Accommodating the Unknown: Balancing Employee Human Rights with the Employer Duty to Ensure Safety: A Dialogue on *Stewart v Elk Valley* and the *Cannabis Act*

Jon Soltys[†] *& Daniel W. Dylan*[‡]

This paper examines the Supreme Court of Canada's 2017 decision in Stewart v Elk Valley Coal Corporation where collective worker safety came into conflict with a worker's addiction and his disability-related human rights. The Court's decision continues to be relevant today, particularly following the legalization of cannabis within Canada. In this paper, the authors explore: 1) the background to the Stewart decision; 2) critical developments respecting workplace safety and substance abuse in Canada; 3) the law's response to cannabis treatment and therapies in respect of worker safety and human rights protections; and, 4) the problematic reasoning within Stewart and what such reasoning portends for the adjudication of future human rights. The analysis reveals how the Court departed from a settled line of human rights jurisprudence by circumventing the justification test to reach a result in which higher burdens may be imposed upon workers to establish a claim of disability-related prima facie discrimination in the face of proactive drug disclosure policies, while ultimately also diminishing privacy protections for worker health conditions.

† BScN (Hons.) (Nipissing), BA (Carleton), JD (Lakehead), LLM (Ottawa). Jon has recently completed his master's in law with a concentration in health law, policy and ethics while employed as a legal advisor for a national professional defence organization.

‡ BA (Hons.) (Carleton), LLB (Ottawa), JD (Michigan State College of Law), LLM (Ottawa). Daniel is an Associate Professor at Bora Laskin Faculty of Law, Lakehead University.

Cet article examine la décision rendue par la Cour suprême du Canada en 2017 dans l'affaire Stewart c. Elk Valley Coal Corp. portant sur la question à savoir si l'obligation d'assurer la sécurité collective du personnel entrait en conflit avec la dépendance aux drogues d'un employé et ses droits en tant que personne ayant une déficience. La décision de la Cour suprême est toujours pertinente aujourd'hui, en particulier depuis la légalisation du cannabis au Canada. Dans cet article, les auteurs se penchent sur quatre points : 1) le contexte de l'affaire Stewart c. Elk Valley Coal Corp.; 2) les progrès cruciaux réalisés en matière de sécurité au travail et de consommation de drogue au Canada; 3) la réponse du droit quant aux traitements et thérapies liés à une dépendance au cannabis en regard de la sécurité au travail et de la protection des droits de la personne; 4) le raisonnement problématique qui sous-tend l'arrêt Stewart et ce qu'il laisse présager pour le jugement de causes relatives aux droits de la personne. L'analyse révèle comment la Cour s'est écartée de la jurisprudence établie en matière de droits de la personne en contournant le critère de justification, ce qui pourrait avoir pour effet, d'une part, d'alourdir le fardeau de l'employé devant faire la preuve d'une discrimination prima facie fondée sur une déficience lorsqu'il existe des politiques de divulgation volontaire de consommation de drogue et, d'autre part, de diminuer les protections relatives à la vie privée des employés ayant une affection médicale.

"Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. I[t] is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims."

– Supreme Court of Canada[1]

I. Introduction

In the Supreme Court of Canada case of *Stewart v Elk Valley Coal Corp*, the majority held that an employer's proactive pre-incident addiction disclosure policy, and its decision pursuant to that policy to terminate the plaintiff, Ian Stewart ("Mr. Stewart"), were not *prima facie* discriminatory. A concurring minority found that while Mr. Stewart had established *prima facie* discrimination, Elk Valley Coal Corporation ("Elk Valley") had reasonably accommodated him to the point of undue hardship, defeating the claim. Mr. Stewart had screened positively for a residual amount of intoxicating drugs after a workplace incident. In finding that the policy and termination were not discriminatory, the Court upheld the decision of the Alberta Human Rights Tribunal (the "Tribunal") that Mr. Stewart had been terminated for a breach of policy not due to his addiction,[2] a recognized disability within Alberta's human rights legislation.[3]

At best, *Stewart* may now stand for the general proposition that employers who have enacted proactive pre-incident disclosure policies might be found to have reasonably accommodated employees with addiction-related disabilities of which employers are entirely unaware. At worst, *Stewart* may enable employers to terminate employees on the basis of a disability before human rights protections will even be triggered. This decision simultaneously diminishes human rights related disability safeguards and privacy protections available to those employees coping with substance abuse and addictions. This could cause particular difficulties for employees who deny, or are unaware of, their addiction. The Court in *Stewart* upheld the Tribunal's conclusion that his addiction was not a factor related to his termination, thereby not triggering his disability-related human rights.

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1 *Winnipeg School Division No 1 v Craton*, [1985] 2 SCR 150 at para 8, SCJ No 50.
2 *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at paras 3, 4 [*Stewart*].
3 *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 44(1)(h) [*Human Rights Act*].

In accordance with Canadian human rights law, complainants can make out a *prima facie* human rights complaint by demonstrating the following three elements: "that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact [...] and that the protected characteristic was a factor in the adverse impact."[4] In Mr. Stewart's complaint, his addiction was a recognized disability and protected human rights ground, the termination of his employment constituted an adverse impact and his addiction was a significant factor in Elk Valley's decision to terminate. The concurring minority found that this was clear, stating that "Mr. Stewart's impaired control over his cocaine use was obviously connected to his termination for testing positive for cocaine after being involved in a workplace accident."[5] As a result, Mr. Stewart should have met the "settled and low threshold for *prima facie* discrimination."[6] If Mr. Stewart had made out a *prima facie* claim, the onus then shifts to the employer to lawfully justify the adverse treatment by establishing a *bona fide* occupational requirement or by demonstrating that they have reasonably accommodated the employee to the point of undue hardship. This two-part framework was crystallized and later maintained by the Courts in *Meiorin, Bombardier* and *Moore*.[7]

In light of Canada's recent cannabis legalization and the substance use and abuse possibilities emerging in the workplace, coupled with Health Canada reporting 342,103 registered Canadian medical cannabis users as of September 2018,[8] we argue that *Stewart*'s latent effect is to make it more difficult for employees suffering from substance abuse and addictions to establish *prima facie* discrimination. This is particularly problematic when the employee's denial or ignorance of their addiction is excluded from a tribunal's or court's analysis and reasons for decision.

Furthermore, in the employment context where an employer has implemented a substance use disclosure policy, *Stewart* may erode employee privacy protections. It forces employees to choose between disclosing an otherwise private medical condition and disability where cannabis is used to manage the condition or an addiction related disability itself. Refraining from making this disclosure may lead to potential penalties up to, and including, termination. Employees would lose protection from such adverse impacts even where their use or treatment may have never caused them to be impaired

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4 *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33.

5 *Stewart*, *supra* note 2 at para 50.

6 *Ibid* at para 106.

7 See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39; *Moore v British Columbia (Education)*, 2012 SCC 63.

8 Health Canada, "Cannabis market data" (4 December 2018), online: *Government of Canada* </www.canada.ca/en/health-canada/services/drugs-medication/cannabis/licensed-producers/market-data.html> [perma.cc/ACM2-CPJD] [Health Canada].

during their employment.

In Part II we will discuss the background of *Stewart* and in Part III we will be examining the legal developments in Canadian workplace safety. In Part IV we will explore cannabis and the current workplace safety regime in Canada to contextualize our analysis and discussion of the Court's problematic reasoning within *Stewart* in Part V.

