of an illegal drug is prohibited while on duty or at the operation and, “[w]here an act or omission by an employee who is On Duty or at one of the Mining Operations causes or contributes to a Significant Event, the Company as part of the investigation of the cause of the Significant Event may require the employee to undergo testing.”⁸ The Policy indicated that it did not apply to off duty conduct, “where the circumstances do not reasonably support an inference that the employee’s work performance has been or may be adversely affected.”⁹

The new Policy affirmed that Elk Valley would assist employees struggling with drug and alcohol abuse, dependency or addiction, with the goal of prevention and providing access to treatment resources. The Policy asserted that employees “with a dependency or addiction” could seek rehabilitative assistance without fear of discipline or termination before the occurrence of a “Significant Event,” such as a work related incident.¹⁰ However, “[i]nvolvement in a rehabilitative effort or seeking rehabilitative help for an abuse, dependency or addiction problem after a Significant Event has occurred, or after a demand is made for the employee to undergo testing for reasonable cause under this

⁷ ABCA, *supra* note 4 at para 15.

⁸ Tribunal, *supra* note 2 at para 9.

⁹ ABCA, *supra* note 4 at para 15.

¹⁰ *Ibid* at para 13.

Policy, will not prevent an employee from being disciplined or terminated.”¹¹ Nevertheless, the Policy indicated that Elk Valley would not automatically terminate an employee who did not reveal a dependency or addiction until after an incident. The Policy provided that, if an employee violated the Rules of Conduct or tested positive for drugs or alcohol in a test administered under the policy, Elk Valley would decide whether or not the employee should be terminated by considering all the relevant circumstances, including the employee’s employment record, the circumstances surrounding the positive test result, the pattern of usage, the likelihood that work performance has or may be negatively affected and the importance of deterring this behaviour by other employees.¹² If Elk Valley determined that the conduct warranted discipline, the company would place “primary importance upon deterring similar behaviour by other employees” and terminate the employee unless it would be unjust given the circumstances.¹³ If Elk Valley decided to continue employment, the employee would be required to take the necessary and appropriate steps to avoid the risk of future workplace impairment and, if reasonable under the particular circumstances, Elk Valley could require the employee to undergo periodic or random testing.¹⁴

On October 18, 2005, while operating a loader truck at the worksite, Stewart hit a stationary 170-ton truck, consequently breaking its mirror. Elk Valley considered the incident to be a Significant Event under the Policy and required Stewart to undergo drug testing. The preliminary test revealed the presence of cocaine type drugs. Elk Valley suspended Stewart, pending confirmation of the test result. The subsequent test confirmed the presence of cocaine. Elk Valley conducted an investigative meeting where Stewart was asked about the incident, the drug test and his results. Stewart admitted to using crack cocaine on his days off work and admitted to using crystal methamphetamine and marijuana months before the incident. Stewart indicated that he did not think he had a drug problem prior to the accident but, after talking to a psychologist, he came to realize

¹¹ *Ibid.*

¹² *Ibid* at para 17.

¹³ *Ibid.*

¹⁴ *Ibid.*

that he did have a problem and thought he was addicted. Stewart did not approach anyone at Elk Valley or the Union about his drug use or addiction prior to the incident.

On November 3, Elk Valley terminated Stewart effective immediately. The termination letter stressed the importance of complying with the Policy and disclosing a drug or alcohol dependency before a violation, in order to ensure mine site safety. The letter reiterated the Policy, stating that, “in responding to a violation of the policy the Company will place primary importance upon deterring similar behaviour by other employees and will terminate the employee unless termination could be unjust in all of the circumstances.”¹⁵ In the letter, Elk Valley indicated that it would consider an application for new employment from Stewart after 6 months, given the availability of a suitable vacancy and if he successfully completed a rehabilitation program and agreed to a 24 month “Recovery Maintenance Agreement,” including terms and conditions to monitor and ensure his commitment to sobriety; Elk Valley also stated that it would reimburse 50% of Stewart’s rehabilitation program costs, if he successfully complied with the “Recovery Maintenance Agreement.”¹⁶ The next day, Elk Valley received a letter from Stewart dated November 1, 2005—two days before his termination—stating that he had a problem and was seeking professional help. He indicated that he could not afford the cost of the recommended addiction rehabilitation center and asked for the company’s assistance. While Elk Valley refused to pay the \$5,000, the Union offered to pay but Stewart ultimately decided not to pursue the treatment.

The Union grieved Stewart’s termination and Brent Bish, Vice President of the Union, also filed a complaint with the Alberta Human Rights Commission, alleging that Elk Valley discriminated against Stewart on the grounds of physical and mental disability, contrary to sections 7(1)(a) and (b) of the *Alberta Human Rights Act*:

No employer shall (a) refuse to employ or refuse to continue to employ any person, or (b) discriminate against any person with regard to employment or any term or ^L_{SEP}condition of employment, because of the

¹⁵ Tribunal, *supra* note 2 at para 15.

¹⁶ *Ibid.*

race, religious beliefs, colour, gender, physical disability,¹⁷ mental disability,¹⁸ age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.¹⁹

Of course, there is an exception where the refusal, limitation, specification or preference is based on a bona fide occupational requirement.²⁰

5.2 Summary of Previous Decisions

5.2.1 Arbitration and Judicial Review

Arbitrator Lucas, appointed under the terms of the collective agreement, heard the grievance and suspended Stewart for 24 months and imposed conditions for his reinstatement.²¹ Both the Union and Elk Valley applied for a judicial review of the decision on the grounds that the arbitrator erred in law by assuming, without deciding, that Stewart's termination pursuant to the Policy constituted prima facie discrimination. The ABQB held that the arbitrator made a legal error and set aside the arbitration decision and remitted the case to a different arbitrator for a rehearing.²² Elk Valley appealed the decision and the ABCA upheld the ABQB decision, concluding that remitting the arbitration to a new arbitrator satisfied the standard of reasonableness due to the reasonable apprehension of bias.²³ The Union decided to proceed to the Alberta Human Rights Tribunal, instead of conducting another arbitration hearing.

¹⁷ Under *Alberta HRA*, *supra* note 1, s 44(1)(l), “‘physical disability’ means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness.”

¹⁸ *Ibid*, s 44(1)(h): “‘mental disability’ means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder.”

¹⁹ *Ibid*.

²⁰ *Ibid*, s 7(3).

²¹ *United Mine Workers of America, Local 1656 v Elk Valley Coal Corp*, 2009 ABQB 2 at para 2.

²² *Ibid*.

²³ *Elk Valley Coal Corp v United Mine Workers of America Local 1656*, 2009 ABCA 407.

5.2.2 Alberta Human Rights Tribunal

5.2.2.1 Position of the Parties

The human rights complaint proceeded to the Tribunal. On behalf of Stewart, Brent Bish claimed discrimination on the grounds of “physical and/or mental disability,” contrary to the *Alberta Human Rights Act*.²⁴ Bish submitted that Stewart’s drug addiction was a factor in Elk Valley’s decision to terminate his employment, therefore, the termination constituted prima facie discrimination. Furthermore, Elk Valley did not accommodate Stewart to the point of undue hardship; it failed to conduct a medical assessment and consider other viable options, such as a last chance or rehabilitation agreement.

Elk Valley claimed that terminating Stewart for breaching the Policy did not contravene the *Act*, as the safety sensitivity of the mine site required the company to take every reasonable step to ensure a safe workplace and prevent its employees from using illegal drugs.²⁵ The employer contended that it terminated Stewart, not because he was a drug addict, but because he did not stop using drugs before he had a workplace accident, despite being aware of the Policy.²⁶ Elk Valley claimed that neither Stewart’s termination nor the Policy amounted to prima facie discrimination; thus, it had no duty to accommodate Stewart. In the alternative, Elk Valley claimed that, if the termination constituted prima facie discrimination, it satisfied the duty to accommodate because placing Stewart on its disability plan and paying for his treatment after the accident would have sent a message to the other employees in this safety sensitive workplace that they could continue using drugs until they had an accident.²⁷

²⁴ Tribunal, *supra* note 2 at para 1.

²⁵ *Ibid* at para 102.

²⁶ *Ibid* at para 104

²⁷ *Ibid* at para 106.

5.2.2.2 Medical Evidence

5.2.2.2.1 Dr. Charl Els

Ian Stewart’s counsel called upon Dr. Charl Els, a psychiatrist and addictions specialist, to conduct a medical evaluation of Stewart in November 2010 and testify at the Tribunal hearing on his findings. Dr. Els concluded that, at the time of his termination, Stewart suffered from “moderate cocaine dependence”²⁸ but was “in full remission” at the time of the medical assessment.²⁹ Dr. Els described addiction as a chronic brain disease, characterized by a loss of control,³⁰ and confirmed that denial and cravings—defined as “‘a strong subjective drive to use the substance’ or ‘a psychological state characterized by obsessive thoughts and compulsive behaviour’”³¹—are common elements of addiction.³²

In response to the question of whether Stewart was aware of his substance issues, Dr. Els replied, “I believe that prior to the termination, Mr. Stewart was not aware, and he was likely to be in the equivalent of the precontemplation stage with elements of denial explaining it. I do not believe he was aware of the extent of the problem, nor of the impact it had on his physical use and physical fitness for duty at the mine.”³³ Dr. Els explained that, like most people struggling with substance dependence, Stewart did not perceive any need for treatment, as he did not believe he had a drug problem.³⁴ Thus, he did not see the need to access Elk Valley’s assistance program. Dr. Els agreed that Elk Valley’s policy of terminating employees for a positive drug test after a workplace

²⁸ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder*, 4th ed (Arlington, VA: American Psychiatric Publishing, 1994) [*DSM-IV*], which was in effect at the time, divided substance use disorder into two categories, substance abuse disorder and substance dependence disorder, with the latter being more severe.

²⁹ Tribunal, *supra* note 2 at para 65.

³⁰ *Ibid* at para 89.

³¹ *Ibid* at para 49.

³² *Ibid* at paras 48-50.

³³ *Ibid* at para 61.

³⁴ *Ibid* at para 52.

accident deterred drug use but suggested that other consequences, such as the prospect of having to enter a rehabilitation program, could serve as an equally sufficient deterrent.³⁵

5.2.2.2.2 Dr. Mace Beckson

Elk Valley requested the medical opinion of Dr. Mace Beckson, a psychiatrist and addictions specialist. Dr. Beckson concluded that Stewart had a mild to moderate case of cocaine dependence at the time of the accident; he demonstrated a maladaptive pattern of drug use, resulting in “clinically significant impairment.”³⁶ Stewart acknowledged that he was sleepy at the time of the incident due to his cocaine use the night before and Dr. Beckson agreed that the drug consumption impaired his ability to handle the vehicle.³⁷ According to Dr. Beckson, Stewart met three of the seven substance dependence criteria in the *DSM-IV*: he spent a substantial amount of time obtaining, using and recovering from the effects of cocaine; discontinued important social and recreational activities due to his use; and experienced withdrawal symptoms when he stopped using cocaine.³⁸

Nevertheless, Dr. Beckson concluded that, even though Stewart was addicted to cocaine, he “did not lack the capacity to change his behavior if he so chose.”³⁹ Adopting the moral model of addiction, Dr. Beckson opined that, “Addicted individuals have not lost the capacity to control their behavior; they do not lack the capacity to choose to discontinue drug use; and they do respond to negative consequences and change their behavior in the face of potential punishment.”⁴⁰ The doctor asserted that, despite his addiction, Stewart was capable of complying with the Policy but simply chose not to,⁴¹ pointing to the choices he made with respect to his cocaine use, such as abstaining while at work, not going to work in an intoxicated state and limiting the amount he used when he did not

³⁵ *Ibid* at para 68.

³⁶ *Ibid* at para 80.

³⁷ ABCA, *supra* note 4 at para 9.

³⁸ Tribunal, *supra* note 2 at para 80.

³⁹ *Ibid*.

⁴⁰ *Ibid* at para 76.

⁴¹ *Ibid* at para 93.

have enough money. However, this ostensible display of self-control is arguably eclipsed by the fact that Stewart obtained a second job in order to finance his addiction.⁴² Stewart's ability to limit his cocaine use before and during work does not mean he was in full control of his addiction or addictive behaviours; it may, however, speak to the severity of his addiction and suggest he was able to restrict his cocaine use in certain circumstances. Furthermore, Stewart's efforts to limit his use to when he was off-duty illustrate his attempts to comply with the workplace policy.

Dr. Beckson also asserted that Stewart's denial of his addiction did not impair his decision-making abilities⁴³ and determined that, "[g]iven his capacity for awareness, decision-making, and follow-through," he was not disabled from complying with the Policy.⁴⁴ While Dr. Beckson emphasized the notion of choice and evidently adopted the antiquated moral model of addiction, Dr. Charl Els presented a more nuanced understanding of addiction disability, reflecting the medical model, which should have been weighed more favorably by the Tribunal.

5.2.2.3 Tribunal Decision

The Tribunal held that Elk Valley did not prima facie discriminate against Stewart. It determined that Elk Valley terminated Stewart for failing to comply with Elk Valley's drug policy and that his addiction was not a factor in the termination.⁴⁵ The Tribunal also concluded that the Policy did not adversely impact Stewart because he had the capacity to comply with its terms.⁴⁶

The *Moore* decision, which established the current test for prima facie discrimination, had not yet been released. Nevertheless, relying on human rights jurisprudence up to that point, the Tribunal adopted an approach identical to the *Moore* test and asserted that, in

⁴² *Ibid* at para 80.

⁴³ *Ibid* at para 88.

⁴⁴ *Ibid* at para 93.

⁴⁵ *Ibid* at para 120.

⁴⁶ *Ibid*.

order to establish prima facie discrimination, the claimant must demonstrate that: 1) they had a disability protected under the *Act*; 2) the respondent terminated their employment or treated them adversely; and^[SEP]3) it is reasonable to infer that their disability was a factor in their termination or adverse treatment.^{47 [SEP]}

The Tribunal contemplated an additional element applied by the SCC minority in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*⁴⁸ and seemingly applied by the majority in *Honda Canada Inc. v. Keays*:⁴⁹ “examining whether the adverse action of the employer based on a prohibited ground is stereotypical or arbitrary.”⁵⁰ Nonetheless, the Tribunal affirmed that “proof of prejudice or stereotyping are not additional evidentiary requirements for the Complainant in proving *prima facie* discrimination. Once adverse treatment is shown on the basis of a prohibited ground, an inference of stereotyping, arbitrariness or perpetuation of disadvantage will usually be drawn.”⁵¹

The Tribunal acknowledged that Stewart had a cocaine addiction at the time of the incident, constituting a disability under the *Act*, and that Elk Valley terminated his employment but determined that his addiction was not a factor in the termination. Similar to *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*,⁵² the evidence indicated that “Mr. Stewart was not fired *because of* his disability, but rather because of his failure to stop using drugs, failure to stop being impaired in the workplace and failing to disclose his drug use” prior to the

⁴⁷ *Ibid* at para 115. See *Martin v Carter Chevrolet Oldsmobile*, 2001 BRHRT 37; *Kemess Mines Ltd, v International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para 44, leave to appeal to SCC refused: [2006] SCCA No 140; and *Health Employers Association of British Columbia v British Columbia Nurses' Union*, 2006 BCCA 57 at para 38, cited in *Burgess v Stephen W Huk Professional Corp* 2010 ABQB 424 at para 63.

⁴⁸ 2007 SCC 4 [*McGill University*].

⁴⁹ 2008 SCC 39 at para 71 [*Honda Canada*].

⁵⁰ Tribunal, *supra* note 2 at para 116.

⁵¹ *Ibid*.

⁵² 2008 BCCA 357 [*Gooding*].

workplace accident.⁵³ Firstly, it is apparent the Tribunal applied the incorrect prima facie discrimination test. The prima facie discrimination test—correctly stated by the Tribunal at the outset of the decision—does not demand a causal relationship; it merely requires the disability to be a factor in the termination. However, the Tribunal inappropriately imposed the onerous requirement of a causal connection between the termination and addiction. The Tribunal asserted that, “While any adverse effect of an employer’s treatment towards an employee, whether intended or not, is part of the discrimination analysis, the adverse effect *must be causally linked*, in some fashion, to the disability. In this case the adverse effect was due to the failure of Mr. Stewart to stop using drugs and failing to disclose his use prior to the accident.”⁵⁴ In finding no such causal connection, the Tribunal ultimately determined that there was no connection between Stewart’s addiction and his termination. The Tribunal’s decision disregarded the fact that Stewart’s cocaine addiction impacted his ability to abstain from drugs, in accordance with the workplace policy, thus, demonstrating the absence of a rudimentary understanding of the primary manifestations of addiction.

Although the SCC rejected the notion that a claimant’s choices can undermine their human rights claim, the issue of choice continued to influence lower court decisions involving addictions, as evidenced in this Tribunal decision.⁵⁵ In *Canada (Attorney General) v. PHS Community Services Society*, the SCC refuted the relevance of choice in the context of addiction.⁵⁶ Nevertheless, the Tribunal heavily relied on Dr. Beckson’s evidence indicating that, although Stewart suffered from a cocaine addiction, he was “not ‘disabled’ from making choices with respect to his compliance with the Policy”⁵⁷ and

⁵³ Tribunal, *supra* note 2 at para 120 [emphasis added].

⁵⁴ *Ibid* [emphasis added].

⁵⁵ Jennifer Koshan, “New Developments on the Test for Discrimination Under Human Rights Legislation: Time for Rehab?” (21 August 2015), *ABlawg.ca* (blog), online: <<https://ablawg.ca/2015/08/21/new-developments-on-the-test-for-discrimination-under-human-rights-legislation-time-for-rehab/>> at 5 [Koshan, “New Developments”].

⁵⁶ 2011 SCC 44.

⁵⁷ *Supra* note 2 at para 118.

concluded that denial did not impair Stewart's ability to comply with the drug policy.⁵⁸ The Tribunal also accepted Elk Valley's evidence that Stewart would have been terminated, regardless of whether he had an addiction or was a casual drug user.⁵⁹ The Tribunal incorrectly endorsed a formal notion of equality, as opposed to substantive equality, and failed to acknowledge the clear presence of indirect discrimination in this case. Relying on irrelevant factors, external to the legal test for prima facie discrimination, the Tribunal determined that the termination and Policy were "directed at accountability for an individual who had the capacity to make choices" and did not perpetuate stereotypes or disadvantages suffered by individuals with addiction.⁶⁰

Further, the Tribunal determined that, even if the termination did constitute prima facie discrimination, it was a bona fide occupational requirement due to the safety-sensitive work environment and Elk Valley accommodated Stewart to the point of undue hardship, particularly through the pre-incident assistance plan, the opportunity for future reemployment and offering to assist with rehabilitation costs.⁶¹ However, the pre-incident assistance plan was effectively inaccessible to Stewart since he did not realize he had a problem to disclose before the accident occurred and the two other measures do not constitute accommodation. The fundamental purpose of workplace accommodation is to enable an individual's continued employment with the employer; offering to pay for Stewart's rehabilitation program and suggesting he can later re-apply for employment, after termination, does nothing to further the goal of maintaining his current employment.

The Tribunal acknowledged the employer's duty to inquire about medical information but concluded that Stewart had the capacity to fulfill his duty to request accommodation.⁶² Although Elk Valley did not provide direct objective evidence with respect to undue hardship, the Tribunal held that, if Elk Valley had to provide an

⁵⁸ *Ibid* at para 122.

⁵⁹ *Ibid* at para 123.

⁶⁰ *Ibid* at para 126.

⁶¹ *Ibid* at para 152.

⁶² *Ibid*.

individual assessment—required both under human rights law and the company’s own policy—or impose a lesser punishment, the deterrent effect of the Policy would be significantly reduced and constitute an undue hardship to the company, given its safety responsibilities.⁶³ The Tribunal dismissed the complaint and the Union appealed the decision to the ABQB.

5.2.3 Court of Queen’s Bench of Alberta

On behalf of Ian Stewart, Brent Bish objected to the Tribunal’s decision on the basis that it: (1) applied the incorrect legal test to Stewart’s addiction disability; (2) failed to find a causal connection between Stewart’s disability and termination; (3) incorrectly inferred that the absence of Elk Valley’s intention to discriminate was relevant; (4) inappropriately considered safety risks at the prima facie discrimination stage; (5) failed to recognize the clear adverse effect discrimination; and (6) misapplied the third step of the *Meiorin* test⁶⁴ in assessing the duty to accommodate to the point of undue hardship.⁶⁵ Bish argued that the appropriate standard of review was correctness, while Elk Valley and the Alberta Human Rights Commission argued for the reasonableness standard.⁶⁶

5.2.3.1 Decision

Justice Michalyszyn of the ABQB heard the appeal. Relying on a series of Alberta decisions endorsing the application of the correctness standard of review to human rights panels’ decisions on questions of law, he applied the correctness standard to the issue of prima facie discrimination.⁶⁷ The jurisprudence supported the notion that “the nature of human rights issues are questions of law of general importance to the legal system,” thus

⁶³ *Ibid.*

⁶⁴ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union*, [1999] 3 SCR 3 [*Meiorin*].

