The Duty to Accommodate in the Labour/Employment Context: Western Canada 2009

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Abstract

This paper examines the law pertaining to the duty to accommodate as it has developed in Canada's four western provinces to December 2009. In order to understand the duty to accommodate, one must understand where it is situated as an element within the broader human rights law of discrimination. Part II of this paper provides a general overview of the law of discrimination in the employment context, and the defence of bona fide occupational requirement (also known as bona fide occupational qualification) ("BFOR/BFOQ") within which the duty to accommodate is found. Part III points out that both employers and trade unions may be found to have discriminated on prohibited grounds, and may have resort to the BFOR/BFOQ defence to avoid liability; thus both employers and trade unions may be called upon to accommodate a person (usually an employee or member respectively) to the point of undue hardship. It also addresses the claimant's duty to facilitate his or her own accommodation. Part IV examines at what point the duty to accommodate may arise—when an accommodation is requested, or when implementing work rules or policies, whether unilaterally-imposed by employers or agreed-to by trade unions. Part V looks at the factors addressed in determining whether a particular standard is reasonably necessary for the employer to accomplish its purpose, as related to the BFOR/BFOQ defence. Part VI examines the factors addressed in determining at what point an accommodation may become an undue hardship to the employer and/or trade union, thus discharging them from the duty to accommodate. Part VII brings the reader's attention to some emerging and changing areas of the law of accommodation. Part VIII brings the reader's attention to recent judicial jurisprudence on the duty to accommodate in western Canada. Part IX Concludes the paper stating that the law of discrimination and accommodation is far from settled in Canada, and that interesting and exciting cases are presently wending their way through the courts and administrative tribunals of western Canada.

Table of Contents

Abstract 1
Table of Contents 2
I. Introduction 3
II. Where the Duty to Accommodate fits in to the broader human rights law of discrimination 4
III. Who Owes a Duty to Accommodate in the Employment Context? 16
IV. When does the Duty to Accommodate Arise? 20
V. Determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose—has the defendant accommodated the claimant? 20
VI. When does an accommodation become an "undue hardship" for the Defendant? 21
VII. Emerging areas in the law of accommodation 28
a. Complaint Framing: Specific vs. General 28
b. Workplace Safety vs. Discrimination (and Accommodation). 29
c. Personal Privacy vs. the Employer's Right to Sufficient Information to Verify the Need for Accommodation and to Identify Specific Accommodation Needs 30
d. Accommodating Family Status 32
VIII. Recent Judicial Jurisprudence on the Duty to Accommodate 34
a. Alberta 34
b. British Columbia 35
c. Manitoba 37
d. Saskatchewan 37
IX. Conclusion 38
Table of Authorities 40

I. Introduction

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II. Where the Duty to Accommodate fits in to the broader human rights law of discrimination

To understand the duty to accommodate, one must understand where it is situated as an element within the broader human rights law of discrimination. In the context of employment, the duty to accommodate arises in the third step of the *bona fide* occupational requirement/qualification ("BFOR" or "BFOQ") defence to a complaint of discrimination based on a prohibited ground. Each of the legislatures of British Columbia,[1] Alberta,[2] Saskatchewan[3] and Manitoba[4] have enacted legislation which prohibits discrimination in relation to employment on prohibited grounds such as: race,[5] colour,[6] ancestry,[7] place of origin,[8] political belief,[9] religion,[10] marital status,[11] family status,[12] physical or mental disability,[13] sex,[14] sexual orientation,[15] age,[16] source of income,[17] creed,[18] nationality,[19] receipt of public assistance,[20] ethnic background or origin,[21] or criminal or summary conviction that is unrelated to the employment.[22]

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[1] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 13.
[2] *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 7.
[3] *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 2(1)(m.01), 16.
[4] *The Human Rights Code*, C.C.S.M. c. H175, s. 14.
[5] British Columbia, Alberta, "or perceived race" in Saskatchewan, including "perceived race" in Manitoba.
[6] British Columbia, Alberta, Saskatchewan, Manitoba.
[7] British Columbia, Alberta, Saskatchewan, Manitoba.
[8] British Columbia, Alberta, Saskatchewan,
[9] British Columbia, including "political association or political activity" in Manitoba.
[10] British Columbia, "religious beliefs" in Alberta, including "all aspects of religious observance and practice as well as beliefs" in Saskatchewan, including "religious belief, religious association or religious activity" in Manitoba.
[11] British Columbia, Alberta, Saskatchewan, Manitoba.
[12] British Columbia, Alberta, Saskatchewan, Manitoba.
[13] British Columbia, Alberta, Saskatchewan, "or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device" in Manitoba.
[14] British Columbia, "gender" in Alberta, Saskatchewan, ""including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy [or] gender-determined characteristics" in Manitoba.
[15] British Columbia, Alberta, Saskatchewan, Manitoba.
[16] British Columbia, Alberta, Saskatchewan, Manitoba.
[17] Alberta, Manitoba.
[18] Saskatchewan, Manitoba.
[19] Saskatchewan, "or national origin" in Manitoba.
[20] Saskatchewan,
[21] Manitoba.
[22] British Columbia.

Human rights legislation is "quasi-constitutional"[23], cannot be contracted out of,[24] and is remedial as opposed to punitive.[25] Human rights legislation seeks to promote equality and dignity which are the antithesis of discrimination.[26]

In addition to the provincial human rights statutes, the *Charter*[27] s. 15 states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Courts have held certain grounds to be analogous to those enumerated in *Charter*, s. 15. The Supreme Court of Canada has thus far held that citizenship,[28] off-reserve band member status,[29] sexual orientation,[30] marital status,[31] and possibly having a criminal record[32] are "analogous grounds." Courts may "read in" *Charter* s. 15 enumerated and analogous grounds to provincial human rights statutes that do not incorporate them expressly.[33]

What is discrimination? Discrimination may be of at least four different forms: direct, indirect (or adverse effect or adverse impact), systemic (also known as "systematic"), and discrimination based on "perceived" characteristics. Systemic discrimination—"discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination [but] is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief…that the exclusion is the

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[23] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 at para. 81 ["*Vaid*"].
[24] *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 ["*Etobicoke*"].
[25] *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 148 ["*Taylor*"].
[26] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 69.
[27] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
[28] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 ["*Andrews*"].
[29] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.
[30] *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, *supra* note 26; *M. v. H.*, [1999] 2 S.C.R. 3.
[31] *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325.
[32] Assumed but not decided in *Re Therrien*, [2001] 2 S.C.R. 3.
[33] See e.g. *Vriend, supra* note 26 where the Supreme Court read "sexual orientation" into the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2; see also *Miron, supra* note 31 where the Supreme Court retroactively "read in" to the *Insurance Act*, R.S.O. 1980, c. 218 the new statutory definition of "spouse", legislatively adopted in 1990, which included heterosexual couples who have cohabited for three years or who have lived in a permanent relationship with a child.

result of 'natural' forces, for example, that women 'just can't do the job'"[34]—is closely related to adverse effect discrimination and so will not be separately analysed in this paper. Harassment, including sexual harassment, may be discrimination,[35] but it does not import the duty to accommodate, but rather the employer's duty to provide a safe harassment-free workplace;[36] it is also outside the scope of this paper. The Supreme Court has stated: "Direct discrimination occurs in [employment] 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.'"[37] By contrast, indirect, or adverse effect discrimination

> 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. …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.[38]

In a later case the Court provided the following general definition:

> discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[39]

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[34] *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at para. 34.
[35] *Robichaud v. Canada* (Treasury Board), [1987] 2 S.C.R. 84 at para. 6 ["*Robichaud*"]: "sexual harassment in the course of employment constituted discrimination on the ground of sex."
[36] In *John v. Flynn* (2001), 54 O.R. (3d) 774, [2001] O.J. No. 2578 at para. 26 (QL) (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 394, the Ontario Court of Appeal wrote: "There is a clear duty on an employer to provide a safe work environment for its employees." *John v. Flynn* was followed in Alberta in *Gartner v. 520631 Alberta Ltd*., 2005 ABQB 120, [2005] A.J. No. 194 at para. 67-8 (QL). In *Shebansky v. Kapchinsky, Bar K 3 Ranch and Smith* (1981), 28 A.R. 451, [1981] A.J. No. 730 at para. 19 (QL) (QB), Stratton, J. wrote: "The duty of an employer…may be stated more generally than simply to provide a safe system of work. It is to take reasonable precautions to safeguard his employees from injury." A more recent Alberta decision is *Heller v. Martens*, [2000] A.J. No. 1678 paras. 19, 32 (QL) (Q.B.), affirmed 2002 ABCA 122, where the Court considered the "obligation, on the part of the employer, to maintain a safe workplace" in the absence of a statute mandating particular measures. The Court held that there is such an obligation.
[37] *Ontario (Human Rights Commission) v. Simpsons Sears Ltd*., [1985] 2 S.C.R. 536 at para. 18 ["*Simpsons Sears*"].
[38] *Ibid*.
[39] *Andrews, supra* note 28, at para. 37.

