

Conceptual Challenges in the Application of Discrimination Law in the Workplace

Stan Lanyon, QC¹

The 1999 Supreme Court of Canada decision in BC v BCGEU introduced a “unified approach” to the law of discrimination, rebutting the “conventional approach” represented by a trilogy of earlier religious discrimination cases. Since 1999 the courts, human rights tribunals, arbitrators, employers, and unions have attempted to apply this unified approach to a wide variety of discrimination cases. The issues of prima facie discrimination, accommodation, and undue hardship have presented new conceptual challenges for the unified approach. Through a summary of the relevant jurisprudence and an analysis of its application to a number of British Columbia Court of Appeal decisions, I examine these difficulties, and suggest that they can be most easily addressed within the existing framework by balancing the unified and conventional approaches.

La décision rendue par la Cour suprême en 1999 dans la cause BCGEU c British Columbia a introduit une « approche unifiée » quant au droit en matière de discrimination, réfutant de ce fait « l’approche conventionnelle » représentée par une trilogie de causes antérieures portant sur la discrimination religieuse. Depuis 1999, les tribunaux, les tribunaux des droits de la personne, les arbitres, les employeurs et les syndicats ont tenté d’appliquer cette approche unifiée dans un grand nombre de causes portant sur la discrimination. Les questions de discrimination, d’accommodement et de contrainte excessive ont présenté de nouveaux défis conceptuels à cette approche. Au moyen d’un résumé de la jurisprudence pertinente et d’une analyse de l’application de l’approche unifiée à certaines décisions de la Cour d’appel de la Colombie-Britannique, j’examine ces difficultés et je suggère qu’elles peuvent être résolues dans le cadre existant en trouvant un équilibre entre l’approche conventionnelle et l’approche unifiée.

¹ Stan Lanyon is a mediator/arbitrator in both the private and public sectors and has acted as a neutral in virtually every sector of the economy. He is also a member of the National Academy of Arbitrators. He has been a Professor adjunct at the University of British Columbia.

I. Introduction

The 1999 Supreme Court of Canada's decision in *BC v BCGEU* established a new "unified approach" to the law of discrimination.² This unified approach was a reaction to the "conventional approach" espoused in a trilogy of Supreme Court religious discrimination decisions, which took place between 1985–1992: *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*,³ *Central Alberta Dairy Pool v Alberta*,⁴ and *Central Okanagan School District No 23 v Renaud*.⁵ This trilogy had introduced the concepts of adverse effect discrimination, the duty to accommodate, and undue hardship; concepts borrowed from American jurisprudence but reshaped to fit the Canadian context.

Since *Meiorin*,⁶ the courts, human rights tribunals, arbitrators, employers, and unions have attempted to apply this new unified approach to different forms of discrimination: specifically to drug and alcohol addiction, to marital and family status, and to mental illness. In addressing these forms of discrimination, the issues of *prima facie* discrimination, accommodation, and undue hardship have presented new conceptual challenges.

This paper begins with a brief history of human rights legislation in Canada, particularly in British Columbia. It then summarizes the Supreme Court of Canada's trilogy of decisions dealing with religious discrimination, followed by the Court's response to these three decisions set forth in *Meiorin*,⁷ where the Court crafted a new unified approach. I will then review a number of BC Court of Appeal decisions that attempt to apply this new unified approach in the areas of drug and alcohol addiction and marital and family status. I conclude that the challenges of applying this new unified approach can be addressed within the existing framework by balancing the unified approach with elements of the older conventional approach.

Finally, the purpose of this paper is not to conduct a detailed review of all the recent decisions by courts, administrative tribunals and arbitrators; rather, it is to examine the general principles and the sometimes difficult challenges of applying them.

² *British Columbia (Public Service Employee Relations Commission) v The British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*].

³ *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536, SCJ No 74 [*O'Malley*].

⁴ *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, SCJ No 80 [*Central Alberta*].

⁵ *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, SCJ No 75 [*Renaud*].

⁶ *Meiorin*, *supra* note 2.

⁷ *Ibid.*

II. Brief History of Human Rights Legislation

In an article entitled, “Human Rights Reform: Again?” Heather MacNaughton provides a comprehensive historical overview of human rights legislation in Canada.⁸ Ms. MacNaughton explained that the first human rights legislation arose in the Province of Ontario in response to the atrocities of the Second World War. The *Racial Discrimination Act 1944* prohibited the publication or broadcast of anything indicating an intention to discriminate in employment on the basis of race or creed (religion).

As Ms. MacNaughton described, this was followed in Saskatchewan with the *Saskatchewan Bill of Rights Act* in 1947, which established “equality rights in employment, housing and property, land transactions and education, as well as establishing fundamental freedoms and political rights.”⁹ However, under the Saskatchewan legislation enforcement was by means of prosecution for a “penal offense,” which required proving a violation beyond a reasonable doubt.

In 1962 Ontario became the first province to establish a human rights commission and to consolidate various fair-practice statutes and anti-discrimination provisions into a comprehensive human rights code: the *Ontario Human Rights Code*.

The first human rights legislation passed in British Columbia was the *Equal Pay Act* in 1953, which prohibited wage discrimination.¹⁰ In 1969 British Columbia passed the *Human Rights Act*,¹¹ which consolidated the *Equal Pay Act*¹² the 1956 *Fair Employment Practices Act*,¹³ and the 1961 *Public Accommodation Practices Act*.¹⁴ The 1969 Act protected against discrimination on the basis of “race, religion, colour, nationality, ancestry, or place of origin of that person or class of persons.”¹⁵ In 1973 British Columbia established its Human Rights Commission and added four new grounds to the protected list: sex, marital status, age and political belief.¹⁶ In 1984 the *Human Rights Act* added mental and physical disability.¹⁷ In 1992 the grounds of family status and sexual orientation were added.¹⁸

In 1996 the new *Human Rights Code* restructured the Human Rights Commission and Tribunal, instituted an advisory council, and placed an

⁸ Heather MacNaughton, “Human Rights Reform: Again?” (2011), 74 Sask L Rev 235.

⁹ *Ibid* at 237.

¹⁰ *Equal Pay Act*, 1953 SBC (2d Sess), c 6.

¹¹ *Human Rights Act*, SBC 1969, c 10.

¹² *Equal Pay Act*, *supra* note 10.

¹³ *Fair Employment Practices Act*, SBC 1956, c 16.

¹⁴ *Public Accommodation Practices Act*, SBC 1961, c 50.

¹⁵ *Human Rights Act*, SBC 1969, c 10, s 10 [HRA 1969].

¹⁶ *Human Rights Code*, SBC 1973 (2d Sess), c 119, s 9(2) [HRC 1973].

¹⁷ *Human Rights Act*, SBC 1984, c 22.

¹⁸ *Human Rights Amendment Act*, 1992, SBC 1992, c 43.

important focus on systemic discrimination: “to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the *Code*.”¹⁹ Then Bill 64,²⁰ the *Human Rights Code Amendment Act, 2002*, was passed, and came into force March 31, 2003, eliminating the Human Rights Commission and creating a direct-access tribunal.²¹ The most notable recent amendment, 2007’s *Human Rights Code (Mandatory Retirement Elimination) Amendment Act*, prevents employers from requiring employees to retire merely because they are 65 years or older.²²

III. Current Human Rights Code

Section 13 of British Columbia’s *Human Rights Code* prohibits discrimination in employment. 13(1) enumerates the grounds upon which it is unlawful to discriminate, while the statutory defense of a *bona fide* occupational requirement [BFOR] is set out in 13(4):

Discrimination in employment

13(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.*

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a *bona fide* scheme based on seniority, or
 (b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a *bona fide* retirement, superannuation or pension plan or to a *bona fide* group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) *do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.*²³

Section 2 states that “intention” is not a requirement for contravention of

¹⁹ *Human Rights Code*, RSBC 1996, c 210, s 3(d) [HRC].

²⁰ Bill 64, *Human Rights Code Amendment Act*, 3rd Sess, 37th Parl, British Columbia, 2002 (assented to 31 October 2002).

²¹ *Human Rights Code Amendment Act*, SBC 2002, c 62, amending RSBC 1996, c 210.

²² *Human Rights Code (Mandatory Retirement Elimination) Amendment Act*, SBC 2007, c 21.

²³ HRC, *supra* note 19 at s 13 [emphasis added].

the *Code*.²⁴ Section 3 lays out the purposes the *Code*'s purposes:

Purposes

3 The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code;
- (f) and (g) [Repealed 2002-62-2.]²⁵

Section 4 states that in the event of a conflict between the *Code* and another enactment, the *Human Rights Code* prevails.²⁶ Section 4 is the statutory recognition of the Supreme Court of Canada's decisions in *Insurance Corporation of British Columbia v Heerspink*²⁷ and *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*,²⁸ both of which concluded that human rights legislation is "fundamental law," and as a result, enjoys quasi-constitutional status.

Similarly, parties may not contract out of human rights legislation.²⁹ Further, human rights legislation is incorporated into all collective agreements.³⁰ Ultimately, following *O'Malley*, human rights codes are to be interpreted broadly and purposefully, and are remedial in nature.³¹

IV. The Supreme Court of Canada's Religious Discrimination Trilogy, 1985 – 1992: *O'Malley*, *Alberta Dairy*, and *Renaud*

Theresa O'Malley was a salesperson at Simpsons-Sears in Kingston, Ontario. Larry Renaud was employed as a custodian for a school district. Both Ms. O'Malley and Mr. Renaud were Seventh-Day Adventists. The Church's Sabbath ran from sundown Friday to sundown Saturday. Both Ms. O'Malley and Mr. Renaud were required to work during this period of time. Ultimately, Ms. O'Malley agreed

²⁴ *Ibid* at s 2.

²⁵ *Ibid* at s 3 [emphasis added].

²⁶ *Ibid* at s 4.

²⁷ *Insurance Corporation of British Columbia v Heerspink*, [1982] 2 SCR 145, 39 BCLR 145.

²⁸ *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 8 CHRR 4210.

²⁹ *Ontario (Human Rights Commission) v Etobicoke*, [1982] 1 SCR 202, 132 DLR (3d).

³⁰ *Parry Sound District Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, 2 SCR 157 [*Parry Sound*].

³¹ *O'Malley*, *supra* note 3.

to become a part-time employee, however, she sought compensation for the difference between her full- and part-time wages. Mr. Renaud, after his refusal to work Friday afternoon shifts, was terminated.

Mr. Christie was a member of the World Wide Church of God. A central tenet of the Church was a Saturday Sabbath and ten other holy days. Mr. Christie requested Easter Monday off, but the employer refused. When Mr. Christie failed to show up for work on Easter Monday, he was fired.