⁶⁵ ABQB, *supra* note 3 at paras 27, 54.

⁶⁶ *Ibid* at para 11.

⁶⁷ *Ibid* at para 14: *Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 at paras 8-10; *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426 at paras 16-28; *Lund v Boisson*, 2012 ABCA 300; and *Lethbridge Regional Police Service v Lethbridge Police Association*, 2013 ABCA 47 at para 28 [*Lethbridge*].

attracting the correctness standard.⁶⁸ Justice Michalyshyn concluded that the issue of whether any existing discrimination was reasonable and justified in the circumstances was a question of mixed law and fact, subject to the reasonableness standard.⁶⁹

Justice Michalyshyn held that Stewart's termination did not constitute prima facie discrimination and concluded that the Tribunal correctly rejected the notion that "any connection" between the disability and adverse treatment was sufficient to find prima facie discrimination.⁷⁰ He concluded that, taken together, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital General de Montreal*,⁷¹ *Honda Canada Inc. v. Keays*,⁷² *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*⁷³ and *Wright v. College and Association of Registered Nurses of Alberta (Appeals Committee)*⁷⁴ confirmed that the test for prima facie discrimination included some consideration of whether stereotypical or arbitrary assumptions underlie the adverse treatment.⁷⁵ Justice Michalyshyn asserted that, "Stewart was treated not as a drug addict but as a drug user" and, thus, the decision to terminate him was not based on arbitrary or stereotypical preconceived notions.⁷⁶ He accepted the Tribunal's conclusion that Stewart was in control of his drug use and Elk Valley terminated his employment because he failed to stop using drugs and disclose his drug use, and not because of his addiction.⁷⁷ The ABQB decision concluded that there was no causal connection between Stewart's disability and termination and found no prima facie discrimination.

⁶⁸ ABQB, *supra* note 3 at para 18; *Lethbridge*, *supra* note 67 at para 28.

⁶⁹ ABQB, *supra* note 3 at para 25; *Alberta (Minister of Human Resources and Employment) v. Weller*, 2006 ABCA 235 at para 20; *Gramaglia v Alberta (Government Services Minister)*, 2007 ABCA 93 at para 27.^[11]

⁷⁰ ABQB, *supra* note 3 at para 36.

⁷¹ *McGill University*, *supra* note 48.

⁷² *Honda Canada*, *supra* note 49.

⁷³ *Supra* note 52.

⁷⁴ 2012 ABCA 267 [*Wright*].

⁷⁵ ABQB, *supra* note 3 at para 38.

⁷⁶ *Ibid* at para 45.

⁷⁷ *Ibid*.

Despite finding no prima facie discrimination, Justice Michalyszyn went on to examine the issue of accommodation. Bish argued that the Tribunal misapplied the third part of the *Meiorin* test and failed to demonstrate that the standard was reasonably necessary to accomplish the legitimate work-related purpose—namely, ensuring safety. Stewart did not recognize that he had an addiction disability at the time of the accident and the Policy only offered protection and confidential, individualized assistance to individuals with a dependency or addiction, not casual drug users or drug users who later realized they had an addiction after a workplace incident; thus, Elk Valley’s offer of no-risk self-reporting was inadequate in this case.⁷⁸ The Tribunal erred in finding that termination was appropriate on the basis that Stewart could have reasonably complied with the Policy by seeking assistance before the accident, because he did not actually know he had an addiction at the time.⁷⁹ Accordingly, the ABQB held that the Tribunal erred in finding that Elk Valley accommodated Stewart to the point of undue hardship.

5.2.4 Court of Appeal of Alberta

Bish, on behalf of Stewart, challenged the ABQB’s decision to dismiss the appeal on the ground that the Tribunal failed to apply the proper legal test for prima facie discrimination. Elk Valley, on the other hand, disputed the court’s decision on accommodation and contended that its Policy and practice established bona fide occupational requirements. The Alberta Human Rights Commission intervened to argue that it should receive deference on all legal issues under its authorizing statute.

5.2.4.1 Majority Decision

The ABCA examined whether Stewart’s termination amounted to discrimination on the basis of his addiction, whether the Tribunal applied the proper legal test for prima facie discrimination and whether Elk Valley accommodated Stewart to the point of undue hardship. The ABCA applied the standard of correctness to the legal interpretation of the *Moore* and *Meiorin* tests, as “these definitions are questions of law of fundamental

⁷⁸ *Ibid* at para 61.

⁷⁹ *Ibid* at paras 62-65.

significance to the Canadian legal system,”⁸⁰ and applied the reasonableness standard to fact findings and findings of mixed fact and law.⁸¹ The ABCA majority, comprised of Justices Picard and Watson, concluded that Stewart’s termination did not amount to discrimination and dismissed the appeal.⁸² The majority held that the Tribunal applied the proper test for prima facie discrimination, finding the legal analysis to be consistent with *Moore* and did not import a new requirement that the discrimination must be based on arbitrariness or the perpetuation of historical stereotypes.⁸³

The ABCA majority asserted that the *Moore* test requires the disability to be “a real factor in the adverse impact and not just part of the necessary background.”⁸⁴ Accordingly, the ABCA concluded that the Tribunal’s decision did not violate the *Moore* test because “the disability did not constitute a real factor in the adverse impact” and the Policy did not distinguish between people with a disability and people without a disability, it simply distinguished between people who complied with the Policy and those who did not.⁸⁵ The ABCA put forward two possible interpretations of the Tribunal’s decision: firstly, the Tribunal considered arbitrariness and stereotypes as an alternative to its primary conclusion that Stewart’s disability was unrelated to the adverse impact—since his disability would have been addressed without discipline had he come forward prior to the incident and he was capable of complying with the Policy—or, secondly, the Tribunal effectively determined that the application of the Policy was not a pretext for discriminatory action against Stewart and there was no evidence of discrimination revealed by arbitrariness or stereotypical thinking.⁸⁶ The ABCA did not find sufficient evidence indicating that arbitrariness or stereotypical thinking motivated

⁸⁰ *Supra* note 4 at para 47.

⁸¹ *Ibid* at para 58.

⁸² *Ibid* at para 5.

⁸³ *Ibid* at para 6.

⁸⁴ *Ibid* at para 63.

⁸⁵ *Ibid* at para 66.

⁸⁶ *Ibid* at paras 67-73.

Elk Valley to terminate Stewart and concluded that the Tribunal did not err in determining that his disability was not a factor in the adverse impact.⁸⁷

The ABCA majority also found the Tribunal's accommodation analysis to be consistent with the *Meiorin* test and concluded that the ABQB erred by finding the Tribunal's decision to be unreasonable, as the Court's inference regarding Stewart's capacity to self-report before the incident failed to show the required deference to the Tribunal's factual findings.⁸⁸ Emphasizing the objective of maintaining a safe work environment and deterring employees from neglecting to address or disclose their addiction, the ABCA held that Elk Valley's Policy and practices addressed bona fide occupational requirements and constituted reasonable accommodation for employees with addiction.⁸⁹

5.2.4.2 Dissenting Decision

In dissent, Justice O'Ferrall determined that the Tribunal and ABQB erred in finding that Stewart's addiction was not connected to his dismissal and that he had not established a prima facie case of discrimination. Justice O'Ferrall asserted that the protected ground must simply be a part of the causal chain leading to the adverse impact in order to constitute a factor under the *Moore* test.⁹⁰ The *Moore* test did not require evidence of arbitrariness or stereotypical behaviour to establish a prima facie case of discrimination and placing such an obligation on the complainant, before the onus shifted to the respondent, would prevent most cases of unintentional discrimination from proceeding.⁹¹ Justice O'Ferrall concluded that a complainant is simply required to demonstrate a connection between the protected characteristic and adverse effect.⁹² In response to the employer's argument for the stricter approach applied in *Wright* and *Gooding*, Justice O'Ferrall distinguished the two cases on the basis that they were decided before *Moore*

⁸⁷ *Ibid* at para 75.

⁸⁸ *Ibid* at para 78.

⁸⁹ *Ibid* at para 8.

⁹⁰ *Ibid* at paras 99, 101.

⁹¹ *Ibid* at para 103.

⁹² *Ibid* at para 110.

and involved the culpable behavior of theft; he problematically suggested that, in such situations, there may be a greater onus to demonstrate how the protected characteristic is connected to the adverse effect.⁹³

Justice O’Ferrall determined that both the Tribunal and ABQB applied the wrong legal test for prima facie discrimination, stating: “The complainant’s addiction was not just a factor leading to his dismissal, it was the entire reason for it... the discrimination was ‘because of’ the complainant’s conceded physical or mental disability.”⁹⁴ Elk Valley terminated Stewart because it wanted to deter other employees from failing to disclose their addiction prior to a workplace incident and the Tribunal fundamentally erred by failing to consider the motive of deterrence in determining whether Stewart’s addiction was a factor in his termination.⁹⁵

Justice O’Ferrall also held that Elk Valley failed to accommodate Stewart to the point of undue hardship. He agreed with the ABQB that the Tribunal erred by finding that Elk Valley’s voluntary referral program sufficiently accommodated Stewart; the Policy did not accommodate employees, like Stewart, who were unaware of their addiction and unable to disclose before an incident.⁹⁶ He asserted that the Tribunal erred by concluding that no other penalty besides termination could both accommodate Stewart’s disability and satisfy Elk Valley’s goal of deterrence, given the available alternatives, such as suspension without pay.⁹⁷ The Tribunal also erred in finding that the need for deterrence superseded the requirement of conducting an individual assessment, prescribed by both *Meiorin* as a procedural duty as well as the company’s own policy.⁹⁸

⁹³ *Ibid* at para 109.

⁹⁴ *Ibid* at para 118.

⁹⁵ *Ibid* at paras 122-123.

⁹⁶ *Ibid* at para 138.

⁹⁷ *Ibid* at para 136.

⁹⁸ *Ibid* at para 139.

5.3 Supreme Court of Canada Decision

Bish, on behalf of Stewart, appealed the ABCA decision to the SCC and raised three issues on appeal. First, Bish asserted that the correctness standard of review should be applied, as the legal tests for prima facie discrimination and the duty to accommodate “must be based on the same elements and the same degree of proof in every case, applied in an objectively principled way.”⁹⁹ The respondents—Elk Valley, Cardinal River Operations and the Alberta Human Rights Commission—contended that issues related to findings of mixed fact and law, including the application of the *Moore* and *Meiorin* tests, were within the Tribunal’s expertise and subject to the reasonableness standard.¹⁰⁰ Second, Bish argued that the Tribunal erred in concluding that prima facie discrimination had not been established in this case. Third, the Tribunal erred in finding Elk Valley met its burden of establishing undue hardship.¹⁰¹

5.3.1 Majority Decision

Chief Justice McLachlin and Justices Abella, Karakatsanis, Côté, Brown and Rowe formed the majority in *Elk Valley*, with the Chief Justice articulating the majority’s reasoning. The majority applied deference to the Tribunal’s decision and found its conclusion, that Stewart’s addiction was not a factor in his termination, to be reasonable. The SCC accordingly upheld the termination and dismissed the appeal.

5.3.1.1 Standard of Review

The majority briefly addressed the issue of standard of review and determined that the Tribunal’s decision attracted deference. Although questions of law typically attract the standard of correctness and the SCC ultimately holds the responsibility of “assur[ing] uniformity, consistency and correctness in the articulation, development and

⁹⁹ *Elk Valley*, *supra* note 5 (Factum of the Appellant at paras 6b-c).

¹⁰⁰ *Ibid* (Factum of the Respondent, Elk Valley Coal Corporation at paras 113-115); and *Ibid* (Factum of the Respondent, The Alberta Human Rights Commission at para 6).

¹⁰¹ *Ibid* at para 18.

interpretation of legal principles throughout the Canadian judicial system,”¹⁰² the majority applied the reasonableness standard to all issues raised in the appeal, including the Tribunal’s application of the *Moore* and *Meiorin* tests. Chief Justice McLachlin, on behalf of the majority, asserted:

In sum, this case involves the application of settled principles on workplace disability discrimination to a particular fact situation. The nature of the particular disability at issue — in this case addiction — does not change the legal principles to be applied. The debates here are not about the law, but about the facts and the inferences to be drawn from the facts. These issues were within the purview of the Tribunal, and attract deference. The only question is whether the Tribunal’s decision was reasonable.¹⁰³

However, the apparent differences in the interpretation of the prima facie discrimination test by the Tribunal and lower courts, including the issue of whether the individual must establish arbitrariness or stereotyping, suggested that the legal principles regarding workplace disability discrimination were not, in fact, settled.¹⁰⁴ The conflicting application of the prima facie discrimination test by the SCC majority and dissenting justices also called into question whether the law was settled.¹⁰⁵ Accordingly, the decision to apply deference to the interpretation of such fundamental legal principles was arguably inappropriate.

5.3.1.2 Was the Tribunal’s Decision Unreasonable?

In *Elk Valley*, the SCC majority reaffirmed the prima facie discrimination test originally established in *Moore*, and later affirmed in *Quebec (Commission des droits de la*

¹⁰² Supreme Court of Canada, “Role of the Court” (15 April 2016), online: <<http://www.scc-csc.ca/court-court/role-eng.aspx>>.

¹⁰³ *Supra* note 5 at para 22.

¹⁰⁴ Jennifer Koshan, “‘Majoritarian Blind Spot’? Drug Dependence and the Protection Against Employment Discrimination” (20 June 2017), *ABlawg.ca* (blog), online: <<https://ablawg.ca/2017/06/20/majoritarian-blind-spot-drug-dependence-and-the-protection-against-employment-discrimination/>> at 2 [Koshan, “Majoritarian Blind Spot”].

¹⁰⁵ *Ibid.*

personne et des droits de la jeunesse) v. *Bombardier Inc. (Bombardier Aerospace Training Center)*:¹⁰⁶

To make a case of *prima facie* discrimination, “complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact”: *Moore*, at para. 33. Discrimination can take many forms, including “‘indirect’ discrimination”, where otherwise neutral policies may have an adverse effect on certain groups: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination: *Bombardier*, at para. 40.¹⁰⁷

The majority concluded that, “[t]he Tribunal cited the proper legal test and noted, at para. 117, that it was ‘not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the Act.’”¹⁰⁸ However, although the Tribunal initially cited the correct *prima facie* discrimination test, it later deviated from this test, asserting that, “the adverse effect must be causally linked, in some fashion, to the disability.”¹⁰⁹ The Tribunal ultimately imposed the requirement of a causal connection between Stewart’s addiction and his termination, contrary to the well-established *prima facie* discrimination test.

As the first two elements of the *prima facie* discrimination test were not contested by the parties, the SCC went on to examine the Tribunal’s finding that Stewart’s addiction was not a factor in his termination: “In the Tribunal’s view, Mr. Stewart was fired not because he was addicted, but because he had failed to comply with the terms of the Policy, and for no other reason. The Tribunal also concluded that Mr. Stewart was not adversely impacted by the Policy because he had the capacity to comply with its terms.”¹¹⁰ The

¹⁰⁶ 2015 SCC 39 [*Bombardier*].

¹⁰⁷ *Supra* note 5 at para 24.

¹⁰⁸ *Ibid* at para 26.

¹⁰⁹ Tribunal, *supra* note 2 at para 120.

¹¹⁰ *Supra* note 5 at para 26.

majority stated that the only question before the Court was whether the Tribunal's conclusion was reasonable—essentially whether “the decision is within a ‘range of possible, acceptable outcomes’ which are defensible in respect of the evidence and the law”¹¹¹—and ultimately found the decision that Stewart's addiction was not a factor in his termination to be reasonable. However, the majority failed to recognize that the Tribunal applied the incorrect prima facie discrimination test and required more than a connection between the disability and termination. Imposing the requirement of a causal connection, the Tribunal found that Stewart's addiction had not reached this threshold and erroneously concluded that it was not a factor at all. It is difficult to conceive how the adoption of incorrect legal principles amounted to the reasonable application of the prima facie discrimination test and a reasonable legal decision, as the majority found.

In coming to its conclusion, the majority reviewed the evidence and summarized the Tribunal's findings, as follows:

The Tribunal found, based on the evidence before him, that Mr. Stewart was terminated “due to the failure of Mr. Stewart to stop using drugs and failing to disclose his use prior to the accident” (para. 120). It accepted that people with addictions may experience denial and that the distinction between termination due to disability and termination due to the failure to follow a policy may appear “superficial” given that the failure to follow a policy may be a symptom of an addiction or disability (para. 122). However, in the circumstances of this case, the Tribunal found that the evidence established that the Policy adversely impacted Mr. Stewart *not because of denial* “but rather *because he chose* not to stop his drug use or disclose his drug use” (para. 122).

...

The Tribunal went on to consider whether the Policy itself adversely impacted Mr. Stewart because of his addiction. In that context, the Tribunal noted that “Mr. Stewart *would have been fired whether or not he was an addict or a casual user*” (para. 123) and that “[t]he Policy as applied to Mr. Stewart which resulted in Mr. Stewart's termination was not applied *due to* his disability” (para. 125). The Tribunal concluded that Mr. Stewart had “*the capacity to make choices*” about his drug use (para. 126). In the Tribunal's view, the expert evidence in this case demonstrated

¹¹¹ *Ibid* at para 27; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

that Mr. Stewart's addiction did not diminish his capacity to comply with the terms of the Policy. Accordingly, the Policy did not adversely impact Mr. Stewart [emphasis added].¹¹²

The majority determined that there was sufficient evidence capable of supporting the Tribunal's conclusion that Stewart was not terminated for his addiction, but rather the breach of the Policy, and accepted the Tribunal's finding that he had the capacity to comply. Accordingly, the majority held it was reasonable for the Tribunal to find no prima facie discrimination.¹¹³

The language used by the Tribunal, and cited by the SCC majority above, is revealing. The terms "due to" and "because of" indicate the Tribunal sought a causal relationship, not just a connection, between Stewart's drug addiction and the termination of his employment. This inappropriately stringent application of the third step of the prima facie discrimination test is inconsistent with the *Moore* test, as clarified in *Bombardier*.¹¹⁴ Furthermore, the majority accepted the Tribunal's conclusion that the Policy only adversely impacted Stewart because he "chose" not to stop using drugs or disclose his use to the employer and that the Policy was not discriminatory because it applied to both casual drug users and individuals with addictions. The imposition of a causal connection requirement, relying on reasoning based on "choice" to defeat a discrimination claim, placing emphasis on the employer's intent rather than the resulting discriminatory effect and the acceptance of a formal equality approach to discrimination are problematic and inconsistent with human rights law jurisprudence.¹¹⁵ It is unclear how this constituted a reasonable application of the prima facie discrimination test, as the majority concluded.¹¹⁶ To find a connection between the addiction and termination under the *Moore* test, Stewart's addiction must have merely impacted his ability to stop using drugs and comply with the Policy in some way. The Tribunal disregarded the indirect

¹¹² *Supra note 5* at paras 32, 34.

¹¹³ *Ibid* at para 35.

¹¹⁴ Koshan, "Majoritarian Blind Spot," *supra note 104* at 4.

¹¹⁵ *Ibid* at 6.

¹¹⁶ *Ibid* at 4.

discrimination resulting from the application of the Policy and the majority failed to acknowledge this error.

The majority rejected the Union's claim that the Tribunal's conclusion could be interpreted to mean that, although the breach of the Policy was the primary cause of the termination, Stewart's addiction was still a factor in the termination, because the Tribunal "unequivocally and repeatedly stated that addiction was not a factor."¹¹⁷ Certainly, the Tribunal came to this conclusion; however, that in itself does not make it true or even reasonable. The majority also dismissed the argument that Stewart's denial prevented him from disclosing his addiction prior to the accident, in compliance with the Policy. The majority accepted the Tribunal's determination that, although Stewart may have been in denial, "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" and held that denial was irrelevant in this case.¹¹⁸

Chief Justice McLachlin stated that, "It cannot be assumed that Mr. Stewart's addiction diminished his ability to comply with the terms of the Policy,"¹¹⁹ and went on to assert that the ability of an individual to control their addictive behaviours should be conceptualized and assessed on a spectrum:

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.* The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence: *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41 [emphasis added].¹²⁰

¹¹⁷ *Supra* note 5 at para 36.