The British Columbia Court of Appeal provides the following statement recognizing discrimination based on "perceived" characteristics in the context of "disability" being the prohibited ground:

> 38 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 v. 3501736 Inc*. (c.o.b. *Carter Chevrolet Oldsmobile*), [2001] B.C.H.R.T.D. No. 39, 2001 BCHRT 37 at para. 22, [*Martin*].[40]

It should be noted that intent to discriminate is immaterial, and is not an element required to be proved to make out a claim of discrimination:

> It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. …To take the narrower view and hold that intent is a required element of discrimination under the *Code* would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create…injustice and discrimination by the equal treatment of those who are unequal… The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination. It is my view that the courts below were in error in finding an intent to discriminate to be a necessary element of proof.[41]

The onus is on the claimant employee to establish a *prima facie* case of discrimination. How can s/he do this? In the context of *Charter* s. 15, the Supreme Court stated that

> a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[42]

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[40] *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, 2006 BCCA 57, [2006] B.C.J. No. 262 (QL) ["*Health Employers*"].
[41] *Simpsons Sears, supra* note 37 at paras. 12, 14.
[42] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 39 ["*Law*"].

The Supreme Court of Canada, and many other adjudicators, have applied *Charter* s. 15 jurisprudence in considering the concept of discrimination under human rights legislation, and *visa versa*.[43] In *Baum*[44] Eidsvik J. wrote: "Unfortunately, despite the test for discrimination in [*Simpsons Sears*] many of the cases in the disability discrimination area jump over this first test of *prima facie* discrimination (or give it lip service) and head directly into a discussion of whether the employer properly accommodated the employee's disability. Accordingly, the law on the duty to accommodate has become quite well developed however, the initial test has been sparsely discussed until recently."[45] Eidsvik J. cited *McGill*[46] in which Abella J. wrote <u>for the minority</u>:

> [49] …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. <u>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</u>. …
>
> [53] There is no need to justify what is not, *prima facie*, discriminatory. …
>
> [Emphasis added].

The Alberta Court of Appeal recently wrote that: a finding "that the employer had not met the onus on it to accommodate…necessarily presupposes a conclusion as to prima facie discrimination, as reasonable accommodation need not even be considered absent prima facie discrimination. …the critical issue of accommodation is not totally severable from the legal issue of discrimination. The two are sequential."[47] Abella J.'s articulation of the *prima facie* discrimination test in *McGill* was adopted by a majority of the British Columbia Court of Appeal (Huddard and Tysoe JJA.) in *BCGSEU*:[48]

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[43] See e.g. *Andrews*, *supra* note 28; *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219; *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 ["*Boisbriand*"].
[44] *Baum v. Calgary (City)*, 2008 ABQB 791, [2008] A.J. No. 1479 (QL) ["*Baum*"].
[45] *Ibid*. at para. 29.
[46] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal*, 2007 SCC 4 ["*McGill*"].
[47] *Elk Valley Coal Corporation v. United Mine Workers of America Local 1656*, 2009 ABCA 407 at paras. 24-5 ["*Elk Valley*"].
[48] *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357, leave to appeal refused, [2008] SCCA No 460 (QL) ["*BCGSEU*"].

> [13] …Conduct is discriminatory if its effect is to impose on a person or group of persons, penalties obligations, or restrictive conditions not imposed on other members of the community. The essence of discrimination is in the arbitrariness of its negative impact.
>
> [14] This year, the majority of the Supreme Court of Canada reiterated the importance of proof of discriminatory conduct (in the sense of stereotyping or arbitrariness) by the employer in *Honda Canada Inc. v. Keays*, 2008 SCC 39 at para. 71, and in *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. 13.
>
> [15] 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.
>
> [Emphasis added].

However, Kirkpatrick JA. (dissenting) was of the following view:

> [20] …the central issue in this appeal concerns the correct legal test for determining *prima facie* discrimination in cases of addiction-related employee misconduct. …
>
> [52] In *Kemess and Health Employers*, this Court cited *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)*, 2001 BCHRT 37, [2001] B.C.H.R.T.D. No. 39 (Q.L.) at para. 22, for the test to be applied under s. 13(1)(a) of the Human Rights Code to establish a case of *prima facie* discrimination: an employee must establish that he or she had (or was perceived to have) a physical or mental disability; he or she received adverse treatment; and his or her disability was a factor in the adverse treatment. These analytical steps are required to give s. 13(1) a broad purposive and liberal meaning. …
>
> [55] It is important to recognize that the grieving employee bears the onus of establishing *prima facie* discrimination. In a situation of adverse effects discrimination, the employee must adduce evidence establishing a nexus between the addiction and the misconduct - the stated reason for termination. This evidentiary burden is significant, for it cannot be assumed that addiction is always a causal factor in an addicted employee's misconduct. …
>
> [58] In a case of adverse effects discrimination, due to the very nature of the claim, evidence establishing a causal connection between the disability and the misconduct is a crucial component of the employee's case. As explained in *Martin*, "indirect ... discrimination occurs when a respondent engages in conduct, or applies a rule or standard, that is neutral on its face but which has an adverse effect on an individual or group because of a proscribed ground of discrimination" (para. 24). An appreciation of indirect or adverse effects discrimination is rooted in s. 2 of the *Human Rights Code*, which provides: "[d]iscrimination in contravention of this *Code* does not require an intention to contravene this *Code*". Thus "adverse effects" discrimination is simply another way of expressing the concept of unintentional discrimination.

The majority decision in *BCGSEU* suggests that a causal connection between the disability and the misconduct is irrelevant if the disability played no part in the employer's decision to terminate the employment and the disabled person suffered no impact for the misconduct greater than that another employee would have suffered for the same misconduct. The majority decision runs contrary to binding Supreme Court of

Canada jurisprudence relating to adverse effect discrimination, and the immateriality of employer "intention" to discriminate. Kirkpatrick JA.'s formulation of the test is correct and adopts the test articulated by Finch C.J.B.C., Hall and Mackenzie JJA. in *Kemess Mines.*[49] Although it is curious that the Supreme Court of Canada refused leave to appeal *BCGSEU*, it should be noted that leave was also refused in *Kemess Mines*. Between those two decisions,[50] four of six Justices of the BC Court of Appeal adopted the following articulation of the test:

> …to establish a case of *prima facie* discrimination: an employee must establish that he or she had (or was perceived to have) a physical or mental disability; he or she received adverse treatment; and his or her disability was a factor in the adverse treatment.

Manitoba Arbitrator Graham has written:[51]

> It is not easy to reconcile the differing analyses contained in the majority decisions in *Kemess* and [*BCGSEU*], particularly given the refusal of the Supreme Court of Canada to grant leave to appeal in either case. Nonetheless, I make the following observations and findings: The law is settled that a drug or alcohol addiction constitutes a disability; According to the test for *prima facie* discrimination as set forth in *Kemess*, and also endorsed by Madam Justice Kirkpatrick in her minority decision in [*BCGSEU*], which test I accept as a proper formulation of the law, it is necessary to find that the Grievor's disability (i.e. his addiction) was a factor in his adverse treatment, i.e. the termination of his employment; …I am not persuaded by the majority's conclusion in [*BCGSEU*] that the grievor in that case was not discriminated against because he suffered no greater impact for his misconduct, than any other employee would have suffered. That reasoning, when applied to this case, overlooks the fact that the Grievor's addiction made it much more likely that he would breach the reporting requirements of the Policy, than would an employee who does not suffer from an addiction. One of the salient features of discrimination, as defined in Section 9(1) of the Manitoba *Human Rights Code*, is differential treatment based on an enumerated characteristic (in this case, a physical or mental disability). The Grievor was treated differentially because his disability made it much more likely that he would run afoul of the reporting requirements of the Policy, than would an employee who was not addicted.
>
> [Emphasis added].