These three Supreme Court of Canada decisions changed the nature and scope of discrimination law. No longer was discrimination limited to intentional acts. Justice McIntyre in *Simpson-Sears* concluded that intention was not a “governing factor” when construing human rights legislation.³² Rather, it was the result or the effect of any discriminatory actions that was most significant. The Court adopted from the American jurisprudence the concepts of adverse effect discrimination, the duty to accommodate, and undue hardship.

Justice McIntyre explained that acts of direct discrimination are rules or policies that discriminate on their face in respect of a prohibited ground; conversely, acts of indirect or adverse effect discrimination are policies or rules that on their face are neutral, and apply equally to all employees, but have a discriminating effect on one or more employees in respect of a prohibited ground:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, “No Catholics or no women or no blacks employed here.” There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a *prima facie* case of discrimination based on creed before the Board of Inquiry.³³

³² *Ibid* at para 14.

³³ *Ibid* at para 18.

Different remedies flowed from direct and indirect discrimination. In cases of direct discrimination, if a rule was found not to be “reasonably necessary” to the performance of the work at issue, then the entire rule was struck down. However, in cases of indirect or adverse effect discrimination, if the rule was found to be neutral on its face, and “rationally connected” to the performance of the work in issue (a lower test), then the rule would remain in force, and only the adverse effect on one or more employees needed to be addressed; the employer was required to accommodate affected employees.

The duty to accommodate, which was not found in the legislation, required an employer to take reasonable measures to accommodate the employee, up to the point of undue hardship. The Court said that the concepts of “reasonable” and “short of undue hardship” are not “independent criteria but are alternate ways of expressing the same concept.”³⁴ Therefore, some hardship was acceptable. Factors that constituted undue hardship included “financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities.”³⁵ Also included are issues such as safety and the size of the employer’s operation.³⁶ No employee was entitled to a “perfect solution,” only to an accommodation that was “reasonable in all the circumstances.”³⁷

An employer who was found guilty of indirect discrimination was often seen as an innocent discriminator. This was because a rule that was neutral on its face would be otherwise “valid in its general application.”³⁸ Most importantly, the duty to accommodate was “more in the nature of an exception from liability than an additional obligation.”³⁹ Further, the duty to accommodate was determined to be a “multi-party inquiry” involving the employee, the union, and the complainant.⁴⁰

Finally, Justice McIntyre in *O’Malley* described the circumstances of an employer and an employee as a case of a “special relationship.”⁴¹

V. Meiorin

Tawney Meiorin was a forest firefighter with the British Columbia government. She had performed her work well in the past; however, when the government adopted a new series of fitness tests, including a 2.5-km run designed to test aerobic capacity, she was unable to complete this test. As a

³⁴ *Renaud*, *supra* note 5 at para 19.

³⁵ *Central Alberta*, *supra* note 4 at para 62.

³⁶ *Ibid.*

³⁷ *Renaud*, *supra* note 5 at para 44.

³⁸ *Ibid.* at para 25.

³⁹ Justice Sopinka’s reasons in dissent, *Central Alberta*, *supra* note 4 at para 69.

⁴⁰ *Renaud*, *supra* note 5 at para 43.

⁴¹ *O’Malley*, *supra* note 3 at para 22.

result she lost her employment.

The arbitrator concluded that there had been adverse effect discrimination because the new aerobic standard had a disproportionately negative effect on women, who, unlike men, not only had a lower aerobic capacity but also an inability to increase that aerobic capacity with training. He ordered Ms. Meiorin reinstated.

The Supreme Court of Canada found that Ms. Meiorin's inability to meet this aerobic capacity test was not necessary to the safe and efficient performance of the position of a forest firefighter. The reasons for the Court's decision were written by Justice McLachlin (as she then was).

A. Conventional Approach

First, Justice McLachlin described the conventional analytical approach to discrimination outlined in *O'Malley*, *Central*, and *Renaud*.⁴² She wrote that this approach represented a "significant step" in recognizing, for the first time, the harm of adverse effect discrimination – that a rule may be neutral on its face but adverse in its effect on an employee or group of employees. However, she stated that this distinction between direct and indirect discrimination was unnecessarily complex and artificial. She set out multiple criticisms (seven in total) that, over time, had arisen in applying this conventional approach.

In summary, the Court held that the "threshold distinction" between direct and indirect discrimination was both malleable and conclusion driven. Accordingly, the division of remedies corresponding to the distinction between direct and indirect discrimination could not be justified. Moreover, depending upon whether complainants alleged direct or indirect discrimination, they may have been afforded different degrees of protection.

A significant factor in the Court's analysis is that the distinction between direct and indirect discrimination may "serve to legitimize systemic discrimination."⁴³ For example, if a rule or policy is characterized as indirect discrimination, thus neutral on its face, the underlying norms of the rule may remain unquestioned. The role of accommodation in such circumstances may then be construed as a mechanism to fit employees into the existing status quo, as represented by the specific rule or policy. Thus, in *Meiorin*, indirect discrimination had the effect of "entrench[ing] the male norm as the 'mainstream' into which women must integrate."⁴⁴

Under this analysis of the conventional approach, Justice McLachlin wrote that the concept of accommodation was rooted in a model of "formal equality."⁴⁵

⁴² *Meiorin*, *supra* note 2 at paras 19-24.

⁴³ *Ibid* at para 39.

⁴⁴ *Ibid* at para 36.

⁴⁵ *Ibid* at para 41.

However, this formal equality undermines the “promise of substantive equality,”⁴⁶ and leaves unchallenged issues of systemic discrimination.

It is clear that the Court’s decision in *Meiorin* promotes a new approach to the nature and scope of equality. This new approach is evident in three aspects: first, in the distinction between formal and substantive equality; second, in the characterization of the concept of accommodation; and third, in the notion that equality should be built into workplace rules and standards.

It should be recalled that Justice Sopinka in *Renaud* stated that a rule that was neutral on its face, but discriminatory in its effect, was nonetheless “valid in its general application.”⁴⁷ Justice Sopinka’s dissent in *Alberta Dairy* characterized accommodation as “this perspective, the duty is more in the nature of an exception from liability than an additional obligation.”⁴⁸

In contrast, Justice McLachlin wrote that a rule neutral on its face, but discriminatory in its effect, is not a valid rule; further, that it ought to be expressly characterized as discriminatory and should not remain in effect. In her view, the conventional approach intentionally left in place standards that incorporated discriminatory norms with “...the law’s approval. This cannot be right.”⁴⁹

Justice McLachlin cited S. Day and G. Brodsky’s article, “The Duty to Accommodate: Who Will Benefit?,”⁵⁰ which concludes that the concept of accommodation fails to challenge the substantive norms underlying workplace rules; on that basis, it may be an instrument to fit individuals within inherently discriminatory rules. The result may be to shield systemic discrimination from scrutiny. Accommodation framed in this way, as Day and Brodsky wrote, is “rooted in the formal model of equality.”⁵¹ Under this approach, accommodation amounts primarily to *assimilation*. Justice McLachlin affirmed these conclusions:⁵²

I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination...

With respect to the distinction between formal and substantive equality, Anne F. Bayefsky’s article “Defining Equality Rights”⁵³ conducts a comprehensive examination of the Charter of Rights and Freedoms equality

⁴⁶ *Ibid.*

⁴⁷ *Renaud*, *supra* note 5 at para 25.

⁴⁸ *Central Alberta*, *supra* note 4 at para 69.

⁴⁹ *Meiorin*, *supra* note 2 at para 42.

⁵⁰ Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996), 75 *Can Bar Rev* 433 at 466.

⁵¹ *Ibid* at 462, cited in *Meiorin*, *supra* note 2 at para 41.

⁵² *Meiorin*, *supra* note 2 at para 41.

⁵³ Anne F Bayefsky, “Defining Equality Rights,” in Anne F Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1.

provisions soon after their enactment. Formal equality includes the concept that all people are equal before the law. Under this doctrine, the law is administered impartially, regardless of a person's status, and it is administered by courts and tribunals to protect the rights of all individuals under the law. It is a form of procedural equality rather than a guarantee of a substantive equality. By itself, it guarantees that all individuals should be free to pursue their own goals, and any barriers that may exist (for example, bigotry), would be removed.

Conversely, equality of results or outcome attempts to achieve more equality in respect to the actual assignment of rights and resources. This does not mean absolute equality, but it does mean that there is a deliberate attempt to reduce present inequalities. This is termed "substantive equality" or "substantive equal protection."⁵⁴ This may involve both affirmative action and affirmative remedies. In terms of affirmative action it may be that measures are directed towards equality of opportunity; for example, additional assistance is provided to minority groups in respect of educational opportunities. Or it may involve affirmative remedies such as increasing the representation of certain minorities to reflect their actual proportion of the population.

It is the express purpose of Justice McLachlin's reasons in *Meiorin* to shift human rights jurisprudence from formal equality to substantive equality; that is, that human rights legislation be interpreted in accordance with the principles of substantive equality.

This approach is meant not only to transform the task of interpreting human rights legislation generally, but also to address the very purpose underlying the concept of accommodation. Accommodation is no longer seen as simply a "saving or a justification provision" for the employer, or as a device that preserves "neutral" discriminatory standards, but rather as a legal mechanism for *advancing equality*. Thus, we move from Justice Sopinka's conception in *Alberta Dairy* of accommodation as an exception from liability, to Justice McLachlin's conception in *Meiorin* of accommodation as an added legal obligation that requires the employer to demonstrate that it is "impossible" to accommodate individual employees without imposing an undue hardship on the employer.⁵⁵

B. Unified Approach

Justice McLachlin set out three underlying reasons for adopting a unified approach: first, to avoid the problematic distinctions between direct and indirect discrimination; second, to accommodate as reasonably as possible the characteristics of individual employees in setting workplace standards;

⁵⁴ *Ibid* at 16.

⁵⁵ *Meiorin*, *supra* note 2 at para 54.

and thirdly, to take a “strict approach” to exemptions from the duty not to discriminate while permitting exceptions that are reasonably necessary to workplace objectives. She then set out the three-step test for determining whether a *prima facie* discriminatory standard is a BFOR:

4. Elements of a Unified Approach

Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.⁵⁶

The first step of the test involves assessing the general purpose of the rule or standard. For example, does the standard ensure the safe and efficient performance of work?

The second step addresses whether the standard was adopted in good faith.

Thus, under the first two steps, standards or policies, whether reviewed objectively or subjectively, will be examined to ensure that they do not have a discriminatory foundation. As a practical matter, however, these first two steps are rarely challenged. The parties focus inevitably on the third step.