¹¹⁸ *Ibid* at para 38.

¹¹⁹ *Ibid* at para 39.

¹²⁰ *Ibid*.

Although it is important to acknowledge that addictions range in severity, it cannot be forgotten that the very fact of being diagnosed with a drug or alcohol addiction means the individual is experiencing severe symptoms and difficulties controlling their substance use. It is difficult to imagine how a drug addiction would have absolutely no impact on an individual's ability to comply with a workplace drug policy. Furthermore, Stewart's state of denial, the presence of which was not refuted by the employer's medical expert, impeded his ability to comply with the disclosure component of the Policy. Nevertheless, the Tribunal, applying more of an all-or-nothing approach, found Stewart completely capable of complying with the Policy, resulting in the unreasonable decision that his addiction disability was not a factor in his termination.

The SCC majority found "ample evidence" to support the Tribunal's conclusion that there was no prima facie discrimination and found no basis to overturn its decision.¹²¹ In accepting the Tribunal's findings, the majority failed to acknowledge that Stewart's addiction played any role in his termination, even though the addiction clearly impaired his ability to comply with the drug policy—an issue raised in Justice Gascon's dissent.¹²² In light of its determination on prima facie discrimination, the majority did not proceed to examine the issue of accommodation.

The majority confirmed that stereotypical or arbitrary decision-making was not a stand-alone requirement for demonstrating prima facie discrimination and should not be added as a fourth requirement.¹²³ Chief Justice McLachlin affirmed the test for prima facie discrimination, stating:

I see no need to alter the settled view that the protected ground or characteristic need only be "a factor" in the decision. It was suggested in argument that adjectives should be added: the ground should be a "significant" factor, or a "material" factor. Little is gained by adding adjectives to the requirement that the impugned ground be "a factor" in the adverse treatment. In each case, the Tribunal must decide on the factor or

¹²¹ *Ibid* at para 40.

¹²² *Ibid* at para 60.

¹²³ *Ibid* at para 45.

factors that played a role in the adverse treatment. This is a matter of fact. If a protected ground contributed to the adverse treatment, then it must be material.¹²⁴

This approach is consistent with the *Moore* test and *Bombardier*, where the SCC confirmed that the prohibited ground must have simply contributed to the discriminatory conduct,¹²⁵ aside from the suggestion that there must be a connection between the disability and the employer’s decision to terminate, rather than the termination itself. In light of the previous accurate restatement of the *Moore* test¹²⁶ and the declaration that there was “no need to alter the settled view,” this was likely an oversight on the part of the majority. However, read literally, it drastically changes the nature of the prima facie discrimination test to require direct discrimination.

The SCC jurisprudence has established that an individual must simply establish a connection, not a causal connection, between the prohibited ground of discrimination and the adverse treatment;¹²⁷ requiring a causal connection would impose an inappropriately onerous obligation.¹²⁸ Nevertheless, the decisions of the Tribunal, ABQB and ABCA majority in this case were inconsistent with this approach, as they appeared to suggest the requirement of a causal connection. Despite seemingly affirming the prima facie discrimination test established in *Moore* and clarified in *Bombardier*, the SCC majority neglected to acknowledge that the Tribunal did not actually apply this test. The Tribunal sought a causal connection between Stewart’s drug addiction and his termination, which is an inappropriately stringent application of the third step of the prima facie discrimination test. Consequently, the Tribunal came to the conclusion that Stewart’s addiction had no impact on his ability to comply with the employer’s drug policy, which, quite frankly, is contrary to the very nature of addiction. The apparent difficulty of the

¹²⁴ *Ibid* at para 46.

¹²⁵ *Bombardier*, *supra* note 106 at para 48.

¹²⁶ *Elk Valley*, *supra* note 5 at para 24: “To make a case of *prima facie* discrimination, ‘complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact’: *Moore*, at para. 33.”

¹²⁷ *Bombardier*, *supra* note 106 at para 52.

¹²⁸ *Ibid* at para 49; and *Peel Law Association v Pieters*, 2013 ONCA 396 at para 60.

SCC majority in recognizing the Tribunal's unreasonable application of the prima facie discrimination test casts serious doubt on whether the test was actually settled law.¹²⁹

The majority's extreme, and arguably unwarranted, deference to the Tribunal suggests there may have been underlying policy reasons for favoring such a strict approach to discrimination claims on the basis of addiction.¹³⁰ Perhaps, the safety-sensitive nature of the energy industry implicitly impacted the outcome.¹³¹ In justifying the Tribunal's decision, Chief Justice McLachlin appeared to espouse floodgates reasoning, stating:

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 [emphasis added].¹³²

This comment revealed the majority's concern with opening the floodgates for addiction discrimination claims and problematically conflated the prima facie discrimination and accommodation analyses. The question of whether disciplinary action is appropriate in the particular circumstances must be assessed at the bona fide occupational requirement stage of the accommodation analysis, not by importing these considerations into the prima facie discrimination test.¹³³ This would place a significantly greater burden on the employee and serve as a barrier to establishing a claim of prima facie discrimination.¹³⁴ Employers may have legitimate concerns and reasons for imposing discipline to deter

¹²⁹ Koshan, "Majoritarian Blind Spot," *supra* note 104.

¹³⁰ Olivia Dixon, Colin Feasby & Jung Lee, "Recent Judicial Decisions Of Interest To Energy Lawyers" (2018) 56:2 Alta L Rev 479 at 495.

¹³¹ *Ibid.*

¹³² *Supra* note 5 at para 42.

¹³³ Koshan, "Majoritarian Blind Spot," *supra* note 104 at 6.

¹³⁴ Koshan, "New Developments," *supra* note 55 at 7.

substance use that could affect job performance or pose a safety risk.¹³⁵ However, it is important to remember that these concerns are to be considered and assessed after *prima facie* discrimination has been established; they are not meant to defeat a claim of *prima facie* discrimination, as it arguably did in *Elk Valley*.

5.3.2 The Partial Dissent: Justices Moldaver and Wagner

Justices Moldaver and Wagner dissented from the majority in part. The justices held that *prima facie* discrimination had been established and found the Tribunal's conclusion that Stewart's cocaine addiction was not a factor in his termination to be unreasonable. However, Justices Moldaver and Wagner concluded that the Tribunal reasonably held that the employer fulfilled its obligation to accommodate Stewart to the point of undue hardship and, thus, did not discriminate against him on the basis of his addiction.

Applying the *Moore* test, Justices Moldaver and Wagner found a connection between Stewart's addiction and his termination:

We accept the Tribunal's finding that Mr. Stewart was not wholly incapacitated by his addiction and maintained some residual control over his drug use. But we fail to see how the Tribunal could reasonably conclude that because Mr. Stewart had a limited ability to make choices about his drug use, there was no connection between his dependency on cocaine and his termination on the basis of testing positive for cocaine after being involved in a workplace accident.

To prove *prima facie* discrimination, Mr. Stewart is not required to show that his termination was caused solely or even primarily by his drug dependency. Rather, Mr. Stewart must only show that there is a "connection" between the protected ground — his drug dependency — and the adverse effect: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 52. We agree with Gascon J. that Mr. Stewart's exercise of some control over his drug use merely reduced the *extent* to which his dependency contributed to his termination — it did not eliminate it as a "factor" in his termination (para. 120). Mr. Stewart's impaired control over his cocaine use was obviously connected to his termination for testing positive for cocaine

¹³⁵ *Ibid.*

after being involved in a workplace accident. In our view, the Tribunal unreasonably focused on Mr. Stewart's limited capacity to control his choices and behaviour regarding his use of drugs and failed to consider the connection between his drug dependency and his employer's decision to fire him.¹³⁶

Unlike the majority, Justices Moldaver and Wagner appreciated the impact Stewart's addiction had on his drug use and capacity to abstain from drugs, in compliance with the workplace policy. Accordingly, the justices concluded that Stewart's impaired control over his cocaine use was "obviously connected" to his termination.¹³⁷

Justices Moldaver and Wagner assessed Elk Valley's accommodation duty and found it was reasonable for the Tribunal to conclude that Stewart's termination was reasonably necessary to ensure that the deterrent effect of the Policy was not significantly reduced.¹³⁸ Given the safety-sensitive nature of the workplace and Elk Valley's safety obligations, it was important for the employer to deter other employees from using drugs in a manner that could impair their work performance or pose a safety risk. Justices Moldaver and Wagner asserted that subjecting Stewart to an individual assessment or imposing a temporary unpaid suspension, rather than termination, would have undermined the deterrent effect of the drug policy and its valid objective of preventing serious harm in the safety-sensitive workplace.¹³⁹ Thus, it was reasonable for the Tribunal to conclude that incorporating aspects of individual accommodation within the workplace standard would constitute undue hardship.¹⁴⁰

Justices Moldaver and Wagner found that Elk Valley provided reasonable accommodation—namely, the opportunity to apply for re-employment after six months, upon the completion of a rehabilitation program, and the offer to pay for 50% of the cost

¹³⁶ *Supra* note 5 at paras 49-50.

¹³⁷ *Ibid* at para 50.

¹³⁸ *Ibid* at para 55.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

of the program, subject to certain conditions.¹⁴¹ However, as mentioned above, neither of these proposals actually constituted workplace accommodation, as they did not sustain Stewart's continued employment with Elk Valley. Nevertheless, Justices Moldaver and Wagner concluded that it was reasonable for the Tribunal to find that Elk Valley fulfilled its duty to accommodate to the point of undue hardship and did not discriminate against Stewart on the basis of his drug addiction.

5.3.3 The Dissent: Justice Gascon

Justice Gascon's reasoning is most in line with the law on discrimination and reasonable accommodation, human rights principles and a broad, generous approach to interpreting human rights legislation. Departing from the majority decision and partial dissent, he found the Tribunal's decision, with respect to both *prima facie* discrimination and the duty to accommodate, to be unreasonable.

Notably, Justice Gascon proceeded by identifying the obstacles and challenges arising in addiction disability cases, stating:

Still, stigmas surrounding drug dependence — like the belief that individuals suffering from it are the authors of their own misfortune or that their concerns are less credible than those of people suffering from other forms of disability — sometimes impair the ability of courts and society to objectively assess the merits of their discrimination claims. These stigmas contribute to the “uneasy fit of drug addiction and drug testing policies in the human rights arena” noted by the Alberta Human Rights Commission (the “Tribunal”) below (Tribunal reasons, 2012 AHRC 7, at para. 153 (CanLII)).

Yet, as drug-dependent persons represent one of the marginalized communities that could easily be caught in a majoritarian blind spot in the discrimination discourse, they of course require equal protection from the harmful effects of discrimination. In my view, improper considerations relied on by the Tribunal here — such as drug-dependent persons having some control over their choices and being treated “equally” to non-drug-dependent persons under drug policies, and drug policies not necessarily

¹⁴¹ *Ibid* at para 56.

being arbitrary or stereotypical — effectively excluded Mr. Stewart, a drug-dependent person, from the scope of human rights protections.¹⁴²

Justice Gascon vehemently disagreed with the majority's decision, stating that a workplace policy that, in application, automatically terminates an employee who uses drugs prima facie discriminates against individuals with addictions.¹⁴³ Stewart's addiction was very much a factor in his drug use, which was ultimately the basis for his termination. Furthermore, he concluded that Elk Valley failed to discharge its duty to accommodate Stewart to the point of undue hardship.¹⁴⁴ Although the safety-sensitive nature of a workplace may prompt the implementation of strict drug policies, "such policies, even if well-intentioned, are not immune from human rights scrutiny."¹⁴⁵

Justice Gascon agreed with the majority that, given the Court recently settled the tests for discrimination and the duty to accommodate, the Tribunal's decision, "which at least noted these settled legal principles and merely purported to apply them to the facts at issue," should be reviewed on the standard of reasonableness.¹⁴⁶ Although the majority identified the correct prima facie discrimination test, it failed to recognize how the Tribunal applied the test unreasonably. Justice Gascon asserted that the majority decision deviated from the established approach by (1) failing to detect the Tribunal's misunderstanding of the factor test for contribution, under the third step of the analysis; (2) implicitly affirming the erroneous legal principles the Tribunal relied upon in its reasoning; and (3) improperly importing justification considerations, belonging in the accommodation analysis, into the prima facie discrimination test.¹⁴⁷

¹⁴² *Ibid* at paras 58-59.

¹⁴³ *Ibid* at para 60.

¹⁴⁴ *Ibid* at para 61.

¹⁴⁵ *Ibid* at para 62.

¹⁴⁶ *Ibid* at para 77.

¹⁴⁷ *Ibid* at para 86.

The majority failed to recognize that the Tribunal’s reasoning was premised on incorrect legal principles. Justice Gascon contended that the Tribunal’s decision was not actually concerned with whether Stewart’s drug addiction contributed to his termination:

Rather, the Tribunal was concerned with whether Mr. Stewart’s addiction was (1) an irrepressible factor in his termination, i.e. a factor which was completely beyond his control (an improper approach, as I explain below, and as the Chief Justice recognizes at para. 46); and (2) a factor in Elk Valley’s decision to terminate Mr. Stewart (i.e. the intent requirement rejected by this Court’s jurisprudence, as I explained above, and about which the Chief Justice also agrees at para. 24). In light of these errors, while the Tribunal may have repeatedly found that Mr. Stewart’s addiction was not a factor in his harm, that conclusion was based on misapprehensions of principle and is therefore undeserving of deference.¹⁴⁸

The Tribunal narrowed the *prima facie* discrimination analysis by essentially requiring direct discrimination and the addiction to be more than a factor in the adverse impact.

The majority found the Tribunal’s conclusion to be reasonable on the basis that Stewart’s addiction purportedly did not diminish his capacity to comply with the employer’s policy. However, the Tribunal did not conclude that Stewart’s addiction did not impair his ability to comply with the policy, but rather that it did not *eliminate* his capacity to comply:

... the Tribunal’s various choice-related findings — i.e. that Mr. Stewart “was able to make choices” about drug use (para. 121); “could, and in fact did make rational choices” about drug use (para. 122); and “had the capacity to make choices” about drug use (para. 126) — *only mean that Mr. Stewart maintained some residual control over his choice to use drugs, not that he maintained complete unimpaired control over that choice*. In my view, that is the only possible interpretation of these findings when the Tribunal found that Mr. Stewart was addicted to cocaine (para. 118) and interpreted “addiction” as meaning “impaired control” over drug use (para. 109). As a result, *admitting that Mr. Stewart had impaired control regarding drug use is irreconcilable with that control being in no way diminished by his addiction* [emphasis added].¹⁴⁹

¹⁴⁸ *Ibid* at para 87.

¹⁴⁹ *Ibid* at para 88.

Addiction, by its very nature, entails a diminished ability to resist using the addictive substance. A person diagnosed with a drug addiction would experience, to some degree, a diminished capacity to control their choices and behaviours regarding drug use,¹⁵⁰ thus establishing the necessary connection between the disability and discipline for violating the employer's drug policy.

By approvingly summarizing how the Tribunal limited its' reasoning to discriminatory intent rather than effect, despite recognizing that intent is not required to establish prima facie discrimination, and relied on notions of choice and formal equality, the majority decision implicitly affirmed these erroneous legal principles.¹⁵¹ The majority also appeared to endorse a narrow interpretation of prima facie discrimination "to preserve the enforceability of drug and alcohol policies,"¹⁵² inappropriately importing justificatory considerations, such as the importance of the workplace policy, into the prima facie discrimination analysis and espousing a narrow understanding of the factor test.¹⁵³

Justice Gascon identified four conceptual errors in the Tribunal's prima facie discrimination analysis: (1) requiring Stewart to make prudent choices to avoid discrimination; (2) limiting Stewart's human rights protections to a sense of formal equality; (3) requiring Stewart to prove the employer treated him arbitrarily or stereotypically; and (4) requiring Stewart to establish a causal relationship between his addiction and termination.¹⁵⁴ Importing considerations of choice into the prima facie discrimination test fundamentally alters the nature of the analysis, effectively requiring the protected ground to be a direct factor in the adverse impact, as opposed to just a factor.¹⁵⁵ It problematically places the burden on employees to avoid discrimination,

¹⁵⁰ *Ibid* at para 89.

¹⁵¹ *Ibid* at para 90.

¹⁵² *Ibid* at para 92.

¹⁵³ *Ibid* at para 93.

¹⁵⁴ *Ibid* at para 96.

¹⁵⁵ *Ibid* at para 98.

rather than on employers to not discriminate,¹⁵⁶ and places blame on marginalized communities for their choices, reinforcing stigma and stereotypes.¹⁵⁷ Justice Gascon rejected the Tribunal’s conclusion that, because Stewart had the capacity to make some choices with respect to his drug use, his termination resulted from his choice to use drugs, and not his addiction. This reasoning “has the effect of denying human rights protections to a vast majority of drug-dependent people who, despite their addiction, most likely maintain some modicum of control over things as basic as ‘when and where’ they use drugs.”¹⁵⁸ Furthermore, relying on principles of formal equality, the Tribunal disregarded the presence of indirect discrimination. The Tribunal asserted that the Policy’s equal treatment of individuals with and without addictions prevented it from being discriminatory; however, such “equal” treatment only relates to direct discrimination and does not exhaust the prima facie discrimination analysis.¹⁵⁹ The Tribunal also improperly imported considerations of arbitrariness and stereotyping into the prima facie discrimination analysis.

The Tribunal misinterpreted and misapplied the factor analysis by requiring a causal connection and assessing discriminatory intent, rather than effect. Justice Gascon interpreted the Tribunal’s assertion that Stewart’s addiction was not a factor in his termination to mean that the addiction was not a factor in Elk Valley’s decision to terminate his employment—in other words, Elk Valley did not intentionally discriminate against Stewart, but this is the incorrect legal test.¹⁶⁰ The Tribunal “relied on *Gooding* for the proposition that a ground is not a factor in harm unless it plays a role ‘in the employer’s decision’ to terminate an employee,” narrowing the scope of prima facie discrimination to direct and intentional discrimination.¹⁶¹

¹⁵⁶ *Ibid* at para 99.

¹⁵⁷ *Ibid* at para 101.

¹⁵⁸ *Ibid* at para 102.

¹⁵⁹ *Ibid* at para 103.

¹⁶⁰ *Ibid* at para 112.

¹⁶¹ *Ibid* at paras 113-114.

The evidence established that Stewart's addiction was at least one factor in his termination. Justice Gascon recognized that, "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."¹⁶² This established the necessary connection between his disability and termination:

It is true that Mr. Stewart was not wholly incapacitated by his addiction and maintained some residual control over his choices (paras. 121-22). But that merely diminishes the extent to which his dependence contributed to his harm, it does not eliminate it as "a factor". *To require complete incapacitation for addiction to ground a discrimination claim would effectively erase addiction from the scope of legal disability. This is because addiction, by definition, refers to impaired, not eliminated, control.* According to the Chief Justice, the Tribunal "rejected this argument" based "on the facts" of this case (paras. 38-39). But, in reality, the Tribunal did not reject this argument; rather, it avoided it by interpreting the "factor" test as relating to discriminatory intent, not adverse effect, and by improperly requiring absolute incapacity to ground a claim relating to discrimination based on addiction [emphasis added].¹⁶³

With respect to accommodation, Justice Gascon concluded that the Tribunal identified the correct test but disagreed with its finding that Elk Valley fulfilled its duty to accommodate. The employer failed to conduct an individualized assessment of Stewart as part of its accommodation efforts to determine reasonable alternative measures, contrary to its own Policy and human rights principles. In fact, the employer did not provide him with any accommodation:

A policy that "accommodates" employees through mechanisms which are either inaccessible by the employee due to their disability or only applicable to the employee post-termination cannot justify *prima facie* discrimination. Before his termination, Mr. Stewart was purportedly accommodated by the offer of lenient treatment if he voluntarily disclosed his drug dependence. But that accommodation was inaccessible by him because he, as the Tribunal found, appeared to have been unaware of his dependence, a symptom of his disability. After his termination, Mr.

¹⁶² *Ibid* at para 117.

¹⁶³ *Ibid* at para 118.