A third panel of the BC Court of Appeal, Levine, Tysoe and Smith JJA., cited "*Kemess Mines* at para. 22" as setting out "the legal elements of *prima facie* discrimination and the scope and nature of the duty to accommodate."[52] Interestingly, Tysoe JA., who agreed with Huddard JA.'s articulation of the test in *BCGSEU* (released 18 September 2008), in *Domtar* (released 11 February 2009) agreed with Levine, and

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[49] *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para. 44; leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 140 ["*Kemess Mines*"].
[50] See also *Health Employers*, *supra* note 40.
[51] *Legal Aid Lawyers Assn. v. Manitoba (Fawcett Grievance)*, 181 L.A.C. (4th) 296, [2009] M.G.A.D. No. 6 at para. 97, 98 (QL) ["*Legal Aid Lawyers*"].
[52] *Communications, Energy and Paperworkers' Union of Canada, Local 789 v. Domtar Inc*., 2009 BCCA 52, [2009] B.C.J. No. 202 at paras. 29, 36 (QL) [*Domtar*].

Smith JJA. that the proper test is as set out by Finch CJBC, Hall and Mackenzie JJA. in *Kemess Mines*. More recently, in *Armstrong,* [53] a fourth panel of the BC Court of Appeal, Newbury, Huddart and Tysoe JJ.A., cited the *Kemess Mines* "three-step analysis… developed to determine whether *prima facie* discrimination is established."[54] Again, Huddard JA. who articulated the test in *BCGSEU* (released 18 September 2008), in *Armstrong* (released 9 February 2010) agreed with Newbury and Tysoe JJ.A. that the *Kemess Mines* test is correct. Between those four decisions then, nine Justices[55] adopt the *Kemess Mines* test; even Huddard and Tysoe JJ.A. have each endorsed *Kemess Mines* as setting out the correct test subsequent to their majority decision in *BCGSEU.* The Court in *Armstrong* wrote:

> The parties made extensive submissions to us with respect to the issue of whether, on the basis of *McGill University Health Centre* and [*BCGSEU*], 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.[56]

In *Baum*[57] Eidsvik J. set out the following test: "In order for the complainant to be successful with these complaints as *prima facie* discrimination based on disability, the Panel had to be, and now this Court in review, has to be satisfied that the alleged underemployment, unmodified position etc. was based on 'attributed characteristics' as opposed to 'actual abilities based on the individual's own merits and capacities' or 'that the employer's conduct is based on stereotypical or arbitrary assumptions about persons with disabilities' (to paraphrase the test in *McGill*)."[58] For similar reasons that Huddard J.A.'s test in *BCGSEU* should be rejected in preference for the *Kemess Mines* test, Eidsvik J.'s test should be rejected. In addition to the "*Baum* test" failing to address adverse effect discrimination (it focuses on the employer's conduct as opposed to the effect of the conduct), and the immateriality of employer "intention" to discriminate (it focuses on what the employer "based" its conduct on), it is also more difficult to conceptualize and apply than the *Kemess Mines* test, which has three easily understood and distinct

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[53] *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56, [2010] B.C.J. No. 216 at para. 21 (QL), leave to appeal to SCC refused, [2010] S.C.C.A. No. 128 ["*Armstrong*"].
[54] *Ibid*. at para. 21.
[55] Finch C.J.B.C., Hall, Huddard, Kirkpatrick, Levine, Mackenzie, Newbury, Smith and Tysoe,JJ.A.
[56] *Armstrong*, *supra* note 53 at para. 27.
[57] *Baum, supra* note 44.
[58] *Ibid*. at para. 46.

elements which a claimant must prove on a balance of probabilities: (1) that he or she had (or was perceived to have) a physical or mental disability; (2) that he or she received adverse treatment; and (3) that his or her disability was a factor in the adverse treatment. This test captures all types of discrimination (direct, adverse effect, and systematic) and makes employer intentionality immaterial—it respects Supreme Court of Canada jurisprudence relating to discrimination. In *Burgess*[59] Moreau J. adopted the *Kemess Mines* test in Alberta.

The relevant human rights legislation must be consulted in order to glean what type of conduct amounts to "discrimination" in the specific jurisdiction.[60] For example, the Manitoba *Code* explicitly defines discrimination as follows:

> "Discrimination" defined
>
> 9(1) In this Code, "discrimination" means
>
> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
>
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).[61]

Mahoney J. points out in *Hamilton*:[62]

> Discrimination of any kind is determined by direct or indirect evidence. Direct evidence can include outright statements made by an employer about a candidate that shows intent to exclude. For example "there is too much white hair around here" or "you probably will not be able to work our new computer system." Indirect evidence is when a qualified older job applicant is turned down for a younger less qualified person. If, however, the younger person is better qualified, it may not be a case of discrimination.[63]

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[59] *Burgess v. Stephen W. Huk Professional Corp*., 2010 ABQB 424, [2010] A.J. No. 756 at para. 63 (QL) ["*Burgess*"].
[60] See Part III below.
[61] *Supra* note 4, s. 9.
[62] *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225, [2009] A.J. No. 449 (QL).
[63] *Ibid*. at para. 37; emphasis added.

Only after the claimant (usually an employee) establishes a *prima facie* case of discrimination does the onus shift to the defendant to establish on a balance of probabilities that the impugned standard, work rule, or action is a BFOR/BFOQ. Before 1999 there were different legal tests applied in cases of direct and indirect discrimination for an employer to establish a BFOR/BFOQ defence. However, in 1999 the Supreme Court of Canada adopted

> a unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.[64]

After *Meiorin*, BFOR/BFOQ defences to direct, indirect and systemic[65] discrimination are all analysed following the *Meiorin* "unified approach", stated as follows:

> 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 fulfilment 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.[66]

The duty to accommodate arises in the third of the three steps of the *Meiorin* test. The steps are consecutive, in that the defendant must establish rational connection under step 1 before the analysis proceeds to step 2.[67] If the defendant fails to establish rational connection, the analysis does not proceed further as the BFOR/BFOQ defence has failed. If the defendant establishes rational connection under step 1, but fails to establish honest and good faith belief that adoption of the standard was necessary to the fulfilment of the legitimate work-related purpose under step 2, the analysis does not proceed to the duty to

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[64] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* (Meiorin Grievance), [1999] 3 S.C.R. 3 at para. 50 ["*Meiorin*"].
[65] *Ibid*. at paras. 39-42.
[66] *Ibid*. at para. 54.
[67] *Ibid*. at para. 59.

accommodate under step 3.[68] But if the defendant establishes steps 1 and 2 (the easiest to prove), the analysis proceeds to the duty to accommodate under step 3 (the most difficult step to make out). The duty to accommodate is not unlimited—a defendant need only accommodate to the point of "undue hardship", a legal concept discussed in Part V below.

The relevant human rights legislation must be consulted in order to determine statutory defences to discrimination, and statutory requirements for the BFOR/BFOQ defence, if any. For example, in British Columbia the prohibitions against any person refusing to employ or refusing to continue to employ a person, or discriminating against a person regarding employment or any term or condition of employment, does not apply as it relates to age, to a bona fide scheme based on seniority, or 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,[69] nor with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.[70] However, the B.C. *Code* does not define "*bona fide* occupational requirement." In Alberta the prohibitions against any person refusing to employ or refusing to continue to employ any person, or discriminating against any person with regard to employment or any term or condition of employment, as it relates to age and marital status does not affect the operation of any *bona fide* retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan,[71] nor with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.[72] The Alberta *Act* also does not define "*bona fide* occupational requirement." In Saskatchewan, the *Code*[73] provides the following relevant defences and exceptions:

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[68] *Ibid*. at paras. 60, 62.
[69] *Supra* note 1, s. 13(3).
[70] *Ibid*., s. 13(4).
[71] *Supra* note 2, s. 7(2).
[72] *Ibid*., s. 7(3).
[73] *Supra* note, 3.