The third step is the test of reasonableness. Is the rule or standard necessary in order to accomplish its legitimate purpose? In order to demonstrate this, the employer must show that it cannot accommodate the complainant without suffering undue hardship. Both the process of accommodation and the substantive content of the specific accommodation are reviewed.⁵⁷ Finally, Justice McLachlin wrote that employers must build “conceptions of equality” into the workplace standards:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the

⁵⁶ *Ibid.* at 53.

⁵⁷ *Ibid.* at para 66.

performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard *itself* is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.⁵⁸

Having set out the development of the law to date, the next task is to illustrate the difficulties that have arisen in the application of this law to emerging issues in the workplace.

VI. Analysis

A. Introduction

As we have seen, the early human rights legislation addressed only intentional discrimination. The Supreme Court of Canada in *O'Malley* broadened the scope of the law to include indirect or adverse effect discrimination as well as the concepts of accommodation and undue hardship.⁵⁹ Section 2 of the British Columbia *Human Rights Code* now incorporates the Supreme Court of Canada's dictum that intent is no longer required in order to show a contravention of human rights legislation.⁶⁰

As well, the grounds of discrimination have expanded. For example, the original Saskatchewan legislation from 1947 set out the grounds of race and creed (religion). In 1969 the British Columbia *Human Rights Act* listed "race, religion, colour, nationality, ancestry or place of origin";⁶¹ in 1973 British Columbia got its first *Human Rights Code*,⁶² and the grounds were expanded to include sex, marital status, age and political belief; in 1984 mental and physical disability were added; in 1992 the grounds of family status and sexual orientation were added; and in 2008 the grounds of the age were amended to permit employees to work beyond the age of 65 years.

Traditionally the substance of anti-discrimination law has been concerned with protecting individuals from arbitrary distinctions based on race, gender or religion. To exclude individuals based on traits that are considered to be immutable (race, gender), over which a person has no control, and have

⁵⁸ *Ibid* at para 68 [emphasis in original].

⁵⁹ *O'Malley*, *supra* note 3.

⁶⁰ *Ibid*.

⁶¹ *HRA 1969*, *supra* note 15.

⁶² *HRC 1973*, *supra* note 16.

nothing to do with their actual abilities, is seen as arbitrary, unjust and morally repugnant. In addition, there may be groups of persons who have been subjected to historic and pervasive discrimination (for example, religious groups).

In *Withler v Canada (Attorney General)*, Chief Justice McLachlin and Justice Abella, writing on behalf of the Court, provided a helpful comment about the nature of both enumerated and analogous grounds under Section 15(1) of the *Charter of Rights and Freedoms*:

The first step in the s. 15(1) analysis ensures that the courts address only those distinctions that were intended to be prohibited by the *Charter*. In *Andrews [Andrews v. Law Society of British Columbia]*, [1989] 1 S.C.R. 143], it was held that s. 15(1) protected only against distinctions made on the basis of the enumerated grounds or grounds analogous to them. An analogous ground is one based on a “personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13. Grounds including sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination.⁶³

Section 15(1) of the *Charter* lists the following enumerated grounds “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” It does not list the analogous grounds of sexual orientation, marital status or citizenship.

Withler is critical of the comparator group analysis approach to section 15. Although it readily affirmed that equality is a “comparative concept,”⁶⁴ the Court saw this analysis as rooted in formal equality rather than substantive equality:

Both the inquiries into perpetuation of disadvantage and stereotyping are directed to ascertaining whether the law violates the requirement of substantive equality. Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

It follows that a formal analysis based on comparison between the claimant group and a “similarly situated” group, does not assure a result that captures the wrong to which s. 15(1) is directed – the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison

⁶³ *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 33, 1 SCR 396 [emphasis added].

⁶⁴ *Ibid* at para 41.

with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.⁶⁵

The Supreme Court of Canada in *Moore v British Columbia* cited *Withler* in rejecting the use of comparator group analysis in finding discrimination under British Columbia's *Human Rights Code*.⁶⁶ *Withler* and *Moore* continued the Court's focus on substantive equality, which began with *Meiorin*.

The facts in *O'Malley*,⁶⁷ *Central Alberta*,⁶⁸ and *Renaud*⁶⁹ all dealt with religious discrimination. The facts in *Meiorin* dealt with gender discrimination.⁷⁰

Since the decision in *Meiorin*, issues and circumstances have arisen in the workplace that involve personal characteristics that have not traditionally been considered to be "immutable or changeable only at unacceptable cost to personal identity." These include such issues as treatable illnesses and marital and family status. These issues have raised conceptual challenges in respect to the concepts of *prima facie* discrimination, accommodation and undue hardship.

Meiorin is a remarkable and somewhat unique decision. It has a strong moral vision of equality and a vigorous legal policy designed to achieve it. The challenge, therefore, is not only to preserve the underlying purposes and goals of the *Meiorin* policy, and the advancement of its analysis, but also to adapt it to the conceptual challenges presented by new circumstances of discrimination.

B. *Prima Facie* Test

i. *Traditional Test*

The B.C. Court of Appeal in *Health Employers' Association of British Columbia v. British Columbia Nurses' Union* set out what is required to establish a *prima facie* case of discrimination. Chief Justice Finch stated the following:

Discrimination is defined in s. 1 of the *Human Rights Code* to include conduct that offends s. 13(1)(a). A finding that there was a "refusal to continue to employ a person" on the basis of a prohibited ground is discrimination. Therefore, under s. 13(1)(a), to establish a *prima facie* case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment: *Martin*

⁶⁵ *Ibid* at paras 39-40.

⁶⁶ *Moore v British Columbia (Education)*, 2012 SCC 61 at para 30, 351 DLR (4th) [Moore].

⁶⁷ *O'Malley*, *supra* note 3

⁶⁸ *Central Alberta*, *supra* note 4.

⁶⁹ *Renaud*, *supra* note 5.

⁷⁰ *Meiorin*, *supra* note 2.

v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile), [2001] B.C.H.R.T.D. No. 39 (QL), 2001 BCHRT 37 at para. 22, [Martin].⁷¹

This is known as the “traditional” *prima facie* test. It derives from the Supreme Court of Canada decision in *O’Malley*.⁷² Thus, if a complainant falls within one of the enumerated or protected classes, has been subject to adverse treatment, and status (or disability) was a “factor” in the adverse treatment, then a *prima facie* case has been established. Further, in *Kemess Mines* the B.C. Court of Appeal affirmed that disability need only be “a factor,” and not necessarily the sole or overriding factor, in any adverse treatment.⁷³

The Supreme Court of Canada in *Moore* recently affirmed this traditional three-part *prima facie* test with regard to a matter arising under the British Columbia *Human Rights Code*.⁷⁴

ii. *Treatable Illness – Alcohol and Drug Addiction*

I was the original arbitrator dealing with two matters that went to the British Columbia Court of Appeal and are addressed in the next sections of this paper: *BC v BCGSEU* in 2008⁷⁵ and *Health Sciences Association of BC v Campbell River and North Island Transition Society* in 2004.⁷⁶

The facts in the British Columbia Court of Appeal decision in *Gooding* involved a liquor store manager, Mr. Gooding, who stole alcohol from his employer, a government liquor store. The facts were egregious. He stole alcohol several times a week for a year, based on a particular scheme. Mr. Gooding was fired for theft. Medical evidence established that he was an alcoholic. Alcoholism falls within the ambit of physical and mental disability under section 13 of the *Human Rights Code*.⁷⁷

The majority of the B.C. Court of Appeal concluded that there was no *prima facie* discrimination. It stated that Mr. Gooding’s alcoholism played no part in the employer’s decision to terminate him. He was dismissed, not because he was an alcoholic, but because he committed theft. His dismissal, therefore, was not based on any stereotypical or preconceived notions of alcoholism, or his status as an alcoholic. His misconduct (the theft) attracted no greater prejudice in comparison to other employees who commit theft. Justice Huddart relied on Justice Abella’s comments on the nature of discrimination as set out in

⁷¹ *Health Employers Association of British Columbia (Kootenay Boundary Regional Hospital) v British Columbia Nurses’ Union*, 2006 BCCA 57 at para 38, 54 BCLR (4th) 113 [HEABC v BCNU] [emphasis in the original].

⁷² *O’Malley*, *supra* note 3.

⁷³ *Kemess Mines Ltd v International Union of Operating Engineers Local 115*, 2006 BCCA 58, 4 BCLR (4th) 252 [Kemess Mines].

⁷⁴ *Moore*, *supra* note 66 at para 33.

⁷⁵ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union*, 2008 BCCA 357, 63 CHRR 1 [Gooding].

⁷⁶ *Campbell River and North Island Transition Society v Health Sciences Association of British Columbia*, 2004 BCCA 260, 50 CHRR 140 [Campbell River].

⁷⁷ *Handfield v North Thompson School District No 26*, (1995) 25 CHRR D/452, [1995] BCCHR D No 4 (QL).

McGill University Health Centre,⁷⁸ citing from those reasons in *Gooding*:

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 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.

I am reinforced in my view by three recent decisions of the Supreme Court of Canada, where allegedly discriminatory conduct by employers was considered. In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, Abella J., in concurring reasons with which the Chief Justice and Bastarache J. agreed, addressed the need for a finding of *prima facie* discrimination. After noting the central importance of that finding and referencing the definitions of "discrimination" in the *Charter of human rights and freedoms*, R.S.Q., c. C-12, and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, she wrote:

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

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

I can find no suggestion in the evidence that Mr. Gooding's termination was arbitrary and based on preconceived ideas concerning his alcohol dependency. It was based on misconduct that rose to the level of crime. That his conduct may have been influenced by his alcohol dependency is 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.⁷⁹

⁷⁸ *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'hôpital général de Montréal*, 2007 SCC 4, 1 SCR 161 [*McGill University Health Centre*].

⁷⁹ *Gooding*, *supra* note 75 at para 11.

There has been criticism of this approach.⁸⁰ In summary, this criticism is as follows: the Court appears to require an adjudicator to focus on the state of mind of the alleged discriminator. Thus, if the employee's membership in a protected group was not a factor in an employer's decision, then that decision cannot be found to be discriminatory. This stands in conflict with the longstanding jurisprudence that intention is not required to find discrimination; and it is also in conflict with section 2 of the *Human Rights Code* – that intention is not a requirement for a finding of contravention of the *Code*.