Stewart was allegedly accommodated by being given the prospect of reapplying for his position. But, again, accommodation assists employees in their sustained employment, not former employees who may, or may not, successfully reapply for the position they lost as a result of a *prima facie* discriminatory termination.¹⁶⁴

Elk Valley failed to consider Stewart's circumstances—for example, the extent of his addiction, employment history and capacity for rehabilitation—before terminating his employment. The Tribunal justified this omission partly on the basis that Stewart disregarded his duty to request accommodation, given his “capacity” to do so.¹⁶⁵ However, Stewart's ability to make some choices about his drug use did not eliminate Elk Valley's accommodation duty: “Complainants' choices, imprudent or otherwise, do not weaken their human rights, either in law or in policy. Such an approach reverses the burden and requires that complainants avoid discrimination.”¹⁶⁶ Justice Gascon concluded that neither the pre-incident nor post-incident accommodations offered by Elk Valley qualified as reasonable accommodation, as they were not accessible to Stewart during his employment. He opined that the Tribunal should have considered the deterrent effect of alternative penalties, such as suspension without pay.¹⁶⁷

5.4 Conclusion

The majority SCC decision in *Elk Valley* exhibited an unfortunate disregard of the well-established fundamental human rights laws and principles that are at the very heart of Canadian human rights law. The most problematic and disappointing aspect of the majority's decision is its silence on the various flaws and departures from fundamental human rights law demonstrated in the Tribunal's analysis—specifically, requiring a causal relationship between the employee's addiction and adverse impact; importing additional requirements into the analysis, such as requiring the employee to make prudent choices to avoid discrimination, demonstrate a complete lack of self-control and establish

¹⁶⁴ *Ibid* at para 61.

¹⁶⁵ *Ibid* at para 133.

¹⁶⁶ *Ibid* at para 136.

¹⁶⁷ *Ibid* at para 144.

arbitrary or stereotypical treatment and discriminatory intent; limiting human rights protections to formal equality; and accepting insufficient evidence of accommodation. By not acknowledging the various flaws in reasoning and deviations from established human rights law, the majority appeared to accept these erroneous legal principles. Despite explicitly affirming the prima facie discrimination test articulated in *Moore*, the majority failed to acknowledge the Tribunal's various departures from this test. In finding the Tribunal's decision to be reasonable, in spite of these flaws, the SCC left many unanswered questions with respect to the legal and evidentiary requirements for satisfying the prima facie discrimination test, particularly, the third element—establishing a connection between the protected human rights characteristic and adverse impact.

Affirming the approach in *Moore* and *Bombardier*, *Elk Valley* seemingly settled the test for establishing prima facie discrimination; however, it is clear from the decision that differences in opinion still remained with respect to the legal and evidentiary requirements for satisfying the test, particularly the factor element, in cases of indirect discrimination.¹⁶⁸ Although *Elk Valley* purportedly involved “the application of settled principles on workplace disability discrimination,”¹⁶⁹ as asserted by the majority, the SCC justices did not apply a unanimous approach to prima facie discrimination and accommodation—demonstrating disagreement regarding these ostensibly settled, fundamental legal principles. Justice Gascon's approach to discrimination and workplace accommodation adhered to foundational, established human rights law, while the majority and partial dissent endorsed divergent legal tests and principles. The SCC justices' apparent difficulty in recognizing the Tribunal's unreasonable application of the legal tests seriously calls into question whether the law has actually been settled in this regard.¹⁷⁰

¹⁶⁸ Peter Neumann & Jeffrey Sack, “eText on Wrongful Dismissal and Employment Law,” 1st ed, 8th update, November 2017, 2012 CanLIIDocs 1 at 560.

¹⁶⁹ *Elk Valley*, *supra* note 5 at para 22.

¹⁷⁰ Koshan, “Majoritarian Blind Spot,” *supra* note 104 at 7.

Despite correctly identifying the relevant legal tests and principles, the majority failed to acknowledge the Tribunal's clear departure from the very human rights analyses it endorsed. The majority's acceptance of the Tribunal decision, despite being riddled with various legal errors and flaws, is concerning and reflects uncertainty in addiction law:

[W]hile the majority claims that the test for discrimination is settled, its deference to the application of that test by the Tribunal, along with its own language and reasoning, indicate that several trouble spots remain: the application of the factor/contribution step and whether a causal link is required in practice; the reliance on "choice" as a means of defeating a discrimination claim, a particular concern in cases involving addictions; the focus on the employer's intent rather than effects and corresponding erasure of adverse effects discrimination; and the endorsement of a formal equality approach to discrimination.¹⁷¹

Furthermore, the Tribunal decision also indicated that an employee must demonstrate arbitrary or stereotypical treatment in order to establish discrimination—a principle rejected by the SCC. Arising from the application of the incorrect legal test and reliance on medical evidence based on the moral model of addiction, the Tribunal came to the unreasonable conclusion that Stewart's drug addiction was not a factor in his termination. Making the superficial distinction that the employer terminated Stewart for violating the drug policy, as opposed to the drug addiction that led to this behaviour, should not preclude a finding of prima facie discrimination and evade an individual's human rights protections. The *Moore* test merely requires a connection between the addiction and termination. It is inconceivable how a drug addiction, which by its very nature impacts an individual's ability to control and limit their drug use, to some degree, has absolutely no connection to their termination for breaching the employer's drug policy. Clearly, Stewart's addiction impaired his ability to fully comply with the drug policy, which ultimately led to his termination. Had the Tribunal reasonably applied the legal test it identified, it would have found prima facie discrimination in this case; its decision to the contrary was absolutely unreasonable.¹⁷²

¹⁷¹ *Ibid* at 6.

¹⁷² *Elk Valley*, *supra* note 5 at para 123 (Gascon J).

The conclusion that the Tribunal's decision was reasonable demonstrates a lack of rudimentary understanding of addiction and its primary symptoms. The majority's decision was internally inconsistent and failed to correspond with its findings regarding the existence and nature of Stewart's addiction. Astutely articulated in his dissent, Justice Gascon asserted that:

The Chief Justice accepts that “[t]he question, at base, is whether at least one of the reasons for the adverse treatment was the employee's addiction” (para. 43). 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 (para. 109). The Tribunal also found that Mr. Stewart was drug-dependent with respect to cocaine (para. 118). Both experts agreed that Mr. Stewart was unaware of his drug dependence at the time of the incident (paras. 58, 61, 66 and 80). 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.¹⁷³

Given these findings, it is unclear how the majority came to the conclusion that it did, following the legal test it claimed to have applied. The majority clearly departed from the *Moore* test and fundamental human rights principles and, instead, applied a stricter, narrower standard that incorporated irrelevant and inappropriate considerations, contrary to the human rights framework and a biopsychosocial understanding of addiction.

Legal decision makers must examine addiction cases through a human rights lens that views addiction as a disability garnering human rights protections and appreciates the realities of addiction disability. Compulsions and feeling a lack of control are common symptoms of drug and alcohol addiction disability. Naturally, addictions, and the intensity of addiction-related compulsions, vary in severity and individuals will vary in their capacity to resist these compulsions. Compulsion arising from addiction, regardless of its intensity, would not exist but for the addiction, and thus is a manifestation of the

¹⁷³ *Ibid* at para 117.

disability.¹⁷⁴ Accordingly, discipline for misconduct arising from the employee's compulsive substance use constitutes a connection between the addiction and the adverse impact. In finding an insufficient connection between Stewart's addiction and his termination for violating the employer's drug policy, the Tribunal clearly applied a different standard from the one necessitated by the *Moore* test. Decisions in addiction disability cases, like *Elk Valley*, have diverged from the factor requirement of the prima facie discrimination analysis and placed the focus on the individual, examining the strength of their compulsions and ability to make choices. This approach problematically espouses a moralistic understanding of addiction and places the blame on individuals with addiction disability. It is important for legal decision makers to recognize that, "the concept of 'compulsion', and the varying ability of addicts to control compulsion, cannot be seen as equivalent to the concept of choice as it applies to non-addicts. Addicts are adversely affected by a disease, others are not."¹⁷⁵ The ability to make some choices about one's drug use does not and should be used to eliminate an employer's duty to accommodate: "Complainants' choices, imprudent or otherwise, do not weaken their human rights, either in law or in policy. Such an approach reverses the burden and requires that complainants avoid discrimination."¹⁷⁶

The importation of additional requirements beyond a simple connection between the addiction and termination—namely, a direct, causal connection and considerations of control and decision-making capacity—conflicts with the factor requirement under the *Moore* test for prima facie discrimination and inappropriately increases the evidentiary burden for employees with addiction disability, contrary to human rights law and principles. The prima facie discrimination analysis is not an assessment of the employer's justification for termination. The sole purpose of the analysis is to determine whether the employee had a protected characteristic, they experienced an adverse impact and the

¹⁷⁴ Richard Coleman, "The Clash between Traditional Labour Law and Contemporary Human Rights: Evaluating the Hybrid Approach to Employee Addiction," *Labour Arbitration Yearbook 2011-2012* (Toronto: Lancaster House, 2012) 183 at 207.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Elk Valley*, *supra* note 5 at para 136 (Gascon J).

protected characteristic was, in some way, a factor in the adverse impact. These elements were present in *Elk Valley*. However, this would not have been the end of the analysis. A finding of prima facie discrimination does not in itself mean that the employee's employment should be reinstated. These concerns are to be addressed in the next step, the duty to accommodate analysis, and not imported into the prima facie discrimination analysis.

It is understandable that an employer in a safety-sensitive workplace would have legitimate concerns about reinstating an employee who had previously been impaired at work while in the thralls of their addiction. While employers have an obligation to maintain a safe work environment, this responsibility must be balanced with its duty to accommodate an employee with a disability to the point of undue hardship. In order to reach the threshold of undue hardship, the employer must provide objective evidence demonstrating the presence of an actual, serious safety risk. The employer in *Elk Valley* did not provide such evidence and failed to offer accommodation that was accessible to Stewart during his employment, yet the Tribunal found this to be sufficient. Post-termination measures do not legally constitute accommodation and should not be treated as such. Unfortunately, the SCC majority opted not to comment on the Tribunal's problematic accommodation analysis upon finding no prima facie discrimination.

Elk Valley failed to consider Stewart's individual circumstances, including the extent of his addiction, employment history and capacity for rehabilitation, before terminating his employment. The Tribunal justified this omission partly on the basis that Stewart disregarded his duty to request accommodation, given his "capacity" to do so.¹⁷⁷ Elk Valley's Policy provided pre-incident accommodation to employees with addictions; however, given that Stewart was unaware of his addiction at the time of the incident, as confirmed by the two medical experts, this pre-incident accommodation was inaccessible to him. Diminishing Elk Valley's duty to accommodate on the basis that Stewart failed to request accommodation, which was symptomatic of his disability, was unreasonable:

¹⁷⁷ *Ibid* at para 133.

Bearing in mind that those suffering from addiction are routinely unaware of their drug dependence, this amounts to, in effect, removing all human rights protections for such individuals. In other words, it says: you only get human rights protections if you ask, though we know, due to your disability, that you will not.

This insensitivity arises disproportionately in the context of addictions, likely because of the stigma associated with them. We would never demand that an employee with a physical disability complete an unattainable physical activity to access accommodation. Still, that is precisely what Elk Valley, in a psychological context, did to Mr. Stewart here. He could never have sought accommodation for a disability he did not know he had.¹⁷⁸

It is true that both the employer and employee seeking accommodation must cooperate in the accommodation process. However, the employee's inability to initiate or participate in the process, as a result of their denial, does not eliminate the employer's obligations. Elk Valley still had a duty to accommodate Stewart to the point of undue hardship and failed to do so. The Tribunal's analysis inappropriately placed the focus on the employee, rather than the employer, and disregarded key accommodation principles. The SCC majority should have taken the opportunity to comment on these apparent errors and the Tribunal's unreasonable application of the accommodation analysis.

Elk Valley provided the SCC with the opportunity to offer much needed clarity on disability law but it is clear that it was a missed opportunity. Unfortunately, the majority decision arguably created more confusion and left many unanswered questions regarding the application of the prima facie discrimination test and workplace accommodation analysis.

¹⁷⁸ *Ibid* at paras 134-135 (Gascon J).

Chapter 6

6 The Aftermath of *Stewart v. Elk Valley Coal Corp.*

Following the release of *Stewart v. Elk Valley Coal Corp.*,¹ the law on prima facie discrimination and the duty to accommodate employees with addiction appeared to be unclear and unsettled. While the majority decision in *Elk Valley* did not, on its face, change the legal framework for establishing discrimination, the majority's application of the law did not reflect the well-established human rights principles underlying Canadian human rights law, described in Chapter 2. It was unclear what impact this Supreme Court of Canada (SCC) decision would have on the subsequent addiction disability case law and which direction the jurisprudence would take.

Some in the legal community feared that the majority decision would leave Canadian employees suffering from drug and alcohol addictions without human rights protections in their workplace.² There was concern that *Elk Valley* “could have a chilling effect,” as the majority's decision rested on a very narrow understanding of addiction disability, which ultimately led to the conclusion that Stewart's addiction was not a factor in his termination.³ Although the SCC majority decision did not appear to change the legal framework for finding discrimination, the majority's application of the law to the facts of the case is troubling:

It placed emphasis on the individual “choice” of Mr. Stewart to use drugs, and accepted the Tribunal's rather superficial distinction between termination for using drugs and termination for breaching a policy forbidding the use of drugs. As Justice Gascon noted in dissent, the majority also afforded too much deference to the Tribunal's finding that

¹ 2017 SCC 30 [*Elk Valley*].

² Cristin Schmitz, “SCC okays zero tolerance drug policy for safety-sensitive workplaces” (15 June 2017), *The Lawyer's Daily*, online: <<https://www.thelawyersdaily.ca/articles/3989/scc-okays-zero-tolerance-drug-policy-for-safety-sensitive-workplaces>>.

³ BakerLaw, “*Stewart v Elk Valley Coal Corp.* Summary: SCC Reaffirms Test for Discrimination but Gives a Narrow Understanding of Addiction” (27 June 2017), *BakerLaw* (blog), online: <<https://www.bakerlaw.ca/blog/stewart-v-elk-valley-coal-corp-summary-scc-reaffirms-test-discrimination-gives-narrow-understanding-addiction/>>.

Mr. Stewart's addiction was not a factor in the employer's decision to terminate him. The correct question rather was whether Mr. Stewart's addiction was a factor in his termination – including his breach of the policy.⁴

It was uncertain whether or how the decision would affect addiction disability law in Canada. Would *Elk Valley* thwart or halt the progress towards a broad, liberal human rights approach to addiction in the workplace, or would legal decision makers distinguish the case in their decisions? If legal decision makers did consider or apply *Elk Valley*, would they adopt the law as stated in the decision or rely upon the SCC majority's application of the law to successfully justify termination in safety-sensitive workplaces? The answer to these questions would soon be revealed with the release of legal decisions in the post-*Elk Valley* era.

Since the release of *Elk Valley* in June 2017, numerous addiction disability cases have been decided⁵ and it is clear that the *Elk Valley* decision has shaped and developed the current addiction jurisprudence. The subsequent case law—especially, arising in the nursing sector in Ontario—has espoused the legal principles affirmed in *Elk Valley* and provided insightful commentary on the SCC decision. This chapter examines five decisions that are representative of the case law that has emerged in the wake of *Elk Valley*: *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*,⁶ *Humber River Hospital v. Ontario Nurses' Association*,⁷ *Regional Municipality of*

⁴ *Ibid.*

⁵ For example, *Union of Northern Workers v Government of the Northwest Territories*, 2019 CanLII 18391 (NT LA) (the employer's failure to obtain a medical prognosis regarding the grievor's possible alcohol dependency prior to terminating her employment during the probationary period amounted to a breach of the employer's duty to inquire and discrimination); *Jasper (Municipality) v Canadian Union of Public Employees, Local 1458*, [2017] AGAA No 44 (termination was found to be excessive under the circumstances); *Nadeau v Deputy Head (Correctional Service of Canada)*, 2018 FPSLRB 28 (reinstatement ordered); *North American Palladium, Lac des Isles Mine v United Steelworkers*, [2018] OLAA No 173 (reinstatement ordered); *Interior Health Authority v Hospital Employees' Union*, [2018] BCCAAA No 87 (several elements of the employer's Substance Use Disorder Policy were found to be unreasonable, including overly broad employee search and testing provisions, the automatic imposition of Last Chance Agreements in cases of no self-disclosure, duplicative reporting requirements and failing to consider an employee's individual circumstances prior to removing the employee from the workplace pending an independent medical evaluation).

⁶ [2018] OLAA No 119 (Burkett) [*Toronto District School Board*].

Waterloo (Sunnyside Home) v. Ontario Nurses' Association,⁸ *Canadian Pacific Railway v. Teamsters Canada Rail Conference*⁹ and *Ontario Nurses' Association v. Cambridge Memorial Hospital*.¹⁰ These cases reflect the current trend towards a more liberal, broad human rights approach to addiction cases and the reliance on *Elk Valley*—namely, the law as stated, rather than applied, by the SCC—to support such an approach.

6.1 *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*

Toronto District School Board concerned the termination of a school caretaker with approximately 22 years of service. The grievor started working for the Toronto District School Board in 1996 and had an unblemished employment record until 2015, when she entered into an abusive relationship and developed an alcohol addiction. She was absent for nearly 40% of her scheduled shifts in 2015, about 25% in 2016 and approximately 87% in 2017.¹¹ The grievor entered into but failed to complete addiction treatment programs and continued to be absent from work. She met with the employer in February 2017 and agreed to enter a residential treatment program; the employer suspended her sick pay when it did not receive proof of treatment. In May 2017, the grievor entered into a last chance agreement, as a settlement for the grievance challenging the suspension of her sick pay. The last chance agreement required her to enter into a residential treatment program, submit to an assessment by an addictions specialist, remain abstinent, provide written proof of program completion with a prognosis for continued abstinence, enroll in an aftercare program and submit to random alcohol testing. The last chance agreement stated that any breach of the terms would result in her termination and that the employer fulfilled its duty to accommodate.

⁷ [2018] OLAA No 416 (Gedalof) [*Humber River*].

⁸ [2019] OLAA No 16 (Steinberg) [*Sunnyside Home*].

⁹ [2019] 139 CLAS 27 (Clarke) [*Canadian Pacific Railway*].

¹⁰ 2019 ONSC 3951 (Ellies RSJ, Sachs and Backhouse JJ) [*Cambridge Memorial*].

¹¹ *Supra* note 6 at para 5.

The grievor began a 20-day residential treatment program in early April 2017 but failed to provide the employer with proof of completion, apart from a generic doctor's note in late May, indicating that she would be absent from work until the end of the month. When the grievor did not return to work, the employer requested further documentation and arranged for a meeting. When she failed to attend the meeting, the employer terminated her in June 2017. The termination letter provided that she had been terminated for breaching the last chance agreement, failing to cooperate with the employer's accommodation efforts, being absent from work without leave, failing to comply with absence reporting procedures and frustration of contract.¹² The grievor continued to struggle with her addiction and, in February 2018, she enrolled in a two-week community withdrawal management day program. Leading up to the arbitration hearing, the counselor from the treatment centre submitted a letter, indicating that clients present different levels of readiness and intention to change their substance use, the centre "does not provide diagnostic or prognostic information," the grievor was expected to complete the program in late February and they would discuss next steps for her treatment.¹³ A subsequent letter from the treatment centre confirmed that the grievor completed the outpatient program and voluntarily joined a recovery group.

The Toronto District School Board contended that: it had accommodated the grievor to the point of undue hardship, as confirmed by the parties in the last chance agreement; the grievor breached the last chance agreement; absent extraordinary circumstances, the last chance agreement should be given effect; and the post-treatment evidence did not provide a prognosis for recovery.¹⁴ The union asserted that the employer could not contract out of its statutory duty to accommodate to the point of undue hardship and that the last chance agreement was not determinative.¹⁵ The union asserted that:

¹² *Ibid* at para 1.

¹³ *Ibid* at para 5.

¹⁴ *Ibid* at para 6.

¹⁵ *Ibid* at para 7.

[I]n this case, the Employer's duty to accommodate continued beyond the effective date of the "last chance" agreement; that the point of undue hardship has not yet been reached in the case of an employee with 20 years of unblemished service who has ended an abusive relationship, stabilized her housing and taken steps to deal with her addiction; that the post-discharge evidence establishes that the grievor is capable of regular attendance going forward; and that given the nature of her disability, a relapse should not have resulted in the grievor's termination.¹⁶

The arbitrator, affirming human rights law principles and jurisprudence, confirmed that, "parties to a collective agreement cannot contract out of their statutory obligation to accommodate an employee disability to the point of undue hardship."¹⁷ He correctly acknowledged that the existence of a last chance agreement does not in itself constitute accommodation to the point of undue hardship. Nevertheless, the arbitrator found that, given the particular circumstances, the employer accommodated the grievor to the point of undue hardship:

[T]he evidence in this case is that prior to executing the "last chance" agreement, the grievor's attendance was far below the minimally acceptable level of attendance even though the Employer had supported the grievor with changes in work location, leaves of absence and sick pay through various relapses. It is not surprising, therefore, that the parties and the grievor confirmed in the "last chance" agreement that the grievor had been accommodated to the point of undue hardship and that the "last chance" agreement itself constituted further accommodation. The evidence satisfies this arbitrator that the grievor had been accommodated to the point of undue hardship as of the time the "last chance" agreement was executed.¹⁸

Last chance agreements are useful devices that enable employers to communicate the seriousness of the situation to the employee, without resorting to termination.¹⁹ Although such agreements are not determinative on the issue of accommodation, absent compelling evidence of rehabilitative potential, arbitrators have been hesitant to question last chance agreements, provided that the terms are reasonable in light of the underlying

¹⁶ *Ibid.*

¹⁷ *Ibid* at para 8.