II. Background in *Stewart v Elk Valley Coal Corp*

Ian Stewart, a nine-year employee of Elk Valley and its predecessor Cardinal River Operations Ltd., was involved in a non-fatal accident while operating heavy-equipment in the workplace after having used cocaine the night before.[9] Elk Valley had in place an "Alcohol, Illegal Drugs & Medication Policy" (the "Policy"), which permitted employees to proactively disclose substance use or addiction issues to the company.[10] The company would then, as a *quid pro quo*, offer treatment to those employees with limited or no employment-related penalties.[11] The purpose of the Policy, otherwise known as the "no free accident" rule, was to ensure a safe workplace for all employees.[12] Under the Policy, employees who failed to proactively disclose any abuse of, or addiction to, alcohol, illegal drugs or pharmaceutical substance, and were involved in an incident after which they tested positive for any of these substances, would be deemed to be non-compliant with the Policy and unequivocally face termination.[13]

Following the workplace accident, as described above, Mr. Stewart met with Elk Valley representatives and disclosed to the company that he thought he was addicted to cocaine, which he used on his days off work.[14] Following such disclosure, Mr. Stewart was terminated.[15] Union representatives filed a complaint with the Tribunal on Mr. Stewart's behalf, arguing that his termination was related to his addiction, a recognized disability under the *Alberta Human Rights Act*,[16] and therefore, his termination amounted to unlawful discrimination.

The Tribunal found that Mr. Stewart had not established *prima facie* discrimination, but that he had breached Elk Valley's Policy by not disclosing his substance dependency pre-accident.[17] In the alternative, the Tribunal held that even if Mr. Stewart had established *prima facie* discrimination, the

[9] *Stewart*, *supra* note 2 at para 2.
[10] *Ibid* at para 1.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid* at para 2.
[15] *Ibid.*
[16] *Human Rights Act*, *supra* note 3..
[17] *Stewart, supra* note 2 at para 6.

employer, Elk Valley, had accommodated Mr. Stewart to the point of undue hardship, justifying his termination under human rights law.[18]

The Tribunal's decision was affirmed by the Alberta Court of Queen's Bench[19] and later by the Alberta Court of Appeal,[20] with O'Ferrall JA, dissenting. An 8-1 majority of the Supreme Court of Canada, led by then Chief Justice McLachlin, dismissed Mr. Stewart's subsequent appeal.[21] In reaching their decision, the Court utilized the *Dunsmuir* framework for judicial review, which holds that the standard of review on judicial review of an administrative tribunal's decision is either reasonableness or correctness.[22] The majority of the *Stewart* Court deemed reasonableness to be the appropriate standard,[23] giving deference to the Tribunal's decision that *prima facie* discrimination had not occurred as Mr. Stewart had not been terminated *because of* his substance abuse and/or addiction.[24] Instead, the Court held that Mr. Stewart was terminated as a result of his breach of the Policy, which foretold termination for failing to proactively disclose substance abuse or addiction. The Court found that Mr. Stewart's termination was reasonable because he failed to disclose his addiction in accordance with the Policy, and was involved in a significant workplace accident while on duty with residual amounts of cocaine in his bloodstream.[25]

In their concurring judgement, Justice Moldaver, and then Justice Wagner found that, although Mr. Stewart had established *prima facie* discrimination, the discrimination was nevertheless justified, as Elk Valley's Policy had reasonably accommodated Mr. Stewart to the point of undue hardship, and thus Elk Valley had discharged its accommodation obligations.[26] This concurring judgement suggests that proactive employer disclosure policies may reasonably and adequately accommodate employees with substance and addictions-related disabilities of which employers are unaware. There are, however, problematic aspects of the majority and concurring reasons for decision, which will be discussed in Part IV.

In contrast to the majority, the lone dissenting opinion, written by Justice Gascon, found that Mr. Stewart had suffered *prima facie* discrimination, that this discrimination was not justifiable, and that, owing to a number of procedural errors committed by the Tribunal, its decision was unreasonable and undeserving of the deference stipulated by the *Dunsmuir* framework and

[18] *Ibid* at para 7.
[19] *Bish v Elk Valley Coal Corp*, 2013 ABQB 756.
[20] *Bish v Elk Valley Coal Corp*, 2015 ABCA 225.
[21] *Stewart, supra* note 2.
[22] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 45 [*Dunsmuir*].
[23] *Stewart, supra* note 2 at para 22.
[24] *Ibid* at para 28.
[25] *Ibid* at para 32.
[26] *Ibid* at para 48.

given by the Court.[27] Furthermore, Justice Gascon denounced the Tribunal for reaching an unreasonable conclusion by both misapplying the analysis set out in *Meorin, Moore* and *Bombardier,* and by rendering a decision that was unsupported by the Tribunal's own factual findings.[28]

With the facts of *Stewart* set out, we will now briefly outline Canadian workplace safety regimes to contextualize our critique, followed by an analysis of the existing law in respect of substance abuse in the workplace as it relates to cannabis.

III. Aftermath of the Westray Coal Mine Disaster and *R v Metron*: Recent Developments to Workplace Safety in Canada

Workplace safety initiatives and legislation in Canada have been in constant flux since the enactment of the *Factory Acts*,[29] the development of the first workers' injury compensation regimes, the publication of the *Meredith Report*,[30] and later, as increasingly sophisticated provincial occupational health and workplace safety legislation began to emerge.[31] A noteworthy legal development stemmed from the Westray Coal Mine disaster in Eastern Canada, which served to enhance workplace safety penalties for employers who permit unsafe workplaces through a significant expansion of criminal corporate liability within the *Criminal Code.*

On May 9, 1992, the Westray Coal Mine disaster in Plymouth, Nova Scotia, shook the nation, when the ignition of methane gas led to coal dust detonation, causing an explosion that killed 26 underground coal miners. Justice Richard served as commissioner of the public inquiry, which found "that the loss of the miners was not the result of an isolated error but showed instead an operating philosophy that consistently prioritized economic expediency over concerns for workers' safety," and that "Westray [produced] coal at the expense of worker safety."[32] Justice Richard's 1997 report, *The Westray Story: A Predictable Path to Disaster, identified a complete disregard for worker safety demonstrated by factors including:* inadequate ventilation design and maintenance, an unauthorized mine layout, methane detectors that were

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[27] *Ibid* at para 60.

[28] *Ibid* at para 78.

[29] *The Ontario Factories' Act*, SO 184, c 39. See also Eric Tucker, "Making the Workplace 'Safe' in Capitalism: The Enforcement of Factory Legislation in Nineteenth Century Ontario" (1988) 21 Labour/Le Travail 45-86.

[30] Ontario, Legislative Assembly of Ontario, *The Meredith Report*, (Final Report), (Toronto, LK Cameron, 1913).

[31] Norman Keith, *Canadian Health and Safety Law: A Comprehensive Guide to the Statutes, Policies and Case Law* (Canada Law Book, 1997).