More recently, the British Columbia Court of Appeal in *Armstrong v British Columbia*⁸¹ stated that it was not necessary to demonstrate that adverse treatment had been based on arbitrariness or stereotypical presumptions. Rather, this requirement is incorporated in the third element of the *prima facie* test (that disability was a factor in the adverse treatment):

The parties made extensive submissions to us with respect to the issue of whether, on the basis of *McGill University Health Centre* and *Gooding*, there is now a requirement to show that the adverse treatment was based on arbitrariness or stereotypical presumptions. In my view, such separate requirement does not exist, and the goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the *prima facie* test. After making reference to stereotyping and arbitrariness in para. 48 of *McGill University Health Centre*, Abella, J. went on to explain in para. 49 that the test for *prima facie* discrimination therefore requires that there be a link between the group membership and the adverse treatment. In any event, the adjudicator in this case only required Mr. Armstrong to satisfy the three steps of the *prima facie* test and did not require him to also prove that the Province's decision not to fund PSA screening tests was based on arbitrariness or stereotypical presumptions.⁸²

The minority in *Gooding* held that *prima facie* discrimination had been established. The evidence at arbitration had found a nexus between the misconduct (theft) and disability (alcoholism). Therefore, Madam Justice Kirkpatrick stated that it was reasonable on the evidence to infer that the disability was a factor in the adverse treatment. She held that *prima facie* discrimination had been established as follows:

On the evidence establishing the causal connection between the alcoholism and the theft of alcohol, it is reasonable to infer that Mr. Gooding's alcoholism was related to his termination for theft. Theft was the reason given for Mr. Gooding's termination;

⁸⁰ Patricia Janzen, Nicola Sutton & David G Wong, "Discrimination in Human Rights Law Twenty Years After Andrews" (Paper delivered at the CLEBC, November 2009) online: CLEBC Practice Points: Human Rights <<http://www.cle.bc.ca/PracticePoints>> at 1.1.7-1.1.8; Brian Etherington, "Recent Developments in the Duty to Accommodate Disabilities" in Allen Ponak, Jeffrey Sack & Brian Burkett, eds, *Labour Arbitration Yearbook 2012-2013*, 2d series (Toronto: Lancaster House, 2012) 403.

⁸¹ *Armstrong v British Columbia (Ministry of Health)*, 2010 BCCA 56, 2 BCLR (5th) 290 [*Armstrong*].

⁸² *Ibid* at 27.

there was not a reason for termination unrelated to his alcoholism.⁸³

The majority and minority decisions illustrate several conceptual difficulties: for example, both raise the issue of the nature and definition of discrimination in these circumstances. In the majority's view, the fact that the theft was influenced by Mr. Gooding's alcohol dependency was "irrelevant," since alcoholism "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."⁸⁴

In the minority's view, "Theft was the reason given for Mr. Gooding's termination; there was not a reason for termination unrelated to his alcoholism."⁸⁵

Thus, the criticism of the majority's approach is that if the termination of Mr. Gooding perpetuated the prejudice or disadvantage experienced by the disabled, in this case addicted employees, is it not reasonable to infer that this disability was linked to his termination? Conversely, the criticism of the minority is that it essentially reads out the third element of the *prima facie* discrimination test. One merely has to prove the first two elements, a disability and adverse treatment, and then simply infer the third element – the relationship between the two.

The importance of the requirement that adverse treatment be based on arbitrariness or stereotypical presumptions goes to the very definition of discrimination. The majority in *Gooding* relied upon Justice Abella's significant comment that there is a difference between rules and policies that make a distinction and those that are discriminatory; and thus, not every distinction is discriminatory. It is not enough to impugn an employer's conduct simply on the basis that what was done had a negative impact upon an individual in a protected group. It is the link between the group's membership and the arbitrariness or stereotypical conduct that gives rise to a human rights remedy.

However, it is fair to say that arbitrariness or stereotyping up to this point has generally not been a requirement for finding *prima facie* discrimination – perhaps because it is thought to speak to intent. Rather, in respect of the third factor of the *prima facie* test (the link or nexus between the protective characteristic and the adverse impact) the requirement applied most often has been a "because of" (referencing section 13 of the *Code*, "because of the race, colour, etc.") or a "but for" test; and it is this test that has been the subject of criticism.

This focus on effect raises evidentiary issues. Justice McLachlan stated in *Meiorin*, "a modern employer with a discriminatory intention would rarely frame

⁸³ *Gooding*, *supra* note 75 at para 61.

⁸⁴ *Ibid* at para 15.

⁸⁵ *Ibid* at para 61.

the rule in directly discriminating terms.”⁸⁶ Since intention is not a requirement to prove discrimination, and the focus is on effect, the evidentiary approach may be one that Justice Kirkpatrick described in her dissent as “a contextual approach.” A link must be established between misconduct, disability, and adverse treatment by way of a thorough review of the rule or policy at issue, the employer’s actions, the available expert evidence, the employee’s conduct and the union’s conduct. Overall this may place a greater evidentiary onus on the complainant. Traditionally, the concern is that placing a greater onus on a complainant may tend to decrease both the access to and the scope of equality rights; conversely, placing a greater burden on the defendant or the employer is thought to increase the scope of equality rights.

A serious criminal matter such as theft does not fit easily within the court’s test of either *prima facie* discrimination or the unified approach. It may well be that the courts will require a greater level of evidentiary scrutiny in respect to *prima facie* discrimination when faced with cases of alleged discrimination in circumstances that involve drug and alcohol addiction combined with criminal conduct. This may be the intention of the BCCA in *Gooding and Armstrong* with its adoption of Justice Abella’s remark that adverse treatment must be based upon arbitrariness or stereotypical assertions to establish *prima facie* discrimination.

This leads us to the next issue of family and marital status in which a higher level of *prima facie* discrimination is indeed required in British Columbia.

iii. Family Status

The British Columbia Court of Appeal in *Campbell River* was concerned with the issue of *prima facie* discrimination in respect of family status.⁸⁷ The complainant was a part-time child and youth support worker in a transition house that provided a safe shelter for women suffering from marital abuse, and also provided care for their children. The complainant’s son suffered from serious behavioural problems that her doctor stated required her to be home to provide after-school care. The transition house made a change in her hours of work (from 8:30 a.m. – 3:00 p.m. to 11:30 a.m. – 6:00 p.m.). This change was necessary to provide other school-aged children with counselling and care.

Both parties wanted to address the issue of *prima facie* discrimination, so they agreed to proceed to arbitration on this issue. The grievor did not intend to return to the workplace. At arbitration, therefore, the union asked for a just and equitable termination of the grievor, including damages. (A settlement was ultimately reached.)

The employer argued that family status was limited to the status of being

⁸⁶ *Meiorin*, *supra* note 2 at para 29.

⁸⁷ *Campbell River*, *supra* note 76.

a parent per se. The union relied on the Canadian Human Rights Tribunal decision in *Brown v Department of National Revenue*,⁸⁸ which concluded that whenever there was a conflict between a job requirement and a family obligation, *prima facie* discrimination was established. The arbitrator ruled in favour of the employer, concluding that family status was limited to the status of being a parent per se and did not apply to all conflicts between workplace rules and family obligations.⁸⁹ The parties made the same argument before the British Columbia Court of Appeal that they had made before the arbitrator. The Court rejected both arguments:

The parties have cited no other cases that assist in providing a working definition of the parameters of the concept of family status as the term is used in the *Code*. In my opinion, it cannot be an open-ended concept as urged by the appellant for that would have the potential to cause disruption and great mischief in the workplace; nor, in the context of the present case, can it be limited to “the status of being a parent per se” as found by the arbitrator (and as argued by the respondent on this appeal) for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.

If the term “family status” is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.⁹⁰

The Court was clearly concerned about the potential for the *Human Rights Code* to prohibit any term or condition of employment that interfered in any way with parental responsibilities. However, its attempt to strike a “middle ground” – by specifying that there had to be a serious interference with a substantial parental obligation – has been criticized. In *Johnstone v Canada* the Court rejected the additional requirement that there had to be a serious interference with a substantial parental or family obligation, ruling that family status discrimination claims should be subject to the same broad criteria as other grounds of alleged discrimination: “there is no obvious justification for relegating this type of

⁸⁸ *Brown v Canada (Department of National Revenue – Customs & Excise)*, [1993] CHR D No 7, 19 CHRR D/39.

⁸⁹ *Campbell River and North Island Transition Society v Health Sciences Association of British Columbia* (2002), 110 LAC (4th) 289, 2002 CarswellBC 3653 (WL Can).

⁹⁰ *Campbell River*, *supra* note 76 at paras 38-39 [emphasis added].

discrimination to a secondary or less compelling status.”⁹¹ In effect, the Court concluded that applying a higher *prima facie* standard in respect of family status resulted in a hierarchy of rights.

The determination of *prima facie* discrimination is a determination as to what constitutes discrimination in a particular circumstance. If discrimination is not established whenever a workplace rule conflicts with a family obligation, despite *Brown* then what is the definition of discrimination with respect to family status; and, what is the *prima facie* standard?

The British Columbia Court of Appeal in *Campbell River* stated that the Canadian Human Rights Tribunal in *Brown* had “conflated the issues of *prima facie* discrimination and accommodation.”⁹² In effect, what the Court is saying is that the tribunal passed through the test of *prima facie* discrimination and went straight to the duty to accommodate; that is, whenever there is a conflict between family obligation and a workplace rule, the employer is obligated to accommodate the employee. It is akin to ascribing to employees a free-standing right to be accommodated. On the other hand, the criticism directed at the British Columbia Court of Appeal is that it has conflated or subsumed into *prima facie* discrimination the concepts that more properly belong to a consideration of accommodation and undue hardship (a “serious interference”).⁹³

It seems to me that both criticisms are correct. Each analysis is open to the criticism that it is conclusion driven. This is the same criticism that was made with respect to the conventional approach in *Meiorin*. An analysis of *prima facie* discrimination inherently raises the definition of discrimination.

The Federal Court has recently issued its latest decision concerning Ms. Johnstone.⁹⁴ Ms. Johnstone, an employee of the Canada Border Service Agency [CBSA], asked to be scheduled to a permanent day shift so that she could better manage her daycare arrangements. Day shifts were available for part-time employees, but full-time employees were required to work a rotating shift schedule. CBSA offered her a part-time shift, but this would have had an adverse impact on her earnings, benefits, and pensions. The Canadian Human Rights Tribunal found in favour of Ms. Johnstone. The CBSA appealed the Tribunal’s decision to the Federal Court. The issue of the *prima facie* test and the *Campbell River* decision were once again addressed:

The Tribunal acknowledged that “not every tension that arises in the context of work-life balance can or should be addressed by human rights jurisprudence”. In my view the childcare obligations arising in discrimination claims based on family status must be one of substance and the complainant must have tried to reconcile family

⁹¹ *Johnstone v Canada (Attorney General)*, 2007 FC 36 at para 29, aff’d 2008 FCA 101, 306 FTR 271 [*Johnstone*].