> 16(4) No provision of this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation or pension plan, or any terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority.
>
> 16(5) Nothing in this section deprives a college established pursuant to an Act of the Legislature, a school, a board of education or the Conseil scolaire fransaskois of the right to employ persons of a particular religion or religious creed where religious instruction forms or may form the whole or part of the instruction or training provided by the college, school, board of education or Conseil scolaire fransaskois pursuant to The Education Act, 1995.
>
> 16(7) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex, disability or age do not apply where sex, ability or age is a reasonable occupational qualification and requirement for the position or employment.
>
> 16(8) This section does not prohibit an employer from refusing to employ or refusing to continue to employ a person for reasons of any prohibited ground of discrimination where the employee is:
>
> (a) employed in a private home; or
>
> (b) living in the home of the employer.
>
> 16(10) This section does not prohibit an exclusively non-profit charitable, philanthropic, fraternal, religious, racial or social organization or corporation that is primarily engaged in serving the interests of persons identified by their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance from employing only or giving preference in employment to persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.
>
> (11) This section does not prohibit an employer from:
>
> (a) granting employment to, continuing to employ or advancing a person who is the parent, child or spouse of another employee of the employer where a reasonable and bona fide cause exists for the employer's action; or
>
> (b) refusing to employ, to continue to employ or to advance a person who is the parent, child or spouse of another employee of the employer where a reasonable and bona fide cause exists for the employer's refusal.

The Saskatchewan *Code* defines neither "reasonable and bona fide qualification", nor "reasonable occupational qualification." In Manitoba, "[n]o person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."[74] Similarly, "[n]o trade union, employer, employers' organization, occupational association, professional association or trade association, and no member of any such union, organization or association, shall (a) discriminate in respect of the right to membership or any other aspect of membership in the union, organization or

[74] *Supra* note 4, s. 14(1); emphasis added.

association; or (b) negotiate on behalf of any other person in respect of, or agree on behalf of any other person to, an agreement that discriminates unless bona fide and reasonable cause exists for the discrimination."[75] Although the Manitoba *Code* provides no general definition of "reasonable requirements or qualifications," it does provide that "it is a bona fide and reasonable requirement or qualification where, in choosing a person to provide personal services in a private residence, the employer discriminates for the bona fide purpose of fostering or maintaining a desired environment within the residence, if there is otherwise no contravention of this *Code* in the employment relationship."[76] When the applicable statute does not set out the test for establishing a BFOR/BFOQ, the *Meiorin* test applies.

While not definitive, the Alberta Human Rights and Citizenship Commission has published a Duty to Accommodate Interpretive Bulletin,[77] and the Manitoba Human Rights Commission has published Policy L-11 on "Reasonable Accommodation: Bona Fide and Reasonable Occupational Qualification,"[78] which publications may provide some understanding of the duty to accommodate to the point of undue hardship in the respective jurisdictions.

III. Who Owes a Duty to Accommodate in the Employment Context?

In British Columbia discriminatory practices by employers, trade unions, employers' organizations, occupational associations, and other persons are prohibited.[79] In Alberta, employers are prohibited from discriminating in relation to employment or any term or condition of employment;[80] and trade unions, employers' organizations and occupational associations are prohibited from discriminating on prohibited grounds generally, and in relation to membership issues specifically.[81] In Saskatchewan "everyone" has the right to engage in and carry on any occupation without discrimination;[82] discrimination by

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[75] *Ibid*., s. 14(6).
[76] *Ibid*., s. 14(8).
[77] Available at: http://www.albertahumanrights.ab.ca/Bull_DutytoAccom.pdf.
[78] Available at: http://www.gov.mb.ca/hrc/english/publications/policies/L11.pdf.
[79] *Supra* note 1, ss. 11-14.
[80] *Supra* note 2, ss. 6-7.
[81] *Ibid*., s. 9.
[82] *Supra* note 3, s. 9.

employers is prohibited in relation to employment;[83] professional and trade associations cannot discriminate respecting their membership;[84] trade unions cannot discriminate against any person in regard to employment;[85] and no employee can discriminate against another employee on the basis of a prohibited ground.[86] In Manitoba, no person may discriminate respecting employment or occupation;[87] and trade unions, employers, employers' organizations, occupational associations, and professional associations cannot discriminate respecting membership matters or the negotiation of agreements on behalf of any other person.[88]

For the purposes of this paper it is important to note that the duty to accommodate may oblige both employers and trade unions, and both may argue BFOR/BFOQ defences in appropriate circumstances. Regarding trade unions, "the duty to accommodate only arises if a union is party to discrimination. It may become a party in two ways."[89]

> First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. …
>
> Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's co-operation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve. I agree with the majority in Office and Professional Employees International Union, Local 267 at p. 13 that "Discrimination in the work place is everybody's business".[90]

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[83] *Ibid*., ss. 16(1) and 16(3.1).
[84] *Ibid*., ss. 17-18.
[85] *Ibid*., s. 18.
[86] *Ibid*., s. 16(2).
[87] *Supra* note 4, s. 14(1).
[88] *Ibid*., s. 14(6).
[89] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 35 ["*Renaud*"].
[90] *Ibid*. at para. 36-7.

Discrimination in the work place being "everybody's business," it follows that persons claiming the right to be accommodated (usually employees) also have a "duty to facilitate" their own accommodation:

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in O'Malley. At page 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.[91]

In *Brewer,* [92] the Alberta Court of Appeal discussed the "two aspects of the failure to co-operate." It held "The first is the obligation of a complainant to co-operate with the Commission's investigation. The second is the obligation of a complainant to co-operate with his or her employer's attempts to accommodate a disability."[93] In relation to the first aspect the Court wrote: "the Commission was entitled to take the view that the respondent could not legitimately control contact between the Investigator and her doctors with respect to relevant and material matters. … What information should reasonably be provided to the Commission during an investigation is directly within its mandate."[94]

If an employee fails in her or his duty to facilitate, the result may be a finding that the employer or trade union has discharged its duty to accommodate to the point of undue hardship;[95] however, a decision of the British Columbia Supreme Court[96] held that it would be an "erroneous assumption that the duty to facilitate is absolute, and that any failing on the part of the Grievor will relieve the employer of the duty to

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[91] *Ibid.* at para. 43.
[92] *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 435, [2008] A.J. No. 1433 (QL) ["*Brewer*"].
[93] *Ibid*. at para. 19.
[94] *Ibid*. at paras. 20-21.
[95] *Re Ottawa Civic Hospital and O.N.A.* (Hodgins) (1995), 48 L.A.C. (4th) 388.
[96] *Canada Post Corp. v. Canadian Union of Postal Workers*, 2007 BCSC 1702.

accommodate."[97] A finding that an employee failed in his or her duty to facilitate could result in reduced liability for the employer and/or trade union.[98] The British Columbia Court of Appeal has stated: "An addicted employee does have a duty to facilitate accommodation through rehabilitation… however, the scope of the employee's duty may vary depending on the relevant factors … including whether the employee is in denial or unaware of his addiction/disability."[99] An employee's duty may include:

1. making an initial request for accommodation;[100]
2. demonstrating the need for accommodation;[101]
3. furnishing sufficient information to verify the need for accommodation and to identify specific accommodation needs;[102]
4. assisting in the search for accommodation;[103] and
5. accepting and facilitating the implementation of an accommodation that is reasonable in the circumstances;[104]
6. reasonably helping him or herself.[105]

An employee is not entitled to a perfect solution, and s/he is not entitled to a job of his or her choice; rather s/he has a duty to accept a reasonable attempt by the employer or trade union to accommodate him or her.[106]

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[97] *Ibid*. at para. 74;
[98] *Alberta (Infrastructure and Transportation) v. Alberta Union of Provincial Employees* (B.D. Grievance), [2007] A.G.A.A. No. 73 ["*Infrastructure and Transportation*"].
[99] *Kemess Mines, supra* note 49 at para. 44.
[100] *Infrastructure and Transportation, supra* note 98.
[101] *Ibid*.
[102] *McGowan v. Canadian Forest Products Ltd*., 2004 BCHRT 403, [2004] B.C.H.R.T.D. No. 427 at para. 22.
[103] *Hinter v. Save On Foods*, 2006 BCHRT 37, [2006] B.C.H.R.T.D. No. 37 at para. 60.
[104] *Williamson v. Mount Seymour Park Housing Co-operative*, 2005 BCHRT 334, [2005] B.C.H.R.T.D. No. 334 at para. 18; *Re Advance Engineered Products Ltd. and Advance Employees' Assn*. (2007), 160 L.A.C. (4th) 289, [2007] S.L.A.A. No. 14 at para. 41; *United Food and Commercial Workers Local 401 v. Canada Safeway Ltd*. (Kemp Grievance), [2007] A.G.A.A. No. 51 at para. 115; *Re Klinic Inc*., [1996] M.G.A.D. No. 21 at para. 328.
[105] "[B]efore claiming that an employer has made no effort to accommodate an employee, the employee must show that he or she personally acted reasonably by mitigating insofar as possible the disruptions that the employee's disability may cause": *Bérard and Treasury Board (Agriculture Canada)* (1993), 35 L.A.C. (4th) 172, [1993] C.P.S.S.R.B. No. 72.
[106] *Canadian Union of Public Employees, Local 1251 v. New Brunswick (Department of Public Safety)* (Cosman Grievance), 145 L.A.C. (4th) 324, [2005] N.B.L.A.A. No. 9 (QL) at para. 20.