[32] K Peter Richard, *The Westray story: a predictable path to disaster: report of the Westray Mine Public Inquiry* (Halifax: Westray Mine Public Inquiry, 1997) [Richard].

disconnected because of frequent alarms and an "appalling lack of safety training and indoctrination of miners."[33]

The report placed responsibility for the disaster squarely on the owner-operator of the mine, and Curragh Resources Inc. Corporate officials and Curragh Inc. were charged with fifty-two offences under Nova Scotia's occupational health and safety legislation.[34] Thirty-four of these charges were stayed due to the ongoing criminal investigation, yet none of the remaining charges went to trial.[35] Charges of criminal negligence and manslaughter were laid against the two Westray mine managers, but were similarly abandoned when the Crown stayed the proceedings, indicating that there was insufficient evidence to support a conviction.[36] The state of criminal corporate liability was held to be too restrictive to secure convictions against negligent corporations, as it required that the "directing mind" of the corporation be identified in order for the company to be held criminally liable for any acts or omissions.[37] This narrow requirement failed to address the modern reality of corporations, where responsibility and the authority to delegate is spread throughout the corporate structure and is often not isolated in a unitary "directing mind."[38] Ultimately, this led the Federal government to enact Bill C-45 in 2003 with the hope of curing such criminal corporate liability deficiencies.[39]

Bill C-45, *An Act to amend the Criminal Code (Criminal Liability of Organizations)*,[40] *broadened* the scope of corporate criminal liability and made corporations responsible for the conduct and supervision of their employees, agents, servants and representatives.[41] This expansion of corporate criminal liability would significantly set the stage for the prosecution in *R v Metron Construction Corporation (Metron)*. This important workplace safety case illustrates the importance of employers' responsibility to ensure that employees are not impaired while at work, particularly in safety-sensitive work environments where minor errors can have grave consequences.

Metron, a 2013 decision of the Ontario Court of Appeal, stemmed from a December 24, 2009 incident in Toronto, Ontario, where three construction workers and one site supervisor, Fayzullo Fazilov, fell to their deaths from the

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[33] Martin O'Malley, "Westray remembered: explosion killed 26 N.S. coal miners in 1992" *CBC News* (9 May 2012), online: <www.cbc.ca/news/canada/nova-scotia/westray-remembered-explosion-killed-26-n-s-coal-miners-in-1992-1.1240122> [perma.cc/B5NA-P2XF] [O'Malley].

[34] Steven Bittle, "Still Dying for a Living: Corporate Criminal Liability After the Westray Mine Disaster" (2014) 50:3 Alta LR 677 at 677.

[35] *Ibid*.

[36] Richard, *supra* note 32.

[37] O'Malley, *supra* note 33.

[38] *R v Metron Construction Corporation*, 2013 ONCA 541 at para 59 [*Metron*].

[39] Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, 2nd Sess, 37th Parl, 2003 (assented to 7 November 2003).

[40] *Ibid*.

[41] *Ibid* at para 118.

14th floor while working.[42] It was later discovered that the workers and Fazilov were not equipped with the appropriate safety lines, and that although there were six people on the swing stage at the time of the incident, the swing was only designed to hold the weight of no more than two persons.[43] Toxicological analysis determined that all four men involved in the accident had ingested cannabis shortly before the accident, while other evidence indicated that Fazilov had permitted such ingestion to occur.[44] Fazilov had been hired as the site supervisor for the balcony restoration construction by Vadim Kazenelson, the project manager who was present at the construction site when the incident occurred.[45]

Under sections 217.1, 219 and 22.1 of the *Criminal Code* – enacted as a result of the Westray disaster – Fazilov was found by the court to be a "senior officer" of Metron Construction and, based on his acts and omissions, Metron Construction was charged with criminal negligence causing death.[46] Joel Swartz, the president and sole director of Metron, pled guilty on behalf of the company to one count of criminal negligence causing death. The remaining counts were withdrawn.[47] Swartz also pled guilty to four charges stemming from the *Occupational Health and Safety Act* (*OHSA*), most notably for allowing the continued use of equipment while it was known to be defective and/or hazardous, thereby endangering worker safety.[48]

The Crown submitted that a fine of $1,000,000 against Metron Construction would have been appropriate, while the defence sought a fine of just $100,000.[49] Justice Bigelow imposed a fine of $200,000, a figure he justified on the basis that it was "over 3 times the net earnings of the business in its last profitable year,"[50] from which the Crown appealed. The Ontario Court of Appeal found that the original sentence was demonstrably unfit, that the employees were entitled to expect higher standards of conduct than were exhibited by the employer, Metron Construction, and that the denunciation and deterrence sentencing principles set out in section 718 of the *Criminal Code* should have received greater emphasis by the trial court.[51] The Court of Appeal substituted the trial court's sentence and imposed a fine of $750,000;[52] however, this increased fine did not conclude the matter.

In 2015, the project manager, Vadim Kazenelson, was found guilty of

[42] *Ibid* at para 11.
[43] *Ibid.*
[44] *Ibid* at paras 13, 15.
[45] *R v Metron Construction Corporation*, 2012 ONCJ 506 at para 1.
[46] *Ibid* at para 7.
[47] *Ibid*.
[48] *Ibid* at para 22.
[49] *Ibid* at paras 10, 11.
[50] *Ibid* at para 32.
[51] *Metron, supra* note 38 at para 115.
[52] *Ibid* at para 120.

four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm arising from his conduct during the Metron incident.[53] Kazenelson was found to have not taken the necessary steps to ensure that safety lifelines were available and used by workers under his supervision, a fundamental safety rule that he was aware of due to his extensive training by the Construction Safety Association of Ontario.[54] Kazenelson was sentenced to three and a half years in custody on each count, which were to be served concurrently.[55] This was the first sentence of its kind in Canada and it caused employers and corporate entities to proverbially stand up and take notice. Kazenelson's 2018 appeal was unsuccessful.[56]

IV. Cannabis and the Workplace Safety Regime in Canada

Criminal prosecutions, as seen in the *Metron* case, have been initiated sparingly and seem to be reserved for only the most flagrant workplace abuses and incidents. Nevertheless, these events contextualize the *Stewart* decision. They are emblematic of the heightened awareness of workers' rights to safe workplaces and of the concurrent needs to prevent workplace safety abuses from occurring. These decisions also help to hold accountable those responsible for the incident through the imposition of meaningful consequences when such abuses and more injurious incidents do occur.

Consequently, employers have responded in dynamic ways to manage and mitigate the risk that impairment, intoxication and substance abuse pose in the workplace. Responses include the implementation of hazard, accident and injury reporting procedures, safe work practices and procedures, zero tolerance policies for impairment and workplace violence, drug testing protocols, and the mandated use of personal protective equipment. Such responses have been particularly prominent within safety-sensitive work environments where the propensity for personal harm is naturally heightened, and where being free from impairment can be a *bona fide* occupational requirement. Despite these initiatives to mitigate risk, both employees and employers should be aware of their rights and obligations under the relevant employment standards and labour legislation, collective agreements and provincial occupational health and safety standards.