¹⁸ *Ibid.*

¹⁹ *Ibid* at para 9.

circumstances, as this would ultimately inhibit their use.²⁰ In this case, the employer made several attempts to accommodate the grievor and the arbitrator reasonably found no compelling evidence of rehabilitative potential. Despite the last chance agreement, the grievor continued to drink alcohol, failed to submit to an assessment by an addictions specialist, did not complete a residential treatment program and was resistant to the random drug and alcohol testing.²¹ She made no effort to comply with the agreement until the employer decided to terminate her. The arbitrator concluded that the medical evidence failed to demonstrate she had a positive prognosis for recovery that supported overriding the last chance agreement.²² He held that the employer had satisfied its duty to accommodate to the point of undue hardship and dismissed the grievance.

Although the decision was not in the grievor's favour, it was reasonable given the circumstances. Correctly acknowledging that a last chance agreement does not in itself constitute accommodation to the point of undue hardship, the arbitrator conducted an individualized assessment. He recognized the employer's several previous attempts to accommodate the grievor and found no compelling evidence of rehabilitative potential. Ultimately, the absence of promising medical evidence, in light of the grievor's previous relapses, led the arbitrator to reasonably conclude that the employer fulfilled its duty to accommodate the grievor to the point of undue hardship.

6.2 *Ontario Nurses' Association v. Humber River Hospital*

Humber River involved the termination of an emergency department nurse. After working there for four years, she was terminated following the employer's discovery that she stole narcotics and other medications from the hospital. In late February 2016, a colleague saw the grievor put an ampule of morphine in her pocket and reported it to the team leader. When confronted with the allegation, she pulled multiple unopened vials of morphine from her pocket as well as various vial medications and tablets from her bag.

²⁰ *Ibid.*

²¹ *Ibid* at para 12.

²² *Ibid.*

The grievor admitted that she obtained the medications from the hospital. She said that she suffered from headaches and stole the medication to fight her condition, not yet revealing that she had an addiction at the time. The grievor also admitted to consuming injectable drugs prior to her shift, which she stole from the hospital, and took Tylenol once it wore off. Following the investigation meeting, the grievor e-mailed the employer, indicating that she was ready to take responsibility, would seek medical assistance and “want[ed] to be clean.”²³ The employer’s investigation confirmed that the grievor stole medication from the hospital and terminated her employment. The union filed a grievance on behalf of the grievor.

The union asserted that the grievor’s termination constituted prima facie discrimination and the employer failed to take any steps to accommodate her. The union sought the grievor’s reinstatement with appropriate accommodation as well as compensation and damages. The employer claimed that it had just cause to terminate the grievor and, thus, the termination did not constitute discrimination. Alternatively, the employer argued it was not an appropriate case for reinstatement. The parties agreed to bifurcate the proceeding to first address the alleged discrimination and later address the issue of accommodation, following the determination of the discrimination issue.

In the course of the hearing, the grievor testified that she began using narcotics in the fall of 2015, when she was prescribed Percocet for a running injury. When this prescription ran out, she went to a different doctor to get Percocet for her headaches. By the time the second prescription ran out, she did not need the drugs for her injury but felt like she was hooked. The grievor indicated that she stole narcotics from the hospital from December 2015 until her termination in March 2016. She did not immediately reveal to the employer that she had an addiction because she was in denial and had not yet acknowledged that she had an addiction. Following the incident, the grievor quickly ran out of morphine and subsequently went through withdrawal. In April, she began seeing Dr. Bobrowski, an addictions specialist, and enrolled in an outpatient program in May. In July, the grievor relapsed and was subsequently discharged from the program. In cross-

²³ *Supra* note 7 at paras 11-12.

examination, it became clear that she failed to attend almost half of the sessions, missed drug testing and tried to manipulate tests. She claimed that she stopped using by September 2016 but then later indicated that she may have continued until October or November. The grievor enrolled in another outpatient program in November and continued regular drug testing. The following spring, she entered a day program and attended a caduceus group program—a recovery group for healthcare professionals.

Dr. Bobrowski provided a medical report stating that the grievor had a severe opioid addiction and was in early remission at the time of the hearing. He stated that the diversion of drugs for personal use is a “hallmark of addiction in health professionals” and “[RI’s] theft of drugs could reasonably have been driven by her addictive illness.”²⁴ The doctor also explained that the theft of non-narcotic drugs, which treat nausea, headaches and pain, could have been a means to self-medicate the effects of her addiction.²⁵ Prior to giving his evidence, Dr. Bobrowski learned that the grievor tested positive for opioids in July 2017, which she claimed was the result of eating poppy seed cake. The doctor stated that it was impossible to determine whether or not the positive test resulted from poppy seeds and that this altered the conclusion in his report that the grievor was in remission. He also discovered that, at the time of the grievor’s termination, she had been using significantly more drugs than previously reported, underreported her symptoms of withdrawal and also acquired drugs from the street. Dr. Bobrowski acknowledged that much of the grievor’s self-reported information was unreliable but explained that denial and underreporting were symptoms of addiction. In light of this new information, Dr. Bobrowski testified that he had doubts about the accuracy of the timeline the grievor provided of her drug use, as it was unlikely she could have built up the tolerance necessary to reach that dosage over such a short period of time.

As a result of the doctor’s testimony, the employer conducted a further investigation and discovered that the grievor’s running accident and initial Percocet prescription occurred in June 2014 and the subsequent prescription for her headaches occurred in June 2015.

²⁴ *Ibid* at para 58.

²⁵ *Ibid*.

The employer argued that the grievor deliberately lied about when she started using narcotics and likely stole drugs for longer than she admitted. When asked to explain these discrepancies, the grievor accepted that she first started using Percocet in 2014 and stated that working night shifts and her addiction affected her memory regarding the dates. She maintained that she had not started using morphine until November or December 2015.

The union asserted that the medical evidence established the required nexus between the grievor's addiction and misconduct to establish prima facie discrimination and trigger the employer's duty to accommodate. The union relied on six Ontario arbitration decisions where the arbitrator found a nexus between the nurse's addiction and theft of drugs from their employer and ordered their reinstatement.²⁶ The union contended that the line of cases arising from *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*,²⁷ relied upon by the employer, adopted a formalistic view of equality that has long been rejected in Canadian law and improperly focused on discriminatory attitude, as opposed to adverse affect, contrary to the human rights analysis endorsed in *Elk Valley*.²⁸ With respect to the issue of accommodation, the union acknowledged that an employee must first accept and pursue treatment for their addiction before engaging the employer's duty to accommodate, and contended that, although the grievor may not have been a "poster child" for recovery, she pursued treatment and persevered; the denial and relapse she experienced are common features of addiction.²⁹

The employer argued that the grievor's addiction was not a factor in her termination and maintained that it neither knew nor ought to have known that she had an addiction at the

²⁶*Sunnybrook Health Sciences Centre v Ontario Nurses' Association*, [2016] OLAA No 361; *Ontario Nurses' Association v Collingwood General and Marine Hospital*, [2010] OLAA No 196; *William Osler Health Centre v Ontario Nurses' Association*, [2006] OLAA No 115; *London Health Sciences Centre v Ontario Nurses' Association*, [2013] OLAA No 24; *St Mary's General Hospital v Ontario Nurses' Association*, [2010] OLAA No 465; and *Thunder Bay Health Sciences Centre v Ontario Nurses' Association*, [2010] 104 CLAS 263 [collectively cited as Six Ontario arbitration decisions].

²⁷ 2008 BCCA 357 [*Gooding*].

²⁸ *Supra* note 7 at para 79.

²⁹ *Ibid* at para 78.

time of her termination. Furthermore, the grievor suffered no greater impact than any other employee would have for the same conduct.³⁰ The hospital argued that *Gooding* provided the correct approach, requiring a causal connection between the disability and decision to terminate. The employer also relied on *Bellehumeur v. Windsor Factory Supply Ltd.*,³¹ an Ontario Court of Appeal case that cited *Gooding* and concluded that the termination of an employee for making threats of violence in the workplace did not constitute discrimination because the employer was unaware of his mental disability, as well as two Ontario arbitration decisions in support of the *Gooding* approach—*Royal Victoria Regional Health Centre v. Ontario Nurses' Association*,³² and *Cambridge Memorial Hospital v. Ontario Nurses' Association*.³³ It is important to note that both of these arbitration decisions have since been judicially reviewed and overturned.

The employer argued that the line of cases relied upon by the union conflated the issues of discrimination and the duty to accommodate, effectively assuming a connection between the disability and termination.³⁴ The employer argued that, even applying this approach, the arbitrator should dismiss the grievance because the grievor: stole more than just the drug she was addicted to; was not compelled to use, as she did not use drugs when they were unavailable; did not use drugs everyday; did not immediately detox; did not follow recommendations to attend inpatient treatment; was not a “poster child” for recovery; experienced a relapse; had subsequent positive drug test results; never admitted to the full extent of her addiction; and repeatedly failed to be honest and forthright.³⁵ She continued to be dishonest about her drug use even while in remission, including in her

³⁰ *Ibid* at para 90.

³¹ 2015 ONCA 473 [*Bellehumeur*].

³² [2016] OLAA No 373 (Raymond) [*Royal Victoria*].

³³ [2017] OLAA No 22 (Randall) [*Cambridge Memorial* arbitration decision].

³⁴ *Supra* note 7 at para 91.

³⁵ *Ibid* at para 96.

testimony under oath.³⁶ The employer argued that, even if the union established prima facie discrimination, reinstating the grievor would constitute undue hardship.³⁷

The arbitrator categorically rejected the *Gooding* approach, asserting that it was inconsistent with the established human rights analysis, most recently affirmed in the *Elk Valley* decision.³⁸ He went on to state that, “What is clear from the Court’s reasoning, and highly significant to my assessment of the *Gooding* approach, is that where it is established that an employee's addiction disability is a factor in their inability to comply with a workplace rule... the employee will have established a prima facie case of discrimination.³⁹ *Elk Valley* also made clear that, in cases of indirect discrimination, the focus must be on the effect of the disability on the employee’s ability to comply with the workplace rule, and not the extent to which the employee’s disability was a factor in the employer’s decision to discipline the employee for their misconduct.⁴⁰ *Gooding* did not follow these human rights principles; the decision focused on the employer’s decision to terminate the employee for theft, rather than whether his disability was a factor in the theft.⁴¹

Elk Valley affirmed that the focus of the analysis must be on the discriminatory impact of the action, not the presence of a discriminatory attitude. The court in *Gooding*, however, concluded that, although the grievor’s addiction may have impacted his conduct and ability to comply with the workplace rule, it was “irrelevant” if the addiction “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.”⁴² The arbitrator explicitly rejected this approach to discrimination, stating:

³⁶ *Ibid* at para 97.

³⁷ *Ibid*.

³⁸ *Ibid* at para 99.

³⁹ *Ibid* at para 106.

⁴⁰ *Ibid* at para 107.

⁴¹ *Ibid* at para 108.

⁴² *Ibid* at para 112; citing *Gooding*, *supra* note 27 at para 15.

... This distinction, which goes so far as to deem “irrelevant” the effect of the employee’s ability to comply with a rule by virtue of having a characteristic protected from discrimination, is precisely what the Supreme of Canada rejects in cases such as *Meiorin*, as reinforced in *Elk Valley*. To adopt the *Gooding* approach would be to read adverse effect discrimination out of our human rights analysis and to embrace a superficial understanding of discrimination that the Supreme Court of Canada has rejected.⁴³

Furthermore, the arbitrator rejected the hospital’s argument that *Bellehumeur* endorsed the *Gooding* approach, as the court did not engage in a substantive analysis or assess the broader meaning of discrimination.⁴⁴ He rejected the *Royal Victoria* and *Cambridge Memorial* arbitration decisions, to the extent that they endorsed *Gooding* and suggested that the compulsion to steal must be so powerful as to eliminate any notion of choice or intention and that there must more be than a connection between the addiction and adverse impact to establish prima facie discrimination.⁴⁵ *Elk Valley* confirmed that the disability must simply be a factor in the adverse impact and rejected the notion of applying a higher standard. The arbitrator also rejected the employer’s claim that the cases relied upon by the union conflated the discrimination and accommodation analyses; decisions generally reflect the manner in which the cases were argued and the focus of the arguments, which in most cases is the nexus between the addiction and adverse impact.⁴⁶

The arbitrator acknowledged the seriousness of theft and the use of narcotics in a hospital setting as well as the resulting concerns for safety and patient care. He recognized that the employer’s desire to protect itself and others from potential harm was well grounded⁴⁷ and confirmed that such legitimate safety concerns do not eliminate the employer’s human rights obligations:

⁴³ *Supra* note 7 at para 113.

⁴⁴ *Ibid* at para 115.

⁴⁵ *Ibid* at paras 117-120.

⁴⁶ *Ibid* at para 121.

⁴⁷ *Ibid* at para 124.

The question is not, therefore, whether an employer is entitled to take action to ensure the behaviour does not continue; clearly, it is. And the need to address effectively the problem behaviour is no less pressing simply because there is a nexus between the conduct and a disability. The question is rather whether the employer can take action that both addresses its legitimate interests and accommodates the employee's disability. And in this regard, arbitrators have been careful to emphasise that a finding of prima facie discrimination does not automatically entitle an employee to accommodated employment.⁴⁸

Upon finding prima facie discrimination, the arbitrator must then determine whether the employer can accommodate the employee to the point of undue hardship.

The arbitrator applied the human rights approach to discrimination, relying on the human rights principles affirmed by the SCC in *Elk Valley*, and found that the grievor's thefts were caused by her addiction and held that her termination constituted prima facie discrimination. In light of the bifurcation of the proceedings, the decision should have ended there. However, despite the parties not making submissions with respect to the duty to accommodate, the arbitrator ultimately went on to decide the issue of reinstatement. Acknowledging the realities of addiction disability, he affirmed that the failure to disclose the disability prior to termination cannot preclude the employer's duty to accommodate, when the inability to disclose may be a feature of the disability.⁴⁹ The arbitrator concluded that the employer either knew or ought to have known that the grievor's conduct could have been related to an addiction disability. He found that the employer made no effort to inquire into the grievor's disability or to determine whether she could be accommodated, thereby breaching its procedural duty to accommodate,⁵⁰ but ultimately accepted the employer's argument that reinstatement was not an appropriate remedy in this case.⁵¹

⁴⁸ *Ibid* at para 125.

⁴⁹ *Ibid* at para 131.

⁵⁰ *Ibid* at para 134.

⁵¹ *Ibid* at paras 135-136.

The arbitrator shared the employer's concerns with respect to the grievor's honesty and forthrightness. In light of the evidence, he concluded that the grievor continued to lie about her addiction and workplace misconduct, despite claiming to be in remission with full insight into her disability, thus justifying the employer's lack of trust:⁵²

... To be clear, my conclusion here is not about whether or not sufficient safeguards could be put in place to ensure that the grievor does not have access to drugs in the course of her employment. That is a question that, had it needed to be answered, would have been addressed in the second stage of this bifurcated proceeding. *Rather, I find that the grievor's ongoing lack of candour even while purporting to be clean and in remission has undermined the trust that is essential to the employment relationship* [emphasis added].⁵³

Consequently, the arbitrator held that reinstatement was not an appropriate remedy; the employer's duty to accommodate to the point of undue hardship "does not require them to employ individuals where the necessary trust relationship between employer and employee has not been rehabilitated."⁵⁴ Finding that reinstatement was not an appropriate remedy, the arbitrator remitted the issue of remedy to the parties.

While the arbitrator's ruling on reinstatement, without hearing submissions on the duty to accommodate, was improper, the bulk of the decision was progressive and rich in its human rights analysis of prima facie discrimination. Following the law and principles stated in *Elk Valley*, the decision espoused the human rights approach to addiction disability and explicitly renounced the *Gooding* approach. The arbitrator reiterated that the focus of the analysis must be on the discriminatory effect, and not intent, in order to capture instances of indirect discrimination and firmly rejected the notion that the grievor must establish something more than a connection between the addiction and adverse impact, such as a compulsion eliminating any notion of choice or intention. In this case, the analysis should have ended there. Although making a determination regarding reinstatement would normally be within an arbitrator's jurisdiction, the bifurcation of the

⁵² *Ibid* at para 142.

⁵³ *Ibid* at para 143.

⁵⁴ *Ibid* at para 144.

proceeding limited the scope of the hearing to prima facie discrimination and considerations of reinstatement are not part of the prima facie discrimination analysis. Clearly, trust and the viability of the employment relationship are important considerations in determining whether to reinstate the grievor. However, this is not an issue to be determined prior to examining the duty to accommodate; it should be addressed after the duty to accommodate analysis, which was bypassed in this case.

6.3 *Regional Municipality of Waterloo (Sunnyside Home) v. Ontario Nurses' Association*

This decision was released just a month after *Humber River*. Prior to her termination, the grievor worked as a nurse and team leader at the Sunnyside Home Long Term Care Facility for nearly 14 years. For approximately two years, the grievor repeatedly misappropriated narcotics for her own use and falsified medical records to conceal the thefts, by charting that patients requested and received the narcotics she used.

In July 2015, a nurse found an empty ampule of hydromorphone in the staff bathroom. The employer's investigation revealed that the grievor regularly came into work early and was in the facility at the time of the incident. She denied any connection to the incident. From January to August 2016, other nurses noticed that the grievor often prepared medication in one unit and then administered them in another unit and sometimes took the medication to her office before administering it to residents. In August 2016, a colleague reported to the employer that she found the grievor in the washroom with an ampule of hydromorphone and that, two weeks prior, she witnessed the grievor slipping a syringe of hydromorphone into her pocket and did not administer it to the resident, contrary to the medical records. The employer conducted an investigation and put the grievor on paid leave. The grievor subsequently informed the employer that she had kidney stone surgery and would be off work. Days later, she revealed that she was being hospitalized for severe withdrawal from narcotics.

The grievor suffered from a kidney condition, which resulted in the production of excess kidney stones. She had multiple surgeries to remove the kidney stones and her doctor prescribed Percocet to control the pain. In the fall of 2014, she started to use Percocet as a

means to cope with stress and exhausted her prescription. The grievor admitted to abusing drugs, including Tylenol 3s, Percocet, hydromorphone and morphine, and misappropriating drugs from the home over the past two years. She also admitted to falsifying medical records to indicate that she administered more pain medication than was actually given and did not always waste the unused remainder of narcotics so she could use them. The employer terminated her for the thefts, falsification of medical records and the resulting patient abuse, irreparable breach of trust and gross misconduct related to protocols.⁵⁵

The grievor testified that she started misappropriating drugs from the employer in October 2014 to control her pain. She indicated that she needed the drugs to get through work and was unable to stop. She would stockpile drugs in advance, when she knew she would be away from work, and supplemented them with over-the-counter medications. She also testified that she experienced withdrawal symptoms when she did not have a sufficient supply of drugs. The grievor admitted responsibility for the empty ampule of hydromorphone found in the staff bathroom in July 2015 and stated that she initially denied any involvement because she felt ashamed. She did not seek help prior to the August 2016 incident because she thought she could stop without help. Following her kidney stone surgery in August 2016, she exhausted her prescriptions and went into extreme withdrawal, which led to her hospitalization. In October, the grievor entered a 35-day inpatient rehabilitation program, where she was diagnosed with severe opioid use disorder and mild to moderate sedative-hypnotic use disorder. Upon successfully completing the inpatient program, she enrolled in an aftercare program and continued to see an addictions specialist. She also went to caduceus group and twelve step meetings. Her doctor indicated that she strictly complied with the treatment plan and she testified that she had not used narcotics since September 2016.