⁹² *Campbell River*, supra note 76 at para 35.

⁹³ *Ibid* at para 39, 40.

⁹⁴ *Johnstone v Canada (Border Services Agency)*, 2013 FC 113, 357 DLR (4th) 706.

obligations with work obligations. However, this requirement does not constitute creating a higher threshold test of serious interference.

The Federal Court of Appeal held in *Morris*, *supra* at para 27:

In other words, the legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment.

This approach was followed in *Johnstone* FC and applies equally here.

In my view, the serious interference test as proposed by the Applicant is not an appropriate test for discrimination on the ground of family status. It creates a higher threshold to establish a *prima facie* case on the ground of family status as compared to other grounds. Rather, the question to be asked is whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way.⁹⁵

The Federal Court appears to have selected some of the language employed in the *Campbell River* decision, while rejecting the higher *prima facie* standard. However, even within the context of the Federal Court's articulated lower *prima facie* test, there is a clear shift in onus and responsibility to employees who must have "tried to reconcile family obligations with work obligations."⁹⁶

The Federal Court's standard in *Johnstone* is also arguably higher than that adopted by the Ontario Human Rights Tribunal in *Devaney v ZRV Holdings*, which found that any genuine inability to work due to family-care responsibilities places a duty on an employer to both investigate and to consider the request for accommodation.⁹⁷

The B.C. Human Rights Tribunal in *Miller v BCTF*⁹⁸ acknowledged that it was bound by the B.C. Court of Appeal approach to family status as set out in *Campbell River*,⁹⁹ but has been "declining to apply it outside the context of complaints of discrimination in employment."¹⁰⁰ The Tribunal went on to discuss the difficulty in establishing discrimination based on family status:

In the employment context, almost every work-related requirement has the potential to interfere, to some degree, with an employee's family obligations. Yet there are obvious societal and economic reasons why employers must be able to require their employees to work, and to do so at certain times and in certain places, regardless of the fact that employees might have conflicting childcare or other family responsibilities.

⁹⁵ *Ibid* at paras 120-21 and 128.

⁹⁶ *Ibid* at para 120.

⁹⁷ *Devaney v ZRV Holdings Limited*, 2012 HRTO 1590, 75 CHRR D/142 (available on CanLII).

⁹⁸ *Miller v BCTF (No 2)*, 2009 BCHRT 34 [*Miller*].

⁹⁹ *Campbell River*, *supra* note 76.

¹⁰⁰ *Miller*, *supra* note 98 at para 20.

Something more is necessary, in that context, to establish discrimination, and the Court of Appeal defined that something more as a “serious interference with a substantial parental or other family duty or obligation”. This is a way of defining, in that context, what is necessary to establish discrimination in the *substantive or purposive sense*.¹⁰¹

Therefore, the B.C. Human Rights Tribunal concluded that in order to establish *prima facie* discrimination in the employment context, the employee had to show that there was a significant interference with a substantial family obligation, and that in addition, the discrimination was substantive or purposive. The Tribunal then added this additional factor to the traditional three-part test:

In order to establish discrimination in the substantive or purposive sense in the circumstances of this case, Ms. Miller must demonstrate that:

- a. she is a member of a group characterized as having a particular “family status”;
- b. she experienced adverse treatment;
- c. that adverse treatment was related to her family status; and
- d. it constituted discrimination in the substantive or purposive sense.¹⁰²

C. Hybrid Test

A significant issue that arose in the *Gooding* arbitration¹⁰³ itself was the “hybrid test” established by the British Columbia Labour Relations Board in *Fraser Lake Sawmills*.¹⁰⁴ In describing this new hybrid test, the Board stated that an addicted employee’s misconduct may contain a mix of culpable and non-culpable factors. It described a “spectrum” of cases: at one end of the spectrum an addiction may bear no relationship to the misconduct, but at the other end, the employee’s conduct may be completely involuntary. In the middle of the spectrum there is a mix of non-culpable and culpable conduct:

In the context of issues involving addiction and workplace misconduct, a review of the arbitration cases reveals a spectrum of facts and issues. At one end of the spectrum, the addiction compels or drives the grievor’s behaviour to the extent of the grievor in effect having no control (at least control which should attract discipline) over his or her actions. At the other end of the spectrum there is addiction, but it is found to not have a causal link to the workplace misconduct.

In between these two ends of the spectrum are what could be termed hybrid facts and cases. In the hybrid context, there is addiction which is directly related to or has a causal connection to workplace misconduct by the employee, but the addiction

¹⁰¹ *Ibid* at para 26 [emphasis added].

¹⁰² *Ibid* at para 30.

¹⁰³ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union*, 2010 BCWLD 3392, 186 LAC (4th) 88.

¹⁰⁴ *Fraser Lake Sawmills Ltd v Industrial Wood and Allied Workers of Canada, Local Union Number 1-424*, 2003 BCLRB B390/2002 (available on CanLII) [*Fraser Lake Sawmills*].

is not of such a nature so as to remove the grievor's control or exercise of choice in respect to the misconduct. In this hybrid context, there is thus a mix of causes, a mix of addiction driven conduct (i.e., non-culpable conduct) and voluntary conduct (i.e. culpable conduct).¹⁰⁵

Under this new hybrid test the Labour Relations Board concluded that the *Labour Code* requires an arbitrator to consider both culpable and non-culpable remedies:

The nature of hybrid cases will mean that the response adopted by an arbitrator may well contain aspects or elements usually associated with both traditional culpable and non-culpable approaches. There may be a need for some corrective action, which would traditionally be associated with a culpable approach. It may also be appropriate for an arbitrator to conclude that, notwithstanding the presence of some blameworthy behaviour, a largely therapeutic, rehabilitative response is required in the circumstances. It is also now well recognized that because of the nature of the disease, an appropriate therapeutic response may itself require a measure of clear consequences aimed at forcing the employee to take responsibility for his or her treatment and actions (which would normally be associated with a culpable approach) as well as the rehabilitative component (which would normally be associated with a non-culpable approach). Also, a basic question to be answered by the arbitrator in dismissal cases, regardless of the approach used, will be whether the employment relationship remains viable.¹⁰⁶

The British Columbia Court of Appeal approved the hybrid test in two decisions: *Kemess Mines*¹⁰⁷ and *HEABC v BCNU*.¹⁰⁸

The British Columbia Labour Relations Board also concluded that the "... duty to accommodate will arise and must be addressed in respect to the non-culpable portion of a set of facts."¹⁰⁹ In *Kemess Mines*,¹¹⁰ the Court stated that when an arbitrator applies the hybrid analysis he or she must keep the just-cause analysis (the culpable conduct) separate from the human-rights analysis (the non-culpable conduct) to ensure that "...all the factors necessary for a full human rights analysis are considered":¹¹¹

It is important to recall that when applying a hybrid analysis, arbitrators are asked to keep the culpable and non-culpable analyses separate. In *Fording Coal*, *supra*, Madam Justice Huddart said:

[80] ... the principles of just and reasonable cause and the duty to accommodate can be analyzed most effectively by being kept separate conceptually. A separate consideration of the two concepts permits a focus on the decision, rule, or conduct alleged to be discriminatory and the response of the employer, union,

¹⁰⁵ *Ibid* at paras 38-39.

¹⁰⁶ *Ibid* at para 91.

¹⁰⁷ *Kemess Mines*, *supra* note 73.

¹⁰⁸ *HEABC v BCNU*, *supra* note 71.

¹⁰⁹ *Fraser Lake Sawmills*, *supra* note 104 at para 104.

¹¹⁰ *Kemess Mines*, *supra* note 73.

¹¹¹ *Ibid* at para 50.

or complainant to that conduct. It is to be recalled that the duty to accommodate arises only where there has been discrimination.

Keeping the analyses separate helps ensure that all the factors necessary for a full human rights analysis are considered. Of course, as the Labour Relations Board said in *Fraser Lake Sawmills* the remedy ordered may well blend the culpable and non-culpable elements.¹¹²

However, this hybrid policy may not be limited only to the arbitral policy established by the B.C. Labour Relations Board. Arbitrator Steeves in *Rio Tinto Alcan Primary Metal*¹¹³ concluded that an arbitrator, where the findings of fact require it, is bound to apply the just-cause analysis set out in section 84(1) of British Columbia's *Labour Relations Code*,¹¹⁴ and at the same time, is required to apply the *Human Rights Code* as a result of the Supreme Court of Canada decision in *Parry Sound*.¹¹⁵ The just-cause standard is set out in *Wm Scott and Company*.¹¹⁶ It is a three-step analysis:

[1] First, has the employee given just and reasonable cause for some form of discipline by the employer? [2] If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? [3] Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?¹¹⁷

This test is not limited to British Columbia. It has been adopted as the just-cause standard across Canada.

The Supreme Court of Canada in *Parry Sound*¹¹⁸ made clear that human rights codes are incorporated into all collective agreements. Therefore, within the collective agreement context an arbitrator has the jurisdiction to interpret and apply both statutory regimes. This is in contrast to a human rights adjudicator, whose primary concern is the issue of discrimination under the *Human Rights Code*.

The legal and practical result in cases of alcohol and drug addiction is twofold. First, combining the just-cause and the human rights analyses most often results in employees who are alcohol or drug addicted being reinstated in the first instance, even in the face of serious misconduct. It must be recalled that human rights legislation takes precedence over other enactments. Thus, in the conduct of a hearing concerning a hybrid issue, it often makes sense to

¹¹² *Ibid* at paras 49-50.

¹¹³ *Rio Tinto Alcan Primary Metal (Kitimat/Kemano Operations) v National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada, Local 2301 (Grant Grievance))*, (2008) 180 LAC (4th) 1, BCCA AAA No 170 (QL).

¹¹⁴ *Labour Relations Code*, RSBC 1996, c 244, s 84(1) [LRC].

¹¹⁵ *Parry Sound*, *supra* note 30.

¹¹⁶ *Wm Scott and Co Ltd v Canadian Food & Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1, BCLRB No 46/76.

¹¹⁷ *Ibid* at para 13.

¹¹⁸ *Parry Sound*, *supra* note 30.

hear the human rights issues first.

The jurisdiction of an arbitrator derives from the collective agreement and from the *Labour Relations Code*. The powers of an arbitrator are set out in sections 89 and 92,¹¹⁹ while section 84 sets out the just and reasonable standard for discipline and discharge.¹²⁰ Although human rights tribunals must, of course, apply statutes of general application related to employment, it is clear that labour arbitrators give much greater weight to a labour relations statutory scheme and/or arbitration principles.