IV. When does the Duty to Accommodate Arise?

If employers unilaterally, or with the agreement of trade unions, implement a work-rule or policy that *prima facie* discriminates against persons or groups on a prohibited ground, the policy must contain provisions which accommodate the characteristics of those persons or groups to the point of undue hardship:

> Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.[107]

When initiated by individuals in an affected group (arguably only those individuals who are aware of their disadvantaged situation, unlike addicts in denial), the duty to investigate and implement an accommodation does not arise until the employer or trade union receives a request for accommodation from the individual or some person or entity on his or her behalf.

V. Determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose—has the defendant accommodated the claimant?

In *Meiorin*[108] the Court stated:

> **64** Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.
>
> **65** Some of the important questions that may be asked in the course of the analysis include:
>
> a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

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[107] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 19 ["*Grismer*"].
[108] *Meiorin, supra* note 64.

b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in Renaud, supra, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard

Specific issues related to the duty to accommodate, which are beyond the scope of this paper to examine in depth, may include: hiring, promotion, transfer and probation; modified tasks; modified shifts, hours and schedules; absenteeism and leaves of absence; assistive equipment or devices; modified workplace and/or environment; child care; training and re-training; dress policies; discipline and counselling (hybrid cases); remuneration. For an excellent examination of these issues, and accommodation in general, see Kevin D. MacNeill, *The Duty to Accommodate in Employment*, loose-leaf ed (Aurora: Canada Law Book, 2009).

VI. When does an accommodation become an "undue hardship" for the Defendant?

In *Grismer*[109] the Supreme Court of Canada stated that "the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost."[110] The defendant must prove his or her defence on a

[109] *Grismer*, *supra* note 107.
[110] *Ibid*. at para. 32; emphasis added.

balance of probabilities. In *Alberta Dairy Pool*[111] the Court provided the following non-exhaustive list of some of the factors that may be relevant to an appraisal of what constitutes undue hardship:

- financial cost; the size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances;
- disruption of a collective agreement;
- problems of morale of other employees;
- interchangeability of work force and facilities;
- where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

The "balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case."[112] "These factors are not engraved in stone. They should be applied with common sense and flexibility in the context of the factual situation presented in each case. The situations presented will vary endlessly."[113]

Some human rights legislation provides a statutory definition of "undue hardship." For example, the Saskatchewan *Code* provides:

> 2(1)(q) "undue hardship" means, for the purposes of sections 31.2 and 31.3, intolerable financial cost or disruption to business having regard to the effect on:
>
> (i) the financial stability and profitability of the business undertaking;
>
> (ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;
>
> (iii) the essence or purpose of the business undertaking; and
>
> (iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;
>
> but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.

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[111] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 ["*Alberta Dairy Pool*"].
[112] *Ibid*. at para. 62.
[113] *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, [1994] S.C.J. No. 57 at para. 32 (QL) ["*Bergevin*"].

The majority of jurisprudence characterizes "undue hardship" as an onerous standard, as opposed to simple reasonableness. In *Renaud*[114] the Supreme Court of Canada stated:

> [19] …More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept.

However, in *Hydro-Québec*,[115] the unanimous Supreme Court of Canada stated: "What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances."[116] "[I]n the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship."[117] The Court continued:

> [14] …the goal of accommodation is to ensure 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 without undue hardship.
>
> [15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. …
>
> [16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> [17] … If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties - or even authorize staff transfers - to ensure that the employee can do his or her work, it must do so to accommodate the employee. …However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.

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[114] *Renaud*, *supra* note 89.
[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 ["*Hydro-Québec*"].
[116] *Ibid*. at para. 12.
[117] *Ibid*. at para. 13.

> [18] Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory…"[in such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship"…
>
> [19] The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

But in *Coast Mountain*,[118] Hinkson J. noted: "…what might be acceptable as a matter of labour law might not be acceptable from a human rights standpoint." Evidentiary means of proving or disproving undue hardship include:

- Admissions; for example where a defendant's witness frankly acknowledges that no forms of accommodation were even considered in respect to a physically disabled employee;
- Agreed statements of fact;
- Expert witnesses;
- Adverse inferences;
- Evidence of past accommodation and attempts at accommodation by the defendant
- Evidence of accommodation by a similarly situated or related employer/trade union, or a different department therein;
- Terms of applicable collective agreement.

Financial Cost: Evidence of excessive past, present or projected financial costs of accommodation must be supported by cogent evidence (not by speculation), and must show that the costs are fairly attributable to the accommodation. The impact of the financial costs on the employer must be balanced against the benefits to the employee needing the accommodation before the financial costs can be declared excessive, and thus an undue hardship. In *Grismer* the Court stated:

> While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This Court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do

[118] *Coast Mountain Bus Co. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada), Local 111*, 2009 BCSC 396, [2009] B.C.J. No. 578 at para. 138 (QL).

> not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice.[119]

Disruption of Collective Agreement: for a defendant to prove on a balance of probabilities that an accommodation would disrupt a collective agreement to the point of undue hardship "more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures."[120] The claim of "substantial" or "significant" interference with the collective agreement rights of other employees must be supported by sufficient evidence. Interference with the collective agreement rights of other employees falling short of "substantial" or "significant" will not support a finding of undue hardship.

> The primary concern [for trade unions] with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted.[121]

Morale of Other Employees: In *Renaud* the Court stated:

> The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were *ad idem* with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.[122]

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[119] *Grismer*, *supra* note 107 at para. 41.
[120] *Renaud, supra* note 89 at para. 20.
[121] *Ibid.* at para. 38.
[122] *Ibid.* at para. 30.

Numerous decisions have considered morale problems of other employees resulting from an accommodation, and if supported by evidence, morale problems may weigh in favour of finding undue hardship, but it is only one factor in the analysis.

Interchangeability of Work Force and Facilities: The size of the employer's operations, and related operations, in addition to the size of the pool of potential replacement workers, are factors considered in determining whether it would be an undue hardship for the employer to transfer replacement workers and/or the (potentially) accommodated employee between its facilities in order to provide an accommodation.

Safety at Issue: Evidence of "serious risk" or "undue safety risk" of an accommodation must be supported by reasonable evidence (not by anecdotal or impressionistic evidence).[123] Some risk incurred by the employee, and imposed on others who stand to be put at risk if the accommodation is implemented, is justified. The defendant must prove that the risk is "serious" or "undue" to successfully argue that an accommodation would impose an undue hardship. Determining the magnitude of the safety risk requires the assessment of three factors—(1) the type of risk; (2) the potential consequences of the risk; (3) the probability of the risk materializing—bearing in mind the level of risk acceptable by an employer/trade union, and society in general. A defendant "may not justify discrimination in employment opportunities by adopting a risk aversion standard that is not reasonably proportional to the actual risk."[124] A few of the many potential safety risks that have been considered in the jurisprudence include: drug or alcohol dependant employees in safety sensitive positions; physical disabilities such as diabetes, multiple sclerosis, and back conditions in relation to employees' ability to perform certain work; extreme fatigue caused by double-shifting of other employees if a person's religious beliefs were to be accommodated through modified schedules.

[123] *Meiorin, supra* note 64 at para. 79.
[124] *Dominion Colour Corp. v. Teamsters, Local 1880* (Metcalfe Grievance) (1999), 83 L.A.C. (4th) 330.

Duration of Accommodation: Some arbitral decisions suggest that the status of a proposed accommodation as temporary or permanent may be a consideration in assessing undue hardship.