In Ontario, under the province's *Occupational Health and Safety Act*, workers are under a duty not to "use or operate any equipment, machine, device or thing or work in a manner that may endanger himself, herself or any other worker."[57] Employers are required to "take every precaution reasonable in the

[53] *R v Kazenelson*, 2016 ONSC 25 at para 1.
[54] *Ibid* at para 125.
[55] *Ibid* at para 46.
[56] *R v Kazenelson*, 2018 ONCA 77.
[57] *Occupational Health and Safety Act*, RSO 1990, c O.1, s 28(2)(b).

circumstances for the protection of a worker"[58] and to "provide information, instruction and supervision to a worker to protect the health or safety of the worker."[59] However, the duty placed upon employers to take every reasonable precaution to ensure workplace safety, which often includes the prohibition of impairment, has the potential to run afoul of the duty to accommodate. Specifically, in regards to a prohibition of impairment, this obligation could conflict with the duty to accommodate employees who legitimately utilize medicinal cannabis to treat medical conditions that constitute a disability. Such a consideration should garner new attention in light of the *Cannabis Act*[60] and the corresponding *Cannabis Regulations*,[61] which repealed the previous framework set by the *Access to Cannabis for Medical Purposes Regulations*[62] in 2018.

Although research into the medicinal value of cannabis had long been hindered by a debate over its legality, the prevalence of cannabis use as a therapeutic tool has increased over the years as patients, physicians and researchers have steadily voiced support for the cautious and compassionate use of medicinal cannabis.[63] This has been particularly true where other therapeutic options have been exhausted and/or failed to alleviate a patient's symptoms.[64] While *Cannabis sativa* has been utilized for medicinal and recreational purposes for nearly 5,000 years,[65] it is increasingly being recognized as a valuable source of unique pharmaceutical compounds with a multitude of potential therapeutic applications.[66] The College of Physicians & Surgeons of Alberta describe in their practice standards document, *Cannabis for Medical Purposes*, that medical cannabis can only be prescribed where conventional therapies have been found to be ineffective.[67] The document also outlines potential restricted use for small subsets of medical conditions, such as neuropathic pain, pain in palliative and end-of-life conditions, chemotherapy induced nausea and vomiting, and spasticity due to multiple sclerosis or spinal cord injury.[68] In Canada, the registered number of medical cannabis clients has

[58] *Ibid*, s 25(1)(h).
[59] *Ibid*, s 25(1)(a).
[60] *Cannabis Act*, SC 2018, c 16.
[61] SOR/2018-144.
[62] SOR/2016-230.
[63] College of Physicians and Surgeons of Ontario, "Cannabis for Medical Purposes" (2019), online: <www.cpso.on.ca/Policies-Publications/Policy/Marijuana-for-Medical-Purposes> [perma.cc/YM6K-CYZC].
[64] *Ibid*.
[65] Gordon D Ko et al, "Medical cannabis–the Canadian perspective" (2016) 9 J Pain Research at 735.
[66] Caroline MacCallum & Ethan B. Russo, "Practical considerations in medical cannabis administration and dosing." (2018) 49 European Journal of Internal Medicine at 12-19.
[67] College of Physicians and Surgeons of Alberta, "Cannabis for Medical Purposes (Marijuana)" (2014), online: *CPSA* <www.cpsa.ca/standardspractice/cannabis-for-medical-purposes> [perma.cc/4A38-TQ5Z].
[68] Caroline A MacCallum & Ethan B Russo, "Practical considerations in medical cannabis administration and dosing" (2018) 49 European J Internal Medicine 12.

grown exponentially from 23,930 registered clients in April to June of 2015 to a staggering 330,758 users in April to June of 2018.[69] These numbers indicate a strong desire to utilize cannabis for its medicinal properties, signaling the need for increased cannabis and cannabinoid research.

The Court addressed the topic of medicinal cannabis in *R v Smith*, deciding that a medical access regime that permitted access to *only* the dried form of cannabis unjustifiably violated the guarantee of life, liberty and security of the person provided for by section 7 of the *Canadian Charter*.[70] While support for cannabis as a medicinal and therapeutic treatment tool continues to grow steadily, the jurisprudence surrounding the level of protection employees have regarding their medicinal use of cannabis to treat a recognized disability under human rights legislation remains largely opaque. *Stewart* adds to that opaqueness, as it places those employees, whose employers have implemented a disclosure policy, in the difficult position of either disclosing their condition and the pharmaceutical therapies used to treat that condition (such as narcotics, cannabis or cannabinoids), or refraining from making such disclosure and potentially suffering penalties up to and including termination. As will be further explored in Part IV, *Stewart* also places those employees who may have an addiction, but who do not yet know or realize the seriousness of their usage, in the problematic position of being required to show that they suffer from a disability. In addition, disclosure could result in the employee being terminated or demoted from a safety-sensitive position, despite a lack of evidence that their cannabis use inhibits their performance or cognition.

For example, in *Calgary (City) v Canadian Union of Public Employees*, a city employee who operated a city street grader, which the court deemed to be a safety-sensitive position, used small amounts of cannabis before bed to address his chronic pain. The employee notified his supervisors of his medical cannabis use. He was subsequently accommodated by being transferred to a non-safety-sensitive position with a lower rate of pay.[71] However, the worker performed his duties for months while continuing to use cannabis in the same way, without being observed or reported for displaying any cognitive impairment, changes in speech, job performance or physical appearance.[72] The Union subsequently grieved the decision of the employer to change his position, seeking lost wages and reinstatement to his previous position. The board found that the employee had completed his duties as required without incident while exhibiting no indicators of impairment, and therefore, directed

[69] *Health Canada, supra* note 8.

[70] *R v Smith*, 2015 SCC 634 at para 2; *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[71] *Calgary (City) v Canadian Union of Public Employees (Cupe 37)*, 2015 CanLII 61756 (AB GAA) at para 7, [2015] AWLD 4209.

[72] *Ibid* at para 8.

the employer to reinstate the worker to his former position.[73]

By contrast, in *French v Selkin Logging,* Mr. French occupied a safety-sensitive position as a logging contractor, smoked cannabis throughout the workday to manage his chronic joint pain, and was subsequently terminated.[74] The complainant alleged that his employer should have accommodated his cannabis use on the job, while the logging company responded that it could not reasonably accommodate the complainant by permitting him to be under the influence of a drug while at work, as that would put the safety of other employees at risk.[75] The British Columbia Human Rights Tribunal held the worker's cannabis consumption without medical authorization – which may have confirmed the safety of his use – was an accommodation his employer simply could not provide. The tribunal concluded that accommodating the worker's cannabis consumption amounted to undue hardship.[76] The tribunal also found that the employer's zero tolerance policy was a *bona fide* occupational requirement, and that French's termination did not amount to a human rights breach.[77]

In *International Brotherhood of Electrical Workers, Local Union 1620 v Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP*, an employee who used cannabis to manage his chronic back pain and anxiety, was subsequently terminated for breaching the company's Drug and Alcohol Standard.[78] The termination came after the employee failed to disclose his prescription for, and use of, medical cannabis at the worksite.[79] At arbitration, the arbitrator endorsed the employee's dismissal, from which, the union appealed.[80] On judicial review to the Supreme Court of Newfoundland and Labrador Trial Division (General), the arbitrator's decision was held to be reasonable under the *Dunsmuir* framework, but lacked justification, transparency and intelligibility in its reasons.[81] It was therefore remitted back to the same arbitrator for rehearing, where a suspension was then imposed instead of termination and the employee was reinstated.[82]

In another decision dealing with the same employer, Tizzard, a construction worker who used cannabis in the evenings to manage pain caused by osteoarthritis and Chron's disease, failed a pre-employment drug