The sole focus of the Human Rights Tribunal in respect to an employment matter (and a significant number of cases before the tribunal are employment cases) is the determination of issues of discrimination. A human rights tribunal is not an arbitrator under the *Labour Relations Code*. Such a tribunal does not cite the *Labour Relations Code* in its determination of employment issues under collective agreements. It does not apply the just-cause standard. Reinstatement is a rare remedy. The usual remedy is the reimbursement of lost wages and damages for injury to dignity. It is perhaps for this reason, that although the B.C. Court of Appeal has affirmed the hybrid analysis, the B.C. Human Rights Tribunal does not apply it. It is therefore fair to conclude that these two separate proceedings, before either an arbitration board or human rights tribunal, are similar only to the point of the first stage of an arbitration, where, under the human rights analysis, reinstatement would flow from a finding of discrimination, without recourse to a just-cause analysis.

It would be fair to say that amongst courts and human rights tribunals there is an unstated concern that in a collective bargaining context human rights may be compromised in the context of collective rights. Indeed, this very concern may be reflected in the courts' policy of keeping the just-cause analysis separate from a human-rights analysis. However, there is little or no exchange in the jurisprudence between labour arbitrators and human rights tribunals.

A recent study conducted by Guylaine Vallée, Michel Coutu, and Marie-Christine Hébert examined the issue of whether there was any difference in the implementation of equality rights as between the Quebec Human Rights Tribunal (*Tribunal des droits de la personne du Québec [TDPQ]*) and labour arbitrators.¹²¹ In total, 242 decisions were analyzed (105 tribunal decisions and 137 arbitration awards) between the years 1992–1999. All decisions involved the *Québec Charter of Human Rights and Freedoms*.¹²²

Although the study came to the conclusion that "...it would be premature

¹¹⁹ *LRC*, *supra* note 114.

¹²⁰ *Ibid.*

¹²¹ Guylaine Vallée, Michel Coutu & Marie-Christine Hébert, "Implementing Equality Rights in the Workplace: An Empirical Study" (2002) 9:1 CLEJ 77.

¹²² *Québec Charter of Human Rights and Freedoms*, RSQ 2008, c C-12.

to conclude, based solely on quantitative data, that the very substance of the right to equality in each jurisdiction is different,"¹²³ it did note some significant differences between the two legal regimes.

First, each statutory regime relied on different legal sources. The TDPQ referred to the Quebec *Charter* in 98% of its decisions, to its own case law in 74.3% of its decisions, to the Supreme Court of Canada decisions in 71.4% of its cases, and to other Canadian and Québec authorities in 68.6% of its decisions. Conversely, arbitrators referred to collective agreements in 72.3% of their decisions, to arbitration case law in 65.7% of their decisions, to the Quebec *Charter* in 61.3% of their cases and to the Supreme Court of Canada in 32.8% of their decisions. Further, the TDPQ rarely considered arbitration case law and arbitrators rarely deferred to TDPQ case law. There was a "consistent lack of dialogue."¹²⁴

The authors concluded that this may be explained, in part, by the fact that a human rights tribunal sees itself as affirming individual and universal rights in the workplace (and these rights must not be narrowed). Arbitrators, on the other hand, see their authority as derived from collective agreements and labour law; social and economic inequalities are therefore addressed by the parties through their collective agreements (and not simply through state action). The Quebec Human Rights Tribunal relies principally on the Quebec *Charter* and its own case law. Arbitrators must rely on collective agreements, arbitral case law, and any other legislation that applies to the workplace.¹²⁵

Several other differences were noted. First, 51.4% of complaints were successful before the TDPQ as opposed to 36.5% of grievances; second, complaints from non-union workplaces were more successful than those from unionized workforces; third, the success rate of complaints filed in the private sector (with the TDPQ) was higher than that in the public sector (59.7% to 39.5%). The reason for this was thought to be that, given the insecurity of employment relationships in the non-unionised private sector, only the most serious cases were filed.¹²⁶

It is clear that divergent streams of jurisprudence addressing human rights in the workplace are undesirable. Perhaps one strategy to avoid such separation would be adopting a policy of "cross-appointments" – arbitrators could be given *ad hoc* appointments to human rights tribunals, and given the right to participate in their policy discussions; human rights adjudicators could be assigned to labour relations tribunals; while a certain number of positions in collective agreements (for example in the public sector) could be

¹²³ Vallée et al, *supra* note 121 at 102.

¹²⁴ *Ibid* at 99.

¹²⁵ *Ibid* at 119.

¹²⁶ *Ibid* at 85.

reserved for human rights adjudicators.

D. Accommodation

As stated, one goal of the new unified approach under *Meiorin* is to address the purpose underlying the concept of accommodation. Accommodation is no longer to be seen as simply a “saving or a justification provision” for the employer (or as a device that inadvertently preserves discriminatory standards), but rather as a legal mechanism for *advancing equality*. Thus, we move from Sopinka’s conception of accommodation as an exception from liability in *Alberta Dairy*, to an added obligation that requires the employer to demonstrate that it is “impossible to accommodate individual employees without imposing an undue hardship.”¹²⁷

The use of the word “impossible” has long been qualified, most recently in *Hydro Quebec*.¹²⁸ In *Meiorin*, Justice McLachlin similarly qualified “impossible,” stating that if a reasonable alternative exists, then the rule will not be a BFO¹²⁹ (echoing Justice Wilson’s *Central Alberta*¹³⁰ reference to his own judgment in *Brossard v Québec*).¹³¹

However, what the word “impossible” did capture was the Court’s underlying purpose, which was to raise or increase the standard of accommodation through the incorporation of the concept of substantive equality. It makes little sense to have a low *prima facie* standard (of which more will be said) that addresses discrimination at the initial stage of analysis, but then apply too low a standard of accommodation such that discrimination is effectively permitted. In terms of conceptual coherence, one would want a low *prima facie* standard so as to address any potential discrimination, and a high standard of accommodation to ensure that all discrimination, including systemic discrimination, is effectively dealt with at the second stage of analysis. As Justice McLachlin stated, one of the purposes of the unified approach was to “take a strict approach to exemptions from the duty not to discriminate...”¹³² And as Justice Abella stated in *McGill University Health Centre*, equality is a “transcendent duty,”¹³³ and therefore, the applicable evidentiary burden on an employer for justifying *prima facie* discrimination is high: “It is an onerous burden, and properly so.”¹³⁴

Second is the issue of the standard of accommodation. It is fair to state that,

¹²⁷ *Meiorin*, *supra* note 2 at para 54.

¹²⁸ *Hydro Québec v Syndicat des employés de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, 2 SCR 561.

¹²⁹ *Meiorin*, *supra* note 2 at para 20.

¹³⁰ *Central Alberta*, *supra* note 4 at para 55; reiterated by Sopinka J at para 79.

¹³¹ *Brossard (Town) v Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 at 344, 53 DLR (4th) 609.

¹³² *Meiorin*, *supra* note 2 at para 50 [emphasis added].

¹³³ *McGill University Health Centre*, *supra* note 78 at para 44.

¹³⁴ *Ibid* at para 52.

as arbitral law has developed, there is increasing attention to accommodating the drug and alcohol addicted employee. Two companion drug-addiction cases were decided by the B.C. Court of Appeal in 2006: *Kemess Mines* and *HEABC v BCNU*.¹³⁵ In *Kemess Mines*, Chief Justice Finch identified a duty on the employee “[a]nd once the employee is aware of his addiction, there is no doubt that he must do all he can to facilitate the success of his rehabilitation and treatment.”¹³⁶

Arbitrator Don Munroe, in *Kemess Mines v IUOE*, made the employee’s return to work conditional upon the following terms: the grievor had to remain fully abstinent from marijuana, alcohol and all other mood-altering drugs; he had to complete a four-week residential treatment program; he had to attend Narcotics Anonymous or Alcoholics Anonymous meetings at least three times a week for a period of two years; and he had to consent to the company conducting random searches of his room for a period of one year. He was also given a ten-month disciplinary suspension.¹³⁷

In general, medical experts characterize alcohol and drug addiction as a treatable illness. Human rights law does the same. An individual is seen to have the ability to overcome the addiction over a period of time. Indeed, this empowerment and accountability adds personal dignity to the individual’s efforts to overcome the addiction. The employee’s addiction may have resulted in non-culpable behaviour, such as issues of attendance, but may also have led to misconduct of a criminal nature (e.g. theft). Both issues are seen as conduct for which an employee is held accountable, and conduct that the employee must change.

Thus, alcohol and drug addiction does not fall within the category of immutable characteristics such as gender and race. The addiction also comprises a mix of medical illness and moral culpability (as in the case of addiction-fuelled theft). And in regard to the traditional forms of discrimination addressed by human rights tribunals, it is fair to say that criminal misconduct by complainants was not one of the facts that informed either the general principles of human rights legislation or the resulting jurisprudence.

In summary, accommodation in these circumstances is seen as protecting the quasi- constitutional rights of an addicted employee. However, there is a mix of culpable and non-culpable remedies, and the employee, in being given the opportunity to retain his or her employment, has a high degree of responsibility in the accommodation process. Indeed, the large onus may often be on the employee, not the employer. In many cases there may be neither change in the workplace, nor any change in the actual job duties performed by

¹³⁵ *HEABC v BCNU*, *supra* note 71.

¹³⁶ *Kemess Mines*, *supra* note 73 at para 44.

¹³⁷ *Kemess Mines Ltd v International Union of Operating Engineers, Local 115 (Gardiner Grievance)* (2005), 139 LAC (4th) 305, [2005] BCCA 90 (QL).

the employee. The employee may simply be given the right to return to his or her former duties under strict conditions, with the employer having increased scrutiny over the employee's conduct both on and off the job.

E. Mental Illness

I have simply picked one prominent case in British Columbia to illustrate the same point: the increased responsibility placed on employees in the accommodation process. Although mental illness falls under the category of a treatable illness, and may sometimes be accompanied with drug and alcohol addiction, there are significant differences.

Arbitrator Joan Gordon in *Shuswap Lake General Hospital v BCNU* reinstated a registered nurse, who suffered from bipolar mood disorder, in an acute-care facility.¹³⁸ In the past, the grievor had experienced manic episodes. In ordering reinstatement, Arbitrator Gordon imposed eleven conditions upon the grievor and six upon the employer. The conditions imposed upon the employee included having to regularly attend her doctors, complying with her treatment regime, and permitting her doctors to communicate directly with her employer; further, the grievor had to prepare self-reports of any relapses or medication adjustments, and had to meet with her employer, upon request, for the purpose of monitoring her condition. In addition, she had to agree to work predictable and routine shifts, to avoid overtime, to advise her co-workers of her disorder and any indications of potential relapses, and to comply with any other reasonable accommodation measures that the union or management might negotiate for detecting early warning signs of her decompensation in the workplace.