Disabled Employee Unable to Fulfill Obligations Under Employment Contract

In a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.[125] A decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must be based on an assessment of the entire situation. Where the employee has been absent in the past due to illness, the employer has accommodated the employee for several years and the doctors are not optimistic regarding the possibility of improved attendance, neither the employer nor the employee may disregard the past in assessing undue hardship.[126] The duty to accommodate must be assessed globally in a way that takes into account the entire time the employee was absent from work.[127]

Interference with Operation of Employer's Business: In *Simpsons Sears*[128] the Court identified "undue interference in the operation of the employer's business"[129] as a relevant factor in assessing undue hardship. This may include administrative inconvenience and scheduling difficulties. There is an obvious overlap with this factor and that of excessive cost.

Customer Preference: Generally customer preference cannot justify prohibited discrimination; however, in rare cases customer preference may be considered as a relevant factor in considering undue hardship,[130] although not in Saskatchewan where the

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[125] *Hydro-Québec*, *supra* note 115 at para. 17.
[126] *Ibid*. at para. 21.
[127] *Ibid*. at para. 20.
[128] *Simpsons Sears, supra* note 37.
[129] *Ibid*. at para. 23.
[130] See e.g. *Re St. Boniface General Hospital* (1992), 32 L.A.C. (4th) 217; *Johnston v. St. James Community Service Society*, 2004 BCHRT 59, [2004] B.C.H.R.T.D. No. 56 (QL).

Code, s. 2(1)(q)(iv) directs that employees', customers' and clients' personal preferences must be disregarded in analyzing undue hardship.

VII. Emerging areas in the law of accommodation

a. Complaint Framing: Specific vs. General

Under human rights legislation a person or entity may request an accommodation on behalf of other persons or classes of people.[131] This fact may be vitally important, as the initial framing of a complaint may determine its ultimate outcome. The author recommends that a complaint alleging that an employer rule/policy is discriminatory should be framed so that the complaint is being made both on behalf of the individual(s) specifically, but also on behalf of the class of people to which the complainant belongs generally. Two Alberta cases are illustrative. *Chiasson HRCC*[132] was a discrimination complaint to the Alberta Human Rights tribunal framed on behalf of John Chiasson specifically, and not on behalf of drug addicts subjected to the policy generally. In that case the employer's hiring policy required all persons seeking non-unionized positions at KBR to take and pass a "post-offer/pre-employment" drug test before they would be hired. Mr. Chiasson, a recreational marijuana user, was terminated shortly after he began work with the employer because of a positive result in a pre-employment drug test. The tribunal found as facts that Mr. Chiasson was not drug addicted, nor was his termination based on the perception by any KBR employees that he was drug addicted (no actual or perceived disability). Mr. Chiasson appealed the Commission's decision to the Court of Queen's Bench.[133] Martin J. overturned the Commission's decision largely on an excellent analysis of the policy's effect on drug addicts generally. The Court of Appeal[134] restored the Commission's decision, stating:

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[131] *Supra* note 1, s. 21(1); *supra* note 2, s. 20(1); *supra* note 3, s. 27(1); *supra* note 4, s. 22; in SK and MB with the consent of the person allegedly discriminated against.
[132] *John Chiasson v. Kellogg, Brown & Root (Canada) Company (Halliburton Group Canada Inc.)* (June 7, 2005), A.H.R.C.C. Decision No. N2002/10/0224, available: http://www.albertahumanrights.ab.ca/ChiassonJohn060705Pa.pdf ["*Chiasson HRCC*"].
[133] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co*., 2006 ABQB 302, [2006] A.J. No. 583 (QL) ["*Chiasson QB*"].
[134] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co*., 2007 ABCA 426 ["*Chiasson CA*"].

> Having come to the conclusion that the issue of how the KBR drug testing policy affected drug addicted persons generally was not before the panel, we do not find it necessary to deal with that issue and find the chambers judge erred in making it central to her determination. Rather, we prefer to leave that issue for an instance in which a proper factual matrix is before the court which squarely raises it.[135]

The Supreme Court of Canada refused leave to appeal.[136] Arguably, *Chiasson CA* would have upheld *Chiasson QB* if the initial complaint had been framed on behalf of addicted persons generally, in addition to Mr. Chiasson's situation specifically. The issue of the KBR drug policy discriminating against drug addicted persons generally not having been properly before the Human Rights Panel, the issue could not be raised or considered on judicial review or appeal.

A similar situation appears to have occurred in *Luka*.[137] In that case Donald Luka complained that an employer pre-access drug and alcohol policy discriminated against him; no complaint was made on behalf of drug addicted persons generally. Mr. Luka failed to prove on a balance of probabilities that he was either an addict (he denied being an addict), or was perceived as being one by the employer. The Commission stated: "

> [165] With regard to determining whether this complaint is broad enough to address the question of systemic discrimination as a result of the pre-access alcohol and drug testing policy, the Panel has determined that this complaint is specific to Mr. Luka. The Panel has reviewed his human rights complaint form and notes that Mr. Luka wrote "the request of the drug and alcohol testing and the resulting diagnoses discriminated against me and ensured that irreparable damages had been caused to myself as an individual."
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> [166] For all these reasons, the Panel finds that the complainant and director have not established any disability or perceived disability. As a result there is no need to determine if there is a Bona Fide Occupational Requirement in this case.

As in *Chiasson*, the Commission did not, and could not, assess whether the impugned policy discriminated against drug addicted persons generally because the original complaint was framed too narrowly.

b. Workplace Safety vs. Discrimination (and Accommodation).

Although the Supreme Court of Canada has stated "the old notion that 'sufficient risk' could justify a discriminatory standard is no longer applicable. Risk can still be

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[135] *Ibid*. at para. 43.
[136] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Root & Brown (Canada) Co*., [2008] S.C.C.A. No. 96.
[137] *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2008 C.L.L.C. 230-014, 2008 CarswellAlta 677 (WeC), appeal allowed on unrelated ground, 2009 ABQB 241 ["*Luka*"]; the Director is appealing to the Alberta Court of Appeal.

considered under the guise of hardship, but not as an independent justification of discrimination,"[138] the Alberta Court of Appeal, at least, appears to have reverted somewhat to a safety-over-discrimination analysis in *Chiasson CA*:

> The evidence disclosed that the effects of casual use of cannabis sometimes linger for several days after its use. Some of the lingering effects raise concerns regarding the user's ability to function in a safety challenged environment. The purpose of the policy is to reduce workplace accidents by prohibiting workplace impairment. There is a clear connection between the policy, as it applies to recreational users of cannabis, and its purpose. The policy is directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. Although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict. To the extent that this conclusion is at odds with the decision of the Ontario Court of Appeal in Entrop v. Imperial Oil Ltd. (2000), 50 O.R. (3d) 18, 189 D.L.R. (4th) 14, we decline to follow that decision.[139]

c. Personal Privacy vs. the Employer's Right to Sufficient Information to Verify the Need for Accommodation and to Identify Specific Accommodation Needs

Each of the four western provinces has privacy legislation regulating the collection, use and disclosure of personal information, including that of employees, in both the public[140] and private[141] spheres. The interplay and conflicts between an employee's privacy rights and an employer's right to sufficient personal (usually medical) information to verify the need for accommodation and to identify specific accommodation needs is an emerging area with little jurisprudence. The issue may simply come down to the following principle: "While the Grievor and/or Union may be entitled to invoke privacy rights, lack of disclosure which in turn leads to lack of knowledge, may ultimately impact on whether the Employer has fulfilled its duty to accommodate to the point of undue hardship. Without sufficient information, an employer may not be able to accommodate to the extent expected by the Grievor."[142] However, "[t]he fact that an employer may be entitled to require an employee to provide personal medical information in order to allow

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[138] *Grismer*, *supra* note 107 at para. 30.
[139] *Chiasson CA, supra* note 134 at para. 33.
[140] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, CHAPTER 165; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01; *The Freedom of Information and Protection of Privacy Act*, C.C.S.M. c. F175.
[141] *Personal Information Protection Act*, S.B.C. 2003, CHAPTER 63; *Personal Information Protection Act*, S.A. 2003, c. P-6.5; *The Privacy Act*, R.S.S. 1978, c. P-24; *The Privacy Act*, C.C.S.M. c. P125.
[142] *Kamloops/Thompson School District No. 73 v. British Columbia Teachers' Federation* (Reimer Grievance), [2005] B.C.C.A.A.A. No. 39 at para. 54.