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[73] *Ibid* at paras 6, 158.
[74] *French v Selkin Logging*, 2015 BCHRT 101, BCWLD 5541.
[75] *Ibid* at para 85.
[76] *Ibid* at para 132.
[77] *Ibid* at para 134.
[78] *International Brotherhood of Electrical Workers, Local Union 1620 v Lower Churchill Transmission Construction Employers Association Inc*, 2016 NLTD(G) 192 at para 8, 20 Admin LR (6th) 330.
[79] *Ibid*.
[80] *Ibid* at para 1.
[81] *Ibid* at paras 46, 63.
[82] *International Brotherhood of Electrical Workers, Local Union 1620 v Lower Churchill Transmission Construction Employer's Association Inc*, 2017 CarswellNfld 375 at para 87, 132 CLAS 264.

and alcohol screening.[83] He then disclosed that he was managing his pain with medically prescribed cannabis and, after significant employer delay (roughly 4 months) during which he was not permitted to start employment, the worker initiated a grievance through his union.[84] At arbitration, the employer successfully defended its decision not to hire Tizzard, describing the position in question as safety-sensitive and further arguing that his cannabis use in the evening might result in an increased risk of residual impairment.[85] In reaching their decision, the arbitrator acknowledged that scientific agreement on a safe interval of time between cannabis consumption and performance of safety-sensitive duties, as well as a sufficiently accurate and reliable testing method to test a subject for impairment, do not currently exist.[86]

In short, these cases illustrate that, at least in the cannabis context, *Stewart* has the potential to short-circuit the workplace discrimination test, which requires an employee to establish only *prima facie* discrimination under a protected ground before requiring the employer to demonstrate accommodation of the disability to the point of undue hardship. Instead, *Stewart* enables an employer to utilize a pre-disclosure termination policy to dismiss an employee who has not disclosed their potentially impairing therapies used to manage their disability or their addiction-related disability itself. This enables the employer to terminate the employee following a workplace accident without any inquiry as to the extent of their substance use, whether reasonable accommodations could be put in place or if the employee had a clear appreciation of their illness.

Within the context of workplace safety in Canada, and the use of cannabis in relation to Canadian workplace safety regimes, we now turn to an analysis and discussion of the Court's recently revised standard of judicial review, the problematic reasoning in *Stewart* and the implications of cannabis legalization in Canada.

V. The Supreme Court's Reasoning and Condonation Within *Stewart* and its Impact on Canadian Human Rights Protections

A. The Revised Standard of Judicial Review

The majority in *Stewart* held that the standard of review for judicial review of decisions rendered by human rights tribunals in Canada is reasonableness,

[83] *Lower Churchill Transmission Construction Employers Assn. Inc. and IBEW, Local 1620 (Tizzard) Re,* 2018 Carswell Nfld 198 at para 110, 136 CLAS 26.
[84] *Ibid* at para 190.
[85] *Ibid* at para 181.
[86] *Ibid* at para 173.

not correctness, and therefore, considerable deference must be afforded to the decisions of the tribunal.[87] The reasonableness standard is primarily focused on the presence of justification, transparency and intelligibility within the decision-making process, and is concerned with whether the decision falls within *a range of possible, acceptable outcomes* which are defensible in both fact and law.[88]

However, this approach also provides tribunals that are held to the reasonableness standard with wider latitude to make potentially questionable decisions or to misapply the law, as these decisions need only fall within a "range of acceptable and rational solutions."[89] However, the Court has stressed that the move to a single reasonableness standard "does not pave the way for a more intrusive review by courts", and that deference requires respect for the legislative choice to leave some matters in the hands of administrative decision makers.[90]

We largely agree with Justice Gascon's analysis of the Tribunal's decision in *Stewart*.[91] Although the Tribunal identified the correct legal analysis for Stewart's discrimination claim, we believe that they misapplied the *prima facie* human rights violation inquiry, which led to both an incorrect legal analysis and an unreasonable result. This result was upheld by both reviewing Courts applying the *Dunsmuir* standard of review. Under the *Dunsmuir* framework, Courts applying the reasonableness standard generally adopt a stance of deference and assess for "the existence of justification, transparency and intelligibility within the decisionmaking process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."[92]

In an attempt to reclarify and revise the standard of judicial review, the Court reconsidered and departed from *Dunsmuir* in the 2019 decision of *Canada (Minister of Citizenship and Immigration) v Vavilov*. In *Vavilov,* the 7-2 majority outlined that reasonableness should be presumed to be the applicable standard of review, and usefully described two fundamental flaws which could render a decision unreasonable.[93] The first flaw is "a failure of rationality internal to the reasoning process," whereas the second flaw "arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it."[94]

Under the first flaw, a decision may be held unreasonable if it fails "to

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[87] *Stewart*, *supra* note 2 at para 20.
[88] *Dunsmuir, supra* note 22 at para 47.
[89] *Ibid* at para 47.
[90] *Ibid* at paras 48 & 49.
[91] *Bish v Elk Valley Coal Corporation*, 2012 AHRC 7, 74 CHRR 425 [*Bish*].
[92] *Dunsmuir, supra* note 22 at para 47.
[93] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 101.
[94] *Ibid*.

reveal a rational chain of analysis", if the decision was based on an irrational chain of analysis, and/or if the decision exhibits clear logical fallacies. Simply put, the decision maker's reasoning needs to "add up."[95] Under the second flaw, a decision may be held unreasonable by a reviewing court if it cannot be "justified in relation to the constellation of law and facts that are relevant to the decision" as "elements of the legal and factual contexts of a decision operate as constraints on the decision maker."[96] These elements include the governing statutory scheme, principles of statutory interpretation and notably, the constraints of the common law. In *Vavilov*, the Court also wrote:

> Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted.[97]

In essence, the Court strongly indicated that administrative tribunals should adhere to settled and binding jurisprudence, and that failure to do so could render a decision unreasonable by a reviewing court. Had Mr. Stewart's appeal been heard following the shift in judicial review that came with *Vavilov*, reviewing courts may have been more reluctant to classify the Tribunal's decision as reasonable. We argue this is primarily due to the Tribunal's serious errors in the application of the *prima facie* legal analysis.

B. Misstating the *Prima Facie* Analysis and Misplacing Elements of Justification

In Alberta, the first step of the human rights discrimination analysis requires an employee alleging discrimination to establish a *prima facie* case of discrimination, by showing that: (1) they have a disability which is protected under the *Alberta Human Rights Act* preventing such discrimination; (2) they experienced adverse treatment by the employer with regard to their employment or a term of that employment; and (3) that their disability was a *factor* in said adverse treatment.[98] Addiction is a recognized disability under the Alberta *Human Rights, Citizenship and Multiculturalism Act*.[99] In order to qualify as addiction-disabled (the ground at issue in *Stewart*), the employee-complainant must first prove a sufficient degree of drug-craving to reach the threshold of drug dependence.[100]

Mr. Stewart's disability, addiction and termination were acknowledged as

[95] *Ibid* at para 102.
[96] *Ibid* at para 105.
[97] *Ibid* at para 112.
[98] *Stewart, supra* note 2 at para 6 [emphasis added].
[99] *Human Rights Act, supra* note 3.
[100] *Stewart, supra* note 2 at para 89.