The employer's accommodation measures included scheduling the grievor to predictable and routine shifts, holding a workshop with respect to bipolar disorder, developing guidelines for detection of any signs of a relapse on behalf of the grievor, and permitting the grievor to be absent from work when she self-identified any indications of a relapse. Finally, the employer had the discretion to implement reporting mechanisms to better monitor the grievor's condition.

Once again, accommodation in the circumstances of mental illness imposes serious limitations and significant responsibilities on employees. There is a balancing of rights as between the employee's interest in returning to employment and the employer's interests in managing its business; and, at times, the public interest is also directly engaged. Finally, it should be stated that the *Shuswap Lake General Hospital, supra*, award is an early illustration of the policy that the duty to accommodate must act as a legal mechanism to

¹³⁸ *Shuswap Lake General Hospital v British Columbia Nurses' Union (Lockie Grievance)*, [2002] BCCA 21 (QL), Award No A-018/02.

advance equality.

Finally, although the grounds of mental and physical disability (e.g. treatable illnesses) have developed more recently in terms of human rights legislation and jurisprudence, individuals who have these attributes may well fall within the same category of traditionally protected groups who share what can be fairly described as immutable characteristics, who are vulnerable, and who have historically suffered discrimination. Mental and physical disabilities are a permanent part of the human condition, and all of us will inevitably experience either or both of these characteristics as we age.

In summary, the issues of *prima facie* discrimination and accommodation have presented challenges for arbitrators trying to apply these different streams of authorities. However, as in the matter of treatable illnesses, the emerging consensus seems to place a greater onus on employees to manage their work and their personal lives. Arbitrator Jesin's decision in *Power Stream Inc and International Brotherhood of Electrical Workers*¹³⁹ and Arbitrator Ponak's decision in *Alberta Union of Provincial Employees*¹⁴⁰ are two notable cases that address the *Campbell River*¹⁴¹ and *Johnstone*¹⁴² tests. Although the concept of "self-accommodation" in both of these arbitral awards was addressed within the context of *prima facie* discrimination, this principle is equally applicable within the context of the accommodation and undue hardship analysis.

With regard to grounds that involve immutable characteristics such as race and gender, self-accommodation does not arise, and rightly so. However, we can see, through the issues of accommodation and undue hardship, a conceptual shift moving the focus from the employer to the employee. This shift enlarges the responsibility of the employee, and may require an employee to participate in all aspects of the accommodation process. This is consistent with principles set out in *Renaud*¹⁴³ – that accommodation is a multi-party process in which all parties are required to participate. And this also requires a corresponding onus on employers to demonstrate greater flexibility.

VII. Concluding Observations

Discrimination can involve deep psychological and social scarring. It goes to the core of an individual's identity and, at the broader social level, great inequalities have the potential to shred the social contract – both social relationships and social cohesion. Most of the grounds enumerated in section 13 address persons who

¹³⁹ *International Brotherhood of Electrical Workers, Local 636 v Power Stream Inc (Bender Grievance)*, [2009] OLAA No 447 (QL), (2009) 186 LAC (4th) 447 [*Power Stream*].

¹⁴⁰ *Alberta (Solicitor General) v Alberta Union of Provincial Employees*, [2010] AGAA No 5 (QL) [*Alberta Union of Provincial Employees*].

¹⁴¹ *Campbell River*, *supra* note 76.

¹⁴² *Johnstone*, *supra* note 91.

¹⁴³ *Renaud*, *supra* note 5.

have historically faced longstanding discrimination.

One classic case of arbitrary stereotyping, combined with marginalization and exclusion, is the refusal to hire someone because of his or her gender, race, or ethnicity. However, today it is rare that people refuse to hire someone expressly for these reasons. Discrimination today is less overt, more covert. Thus, when discrimination does take place, it is more circumspect, and is folded into more general standards or policies. Under *Meiorin*, *supra*, therefore, there is not only a greater scrutiny of workplace rules and standards but also an emphasis on examining the underlying norms embedded in such standards.

Thus a low *prima facie* test and a high accommodation standard are the bookends of a public policy that seeks to end discrimination and promote equality and inclusiveness. In a society committed to equality there are compelling public policy reasons for such a broad and comprehensive standard.

Although the word “impossible” has been properly qualified, what is clear is that this word expresses what most adjudicators would impose as an accommodation standard when confronted with the more classic forms of intentional and morally repugnant forms of discrimination. In such circumstances, what is not permitted at the *prima facie* stage will not be permitted at the accommodation stage.

*Meiorin*¹⁴⁴ addressed the conceptual challenges that resulted from the view of discrimination and accommodation represented by *O'Malley*,¹⁴⁵ *Alberta Dairy*,¹⁴⁶ and *Renaud*.¹⁴⁷ It is in new areas – such as drug and alcohol addiction, mental illness, and marital and family status – that public policy issues are beginning to challenge the conceptual coherence of the analytical scheme in *Meiorin*.

There are a number of options: first, address the third element of *prima facie* discrimination; second, address the issues of accommodation and undue hardship (either together or separately); or third, adjust one or more of these criteria in response to the particular grounds at issue.

First is the issue of the *prima facie* standard – either generally, or specifically in respect of certain grounds. The *Campbell River*¹⁴⁸ decision and the *Gooding*¹⁴⁹ decision are clear examples of this. Both decisions establish a higher onus on complainants. For certain grounds this may establish a hierarchy of rights; or it may involve a redefinition of discrimination in certain circumstances. Justice Abella, in *McGill University Health Centre*,¹⁵⁰ addressed the issue of what

¹⁴⁴ *Meiorin*, *supra* note 2.

¹⁴⁵ *O'Malley*, *supra* note 3.

¹⁴⁶ *Central Alberta*, *supra* note 4.

¹⁴⁷ *Renaud*, *supra* note 5.

¹⁴⁸ *Campbell River*, *supra* note 76.

¹⁴⁹ *Gooding*, *supra* note 75.

¹⁵⁰ *McGill University Health Centre*, *supra* note 78.

constitutes discrimination (not all distinctions constitute discrimination) and concludes that arbitrariness is an essential element in determining *prima facie* discrimination. She found that a three-year automatic termination provision for absenteeism (equivalent to non-culpable discharge or an administrative discharge) did not raise the issue of *prima facie* discrimination.

The Ontario Court of Appeal in *Ontario (Director of Disability Support Program) v Tranchemontagne*¹⁵¹ made clear that in respect to the Ontario Human Rights Code¹⁵² the “[perpetuation of] prejudice or stereotyping” is an essential element in determining *prima facie* discrimination.¹⁵³ However, the Court also explicitly stated that such a prerequisite is not a “freestanding requirement”¹⁵⁴. The Court cited and discussed both *McGill University Health Centre*¹⁵⁵ and *Armstrong*,¹⁵⁶ and concluded that the criterion of the perpetuation of prejudice and stereotyping is “actually incorporated into two stages of the *prima facie* case analysis.”¹⁵⁷ Those stages are, first, a finding of adverse treatment, and second, a determination that one of the protected grounds was a factor in that adverse treatment.

This may be a potential method of actually raising the *prima facie* discrimination standard. Although arbitrariness and stereotyping are among the basic elements of the definition of discrimination they have not, it is fair to say, been seen as “express” requirements of the traditional *prima facie* test (they are now to be restored or included in the third criterion of the test). Perhaps their absence to date, as a matter of practice, is that they appear to require proof of intent – and intent is not a statutory requirement (Section 2); however, that does not mean that they were absent in the circumstances of many cases; or that they were not inferred or construed from the facts. Rather, the actual practice has been to interpret the phrase *because of* (“A person must not discriminate against a person ... *because of* race, colour ...”)¹⁵⁸ as primarily a *but for* test; thus, if the first two elements of the test are present then the third element is all but inferred. Along with the requirement that any discriminatory conduct only need be “a factor” (not the sole or overriding factor) in any adverse treatment, the result has been to establish a purposefully low *prima facie* test. In respect to longstanding vulnerable groups – race, gender, religion – there are compelling public policy reasons for this test. The challenge is in respect to new circumstances arising in the workplace such as treatable

¹⁵¹ *Ontario (Director of Disability Support Programs) v Tranchemontagne*, 2010 ONCA 593, 324 DLR (4th) 87 [Tranchemontagne].

¹⁵² *Human Rights Code*, RSO 1990, c 19.

¹⁵³ *Tranchemontagne*, *supra* note 151 at paras 80-84.

¹⁵⁴ *Ibid* at paras 84 and 95.

¹⁵⁵ *McGill University Health Centre*, *supra* note 78.

¹⁵⁶ *Armstrong*, *supra* note 81.

¹⁵⁷ *Tranchemontagne*, *supra* note 151 at para 104.

¹⁵⁸ *HRC 1973*, *supra* note 16 at s 13(1)(b) [emphasis added].

illnesses and marital and family status.

Thus, the inclusion of arbitrariness or stereotyping as a factor in the traditional *prima facie* test, applied across all grounds of discrimination, may be one way of increasing the *prima facie* standard without establishing a hierarchy of rights among the various protected grounds. The Supreme Court of Canada has relied upon *Andrews v Law Society of British Columbia* in its reformulation of this *prima facie* standard, which inherently raises the definition of discrimination.¹⁵⁹

Finally, in respect to *prima facie* discrimination there is the issue of self-accommodation that was raised in the *Power Stream Inc*¹⁶⁰ and *Alberta Union of Provincial Employees*¹⁶¹ arbitral awards. The concept of self-accommodation in these cases attempts to address the question of whether or not all acts of an employer that adversely affect an employee's familial obligations would constitute *prima facie* discrimination. One approach is to construe self-accommodation as a requirement of *prima facie* discrimination in respect to marital and family status; however, it may be equally applicable to other grounds – for example, physical and mental disability (treatable illnesses). Therefore, if an individual is able to *reasonably* accommodate any potential conflict in their respective duties, for example, they are able to find appropriate daycare arrangements, then that individual is no longer “adversely affected”.

The second approach is to focus on accommodation and undue hardship. In *Meiorin*, accommodation was reframed from being a statutory principle justifying workplace rules, and thereby insulating an employer from liability, to a mechanism for advancing equality.¹⁶² Since *Meiorin*, accommodation and undue hardship have undergone significant changes. First, as contemplated by *Meiorin*, there is increased scrutiny of an employer's policies and standards. Second, there has been an expanded accommodation of complainants.