it to fulfill its duty to accommodate does not…permit the employer to use that information for an improper purpose."[143] Recently a Manitoba grievance arbitrator acknowledged that it is important and necessary for employers to be aware of employees' health information in order to address issues of work planning and its duty to accommodate, but that employers' health information forms must be drafted to meet the employer's requirements and at the same time respect the employee's right to privacy.[144]

In *Gichuru* [145] the BC Supreme Court quashed a Human Rights Tribunal decision to order a complainant to disclose his medical and counseling records from 1995 to 2004. Cullen J. distinguished *Brady,*[146] a case "where the petitioner did not even raise the issue of a privacy interest until the judicial review application, and where the precise issue being raised in the underlying complaint was whether the information being sought was necessary or germane to the respondent, IHA's duty to protect the public and duty to accommodate the petitioner."[147] In another recent Alberta judicial review, Sulyma J. dismissed the application, stating: "With respect to the issue of privacy rights, I accept that the privacy interest of the Grievor was not raised in argument by the Applicant at the hearing. Therefore, the Arbitration Board cannot be faulted for not having conducted an in-depth analysis of that issue when it was not raised."[148]

Of the four western privacy commissioners, the author's research has found only one decision addressing the interplay between personal privacy and the duty to accommodate disability. In *TransAlta*,[149] the Director of the Alberta Office of the Information and Privacy Commissioner cited the federal Assistant Privacy Commissioner:

> The company collects, uses and discloses employee personal information for the purpose of determining the employee's ability to work (or return to work), the employee's eligibility for employment benefits and the company's obligations to accommodate the employee under human

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[143] *Metcalfe v. International Union of Operating Engineers, Local 882*, 2005 BCHRT 512, [2005] B.C.H.R.T.D. No. 512 at para. 169.
[144] *Manitoba v. Manitoba Government and General Employees' Union*, [2007] M.G.A.D. No. 40 at para. 65.
[145] *Gichuru v. Law Society of British Columbia*, 2007 BCSC 1767, [2007] B.C.J. No. 2607 (QL) ["*Gichuru*"].
[146] *Brady v. British Columbia (Human Rights Tribunal)*, 2005 BCSC 1403 ["*Brady*"].
[147] *Gichuru, supra* note 145 at para. 92.
[148] *United Nurses of Alberta, Local 33 v. Capital Health Authority (Royal Alexandra)*, 2008 ABQB 126, [2008] A.J. No. 202 (QL) at para. 58.
[149] *Re TransAlta Corporation and Kelly, Luttmer & Associates Ltd*., Investigation Report P2008-IR-003, [2008] A.I.P.C.D. No. 35 (QL) ["*TransAlta*"].

> rights legislation. A reasonable person would likely consider such purposes to be appropriate in the circumstances.[150]

In *TransAlta* the complainant alleged that his employer TransAlta and its contracted Employee and Family Assistance Program service provider KLA breached the *Personal Information Protection Act* ("*PIPA*") by exchanging his personal employee information (medical) between organizations (TransAlta and KLA) and departments (TransAlta Occupational Health & Safety and management) without his consent. The Director found several breaches of *PIPA*. Two statements are noteworthy:

> While it was reasonable for OHS to use some of the Complainant's personal information to report his fitness to return to work (i.e. completion of treatment, compliance with return to work conditions), it was not reasonable to report additional information that revealed the nature of treatment and that the Complainant had been attending at KLA.[151]

> …this case points to a need for organizations to carefully consider and set out how they will collect, use and disclose personal information, and personal employee information, in these kinds of situations. In particular, it is important for organizations to identify the roles and responsibilities of various parties in the process, and the nature and extent of information that will be collected, used and possibly disclosed at various stages of that process. A particular challenge that this case raises is the need to ensure that all printed materials (correspondence, forms, policies, brochures), as well as all staff involved in the process, provide a consistent message so as to avoid confusion and misunderstandings. Drug and alcohol testing programs (especially where an employee has voluntarily chosen to enter a treatment program), as well as general medical disability management, will invariably involve sensitive personal information of employees, such that failing to ensure the protection of privacy can have far reaching consequences to both individuals and organizations.[152]

In *Coast Mountain*,[153] Hinkson J. noted: "While the information known to the Occupational Health Group was not provided by it to the Attendance Management Group, for the former to have provided the information to the latter without the operator's consent would have been contrary to the *Personal Information Protection Act*…"

d. Accommodating Family Status

All four of the western provinces prohibit discrimination based on the ground of "family status."[154] The jurisprudence relating to the discrimination analysis in the context of

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[150] *Ibid*. at para. 34, citing PIPEDA Case Summary #2004-284.
[151] *Ibid*. at para 121.
[152] *Ibid*. at para. 130.
[153] *Coast Mountain Bus Co. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada), Local 111*, 2009 BCSC 396, [2009] B.C.J. No. 578 at para. 116 (QL).
[154] *Supra* note 12.

family status is in a state of flux. *Campbell River*[155] is the leading case in British Columbia; the Court of Appeal stated the following test: "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. …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."[156] But that test has been rejected by the Canadian Human Rights Commission in *Hoyt,*[157] and the Federal Court in *Johnstone*:[158]

> The *Campbell River* decision, above, has been criticized for conflating the threshold issue of *prima facie* discrimination with the second-stage bona fide occupational requirement (BFOR) analysis. …In my view the above concerns are valid. While family status cases can raise unique problems that may not arise in other human rights contexts, there is no obvious justification for relegating this type of discrimination to a secondary or less compelling status: … I would also add that to limit family status protection to situations where the employer has changed a term or condition of employment is unduly restrictive because the operative change typically arises within the family and not in the workplace (eg. the birth of a child, a family illness, etc.). The suggestion by the Court in *Campbell River*, above, that *prima facie* discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law.

In upholding the Federal Court's decision in *Johnstone* the Federal Court of Appeal stated:

> The reasons given by the Commission for screening out the complaint indicate that the Commission adopted a legal test for *prima facie* discrimination that is apparently consistent with *Health Sciences Association of British Columbia v. Campbell River & North Island Transition Society*, [2004] B.C.J. No. 922, 2004 BCCA 260, but inconsistent with the subsequent decision of the Canadian Human Rights Tribunal in *Hoyt v. C.N.R.*, [2006] C.H.R.D. No. 33. We express no opinion on what the correct legal test is."[159]

In *Hoyt*,[160] the Canadian Human Rights Commission reiterated its previous test related to the evidentiary requirements to establish a *prima facie* case of discrimination in the family status context:

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[155] *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260, [2004] B.C.J. No. 922 (QL) ["*Campbell River*"].
[156] *Ibid*. at para. 39.
[157] *Hoyt v. Canadian National Railway*, 2006 CHRT 33, [2006] C.H.R.D. No. 33 (QL) ["*Hoyt*"].
[158] *Johnstone v. Canada (Attorney General)*, 2007 FC 36, [2007] F.C.J. No. 43 (QL) ["*Johnstone*"].
[159] *Johnstone v. Canada (Attorney General)*, 2008 FCA 101, [2008] F.C.J. No. 427 (QL) at para. 2 emphasis added.; see also *Hicks v. Canada (Attorney General)*, 2008 FC 1059, [2008] F.C.J. No. 1333 at para. 23 (QL).
[160] *Hoyt, supra* note 156.

> the evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.[161]

While *Campbell River* is the law in British Columbia,[162] it remains to be seen which approach, if either, will be adopted in Alberta, Saskatchewan and Manitoba.

VIII. Recent Judicial Jurisprudence on the Duty to Accommodate

Following are reported judicial decisions from the four western provinces which have considered the duty to accommodate in the employment context in the last year.

a. Alberta

- ***Brewer v. Fraser Milner Casgrain LLP,*** 2008 ABCA 435, [2008] A.J. No. 1433 (QL): Appeal by law firm employer from a judicial review decision quashing the decision of the Human Rights Commission dismissing the complaint of an employee alleging discrimination based on physical disability. The employee suffered from "multiple chemical sensitivities." The Court allowed the appeal and restored the decision of the Tribunal as reasonable. The Court commented: "The chambers judge concluded that the Chief Commissioner had ruled that symptoms [of multiple chemical sensitivity] that did not yield a specific medical diagnosis do not qualify as a 'disability' under the *Act*. … Even if the Chief Commissioner fell into this error, it did not affect the result of his review" (para. 26; emphasis added). Therefore, symptoms that do not yield a specific medical diagnosis may still qualify as a "disability" under the *Act*. The Court also addressed a claimant's duty to facilitate ("co-operate" with) the employer's attempt to accommodate a disability.