satisfying the first two requirements of the *prima facie* test; however, we would argue that the Tribunal incorrectly found that his disability was *not causally linked* to his adverse treatment and, consequently, he had not established a *prima facie* claim of discrimination. The Tribunal wrote: "While any adverse effect of an employer's treatment towards an employee, whether intended or not, is part of the discrimination analysis, the adverse effect must be *causally linked*, in some fashion, to the disability."[101] In his dissenting opinion, Justice Gascon held that requiring a *causal* link is simply the wrong inquiry for an adjudicator to undertake, and that the consistent legal approach has been to assess whether the ground was merely *a factor* in the occurrence of the harm.[102] As *Stewart* demonstrates, requiring that disability-based discrimination represents more than merely "a factor" in the analysis has the effect of narrowing the scope of *prima facie* discrimination to *direct* and *intentional* discrimination, which are governed by different legal tests and standards.[103] Therefore, the Tribunal's approach ignored the fact that discrimination does not often occur openly, overtly or directly, but rather, it commonly manifests in more subtle and insidious ways. Discrimination, for example, can occur indirectly, as when seemingly neutral policies have an adverse *effect* on certain groups or individuals.[104]

Erroneously, the Tribunal also discussed arbitrariness and historical stereotypes, writing, "there is no inference that the application of the Policy was arbitrary or perpetuated historical stereotypes",[105] which, as Justice Gascon highlighted, have never been part of the *prima facie* analysis.[106] By inserting both arbitrariness, a feature to be examined within the justification stage of an *Oakes* analysis, and historical stereotypes, a component of systemic discrimination, into the *prima facie* analysis, the Tribunal demonstrated its misunderstanding of the structure and content of the *prima facie* human rights discrimination analysis.

Furthermore, the Tribunal wrote, "Mr. Stewart was not fired because of his disability, but rather because of his failure to stop using drugs, *failure to stop being impaired in the workplace* and failing to disclose his drug use."[107] This statement was made without any clear finding that Mr. Stewart was impaired during the accident or that impairment caused the accident. Justice Gascon correctly indicated that application of the Tribunal's flawed reasoning in future cases would place the onus on an employee-complainant

[101] *Bish*, *supra* note 91 at para 120 [emphasis added].
[102] *Stewart, supra* note 2 at para 115.
[103] *Ibid* at para 114 [emphasis added].
[104] *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 32.
[105] *Bish, supra* note 91 at paras 116, 126.
[106] *Stewart, supra* note 2 at para 106.
[107] *Bish, supra* note 91 at para 120 [emphasis added].

to avoid discrimination by the employer rather than on an employer-respondent to avoid discriminating against the employee.[108] This ignores the power imbalance inherent in employer-employee relationships, which both employment and human rights legislation strive to address. The majority's reasoning essentially permits a form of a contributory fault defence in the *prima facie* stage of discrimination cases, based upon an employee's choices, even though such choices have generally been held to be irrelevant within that analysis.[109]

In sum, the problems we have identified, guided by Justice Gascon's analysis, fundamentally alter the proper analysis for *prima facie* discrimination under Canadian human rights jurisprudence by unnecessarily and incorrectly injecting justificatory elements from the second step of the human rights discrimination justification analysis. As Justice Gascon noted, some academic commentary already exists on this improper justificatory shift.[110] That commentary indicates that importing substantive considerations into the settled low-threshold for *prima facie* discrimination conflicts with the Court's jurisprudence, and unnecessarily and perversely shifts a justificatory burden from the employer-respondent onto the employee-complainant.[111]

In light of this improper shift, one legal scholar has argued that by modifying the procedure for establishing a successful human rights claim, tribunals and courts are unwittingly redefining and diminishing the *extent* of the prohibition on discrimination.[112] This becomes more problematic when it results in more than just one incorrectly decided case – it carries the potential to redefine the entire discrimination landscape.[113] Such redefinition would serve to undermine a settled and stable line of Supreme Court jurisprudence, and may ultimately have the effect of drastically reducing the scope of unlawful discrimination within the provincial human rights sphere.[114] Yet, the principal problem in *Stewart* is compounded by others, namely, the majority's failure to examine the Tribunal's flawed application of the individualized approach to reasonable accommodations in the workplace.

C. Individualized Approach to Reasonable Accommodation in the Workplace

Employers in Canada are required by their respective provincial human

[108] *Stewart*, *supra* note 2 at para 99.
[109] *Ibid* at para 97.
[110] *Ibid* at para 106.
[111] *Ibid*.
[112] Benjamin Oliphant, "*Prima Facie* Discrimination: Is *Tranchemontagne* Consistent with the Supreme Court of Canada's Human Rights Code Jurisprudence?" (2012), 9 JL & Equality 33 at 65.
[113] *Ibid*.
[114] *Ibid*.

rights legislation to meaningfully accommodate employees by adapting their workplace in ways that promote the integration and full participation of all employees. The Court described the goals of employment-related accommodation as ensuring that an employee who is able to work can do so. In practice, [this means] that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted.[115]

This duty to accommodate employees has been informed by three recurring principles in Canadian human rights jurisprudence: respect for dignity, full participation and individualization.[116] The third of these principles, the individualized approach to accommodation, recognizes that two different individuals diagnosed with the same illness can experience their illness very differently; that they may experience the same illness with differing symptom severity and/or limitations; and, that illnesses can change over time. These factors necessitate the principle of individualized accommodations, and as a result, employers should be, and are, discouraged from utilizing or developing formulaic or, in other words, "one-size-fits-all" accommodation solutions.[117]

On this point, in 1999, in *Meiorin*,[118] the Court provided a two-step human rights analysis, holding that "employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals," and that "the standard *itself* is required to provide for individual accommodation, if reasonably possible."[119] This holding was reinforced in *McGill*,[120] where the Court held: "The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made."[121] The emphasis on individualized accommodation was yet again reaffirmed in *HydroQuébec v Syndicat*, where the Court held that "Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise,

[115] *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 at para 14 [*Hydro-Québec]*.

[116] Ontario Human Rights Commission "Policy on ableism and discrimination based on disability" (June 27, 2016), online: <www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability> [perma.cc/72K7-MJUV].

[117] *Ibid.*

[118] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1.

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

[120] *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4.

[121] *Ibid* at para 22.

rigid rules must be avoided."[122] The Court's own jurisprudence makes clear the importance that ought to be placed on individualized accommodation.

In the context of drug and alcohol testing in the workplace, however, the Court held in *Irving* that universal random alcohol-testing policies are overreaching, unless an employer can demonstrate evidence of an alcohol problem.[123] The Court held that the level of danger present in a workplace remains a highly relevant factor in the analysis, but cannot amount to an "automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences."[124] The Court concluded that "a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace."[125] The Ontario Court of Appeal's decision in *Entrop v Imperial Oil Limited,* provides useful parallels to the *Stewart* decision in the human rights context.[126]

In *Entrop,* the complainant had a history of alcohol addiction and disclosed his substance abuse history to his employer, Imperial Oil, in accordance with the company's mandatory alcohol and drug disclosure policy.[127] As a result, Mr. Entrop was promptly reassigned from his safety-sensitive position to a less desirable non-safety sensitive position.[128] However, Mr. Entrop was then reinstated to a safety-sensitive position provided he undertook to agree to unannounced alcohol tests to comply with Imperial Oil's policy.[129] The Ontario Court of Appeal found that for non-safety-sensitive positions, employers are much less likely to be able to justify random drug and alcohol testing policies due to the potential to intrude on the privacy of the employee.[130] Additionally, the Court also determined that random alcohol testing in safety-sensitive positions, though *prima facie* discriminatory, may be justified, as breathalyzer testing, for example, reasonably demonstrates impairment.[131] The court noted, however, that penalties for a positive test need to be individually tailored to satisfy reasonable accommodation requirements.[132]