But one change stands out. *Renaud* described the accommodation process as multi-party.¹⁶³ The employer was to initiate, and the union and the grievor were to participate. However, there has been a shift to much greater responsibility on behalf of employees; accommodation, therefore, may now include elements of “self-accommodation,” something not contemplated, and rightly so, in respect of “immutable” or analogous characteristics.

Undue hardship is an evidentiary standard that may offer another approach. The evidence of accommodation and undue hardship may be complex and may impose a burden on all parties. For example, the evidence might include global assessments of an employee's work history and any past accommodations; it

¹⁵⁹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 [*Andrews*].

¹⁶⁰ *Power Stream Inc*, *supra* note 139.

¹⁶¹ *Alberta Union of Provincial Employees*, *supra* note 140.

¹⁶² *Meiorin*, *supra* note 2.

¹⁶³ *Renaud*, *supra* note 5.

might include expert medical evidence, not only from family doctors but also from specialists providing independent medical reports; it might encompass evidence of the employer's business, an examination of not only the grievor's position but also other potential positions, and any evidence of workplace misconduct. This is a long way from Mr. Justice McIntyre's comment in *O'Malley*, that the burden of proving a duty to accommodate with respect to religious issues would not be a "heavy one in all cases," and that in some cases, "may be established without evidence."¹⁶⁴

More generally, and as previously stated, there is often an underlying concern that within the context of the collective bargaining individual rights may be compromised in the negotiation of collective rights. Thus, addressing the balance between individual and collective rights in the workplace requires careful consideration of many factors.

First, the BCCA in *Kemess, supra*, requires an arbitrator to keep separate the human rights analysis from the just-cause analysis, thus ensuring that "all the factors necessary for a human rights analysis are considered."

Second, the search for accommodation, as Justice McLachlin (as she then was) in *Meiorin* noted, is a "search for proportional, reasonable alternatives to a general rule" applied with "common sense and flexibility."¹⁶⁵

Third, in *Meiorin*, Justice McLachlin noted the need for consistency of analysis between the *Charter of Rights and Freedoms* and human rights legislation. Section 1 of the Charter requires a balancing of constitutional rights. Thus, whether it is constitutional rights or quasi-constitutional rights, a balancing of interests is required.

Fourth, Justice Abella, in *Council of Canadians With Disabilities v Via Rail Canada Inc* described the required balancing of interests inherent in workplace accommodations:

It bears repeating that "[i]t is important to remember that the duty to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. Those words do not constitute independent criteria. Rather, they are alternate methods of expressing the same concept": *Chambly*, at p. 546, citing *Central Okanagan School District No. 23*, at p. 984. The factors set out in s. 5 of the *Canada Transportation Act* flow out of the very balancing inherent in a "reasonable accommodation" analysis. Reconciling accessibility for persons with disabilities with cost, economic viability, safety, and the quality of service to all passengers (some of the factors set out in s. 5 of the Act) reflects the reality that the balancing is taking place in a transportation context which, it need hardly be said, is unique.¹⁶⁶

It may be argued that when the Court in *Meiorin* collapsed direct and

¹⁶⁴ *O'Malley, supra* note 3 at para 28.

¹⁶⁵ *Meiorin, supra* note 2 at para 53; quoting *Commission scolaire regional de Chambly v Bergevin*, [1994] 2 SCR 525, 22 CHRR 1 (QL) at para 63.

¹⁶⁶ *Council of Canadians with Disabilities v Via Rail Canada Inc*, 2007 SCC 15 at para 133, 1 SCR 650 [*Council of Canadians with Disabilities*] [emphasis added].

indirect discrimination into a unified approach, the analytical effect of this was to deem all discrimination to be direct discrimination.¹⁶⁷ Quite properly, effect, not intent, was seen as the ground of responsibility. However, the result is to impose a low *prima facie* standard and a high accommodation standard on employers, properly applied in classic cases of discrimination, to all issues of discrimination.

The expansive scope of the *Meiorin* decision potentially includes conduct not traditionally addressed under human rights law. This is consistent with the evolution of human rights law in a democratic society. However, *Meiorin* and the SCC trilogy of cases (*O'Malley*, *Dairy Pool*, *Renaud*), were developed in the context of the longstanding enumerated grounds of gender and religious discrimination. A low *prima facie* test and high accommodation requirement, along with the significant caution that accommodation must not simply assimilate complainants, advances substantive equality.

Typically, in the workplace the parties are attempting to balance their differing interests, and the adjudicator is often simply monitoring the results of that balancing of interests. If the *prima facie* test is to be maintained at a relatively low standard – and there are good public policy reasons for this – then a reallocation of the accommodation standard, consistent with *Renaud*,¹⁶⁸ may result in shifting the onus, depending on the circumstances, from the employer to the employee. In some respects the best conception of the innocent discriminator (in indirect discrimination) may properly find a new home in the balancing of interests test, without the inherent difficulties that the concept previously incorporated – the reliance on formal equality rather than substantive equality, potentially different remedies and an impoverished view of accommodation.

The adjudicator's task, in most circumstances, is not to prohibit socially and morally repugnant policies or effects, but rather to fashion an accommodation that seeks to balance two or more legitimate and yet competing interests. This shift is a reminder of the importance of the remedial nature of human rights legislation, and a reminder that its application must be consistent with this underlying purpose. Perhaps it is worth recalling Justice McIntyre's comment in *O'Malley*, that the employment relationship represents a "special relationship."¹⁶⁹ From a larger social perspective one difficulty is that these social challenges arising in the workplace are often viewed, and accommodated, only through the narrow lens of discrimination law.

Thus, what potentially emerges is a re-crafting of the balance between the conventional approach and the unified approach.

In respect to longstanding forms of discrimination involving vulnerable

¹⁶⁷ *Meiorin*, *supra* note 2.

¹⁶⁸ *Renaud*, *supra* note 5.

¹⁶⁹ *O'Malley*, *supra* note 3 at para 22.

groups a low *prima facie* test and a high standard of accommodation is essential. In other circumstances of discrimination, for example, the category of “hybrid conduct,” a low *prima facie* test may also be maintained, as well as the significant new purpose and role of accommodation – advancing equality. However, there may be a shifting onus – based on a shared responsibility between employers, unions, and employees – that is consistent with *Renaud*.¹⁷⁰ This must not, of course, result in fewer protections for complainants. This is usually achieved through a balancing of interests that achieves the goal of a reasonable accommodation.¹⁷¹

Finally an important cautionary note: whatever policy alternatives are ultimately constructed, it is clear from the decisions of the Supreme Court of Canada that there must be a continued commitment to a comprehensive concept of equality; and it goes without saying that both formal and substantive equality are inherent elements of that commitment to a broadly inclusive concept of equality.

Formal equality includes both procedural equality and equality of opportunity. Procedural equality requires that all laws be administered objectively and in an unbiased manner. And it is also, of course, an important aspect of the rule of law. The promise of equality of opportunity is that barriers of bigotry will be struck down and all persons will have access to opportunities based on their respective talents.

Under formal equality, people are required to be treated the same where they share characteristics that are *relevantly similar*. For example, if the performance of a particular job requires a certain set of skills it is those skills that are relevant in the prospective hiring or promotion of an individual. In such circumstances, what is irrelevant is a person’s race, gender or religion; and a decision based on these irrelevant characteristics would be discriminatory. This concept of equality has historically involved characteristics that are thought to be immutable or constructively immutable (changeable only at an unexpected cost to personal identity), and most often arose in cases of direct discrimination; for example, a deliberate policy by an employer not to hire Catholics, women or blacks. The traditional remedy is to strike down the rule; and as a result, no issue of accommodation arose. However, under the current unified approach, there is a much richer remedial toolbox: there is greater scrutiny of all such discriminatory rules, a requirement to rewrite such rules in broadly inclusive terms, the ability to address issues of systemic discrimination in respect to such rules, as well as substantive remedies such as affirmative action. As a result, there are no longer different levels of protection based upon the nature of discrimination (direct or indirect).

¹⁷⁰ *Renaud*, *supra* note 5.

¹⁷¹ See Abella J in *Council of Canadians with Disabilities*, *supra* note 166.

Substantive equality attempts to achieve a greater allocation of rights and resources. Its focus is on equality of outcome, not simply equality of opportunity. Substantive equality requires that people be treated differently where the characteristics at issue are *relevantly dissimilar*. In contrast to formal equality, circumstances involving substantive equality are most likely to engage an immutable or analogous characteristic as the relevant characteristic. Three examples are instructive: first, an issue arises in respect to the assignment of rotational shifts; one employee is a parent and has little seniority; the other employee is married, has no parental obligations, and is very senior; the grounds of marital and family status are invoked. Second, two employees are fired for theft; one employee is an alcoholic and the other is not; the grounds of mental and physical disability are relied upon. Third, an issue of aerobic capacity in regard to the expected performance of a certain position is at issue; one employee is female, the other is male; gender is raised as an issue. As previously stated, substantive equality requires a strict level of scrutiny of workplace rules. In addition, there are a broad set of substantive remedies and a high threshold of accommodation.

During the period from 1985 – 1992 in which the Supreme Court of Canada issued its trilogy of decisions dealing with religious discrimination, it also issued *Andrews*.¹⁷² In this decision Justice MacIntyre set out fundamental precepts in respect to both the concept of equality and the definition of discrimination. Although he does not expressly adopt or use the term “substantive equality”, he does capture its fundamental nature when he writes that the “accommodation of differences” is the “essence of true equality.”¹⁷³

It is worth reiterating that the concepts of immutability or analogous grounds are characteristics that are fundamentally rooted in the issue of *personal identity*. These are characteristics that a person either has no control over or cannot change without incurring an unacceptable cost to their personal identity. This is important not only in respect to determining existing and future grounds of discrimination (*prima facie* discrimination), but it may also prove significant in respect to the issue of accommodation – the greater the impact on personal identity, the higher the required accommodation; the lesser the impact on personal identity, perhaps the greater requirement of self-accommodation.

Finally, it may be that balancing the different interests of the parties is best done at the accommodation stage, rather than the *prima facie* stage, especially given the individualized nature of the duty to accommodate.

There were roughly fourteen years between *O'Malley* (1985), and *Meiorin* (1999). That same time period separates *Meiorin* from today. Perhaps the

¹⁷² *Andrews*, *supra* note 159.

¹⁷³ *Ibid* at 169.

Supreme Court of Canada will be able to provide guidance in respect to these issues should it have the opportunity in the near future to hear a number of cases involving such issues as addiction, mental illness, and family and marital status in the workplace.