The employer reported the grievor's misconduct to the College of Nurses of Ontario (CNO), the nursing regulatory body. The CNO prohibited the grievor from practicing nursing until June 2017, subject to conditions, including continuing treatment, monitoring

⁵⁵ *Supra* note 8 at para 34.

recommendations, no administration of or access to controlled substances, direct observation, a workplace monitor and supervisor agreement; any violation could result in significant sanctions, up to and including the revocation of her nursing license.⁵⁶ The employer argued that it could not comply with many of the restrictions imposed by the CNO. The employer asserted that it could not eliminate all access to narcotics, it was not feasible to have other nurses administer narcotics for the grievor, it could not provide a setting where the grievor could be directly observed at all times, given that most of the team leader's work was done independently, and the grievor violated the trust of the residents and their families. Furthermore, the employer argued that committing to a workplace supervisor agreement would be professionally irresponsible because the restrictions could not be satisfied, there were not enough registered nurses to fulfill the workplace monitor role and the manager stated that she would not risk her professional license by entering into such an agreement.⁵⁷

Both the union and employer called expert medical evidence. The employer called Dr. Lawrie Reznek, a psychiatrist and associate professor in psychiatry, and Dr. David Wolkoff, a psychiatrist and expert in addiction treatment. The union called Dr. Gerrit Veenman, the grievor's addiction physician and expert in the treatment of addiction. Dr. Reznek espoused the view that addiction should not be classified as a mental disorder and likened addiction to a bad habit, which he acknowledged was the minority view in the psychiatric profession.⁵⁸ In his opinion, the grievor had the capacity to disclose her addiction at an earlier time and comply with the workplace policies prohibiting the diversion of drugs and falsification of medical records.⁵⁹ Dr. Wolkoff, on the other hand, indicated that, "the grievor had a significantly diminished capacity to resist the urges to engage in behaviours that supported her addiction."⁶⁰ Dr. Veenman testified that the grievor was in recovery, compliant with all aspects of her aftercare program and fit to

⁵⁶ *Ibid* at para 47.

⁵⁷ *Ibid* at para 69.

⁵⁸ *Ibid* at para 75.

⁵⁹ *Ibid* at para 76.

⁶⁰ *Ibid* at para 84.

return to work under the conditions set by the CNO. Dr. Veenman believed that “the grievor had no capacity to make choices about whether or not she could prevent herself from diverting medications or disclosing her addiction.”⁶¹

The union argued that the grievor’s termination constituted prima facie discrimination and the employer failed to demonstrate that it could not accommodate the grievor. The employer contended that prima facie discrimination had not been established; in the alternative, the grievor did not fulfill the bona fide occupational requirements of the position and, in the further alternative, she could not be accommodated without undue hardship. The employer argued that the grievor’s addiction was not a factor in the termination because she did not disclose her addiction until after the employer discovered her misconduct, her disability played no role in the employer’s decision to terminate and she suffered no greater impact than any other employee would have for the same conduct.⁶² The decision to terminate her employment stemmed from the grievor’s thefts and falsification of medical records, failing to admit to her wrongdoing and the resulting patient abuse, breach of trust and the risk to residents.⁶³

Like the employer in *Humber River*, Sunnyside Home primarily relied upon the decisions in *Elk Valley*, *Gooding*, *Bellehumeur*, *Wright*, *Cambridge Memorial* and *Royal Victoria* to support this argument.⁶⁴ The employer asserted that the grievor could not fulfill the bona fide occupational requirements of the team leader position—particularly, having the trust of her employer, colleagues, residents and their families that she would not engage in further misconduct, having a positive therapeutic relationship with the residents and their families, having access to controlled drugs and working independently.⁶⁵ Furthermore, it could not satisfy some of the CNO’s conditions without undue hardship—namely, the requirement to have a workplace supervisor agreement and a

⁶¹ *Ibid* at para 93.

⁶² *Ibid* at para 103.

⁶³ *Ibid* at paras 36-37.

⁶⁴ *Ibid* at para 104.

⁶⁵ *Ibid* at para 106.

workplace monitor on every shift, the ability to directly observe the grievor at any time and the prohibition on administering or having access to controlled substances.⁶⁶

The union asserted that the addiction must only be a factor in the adverse impact to establish prima facie discrimination. It argued that the grievor's misconduct was causally related to her addiction disability, as the medical evidence indicated she had no capacity, or at least diminished capacity, to make choices and control the urges with respect to her addictive behaviour, as a result of her addiction.⁶⁷ The union relied on the line of arbitral cases finding that the presence of an addiction and its impact on a nurse's ability to control or prevent the diversion of medication constituted a factor in her termination.⁶⁸ The employer argued that these decisions conflated the prima facie discrimination and accommodation analyses and should not be followed.⁶⁹ The union asserted that *Gooding* was "premised on a flawed understanding of the law of discrimination" because it imported notions of intention into the prima facie discrimination analysis, contrary to *Elk Valley*.⁷⁰ The union argued that the employer breached both its procedural and substantive duty to accommodate; the employer failed to consider the issue of accommodation, including the duty to inquire where there were reasonable concerns that she may be suffering from a disability, and failed to establish that it could not accommodate the grievor's restrictions without undue hardship.⁷¹

The arbitrator began by explicitly rejecting Dr. Reznek's anomalous view that addiction is not a mental disorder. He concluded that the grievor had "a mental disorder characterized by, among other things, compulsive behaviour and either a complete inability or a diminished capacity to resist the urge to engage in behaviour supporting her

⁶⁶ *Ibid* at para 109.

⁶⁷ *Ibid* at para 116.

⁶⁸ Six Ontario arbitration decisions, *supra* note 26; *Hamilton Health Sciences Corp v Ontario Nurses' Association*, [2013] 117 CLAS 6 [*Hamilton Health*] and *Windsor Regional Hospital v Ontario Nurses' Association*, [2015] OLAA No 133.

⁶⁹ *Supra* note 8 at para 125.

⁷⁰ *Ibid* at para 118.

⁷¹ *Ibid* at para 122.

addiction.”⁷² The arbitrator determined that the grievor only engaged in misconduct when “her addiction had control of her and her urges and her choices were motivated by obtaining narcotics to satisfy her addiction,”⁷³ consistent with the behaviour of a person suffering from substance use disorder.

As the *Humber River* decision was released during the preparation of this arbitration award, the arbitrator gave the parties the opportunity to make submissions on the new decision. The employer argued that *Humber River* misconstrued the reasoning in *Elk Valley*, by removing any consideration of the employer’s reasons for imposing the discipline from the prima facie discrimination analysis.⁷⁴ The arbitrator rejected this argument, as *Elk Valley* clarified that, in cases of indirect discrimination, discriminatory intent is not required to establish prima facie discrimination and the focus is to be on discriminatory impact, not whether the employee’s addiction played a role in the employer’s decision to terminate.⁷⁵ Furthermore, the employer asserted that neither *Humber River* nor the present case presented evidence demonstrating the disproportionate impact of rules prohibiting the theft of drugs and falsification of patient records on people suffering from addiction. The arbitrator challenged this criticism, asserting that the *Humber River* decision explained how the law of indirect discrimination applied in cases where addiction constituted a factor in the violation of a valid workplace rule.⁷⁶

The arbitrator agreed with the assessment of the addiction case law in the *Humber River* decision. He affirmed that *Bellehumeur* was not a general endorsement of *Gooding*, as it “does not engage in any substantive analysis... of whether *Gooding* is consistent with *Elk Valley* or the myriad of other Supreme Court of Canada discrimination jurisprudence”⁷⁷ and rejected the employer’s argument that the arbitrator in *Humber River* erred by

⁷² *Ibid* at para 138.

⁷³ *Ibid* at para 141.

⁷⁴ *Ibid* at para 159.

⁷⁵ *Ibid* at paras 160-161.

⁷⁶ *Ibid* at para 163.

⁷⁷ *Ibid* at para 164.

refusing to follow *Bellehumeur*.⁷⁸ The arbitrator asserted that *Humber River* provided a “carefully reasoned analysis of how *Gooding* departs from the settled principles of the Supreme Court of Canada.”⁷⁹ Accordingly, he disagreed with the *Royal Victoria* and *Cambridge Memorial* arbitration decisions, to the extent that they endorsed the *Gooding* approach and suggested the requirement of additional factors in the prima facie discrimination analysis.⁸⁰ He rejected the *Wright* decision, as it imported the requirement of stereotypical or arbitrary characteristics into the prima facie discrimination test, contrary to the fundamental principles affirmed in *Elk Valley*.⁸¹ He also rejected the employer’s claim that the cases relied upon by the union conflated the prima facie discrimination and accommodation analyses.⁸²

Adopting the human rights approach endorsed in *Humber River*, the arbitrator held that the union established prima facie discrimination, concluding that:

The evidence shows beyond any doubt that there is a connection or nexus between the grievor’s substance use disorder and the adverse effect of termination of employment for violation of admittedly valid workplace rules. Compulsive behaviour and impaired judgment are symptoms of the mental illness of substance use disorder. They were manifested in this case, according to the weight of medical evidence, by either no capacity or diminished capacity on the part of the grievor to comply with workplace rules prohibiting diversion of narcotics and falsification of medical records. Moreover, the grievor testified that she needed opioids “to get through this shift...get through the evening...get through the next day and I won’t anymore; I am going to stop. But I couldn’t stop”. There was no evidence that the grievor diverted the drugs for any reason other than to satisfy her substance use disorder.⁸³

Applying the established prima facie discrimination analysis, the arbitrator found a clear connection between the grievor’s addiction and her termination for stealing narcotics and

⁷⁸ *Ibid* at para 165.

⁷⁹ *Ibid* at para 166.

⁸⁰ *Ibid* at paras 167-168.

⁸¹ *Ibid* at para 171.

⁸² *Ibid* at para 172.

⁸³ *Ibid* at para 174.

falsifying medical records to cover up the thefts. He dismissed the employer's argument that the grievor's addiction was not a factor in her termination because it was not a factor in the employer's decision to terminate her employment and correctly identified that the issue is not whether the grievor's addiction was a factor in the decision to terminate, rather "[t]he focus at this stage is whether the application of valid workplace norms has a discriminatory effect on the grievor because her disability interferes with her ability to comply with those norms."⁸⁴

The arbitrator also concluded that the employer failed to establish that the grievor could not fulfill the bona fide occupational requirements of the team leader position and that it could not satisfy the CNO's requirements. The arbitrator went on to comment on the role of the CNO and the undertaking:

The CNO has been granted the statutory authority and responsibility to determine whether RNs, like the grievor, who suffer from substance use disorder and who are in remission, can return to the practice of nursing and under what conditions. It is explicitly required to exercise its authority with the public interest as its main focus.

Given its statutory role and its expertise in these matters, it can safely be assumed, as confirmed by the terms of the Undertaking, that the CNO is acutely aware of the significance and risks associated with issues such as relapse rates, trust issues and the like in returning nurses in remission to nursing practice and has designed the Undertaking accordingly.

As a result, it is my view, that the opinion of the CNO, as expressed in the Undertaking, must be given significant weight in addressing some of the issues raised by the employer.⁸⁵

The arbitrator held that the employer violated its procedural duty to accommodate the grievor, as it did not consider accommodation issues and failed to take any steps or make any inquiries in response to troubling observations and reports about the grievor's behaviour at work. The arbitrator found the employer's evidence of undue hardship to be insufficient, as it was based on the current structure and performance of work; he

⁸⁴ *Ibid* at para 175.

⁸⁵ *Ibid* at paras 181-183.

recognized that, “[t]hose opinions were formed and expressed without any analysis or thought about what changes in work organization or implementation might be required and might be possible to accommodate the grievor. Any assertion that it would be impossible to accommodate the grievor, or that doing so would cause undue hardship to the employer must be evaluated in that context.”⁸⁶ The arbitrator ordered the employer to reinstate the grievor, accommodate her to the point of undue hardship and compensate her for losses, including general damages arising from the employer’s breach of the procedural duty to accommodate. He remitted the issues of accommodation and compensation to the parties.

The *Sunnyside Home* award illustrates a progressive shift in addiction disability law. Continuing the momentum of *Humber River*, the arbitrator adopted the human rights principles endorsed in *Elk Valley* and rejected the *Gooding* approach. Upholding the well-established doctrine of indirect discrimination, the arbitrator correctly dismissed the notion that, in order to establish prima facie discrimination, the grievor’s disability must have been a factor in the employer’s decision to impose discipline. The arbitrator applied a strict approach to the employer’s duty to accommodate, critically assessing the steps taken by the employer in determining whether the grievor could be accommodated in the workplace; he found the employer’s evidence of undue hardship to be insufficient, as it was based on the current structure and performance of work—not satisfying the employer’s positive obligation to consider the reorganization of work to accommodate an employee’s restrictions. The award of monetary compensation in this case is also very significant, as monetary awards are extremely rare in addiction disability cases. Typically, in successful cases, legal decision makers order reinstatement without any compensation for lost wages or damages, reflecting a sense of condemnation and discipline for the misconduct arising from the addiction disability. Perhaps, this is the beginning of a new trend in remedies in the realm of addiction disability case law.

⁸⁶ *Ibid* at para 190.

6.4 *Canadian Pacific Railway v. Teamsters Canada Rail Conference*

Canadian Pacific Railway concerned the termination of Greg Paisley, a locomotive engineer, with 33 years of service. During his long service, he received minor discipline and had no disciplinary record at the time of his dismissal. In August 2017, Paisley's train had an unavoidable collision with a vehicle on the track. No injuries were sustained. The grievor brought a bottle of whiskey on the train, which he indicated was a gift for someone else. After an inspection identified no defects with the train, he continued to operate the train and consumed some whiskey during this time. Upon interviewing the crew at the next stop, a CP Police constable detected alcohol on Paisley's breath and other symptoms of intoxication and conducted a screening test. Paisley failed the screening test, which led to his arrest, and the Royal Canadian Mounted Police (RCMP) then administered a breathalyzer test. He had a blood alcohol concentration of over 0.08, which led to the RCMP laying criminal charges.

During the employer's investigation, Paisley admitted to consuming alcohol while operating the train and stated that he experienced a breakdown during his tour of duty, as a result of previous incidents in his career, including one that resulted in a death. Paisley revealed that he had "developed an issue with alcohol and possibly other mental health issues."⁸⁷ He affirmed that this was the first time he consumed alcohol while on duty and the incident made him realize that his drinking was a bigger problem than he previously thought. Paisley disclosed some of the events that caused stress in his life, including the fact that both he and his wife battled cancer. He apologized for his conduct and disclosed that he had pursued treatment following the incident. The employer subsequently terminated Paisley for the use and possession of intoxicants while on duty and violating its alcohol and drug policy. The union grieved Paisley's termination, raising the employer's duty to accommodate.

⁸⁷ *Supra* note 9 at para 11.

Following his termination, Paisley was diagnosed with severe alcohol use disorder, along with post-traumatic stress disorder, chronic adjustment disorder and panic attacks. He attended counseling, completed a two-week residential addiction treatment program and continued with aftercare treatment. Paisley faced criminal charges for the workplace incident and pled guilty to one count of Impaired Operation over 0.08 of Railway Equipment. The court granted him a curative discharge—a sentence available to those who demonstrate that they needed curative treatment at the time of the offence—with one year of probation, which prevented him from operating a vehicle or rail equipment for a year.

The union claimed that the employer failed to consider the mitigating circumstances Paisley disclosed during the investigation—namely, that he had experienced tragedies in his life, which led him to rely on alcohol as a coping mechanism. The union contended that termination was excessive under the circumstances and the employer failed to accommodate Paisley. The employer, on the other hand, asserted that the incident constituted just cause for dismissal and argued that, because Paisley did not disclose his addiction to the employer until after the incident and only provided medical documentation substantiating his disability after being terminated, he should not be afforded human rights protections.⁸⁸ It also claimed that there was no causal connection between Paisley's addiction and operating machinery under the influence of alcohol.⁸⁹

While the employer viewed the case as a disciplinary matter, the union contended that it was an issue of the duty to accommodate. The arbitrator stated that the resolution of this case ultimately depended on its characterization.⁹⁰ As the union alleged the employer had a duty to accommodate Paisley, it had the burden to demonstrate prima facie discrimination. If the union failed to meet this burden, the employer could then treat the case as a regular disciplinary matter.⁹¹ However, a finding of prima facie discrimination

⁸⁸ *Ibid* at 2.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* at para 2.

⁹¹ *Ibid* at para 23.

would shift the burden to the employer to establish that it could not have accommodated Paisley without undue hardship.

Acknowledging the importance of substantive equality, the arbitrator confirmed that, “Under the applicable jurisprudence, it is no longer enough to show that the conduct, absent a protected ground under the *CHRA* being involved, would have attracted a severe disciplinary measure.”⁹² Applying the legal principles in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*⁹³ and *Elk Valley*, the arbitrator held that the union satisfied its burden of proving prima facie discrimination; the evidence revealed that Paisley had an alcohol addiction, he suffered an adverse impact through his termination and his addiction was a factor in this adverse impact. During the investigation, Paisley revealed that he had an issue with alcohol and there was no evidence suggesting that this was a ruse to obtain human rights protections.⁹⁴

The arbitrator firmly rejected the employer’s argument that Paisley’s failure to disclose his addiction prior to the workplace incident precluded human rights protections, stating that, “The case law does not support the suggestion that prima facie discrimination can never arise if an employee only raises his/her disability after an incident. The SCC examined this possible scenario in *Elk Valley*, but in different factual circumstances.”⁹⁵ The arbitrator also dismissed the employer’s argument regarding Paisley’s delay in providing medical evidence substantiating his addiction; although Paisley did not immediately provide medical evidence, he told the employer during the investigation that he had an issue with alcohol and sought treatment after the incident.⁹⁶ The arbitrator concluded that the union established prima facie discrimination.

⁹² *Ibid* at para 30.

⁹³ 2015 SCC 39.

⁹⁴ *Supra* note 9 at para 43.

⁹⁵ *Ibid*.

⁹⁶ *Ibid* at para 44.

Arguing that Paisley's misconduct was a disciplinary matter, the employer decided not to directly address the matter of undue hardship and, instead, raised issues with respect to the use of a "medical condition as a shield," the grievor's culpability and the concept of a causal connection between the disability and misconduct. Following the human rights approach, the arbitrator affirmed that, "... once *prima facie* discrimination is shown, the jurisprudence requires an arbitrator to evaluate whether an employer could have accommodated an employee suffering from a disability without undue hardship."⁹⁷ He noted that the legal principles underlying the duty to accommodate remained unsettled, stating: "This area remains exceedingly complex for both parties and decision makers. *Elk Valley* showed that three judges on the SCC could not agree on how to apply these challenging principles."⁹⁸ As the employer's submissions focused on discipline and did not directly address undue hardship, the arbitrator concluded that the employer failed to demonstrate undue hardship and ordered the reinstatement of Paisley's employment, without loss of seniority but without compensation for any lost wages or benefits. The arbitration award imposed conditions on Paisley's employment, including abstaining from drugs and alcohol and random drug and alcohol testing, and stated that a violation of any of the conditions could result in his termination.

The decision in *Canadian Pacific Railway* reflects a broad, liberal human rights approach to addiction disability. The arbitrator applied the legal principles stated in *Elk Valley* and acknowledged that, although the SCC did not find *prima facie* discrimination, the decision in *Elk Valley* was made in light of the particular facts and did not create a universal bar to finding *prima facie* discrimination in cases where an employee fails to reveal the existence of a disability until after a workplace incident. This is especially important in the context of addiction disability, where individuals are commonly in denial and may not recognize that they have an addiction until they experience a significant negative consequence, like a workplace incident. Furthermore, although Paisley clearly held a safety-sensitive position and legitimate safety concerns could easily be inferred,

⁹⁷ *Ibid* at paras 54-55.

⁹⁸ *Ibid* at para 56.

the arbitrator adhered to the established legal analyses and required the employer to demonstrate that it could not accommodate Paisley without undue hardship.

6.5 *Ontario Nurses' Association v. Cambridge Memorial Hospital*

Like *Humber River* and *Sunnyside Home*, *Cambridge Memorial* involved the termination of a nurse for stealing drugs from her employer. The nurse had more than 28 years of discipline-free service at the hospital. An audit in August 2014 revealed that the grievor had been stealing Percocet from the hospital for several months. When confronted with the allegation, the grievor admitted to taking Percocet and indicated that she had “a problem.”⁹⁹ She subsequently went on leave for a year and attended in-patient and aftercare treatment programs for her addiction. Further investigation revealed that the grievor had been stealing Percocet and Tylenol 3 for many years. At this point, the grievor admitted to stealing and diverting Percocet from patients since 2011. However, she denied stealing Percocet since 2006, as suggested by the employer’s investigation, and any misappropriation of Tylenol 3s. The hospital terminated the grievor’s employment for just cause, “solely due to [her] criminal conduct,”¹⁰⁰ but decided not to press criminal charges. The union grieved her termination and the hospital’s failure to accommodate her addiction. The grievor stopped using narcotics in August 2014 and, since entering into an undertaking with the College of Nurses in January 2016, she had been authorized to resume nursing, subject to terms and conditions with respect to workplace monitoring.