While random alcohol testing was permissible in certain circumstances,

[122] *Hydro-Québec, supra* note 115 at para 17.
[123] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd,* 2013 SCC 34.
[124] *Ibid* at para 31.
[125] *Ibid* at para 6.
[126] *Entrop v Imperial Oil Limited*, [2000] 189 DLR (4th) 14, 57 OR (3d) 511 [*Entrop*].
[127] *Ibid* at 2.
[128] *Ibid.*
[129] *Ibid.*
[130] Ontario Human Rights Commission, "Drug and Alcohol Testing – Frequently Asked Questions", online: <www.ohrc.on.ca/en/drug-and-alcohol-testing-%E2%80%93-frequently-asked-questions> [perma.cc/M84E-EEZ2].
[131] *Entrop, supra* note 126 at para 86.
[132] *Ibid*.

the *Entrop* court found that random drug testing for employees in safety-sensitive positions could not be justified as workplace drug testing could only indicate historical or more recent drug use, which by itself is not a reliable marker of impairment.[133] The *Entrop* court was also critical of Imperial Oil's policy to automatically terminate employment of those who test positive for drugs and alcohol while occupying a safety-sensitive position, describing this sanction as "too severe."[134] The court elaborated further: "dismissal in all cases is inconsistent with Imperial Oil's duty to accommodate," and that "accommodation should include consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or a rehabilitation program."[135] The court declined to rule on Imperial Oil's post-incident drug testing policy, similar to the policy discussed in *Stewart,* and reiterated that such a policy could be permitted, provided it was "necessary as one facet of a larger assessment of drug abuse." However, the court also had concerns about the ability to determine impairment with current drug testing technology.[136]

Stewart arguably departed from an emphasis on individualized accommodation, as the Tribunal approved of a "one-size-fits-all" pre-disclosure approach to addictions accommodation. In this sense, Elk Valley's disclosure requirements acted as an initial gateway towards reasonable accommodation and shifted the onus onto employees to take the first step by disclosing their alcohol or drug use. In this sense, the disclosure requirement operates, as stated by the Court's concurring minority, as reasonable accommodation itself, instead of as an opening towards facilitating individualized accommodation. Only once this disclosure had been made would the process of providing individualized accommodation to employees begin. Anything falling short of outright disclosure, as *Stewart* now appears to indicate, may be treated as justification for termination of employment, a perspective that favours deterrence above all other considerations.

Justice O'Ferrall, the dissenting voice at the Alberta Court of Appeal, reiterated the sentiment in *Entrop* that dismissal in all cases of a positive drug or alcohol test would be inconsistent with the duty to accommodate.[137] Additionally, he noted that the Tribunal's generalized approach – prioritizing deterrence in all cases – contradicted the individualized approach to reasonable accommodation that permeates through the jurisprudence.[138] The Tribunal reasoned that if Elk Valley had to offer the opportunity for individual assessment to Mr. Stewart, or replace the immediate effect of termination

[133] *Ibid* at para 99.
[134] *Ibid* at para 100.
[135] *Ibid* at para 112.
[136] *Ibid* at para 114.
[137] *Stewart, supra* note 2 at para 76.
[138] *Ibid.*

of employment with less serious consequences (such as a suspension), the deterring effect of the Policy would be significantly lessened.[139] Justice O'Ferrall further held that the emphasis on deterrence could not override individual assessment because such assessment was not only a "procedural duty" under the Alberta Court of Appeal's jurisprudence, but was also required by the wording of the policy in that case.[140]

Also problematic was that Elk Valley attempted to defend its decision to terminate Mr. Stewart as accommodation *in and of itself,* as it allowed him to reapply for his position post-termination and post-treatment.[141] Justice Gascon quickly rebutted this assertion, writing: "accommodation assists employees in their sustained employment, not former employees who may, or may not, successfully reapply for the position they lost as a result of a *prima facie* discriminatory termination."[142] Justice Gascon also held that a "predetermined or blanket approach to sanctions imposed on employees for disability-related conduct will struggle to fulfill an employer's *individualized* duty to accommodate"[143] and that requiring an employee in denial about their addiction to disclose such information is unlikely to result in any practical or meaningful accommodation.

Justice Gascon's dissent on this essential point illustrates the primary struggles in *Stewart,* which ask: how does an employer meaningfully fulfill its duty to accommodate employees with addiction-related disabilities who lack indicators of addiction unless the employee acknowledges the addiction and proactively discloses it to the employer? And furthermore, must an employee disclose substance use or abuse as a pre-condition to maintaining protection under existing human rights legislation following *Stewart*? Does an employee's duty to disclose their addiction, and the therapies used to treat such addiction, infringe on their entitlement to privacy? These questions have largely been left unanswered or unsettled post-*Stewart*.

Justice Moldaver's and Chief Justice Wagner's concurring judgement in *Stewart* would therefore seem to support the premise that blanket proactive disclosure policies may both be a necessary evil and a creative solution to the lose-lose dilemma found in safety-sensitive workplaces where substance abuse remains an ongoing concern.[144] They suggest that some form of accommodation may be better than none, and that a disclosure policy can function as reasonable accommodation itself, despite the fact that meaningful individualized accommodation can be facilitated only once the hurdle of

[139] *Ibid* at para 53.
[140] *Ibid*.
[141] *Bish, supra* note 91 at para 127.
[142] *Stewart*, *supra* note 2 at para 6.
[143] *Ibid* at para 126 [emphasis added].
[144] *Ibid* at paras 55–56.

disclosure is met.[145] Perhaps the position found in the concurring judgment reflects the most utilitarian and practical approach to balancing workers' rights within dangerous worksites. This notion is echoed in *Entrop,* where the Ontario Court of Appeal stated that "common sense and experience suggest that an accident at a refinery can have catastrophic results for employees, the public and the environment," and that "promoting workplace safety by minimizing the possibility employees will be impaired by either alcohol or drugs while working is a legitimate objective."[146]

The "no free accident rule" and disclosure policy emphasizes a debased, but possibly necessary, *quid pro quo*. It says to workers: "if you recognize and admit that you have a problem and need help, that help can be provided to you; however, we reserve the right to remove you from a safety-sensitive-position once we have been made aware of your usage. Ultimately, this prioritizes the safety of many over the equitable treatment of one. Yet, such an argument, if true, erects a procedural gateway for employees in need of reasonable accommodation and provides an excuse for employers to terminate employees who may not understand the full severity of their illness.

Conversely, but equally problematic, are arguments in support of zero-tolerance addiction policies, which may only serve to drive addicted employees "underground" and away from proactive disclosure to the employer. This is because significant stigma still exists surrounding substance abuse, particularly where employers are not focused on rehabilitating or even accommodating substance-addicted employees. Further, substance abuse has been shown to illicit stigma in areas beyond employment such as housing and social relationships,[147] which may elicit further fear that addiction disclosure will prejudice employers against employees, or that employees may later suffer penalties under other pretexts.