The grievor admitted that she knew what she was doing was wrong but was afraid to come forward because she was ashamed and feared the potential legal consequences. She testified that she never used Percocet at work nor came to work under the influence; she did not feel compelled to come to work on her days off to steal drugs and could go on

⁹⁹ *Cambridge Memorial* arbitration decision, *supra* note 33 at para 23.

¹⁰⁰ *Ibid* at para 1.

vacation without using drugs.¹⁰¹ The grievor's addictions specialist stated that she had a severe opioid addiction;¹⁰² her drug use increased over time, she experienced constant cravings and was "entirely preoccupied with ensuring that she had enough of her drug of choice."¹⁰³ He explained that addiction impacts decision-making and leads to distorted thinking and uncharacteristic behaviour and, despite being aware of the negative consequences of their addiction, individuals are unable to stop using the substance.¹⁰⁴

The parties relied upon two different lines of legal authority. The union relied on the arbitral consensus in Ontario that a nurse with a drug addiction has a human rights defense for stealing that drug from the employer and patients in her care, if she has successfully completed rehabilitative treatment.¹⁰⁵ The union emphasized the grievor's successful rehabilitation and positive prognosis and asserted that she should be reinstated. The employer, on the other hand, adopted the *Gooding* approach, rejecting the notion of a human rights defense to criminal misconduct. The employer submitted that the grievor's thefts constituted a fundamental breach of trust and the employment relationship, amounting to just cause for termination. The hospital claimed that the evidence failed to establish a connection between the grievor's addiction and its decision to terminate her employment, as she had been treated in the same manner as any other employee accused of theft.¹⁰⁶

The arbitrator acknowledged that, "'but for' her addiction, she would not have engaged in the serious misconduct which led to her termination."¹⁰⁷ However, he decided to focus on issues in the grievor's evidence instead—particularly, the fact that she did not own up to the full extent of her misconduct, including the theft of Tylenol 3s, and that her behavior

¹⁰¹ *Ibid* at para 39.

¹⁰² *Ibid* at para 42.

¹⁰³ *Ibid* at para 43.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at para 45: Six Ontario arbitration decisions, *supra* note 26; *Hamilton Health*, *supra* note 68.

¹⁰⁶ *Cambridge Memorial* arbitration decision, *supra* note 33 at para 8.

¹⁰⁷ *Ibid* at para 77.

did not appear to be compulsive because she went on vacations without using drugs and was able to work without using drugs.¹⁰⁸ Furthermore, the arbitrator indicated he had “little doubt that she will stay clean and that she could be accommodated by the Hospital with some hardship,” but revealed that his decision was “not based on either of those considerations.”¹⁰⁹ He denied the grievance, stating that:

In accord with *Gooding*, I don't accept that pleading an addiction to the drug being stolen, which is to say, establishing a nexus between the addiction and the misconduct, is, in itself, a defense to termination. Put differently, it is not prima facie evidence of discrimination. *There is not an iota of evidence before me of direct discrimination*, to use old nomenclature, which is what the BCCA required in *Gooding*

*I have no doubt that SM would not have conducted herself in the fashion she did, 'but for' her drug dependence. Nor am I in a position to call into question Dr. Veenman's opinion that the Grievor was addicted and not merely a 'recreational user'. But in my view, which is consonant with the Doctor's evidence, there are degrees of addiction. The Grievor's addiction, based on her own evidence, was not compulsive. She did not use at work. She went on vacation for one or two weeks without using. She suffered little or no withdrawal when going off the Percocets. She did not provide a comprehensive narrative of her addiction that dovetailed with Dr. Veenman's evidence [emphasis added].*¹¹⁰

The arbitrator inappropriately relied on extraneous factors and imposed additional requirements for establishing prima facie discrimination, clearly departing from the established human rights approach.

The arbitrator's reasoning demonstrated many flaws. The prima facie discrimination test requires a mere connection, not a causal connection, between the disability and termination. Although the arbitrator accepted that, “but for” her addiction, the grievor would not have engaged in the misconduct resulting in her termination,¹¹¹ which clearly constitutes a connection between the addiction and termination, he found this connection

¹⁰⁸ *Ibid* at para 78.

¹⁰⁹ *Ibid* at para 79.

¹¹⁰ *Ibid* at paras 80-81.

¹¹¹ *Ibid* at para 82.

to be inadequate to establish prima facie discrimination. The arbitrator improperly required more than a simple connection, contrary to the proper analysis. Furthermore, his reasoning only referred to direct discrimination and disregarded the notion of indirect discrimination, suggesting an employee must satisfy the more onerous burden of demonstrating direct discrimination, contrary to well-established Canadian human rights law. The arbitrator also suggested that the human rights defense to misconduct only applies to “a full blown addiction,” characterized by compulsion and egregious workplace misconduct, like “shooting up at work.”¹¹² This would problematically ignore the different manifestations of addiction disability and require the individual to go beyond simply establishing a disability. Diverting attention from the grievor’s disability and human rights, the arbitrator emphasized deterrence, stating that, “At a time when opioid addiction is rampant in the culture and a major issue for healthcare professionals, sending the message that pleading addiction, only after being caught stealing one’s drug of choice, should be strongly deterred”¹¹³ and essentially dismissed the grievor’s positive prognosis and likelihood of a successful return to work.

The union sought a judicial review of the arbitrator’s decision.¹¹⁴ The Divisional Court applied the standard of reasonableness to the question of whether the arbitrator applied

¹¹² *Ibid* at para 85.

¹¹³ *Ibid* at para 84.

¹¹⁴ *Cambridge Memorial*, *supra* note 10. Months prior to this judicial review, the Ontario Nurses’ Association sought the judicial review of *Royal Victoria*, *supra* note 32, another case where the arbitrator dismissed the grievance of a nurse who stole drugs from her employer to feed her addiction and upheld her termination. The arbitrator held that the grievance should be dismissed, regardless of whether he applied the approach in *Gooding and Wright*, as argued by the employer, or the Ontario labour arbitration decisions relied upon by the union, where the termination of nurses who stole drugs from their employer as a result of their addiction were found to constitute prima facie discrimination. The arbitrator distinguished the case from these arbitration decisions on the basis that the grievor pled guilty to the criminal offense of theft, thus indicating the thefts were voluntary, her treating physician stated that returning to the hospital would not assist her recovery and, at the time of the arbitration, the grievor had obtained employment in two other health care settings. The union sought a judicial review of the arbitration decision.

In *Ontario Nurses’ Association v Royal Victoria Regional Health Centre*, 2019 ONSC 1268, the Divisional Court found the arbitrator’s decision to be unreasonable, stating that:

36 It is not disputed that P.S. intended to steal the drugs from the Hospital. However, the fact that P.S. had the necessary intention in stealing the drugs to establish *mens rea* does not exclude the possibility that her addiction caused her to take that action. The question

the correct test for prima facie discrimination: “Labour arbitrators, like human rights tribunals, have developed expertise in the area of human rights discrimination. While the question of what test to apply is of general importance, it is not outside their expertise. Thus, the presumption of reasonableness applies.”¹¹⁵ Both the hospital and union agreed that the SCC settled the test for prima facie discrimination in *Elk Valley*, which was released after the arbitration award. The union argued that the arbitrator’s conclusion that prima facie discrimination had not been established was unreasonable, given that he accepted that she had an addiction, suffered an adverse impact and that, but for her addiction, she would not have engaged in the conduct that resulted in her termination. The arbitrator erred by relying on factors not required by the prima facie discrimination analysis, like general deterrence and the absence of a compulsion to use drugs. The hospital, on the other hand, asserted that, although the arbitrator considered the *Gooding* line of cases, this jurisprudence did not drive his decision; rather, he came to the decision as a result of the grievor’s failure to admit to the full extent of her misconduct, her failure

is whether, in the context of human rights jurisprudence, her addiction had reached the point where it “effectively deprive[d] the complainant of her capacity to comply with the Hospital’s rules regarding the handling of drugs.” Capacity in the human rights law context is a very different concept from *mens rea* in the criminal law context.

37 Moreover, in applying a standard of “culpable” versus “non-culpable” in a criminal law context, the Arbitrator appears to have required demonstration of an absence of control as the standard for a determination of whether a causal connection existed between P.S.’s actions and her termination. This is also an unreasonable determination. As the passage cited above from *Elk Valley* demonstrates, there is a spectrum along which most cases will be found. Whether a disability is a factor in the adverse impact suffered by a complainant will depend on the facts and must be assessed on a case-by-case basis. Because he applied a higher standard of causation in the Decision, the Arbitrator failed to conduct such an analysis on the particular facts of this case.

38 Given that the Arbitrator’s finding of an absence of a causal connection between P.S.’s actions and her termination was based solely on his unreasonable determination that her actions were “voluntary”, the Decision was unreasonable. The Arbitrator either failed to address the issue of indirect discrimination or improperly took into consideration P.S.’s guilty plea in the criminal proceedings in implicitly finding that there was an absence of indirect discrimination...

The Court set aside the decision and remitted the grievance back to the arbitrator to determine whether the employer engaged in indirect discrimination.

¹¹⁵ *Supra* note 10 at para 26.

to establish that her addiction developed before she engaged in any misconduct and her failure to establish that she could not control her addiction.¹¹⁶

The Divisional Court ultimately found the arbitrator's decision to be unreasonable, in light of his own findings. The Court affirmed the *prima facie* discrimination test set out in *Elk Valley* and determined that the grievor established the required elements:

In the Award, the Arbitrator refused to accept that the Applicant had established *prima facie* discrimination. He did so after (1) finding that he was not “in a position to call into question Dr. Veenman’s opinion that the Grievor was addicted” (Award, at para. 81); (2) accepting that the Grievor suffered an adverse impact as a result of her addiction (termination); and (3) finding that “but for” her addiction she would not have engaged in the serious misconduct that led to her termination (Award, at paras. 77, 81 and 82). The Applicant is right that these three findings are all that is necessary to establish *prima facie* discrimination under the governing test confirmed by the Supreme Court of Canada in *Elk Valley*.¹¹⁷

The Court concluded that, “it is clear that the Arbitrator did not accept that the Applicant had established *prima facie* discrimination because he was not applying the *Elk Valley* test, but the test in *Gooding*, which the Hospital agrees is no longer good law. As a result, he made a decision based on wrong principles and came to an unreasonable result.”¹¹⁸ Applying the correct legal test, the grievor clearly established *prima facie* discrimination.

The arbitrator inappropriately imported additional factors into the *prima facie* discrimination analysis and relied on extraneous issues to thwart a finding of discrimination. He relied on issues, such as the grievor’s failure to take responsibility for the full extent of her misconduct and the absence of evidence establishing compulsion, which are not part of the *prima facie* discrimination analysis, to justify his conclusion that the grievor had failed to establish *prima facie* discrimination. *Elk Valley* confirmed that no additional words or concepts should be added to the *prima facie* discrimination test

¹¹⁶ *Ibid* at para 30.

¹¹⁷ *Ibid* at para 32.

¹¹⁸ *Ibid* at para 34.

and establishing compulsion is not part of the test.¹¹⁹ The Court recognized that the arbitrator deviated from the established human rights approach and imposed onerous requirements, creating an inappropriate bar to demonstrating prima facie discrimination. Accordingly, the Court allowed the application for judicial review, set aside the arbitration award and remitted the grievance to a new mutually agreeable arbitrator for a new hearing and determination in accordance with the Court's reasons.

Cambridge Memorial reflected the sentiment that emerged in the post-*Elk Valley* arbitral jurisprudence: the endorsement and application of the human rights approach to addiction disability, as affirmed by the SCC in *Elk Valley*. The SCC's confirmation of the fundamental, well-established human rights laws and principles resulted in the explicit rejection of *Gooding* by various legal decision makers. Notably, in this case, even the employer conceded that, in the wake of *Elk Valley*, *Gooding* was no longer good law, signifying the death of the *Gooding* approach to addiction disability. Following the SCC's direction that no additional requirements are to be imported into the prima facie discrimination analysis, the Court declared that demonstrating compulsion is not necessary to establish prima facie discrimination. Recognizing the arbitrator's clear departure from the proper prima facie discrimination analysis, the Divisional Court did what the SCC should have done in *Elk Valley* and found the arbitration decision to be unreasonable. Although *Elk Valley* did not change the law, the SCC's reaffirmation of the law in the 2017 decision has led to stricter compliance with human rights principles by arbitrators and the courts.

6.6 Conclusion

In the three years since the release of *Elk Valley*, the addiction case law has shifted and evolved. The five cases discussed in this chapter reflect the general trend in the post-*Elk Valley* jurisprudence. Although *Elk Valley* appeared to leave many unanswered legal questions, arbitrators and judges across Canada have interpreted the decision as an affirmation of the well-established human rights principles developed in the previous

¹¹⁹ *Ibid* at para 38.

SCC jurisprudence. Legal decision makers have been applying the human rights principles stated in *Elk Valley*, as opposed to following the SCC's questionable application of these principles in the decision.

The post-*Elk Valley* addiction jurisprudence demonstrates a shift towards the broad, liberal human rights approach towards addiction disability. Notably, arbitrators and courts in Ontario finally denounced the *Gooding* approach. The *Elk Valley* decision has been relied upon to affirm that no further considerations or requirements are to be imported into the prima facie discrimination analysis. Applying fundamental human rights principles and the correct legal analysis, legal decision makers have recognized the clear connection between an employee's addiction and their termination for violating the employer's drug and alcohol policy and avoided making superficial distinctions between discipline for violating a workplace policy and misconduct related to the employee's addiction disability, evident in many previous decisions. Legal decision makers have accepted that denial and relapse are common features of drug and alcohol addiction and affirmed that initially denying their addiction, failing to disclose their addiction until after a workplace incident and experiencing relapses cannot in itself preclude their human rights protections and the employer's duty to accommodate to the point of undue hardship. Although legal decision makers acknowledge the legitimate safety concerns of employers, they have upheld the laws and principles regarding the duty to accommodate and require employers to take steps to accommodate the employee and demand objective evidence of the employer's accommodation efforts and undue hardship claims.

In all five cases, the legal decision maker acknowledged the connection between the employee's addiction and termination for misconduct arising from their addiction and found prima facie discrimination. Both *Humber River* and *Sunnyside Home* explicitly rejected the *Gooding* approach, as it deviated from the established human rights analysis, affirmed in *Elk Valley*. The arbitrators endorsed various principles in the *Elk Valley* decision—namely that, the focus of the discrimination analysis must be on the discriminatory impact of an action, and not the presence of a discriminatory attitude; in cases of indirect discrimination, the emphasis must be on the effect of the disability on the individual's ability to comply with the workplace rule, and not the extent to which the

disability was a factor in the employer's decision to terminate; and the rejection of the notion that there needs to be something more than a connection between the addiction and termination in order to establish discrimination. The Court in *Cambridge Memorial* also affirmed that the *Gooding* approach was contrary to the human rights principles set out in *Elk Valley*.

Although the emerging case law demonstrates a shift towards the human rights approach to addiction disability, the jurisprudence still does not reflect a biopsychosocial understanding of addiction, acknowledging the critical role of social factors in the development and manifestation of the disability, as described in Chapter 3. Legal decision makers have rejected the moral model of addiction, in favour of the medical perspective, affirming that drug and alcohol addictions are a serious mental disorder, constituting a disability warranting accommodation. The legal decision makers in these five cases unequivocally accepted addiction as a mental disorder. In *Sunnyside Home*, the arbitrator rejected medical expert opinion that an addiction is not a mental disorder, in favor of the medical evidence that addiction is an illness that severely impacts an individual's ability to control their behavior related to the addiction. These decision makers also did not require the grievor to have a compulsion or complete lack of control, rendering them completely incapable of making decisions or controlling their behaviour with respect to their addiction.

Of the five decisions examined, *Toronto District School Board*, *Sunnyside Home* and *Canadian Pacific Railway* addressed the issue of accommodation.¹²⁰ In the latter two cases, the arbitrator held that the employer failed to fulfill its accommodation duty and ordered the employer to reinstate the grievor. Notably, the arbitrator in *Sunnyside Home* ordered the grievor's reinstatement as well as monetary compensation for her losses, which is exceptionally rare in addiction cases. The arbitrator held that the employer had a responsibility to inquire into the presence of a disability and to take steps to accommodate the employee and demanded strict proof of the employer's accommodation

¹²⁰ The Court in *Cambridge Memorial*, *supra* note 10, remitted the grievance to a new mutually agreeable arbitrator for a new hearing and did not decide the issue of accommodation.

efforts and alleged undue hardship. The arbitrator in *Sunnyside Home* held that simply determining whether it could accommodate the employee within its current organizational structure was insufficient; the employer had an obligation to consider making changes to its organization of work in order to fulfill its duty to accommodate to the point of undue hardship. In *Canadian Pacific Railway*, the arbitrator required the employer to demonstrate its accommodation efforts, despite acknowledging the safety-sensitive nature of the grievor's position, and did not accept the inadequate evidence presented by the employer. Although the arbitrator in *Toronto District School Board* did not order reinstatement, his reasoning and conclusions were reasonable under the circumstances; the arbitrator went through the discrimination and accommodation analyses and found that the employer had satisfied its duty to accommodate to the point of undue hardship, given the employer's previous accommodation attempts and the absence of compelling medical evidence indicating a positive prognosis for the grievor's recovery. Unfortunately, as described above, the arbitrator in *Humber River* decided—without going through the accommodation analysis—that, under the circumstances, it was not an appropriate case to order reinstatement.

The case law emerging in the post-*Elk Valley* era reflects a movement towards the broad, liberal human rights approach to addiction disability. It is well established that drug and alcohol addiction constitutes a disability and the recent jurisprudence rejects the notion that the addiction must completely eliminate an individual's self control and ability to make decisions. Relying on the SCC's reasoning in *Elk Valley*, arbitrators and judges have rejected the notion that there must be more than a mere connection between the addiction and adverse impact and the imposition of additional factors and considerations in the prima facie discrimination analysis. Furthermore, even in the context of safety-sensitive workplaces, legal decision makers have required employers to provide objective evidence of their accommodation efforts and alleged undue hardship. The legal decisions in the wake of *Elk Valley* have adhered to the well-established human rights approach to discrimination and workplace accommodation and signify a change in the landscape of addiction disability case law.

Chapter 7

7 Conclusion

Drug and alcohol addiction has been recognized and accepted as a form of disability under Canadian human rights law for decades. However, despite this recognition, addiction disability has had a tumultuous history in the realm of discrimination and accommodation law jurisprudence. Historically, the three primary legal approaches to addiction disability have been the traditional disciplinary, hybrid disciplinary and human rights approaches. Although the traditional disciplinary approach to addiction disability has largely fallen out of favour, principles underlying this approach have remained in the modern Canadian addiction disability jurisprudence. Legal decision makers have continued to apply approaches deviating from the well-established broad, liberal human rights approach to be applied to all protected human rights grounds. Prior to *Stewart v. Elk Valley Coal Corp.*,¹ the jurisprudence was divided with respect to the approach to be applied to cases of discrimination and accommodation on the basis of drug and alcohol addiction. Canadian addiction disability law appeared to be confused and unsettled, requiring clarification and guidance from the court.

The Supreme Court of Canada (SCC) reached a disappointing conclusion in *Elk Valley*. The Court's application of the law to the particular facts of the case illustrated flawed reasoning and inadequate appreciation of the broad human rights analysis that should have been applied. Nevertheless, despite these flaws, the *Elk Valley* decision provided positive direction by affirming and endorsing the *Moore* test² and the application of human rights principles in addiction disability cases.

¹ 2017 SCC 30 [*Elk Valley*].

² *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*].

7.1 Continuation of the Supreme Court of Canada's Disappointing Track Record

Elk Valley provided the SCC with the opportunity to provide much needed clarity and confirm the correct approach to be applied to case of discrimination and accommodation on the basis of drug and alcohol addiction disability. Unfortunately, the majority issued an internally inconsistent decision that appeared to leave more unanswered questions than provide answers. Although the decision ostensibly espoused and confirmed the human rights approach to addiction disability, the SCC majority failed to actually apply this approach to the situation experienced by Ian Stewart and disregarded the well-established fundamental human rights laws and principles that form the foundation of Canadian human rights law.

Despite explicitly affirming the prima facie discrimination test articulated in *Moore* and clarifying the principles to be applied, the majority failed to acknowledge the Tribunal's obvious departures from this approach. The majority decision was silent on the various flaws and deviations from fundamental human rights law evident in the Tribunal's analysis—specifically, requiring a causal relationship between the employee's addiction and adverse impact; importing additional requirements into the analysis, such as requiring the employee to make prudent choices to avoid discrimination, demonstrate a complete lack of self-control and establish arbitrary or stereotypical treatment and discriminatory intent; limiting human rights protections to formal equality; and accepting insufficient evidence of accommodation. In finding the Tribunal's decision to be reasonable, in spite of these serious flaws in reasoning and deviations from established human rights law, the majority appeared to accept these erroneous legal principles and left unanswered questions with respect to the legal and evidentiary requirements for satisfying the prima facie discrimination test, particularly, establishing a connection between the protected human rights characteristic and adverse impact.

This, unfortunately, was not the first time the SCC issued a flawed decision. *Elk Valley* continued the Court's disappointing track record with respect to disability accommodation cases, where the SCC offered a series of puzzling decisions that failed to clarify the prima facie discrimination and accommodation analyses and ultimately created

more uncertainty. Particularly, three SCC decisions released in 2007 and 2008 added to the confusion by suggesting the importation of additional factors into the prima facie discrimination analysis and an inconsistent approach to the employer's duty to accommodate to the point of undue hardship: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*,³ *Honda Canada Inc. v. Keays*⁴ and *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*.⁵ Notably, the British Columbia Court of Appeal in *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union* relied on these three SCC decisions to establish the importance of demonstrating the stereotypical or arbitrary nature of the discriminatory conduct in order to prove prima facie discrimination.⁶ This remained a point of contention for approximately ten years, until *Elk Valley* confirmed that arbitrary and stereotypical thinking was not a requirement.

McGill University concerned an employee who went on a leave of absence due to mental health concerns. For more than two years, she unsuccessfully attempted to return to work. The collective agreement provided that an employee's employment would be terminated upon 36 months of absence by reason of illness or non-occupational accident. After the expiry of the rehabilitation period, provided for in the collective agreement and extended by the employer, the employee remained unable to return to work as a result of a car accident. The employer terminated the grievor's employment due to her prolonged absence from work. The arbitrator dismissed the grievance on the basis that the employer had already accommodated the grievor by providing her with rehabilitation periods more generous than provided for in the collective agreement and she was still unfit for work at the end of the three-year period provided for in the agreement. The Superior Court dismissed the union's application for judicial review. The Court of Appeal reversed the

³ 2007 SCC 4 [*McGill University*].

⁴ 2008 SCC 39 [*Honda Canada*].

⁵ 2008 SCC 43 [*Hydro-Québec*].

⁶ 2008 BCCA 357 at paras 12-14 [*Gooding*].

decision and remitted the case to the arbitrator to assess the accommodation issue on an individualized basis and rule on appropriate compensation. The SCC allowed the appeal.

The SCC majority⁷ determined that, although the automatic termination clause negotiated by the parties should be considered when assessing the duty to accommodate, it was not determinative of the issue of accommodation, as accommodation must be evaluated on a case-by-case basis. The SCC found that the arbitrator looked beyond the collective agreement and correctly concluded that the employer could not continue to employ an individual who was unable to return to work in the foreseeable future.⁸ Given the particular circumstances, this was a reasonable decision. However, the majority then went on to suggest that, if the grievor felt that the accommodation measure provided for in the collective agreement was insufficient, and she could return to work within a reasonable period of time, she had an obligation to demonstrate her ability to return to work,⁹ thus inappropriately reversing the burden of proof with respect to the employer's duty to accommodate to the point of undue hardship.

In concurring reasons, the remaining justices¹⁰ disagreed with the majority's conclusion that automatic termination clauses were *prima facie* discriminatory. They asserted that, accepting such clauses to be automatically *prima facie* discriminatory would render all time-limited legislated employment protections for absences due to illness, disability or pregnancy presumptively vulnerable, regardless of the reasonableness of their length, and would remove the incentive to negotiate mutually acceptable absences.¹¹ Although the clauses provided protections for an arbitrary, limited period of time, "they are not arbitrary in the way we understand arbitrariness in the human rights context, that is, they do not unfairly disadvantage disabled employees because of stereotypical attributions of their ability" but rather "acknowledge that employees should not be at unpredictable risk

⁷ The majority comprised of Justices Binnie, LeBel, Deschamps, Fish, Charron and Rothstein.

⁸ *Supra* note 3 at para 36.

⁹ *Ibid* at para 38.

¹⁰ The minority comprised of Chief Justice McLachlin and Justices Bastarache and Abella.

¹¹ *Supra* note 3 at paras 54-55.

of losing their jobs when they are absent from work due to disability.”¹² The justices appeared to import the additional requirement of arbitrariness into the prima facie discrimination analysis and conflated the prima facie discrimination and accommodation analyses, finding that:

This does not target individuals arbitrarily and unfairly because they are disabled; it balances an employer’s legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage. If the employee is able to return to work, the same or an analogous job remains available. If not, he or she lacks, and has lacked for three years, the ability to perform the job. This, it seems to me, is precisely what is protected by s. 20 of the *Quebec Charter* which states, in part, that “[a] distinction, exclusion or preference based on the aptitudes or qualifications required for an employment . . . is deemed non-discriminatory.”¹³

The concurring justices conducted a fundamentally flawed analysis by relying upon occupational requirements, which are to be considered in the accommodation analysis, to conclude that the grievor failed to establish prima facie discrimination.

The SCC perpetuated flawed reasoning in *Honda Canada* and *Hydro-Québec*, cases involving the termination of an employee due to their chronic, excessive absenteeism resulting from their disability. *Honda Canada* concerned the wrongful dismissal suit of a non-unionized employee. Honda placed the employee in a disability program that allowed employees to take time off work if they provided medical notes confirming that their absences were related to their disability. The employer became concerned with the frequency of his absences and questioned the legitimacy of the medical notes, particularly whether the doctor had independently evaluated whether the absences were related to his disability. Honda asked the employee to meet with an occupational medical specialist in order to determine how he could be accommodated. On the advise of legal counsel, he refused to meet with the specialist without an explanation of the purpose, methodology and parameters of the consultation. Following his continued refusal, the employer

¹² *Ibid* at para 56.

¹³ *Ibid* at para 63.

terminated his employment. He sued for wrongful dismissal, claiming discrimination, harassment and misconduct on the part of the employer.

Assessing the termination from a traditional wrongful dismissal lens, both the Superior Court and the Court of Appeal failed to apply the human rights approach to addressing the allegations of discrimination on the basis of disability and the issue of workplace accommodation. The decisions focused on the issue of damages, without first determining the issues of prima facie discrimination and accommodation, which were treated as supplemental issues to be considered at the remedies stage. Both courts determined that the employer's discriminatory conduct amounted to an independent actionable wrong for the purposes of awarding punitive damages.

The SCC had the opportunity to clarify the approach to disability discrimination and accommodation in wrongful dismissal cases. Unfortunately, the SCC also failed to apply the prima facie discrimination and accommodation analyses; the Court simply concluded that there was no evidence of discrimination and held that both courts erred in finding that the employer committed discriminatory conduct amounting to an independent actionable wrong.¹⁴ The SCC asserted that it found no arbitrariness or stereotyping and accepted that the need to monitor the absences of employees who are regularly absent constitutes a bona fide occupational requirement.¹⁵ In *Hydro-Québec*, the SCC once again inappropriately emphasized the presence of arbitrariness and stereotyping in cases of discrimination, asserting that the objective of human rights legislation is to “eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job.”¹⁶

The SCC has had a disappointing track record when it comes to disability accommodation cases. The *McGill University*, *Honda Canada* and *Hydro-Québec*

¹⁴ *Supra* note 4 at para 67.

¹⁵ *Ibid* at para 71.

¹⁶ *Supra* note 5 at para 13, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27 at para 36.

decisions advanced flawed legal reasoning with respect to the prima facie discrimination and accommodation analyses, contrary to well-established human rights laws and principles, and created more confusion than it provided clarity. Consequently, many legal decision makers have disregarded and not applied these contradictory principles. Nevertheless, the flawed reasoning and principles espoused in these decisions persisted to a certain degree and remained in the workplace accommodation law discourse for many years, as evidenced in the addiction disability jurisprudence. Approximately ten years later, the SCC was called upon once again to clarify and confirm the correct legal approach to workplace discrimination and accommodation in *Elk Valley*.

Unfortunately, *Elk Valley* was yet another disappointing decision. The SCC majority's reasoning was internally inconsistent. The majority expressly affirmed the *Moore* test for prima facie discrimination, confirmed that the disability must merely be factor in the adverse impact, asserted that discrimination may be direct or indirect and rejected the requirement of establishing discriminatory intent and stereotypical or arbitrary decision making. Nevertheless, the SCC majority curiously did not apply this approach. It failed to acknowledge the Tribunal's deviations from this approach, committing the very errors renounced by the Court, and upheld the Tribunal's conclusion that Elk Valley fired Stewart for breaching the workplace rule, and not because of his disability, on the limited ground that it was a reasonable finding of fact. Frankly, *Elk Valley* was a case of the majority failing to practice what it preached. The silver lining of this disappointing decision is that, in the wake of *Elk Valley*, legal decision makers have accepted the law as expressly stated, and not as applied, by the SCC majority.

7.2 The Legacy of *Stewart v. Elk Valley Coal Corp.*

Despite the SCC majority's disappointing judgment, the Court's commentary in *Elk Valley* has ultimately helped clarify the principles to be applied in addiction disability cases involving workplace misconduct. The principles in *Elk Valley* have been considered and approvingly cited in subsequent addiction disability jurisprudence. In the wake of *Elk Valley*, labour arbitrators have looked to the positive features of the decision, rather than the SCC's flawed analysis, and continue to appreciate that individuals struggling with drug and alcohol addiction disability must be accommodated in a broad and liberal

fashion, in accordance with Canadian human rights law. Legal decision makers across the country have applied the law as stated in the *Elk Valley* decision—paying little attention to the SCC majority’s problematic application of the law to the particular facts of the case—and cite *Elk Valley* as affirming the *Moore* test for prima facie discrimination and the fundamental, well-established human rights laws and principles. *Elk Valley* has ironically emerged as a landmark decision and triggered the much needed progress and rehabilitation of Canadian addiction disability law. The subsequent jurisprudence has reflected a change in the right direction, shifting towards the broad, liberal human rights approach towards addiction disability.

The *Elk Valley* decision expressly affirmed the correct human rights analysis and principles to be applied with respect to determining the existence of prima facie discrimination. The SCC majority endorsed the prima facie discrimination analysis established in *Moore* and reiterated that discrimination can be direct or indirect; thus, discriminatory intent is not a requirement for establishing prima facie discrimination:

To make a case of *prima facie* discrimination, “complainants are required to show that they have a characteristic protected from discrimination under the [*Human Rights Code*, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact”: *Moore*, at para. 33. Discrimination can take many forms, including “‘indirect’ discrimination”, where otherwise neutral policies may have an adverse effect on certain groups: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination: *Bombardier*, at para. 40.¹⁷

The SCC affirmed that the focus is to be on the discriminatory impact of the employer’s action on the individual and not the employer’s discriminatory intent. *Elk Valley* makes clear that discriminatory intent is not required to establish prima facie discrimination.¹⁸

¹⁷ *Supra* note 1 at para 24.

¹⁸ *Humber River Hospital v Ontario Nurses’ Association*, [2018] OLAA No 416 at para 111 [*Humber River*]; and *Regional Municipality of Waterloo (Sunnyside Home) v Ontario Nurses’ Association*, [2019] OLAA No 16 at para 160 [*Sunnyside Home*].

This is important because, as illustrated by the case law, most cases involve indirect discrimination and requiring evidence of discriminatory intent would, in effect, necessitate the existence of direct discrimination and place a more onerous burden on the employee to establish prima facie discrimination. The SCC in *Elk Valley* once again “mandated a much broader and robust understanding of discrimination and equality, and specifically one that accounts for the discriminatory effects of applying standards that may have been adopted with no discriminatory intent whatsoever.”¹⁹

The *Moore* test provides that an employee must simply establish that the disability was a factor in the adverse impact, which, in most addiction cases, is a form of discipline. Nevertheless, the previous addiction disability jurisprudence reveals that legal decision makers have focused on whether the individual’s disability played a role in the employer’s decision to impose discipline. This is contrary to the *Moore* test, which only requires a nexus between the disability and discipline—not the decision to impose discipline, thereby altering the analysis to demand evidence of discriminatory intent. *Elk Valley* has clarified that, “in cases of indirect discrimination the focus of the analysis must be on the effect of the disability on the employee’s ability to comply with the rule, and not on the extent to which the employee’s disability was a factor in the employer’s decision to take disciplinary action for breach of the rule.”²⁰ Following the principles in *Elk Valley*, if there is a nexus between the addiction and the misconduct resulting in discipline, prima facie discrimination will be established, regardless of whether the employer claims that it would have imposed the same discipline on an employee without an addiction for the same misconduct.²¹

Elk Valley further clarified that additional requirements are not to be imported into the prima facie discrimination analysis. The majority categorically rejected the notion that

¹⁹ *Humber River*, *supra* note 18 at para 109.

²⁰ *Ibid* at para 107.

²¹ Raquel Chisholm and Sabina Veltri, “Addiction Disabilities and Misconduct in the Health Care Sector Understanding the Duty to Accommodate after *Stewart v Elk Valley*” in *The Six-Minute Labour Lawyer* 2019 (delivered at the Law Society of Ontario, 20 June 2019) 6-1 at 6-7.

stereotypical or arbitrary decision making should be added as a requirement for establishing *prima facie* discrimination:

First, 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: *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 327 (emphasis in original). The Tribunal expressly noted that proof of arbitrariness and stereotyping was not required, at para. 117.²²

Elk Valley specifically “reject[ed] any notion of requiring complainants to prove that a decision was arbitrary or based on stereotypes precisely because to do so would improperly restrict the analysis from addressing the discriminatory impact of seemingly neutral policies and rules.”²³ Although the SCC majority did not explicitly mention other additional factors that have been improperly imported into the *prima facie* discrimination analysis in addiction disability cases, such as compulsion and absence of control, *Elk Valley* has been cited as broadly rejecting the importation of any additional factors. The SCC in *Elk Valley* clearly stated that the disability must merely be a factor in the adverse impact and “explicitly reject[ed] the notion of applying a higher standard.”²⁴ Accordingly, *Elk Valley* does not support the suggestion that it is necessary to establish that the employee’s compulsion to steal drugs from their employer, as a result of their addiction, was so strong as to eliminate any sense of choice or intention.²⁵ The Ontario Divisional Court asserted that, “As *Elk Valley* made clear, there are no additional words or concepts that should be added to the test for *prima facie* discrimination. Establishing

²² *Supra* note 1 at para 45.

²³ *Humber River*, *supra* note 18 at para 111.

²⁴ *Ibid* at para 119.

²⁵ *Ibid*; and *Sunnyside Home*, *supra* note 18 at para 168.

such things as ‘compulsion’ is not part of the test.”²⁶ There is no need to demonstrate an absence of control to establish the necessary connection between the employee’s misconduct and termination; *Elk Valley* acknowledged that there is a spectrum of addiction disability and whether the disability is a factor in the adverse impact depends on the particular facts and must be assessed on a case-by-case basis.²⁷

Elk Valley also confirmed that the protected ground must only be a factor in the adverse impact. The majority explicitly rejected the suggestion that a higher standard be imposed for establishing a connection between the disability and adverse impact in order to demonstrate prima facie discrimination:

Second, I see no need to alter the settled view that the protected ground or characteristic need only be “a factor” in the decision. It was suggested in argument that adjectives should be added: the ground should be a “significant” factor, or a “material” factor. Little is gained by adding adjectives to the requirement that the impugned ground be “a factor” in the adverse treatment. In each case, the tribunal must decide on the factor or factors that played a role in the adverse treatment. This is a matter of fact. If a protected ground contributed to the adverse treatment, then it must be material.²⁸

The SCC clearly stipulated that the disability must only be a factor, not a significant or causal factor, in the adverse impact. The majority’s statement indicating that the protected ground must be a factor in the decision, rather than the actual adverse impact, has been interpreted as an oversight and not an alteration of the prima facie discrimination analysis. Prima facie discrimination will be established where the employee’s addiction is a factor in their inability to comply with a workplace rule, regardless of whether the employer’s decision to discipline the employee was based on the misconduct, isolated from the disability that contributed to the misconduct.²⁹

²⁶ *Ontario Nurses’ Association v Cambridge Memorial Hospital*, 2019 ONSC 3951 at para 38.

²⁷ *Ontario Nurses’ Association v Royal Victoria Regional Health Centre*, 2019 ONSC 1268 at para 37.

²⁸ *Supra* note 1 at para 46.

²⁹ *Humber River*, *supra* note 18 at para 106.

Elk Valley and the subsequent jurisprudence appear to have resolved the competing approaches to addiction disability, clearly signaling that addiction-related misconduct in the workplace must attract a human rights approach, as opposed to a disciplinary-focused approach.³⁰ Although the SCC majority in *Elk Valley* did not make any mention of *Gooding*, the decision has prompted the explicit rejection of the *Gooding* approach to addiction disability cases. This hybrid disciplinary approach involved the application of a disciplinary or just cause analysis to the voluntary, culpable aspects of the employee's misconduct and a human rights analysis to the involuntary, non-culpable components, causally connected to the disability. Recall, the British Columbia Court of Appeal held that Mr. Gooding's alcohol dependency played no role in the employer's decision to terminate him for stealing alcohol. The court problematically concluded that, although Mr. Gooding's conduct may have been influenced by his alcohol dependency, it was irrelevant if the dependency played no role in the employer's decision to terminate his employment and he suffered no greater impact than any other employee would have for the same misconduct.

Although not widely adopted across Canada, the *Gooding* approach continued to be relied upon by employers and lingered in the addiction disability law landscape. Following the release of the *Elk Valley* decision, Ontario arbitrators and the Divisional Court have expressly denounced *Gooding*, recognizing that it is inconsistent with the established human rights analysis for workplace discrimination, most recently affirmed by the SCC in *Elk Valley*. The SCC made clear that discriminatory intent is not required to establish prima facie discrimination; the employee does not need to demonstrate that the employer treated him or her differently than it would have treated another employee accused of the same misconduct. As stated in *Humber River*, "To adopt the *Gooding* approach would be to read adverse effect discrimination out of our human rights analysis and to embrace a superficial understanding of discrimination that the Supreme Court of Canada has rejected."³¹ The SCC's confirmation of the prima facie discrimination

³⁰ Chisholm & Veltri, *supra* note 21 at 6-12.

³¹ *Humber River*, *supra* note 18 at para 113.

analysis and human rights principles in *Elk Valley* has elicited the consensual rejection of *Gooding*, at least in Ontario.

Addiction disability law in Canada has developed over the past decade and continues to evolve. The *Elk Valley* decision, although flawed, provided clarification and guidance to legal decision makers with respect to the principles to be applied in addiction disability cases, resulting in a progressive movement towards the broad, liberal human rights approach to cases of workplace discrimination and accommodation on the basis of drug and alcohol addiction. Applying fundamental human rights principles and the correct prima facie discrimination analysis, unencumbered by extraneous considerations and inappropriately imposed requirements, legal decision makers have recognized the clear connection between an employee's addiction and their termination for misconduct related to their disability, avoiding the superficial distinction between discipline for violating a workplace policy and discipline for misconduct related to the employee's disability. It is accepted that employees are not required to establish compulsion or a complete lack of control, rendering them completely incapable of making decisions or controlling their behaviour with respect to their addiction. Accepting and adopting the medical model of addiction, legal decision makers recognize that denial, dishonesty and relapse are common features of addiction and cannot be relied upon to preclude the employer's duty to accommodate to the point of undue hardship. While acknowledging the legitimate safety concerns of employers, legal decision makers have upheld the human rights laws and principles regarding the duty to accommodate and require employers to take steps to accommodate the employee and demand objective evidence of the employer's accommodation efforts and resulting claims undue hardship.

The guidance provided by the SCC in *Elk Valley* and the subsequent rejection and abandonment of disciplinary-centered approaches in the wake of *Elk Valley* has resulted in the more consistent application of the principled human rights approach to claims of discrimination on the basis of addiction disability. This is a very important step in rehabilitating Canadian addiction disability law and, hopefully, the momentum continues. As the post-*Elk Valley* addiction disability case law develops, I predict that the human rights approach, informed by the principles endorsed by the SCC in *Elk Valley*, will be

the predominant approach to addressing discrimination on the basis of addiction disability and the employer's duty to accommodate to the point of undue hardship. Time will tell.

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