D. Capacity and Denial of Illness: Muddying the Waters/Reducing Protections for the Addicted

Substance use and addiction are most appropriately portrayed on a spectrum, with the recreational drug user on one end, the severely addicted, physiologically dependent user on the other, and the functional addict falling somewhere in between. Dr. Charles Els, an Alberta-based psychiatrist and addiction specialist, testified in *Wright v College and Association of Registered Nurses of Alberta,* that addictions can occur in mild, moderate or severe degrees and that some addicted persons can nevertheless function satisfactorily.[148]

[145] *Ibid*.

[146] *Entrop*, *supra* note 126.

[147] Luoma et al, "Reducing self-stigma in substance abuse through acceptance and commitment therapy: Model, manual development, and pilot outcomes" (2008) 16:2 J of Addiction Research & Theory 149.

[148] *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para

Given the broad range of addiction and substance use, problems may arise if employees involved in disciplinary level misconduct, who use intoxicating substances recreationally, seek to characterize their use as a fully-fledged addiction and disability. As a result of such mischaracterization, they would be granted full access to human rights protections to which they are not actually entitled.

Thus far, Canadian courts and tribunals have been reluctant to provide unfettered human rights protections to every individual alleging addiction as a disability. Instead, the severity of each individual's purported addiction is considered holistically; which considers the individual, their substance use or abuse, their denial of their illness and their mental capacity are examined. This process often requires experts to qualify the level of addiction claimed by the employee. This helps to explain the underlying tension between the jurisprudence discussing an individual's control over their addiction: it is extremely difficult to accurately ascertain the level and depth of an employee's addiction because, like other disabilities, addiction is not the same for everyone.

Addiction has been defined as an illness "characterized by a loss of control over the need to consume the substance to which the addiction relates."[149] This feature is made more problematic by the ability to hide drug use, known as a "hallmark of addiction."[150] Indeed, denial has been recognized by some medical practitioners as an integral component of substance dependence and not as the "fault" of the affected individual.[151] Addiction is not a conscious process and it is often not within the individual's power or consciousness to admit their dependence.[152] Take, for example, Genevieve Wright: like Mr. Stewart, Ms. Wright was a functioning addict.[153] As a Registered Nurse, she was able to maintain exemplary employee evaluations as a clinical leader while forging narcotic administration records and other nurse's signatures in order to steal the narcotic analgesic, Percocet, over two hundred times.[154] Like Mr. Stewart, Ms. Wright was not disciplined as a result of her drug dependency. Instead, Ms. Wright was disciplined as a result of her fraud and theft, and her significant breaches of the professional duties owed to her patients and the nurses' licencing college.[155]

In *Stewart*, the Tribunal acknowledged Dr. Els' findings respecting

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[149] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 99.

[150] *Kruger Paper Products Limited v Communications, Energy and Paperworkers' Union of Canada, Local 456*, 2008 CanLII 87767 (BC LA) at 24, 2008 CarswellBC 3382.

[151] *Ibid* at para 30.

[152] *Ibid*.

[153] *Entrop*, *supra* note 126 at para 23.

[154] *Ibid*.

[155] *Ibid* at para 12.

addiction: that Mr. Stewart's denial contributed to his limited insight into his disorder and his inability to perceive his need for treatment.[156] However, they also found that, because he was able to make rational decisions with regard to where and when he used drugs, and because he had the capacity to disclose his drug use, he ought to have made such a disclosure.[157] As Justice Gascon stated, this reasoning is flawed.[158] Many individuals struggling with addiction maintain some rationality in choosing when and how to use. Therefore, the problem with the Tribunal's analysis, as upheld by the Court, is that it evaluates rationality within addiction on an all-or-nothing basis. This approach requires a near-complete breakdown of the employee's rationality before that employee is deemed worthy of addiction-related disability protection. Such an analysis is incorrect both from a medical and legal perspective.

VI. Conclusion

Cannabis remains one of the most widely used substances in Canada and its use is on the rise. Following its legalization in 2019, 5.1 million Canadians aged 15 or older reported using cannabis in the past three months compared with 4.5 million in 2018.[159] This has left employers in the position of having to respond pre-emptively to prevent consequential workplace risks.[160] The Conference Board of Canada recently surveyed 163 employers to assess responses to the legalization of cannabis and discovered that 40% of all respondents have zero-tolerance policies in effect and 52% of safety-sensitive employers have introduced zero-tolerance cannabis policies.[161] We do not dispute that impairment-free workplaces are *bona fide* occupational requirements in safety-sensitive workplaces, but rather, we have aimed to show that those employees who need the protection of human rights legislation due to a recognized disability, addiction or those who use cannabis to treat other disabilities, stand on less solid footing post-*Stewart*. We argued that *Stewart*'s latent effects impose upon employees suffering from substance abuse and addictions a higher burden to establish *prima facie* discrimination. Particularly, this is the case when the employee's denial or ignorance of addiction is ignored in a decision maker's analysis and reasons for decision.

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[156] *Stewart*, *supra* note 2 at para 58.
[157] *Ibid* at para 122.
[158] *Ibid* at para 118.
[159] Statistics Canada, "What has changed since cannabis was legalized?" (19 February 2020), online: *Statistics Canada Health Reports* <www150.statcan.gc.ca/n1/pub/82-003-x/2020002/article/00002-eng.htm> [perma.cc/QLU5-SB2N].
[160] Shana Wolch et al, "Keep Calm and ... Understand Cannabis: What Employers in the Energy Sector Want to Know About Legalized Cannabis in the Workplace" (2018) 56:2 Alta LR 337.
[161] The Conference Board of Canada, "Acting on the Cannabis Act: Workplace Policy Approaches to Cannabis" (12 August, 2019), online: <www.conferenceboard.ca/e-library/abstract.aspx?did=10369> [perma.cc/4274-WP7A].

Stated another way, *Stewart's* most significant impact is that it places a higher onus on employees, specifically those who may be in denial about their addictions, to establish discrimination prior to discipline, before the employer must justify their policy through a *bona fide* occupational requirement analysis. This has the effect of weakening the statutory provisions designed to protect employees with legitimate disabilities, addiction related or not, and in doing so, it augments the power imbalance inherent in employer-employee relationships.

At best, *Stewart* may now stand for the general proposition that employers who have enacted proactive pre-incident disclosure policies will be found to have reasonably accommodated employees with addictions-related disabilities of which employers are not aware. At worst, *Stewart* may serve to short-circuit the entire two-stage human rights analysis and bolster employers' common law rights to terminate employees. The Court's decision may also significantly diminish human rights and privacy protections ostensibly available to those employees coping with substance abuse and addictions, irrespective of whether the employees admit or deny addiction.

We find it especially troubling that a human rights tribunal would disregard, or perhaps misunderstand, the correct *prima facie* discrimination and *bona fide* occupational requirement analyses, require that an adverse effect be *causally linked* to the protected ground, import justificatory elements into the *prima facie* discrimination analysis and completely fail to recognize the need for individual accommodation. Pre-disclosure policies have more legal support now than ever before, and we suggest that they may cast an overly broad net, capturing anyone from the employee-user who utilizes cannabis as a sleep aid and who has never been impaired while at work, to the worker with a fully-fledged substance abuse disorder who poses a true danger to their co-workers as well as themselves. The unresolved problem post-*Stewart* is that it is not clear how human rights legislation will, if at all, sufficiently protect either of these categories of employees, or the many who exist in between.