- ***Baum v. Calgary (City)***, 2008 ABQB 791, [2008] A.J. No. 1479 (QL): appeal to Queen's Bench pursuant to statutory appeal (*Human Rights Act*, s. 37) of Human Rights Tribunal decision dismissing an employee's complaint of discrimination based on physical disability. The appeal was dismissed. The Court applied a novel (and arguably incorrect) test for *prima facie* discrimination: was the adverse conduct (not effect) "based on 'attributed characteristics' as opposed to 'actual abilities based on the individual's own merits and capacities' or 'that the employer's conduct is based on stereotypical or arbitrary assumptions about persons with disabilities'" (para. 46).

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[161] *Ibid*. at para. 118.
[162] *Stuart v. Navigata Communications Ltd*., 2007 BCSC 463, [2007] B.C.J. No. 662 (QL) at para. 79.

- ***Hamilton v. Rocky View School Division No. 41***, 2009 ABQB 225, [2009] A.J. No. 449 (QL): Hamilton sued the school board alleging age discrimination in his not being hired as a teacher. Mahoney J. held: "allegations of discrimination cannot support a civil action and such complaints must be made pursuant to the relevant provincial human rights legislation" (para. 23). "Alberta courts have no jurisdiction in matters of discrimination within the exclusive domain of the Human Rights and Citizenship Commission" (para. 24).

- ***Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)***, 2009 ABQB 241, [2009] A.J. No. 503 (QL) ["*Luka*"]: appeal to Queen's Bench pursuant to statutory appeal (*Human Rights Act*, s. 37) of Human Rights Tribunal decision holding that Syncrude (the owner of a construction site) employed Luka for the purposes of the Human Rights legislation, although Luke was an employee of Lockerbie (a contractor to Syncrude). Appeal allowed. "The main issue at the panel hearing was whether Syncrude was an 'employer' of Luka within the meaning of s. 7 of the Act" (para. 6). "Once the Panel determined that it had the jurisdiction to address the issue of whether Syncrude was an employer…the onus should have been on the complainant…to demonstrate *prima facie* discrimination in employment, one aspect of which was to establish that Syncrude was an employer of Luka's for purposes of the Act" (para. 20). "…the Panel erred in determining that Syncrude had the onus of establishing that it was not in an employment relationship with Luka" (para. 24). "What limits the potentially infinite reach of the broad definition of 'employ' is the need for agreement. …Absent agreement there can be no employment" (para. 36). "…it is the electrician who provides the service which is taken. The electrician 'works' for the electrical contractor. The electrician does not work for the building contractor. The building contractor's agreement is with the electrical contractor. There is no agreement between the building contractor and the electrician. The electrician is working 'on' the owner's project but not for the owner. Similarly, in this case, there is no express or implied agreement between Luka and Syncrude and therefore nothing to found a conclusion that Syncrude was an 'employer' under s. 7 of the Act" (para. 37).

- ***Elk Valley Coal Corporation v. United Mine Workers of America Local 1656***, 2009 ABCA 407: the Court wrote that: a finding "that the employer had not met the onus on it to accommodate…necessarily presupposes a conclusion as to prima facie discrimination, as reasonable accommodation need not even be considered absent prima facie discrimination. …the critical issue of accommodation is not totally severable from the legal issue of discrimination. The two are sequential."

b. British Columbia

- ***Armstrong v. British Columbia (Ministry of Health)***, 2010 BCCA 56, [2010] B.C.J. No. 216 (QL): Court of Appeal restored a human rights adjudicator's decision that had been quashed on judicial review. The adjudicator held that the complainant had not been discriminated against by the Province on the basis of

sex when the Province paid for two types of cancer screening tests related to women's reproductive systems (a mammogram and a Pap test) but not for the prostate cancer screening Protein Specific Antigen (PSA) test related to men's reproductive systems.

- ***Communications, Energy and Paperworkers' Union of Canada, Local 789 v. Domtar Inc***., 2009 BCCA 52, [2009] B.C.J. No. 202 (QL): Court of Appeal quashed the appeal of an arbitral decision dismissing a grievance concerning the denial of severance pay by the employer to 8 employees that were receiving long-term disability when the employer permanently closed the paper mill they had worked at (other employees received severance pay under the collective agreement). The Court held that as the arbitrator's decision did not involve a question of general law, the Court had no jurisdiction to hear the appeal under the *Labour Relations Code*, s. 100; rather, the arbitral award should have been reviewed by the Labour Relations Board under *Labour Relations Code*, s. 99.

- ***British Columbia (Ministry of Children and Family Development) v. McGrath***, 2009 BCSC 180, [2009] B.C.J. No. 257 (QL): Application for judicial review of Human Rights Tribunal decision that the Ministry had discriminated against the grandparents of children who were in their care by not paying them the same as foster parents would have been paid to care for them. The Court allowed the application finding that the Tribunal erred by finding that employment discrimination was engaged: "The [grandparents] were not denied employment in relation to their family status, but because their grandchildren were children in need of protection and in the custody of the Director, and they had not demonstrated a willingness or desire to enter into an agreement with the Director and, thus to become foster parents. The Respondents were not applying for employment as foster parents but for the amounts foster parents receive caring for children in the custody of the Director" (para. 161).

- ***Coast Mountain Bus Co. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW - Canada), Local 111***, 2009 BCSC 396, [2009] B.C.J. No. 578 (QL): Judicial review of Human Rights Tribunal decision holding that the employer's Attendance Management Program ("AMP") was systematically discriminatory, and that its application had resulted in discrimination against certain individuals. The Court allowed the application in relation to the overall AMP Policy as it was a BFOR, but upheld the Tribunal's decisions in relation to the individuals.

- ***Gonzalez v. British Columbia (Attorney General)***, 2009 BCSC 639, [2009] B.C.J. No. 955 (QL): Judicial review of Human Rights Tribunal decision holding that it lacked jurisdiction to hear and decide a complaint of discrimination based on physical disability by a disabled lawyer against a Provincial Court Judge whose impugned conduct occurred in open court. The Superior Court dismissed the application: "Arising directly from judicial independence, and its concomitant guarantees, is the fundamental principle of judicial immunity. Indeed, judicial

immunity is essential to the preservation of judicial independence. If judges could be sued personally for an act, a decision, or words spoken in the context of their duties, they may not be capable of performing their judicial functions free from the influence of others" (para. 29). "…the presiding judge was not acting in a purely personal capacity when the allegedly discriminatory remarks were made. The presiding judge's words were spoken in a court room, in the context of a legal proceeding, and in the midst of a discussion about the timing of the child protection case before him. While some of his comments may be characterized as going beyond what was necessary to address the particular circumstances of the case before him, the presiding judge did not act outside of his jurisdiction" (para. 47). "Whether he was wrong or right, committed a human rights violation or simply acted inappropriately, the presiding judge said these things in the course of carrying out his legal duties" (para. 48). "There is no question that human rights legislation is quasi-constitutional and should be given a broad and liberal application. However, judicial immunity is also a constitutional principle and…the immunity of judges must be preserved even when it is alleged they have violated human rights. Judicial immunity is a necessary adjunct to the independence of the judiciary. Any erosion of this principle causes more detriment to the public's confidence in the judiciary than would result from insulating any particular judge from civil liability for wrongful acts in the course of his duties" (para. 49). "…the Tribunal was correct in law when it found that it lacked jurisdiction over the petitioner's claim against the presiding judge based on the principle of judicial immunity" (para. 51).

c. Manitoba

- ***Rowel v. Union Centre Inc***., 2009 MBQB 145, [2009] M.J. No. 215 (QL): Judicial review of Commission decision dismissing complaint at the screening level dismissed. Applicant alleged investigator was biased and Commission adopted investigator's report. The Court: "There is nothing to suggest to me that any bias that may have been displayed by the investigator had any impact whatsoever upon the decision of the Commission ultimately not to proceed to send the applicant's complaint to a hearing" (para. 19). Court applied "reasonbleness" standard and wrote: "Based upon the special nature of Human Rights tribunals and the special legislation that they have to deal with, the decision of the Commission even at the screening level must be accorded considerable deference" (para. 22).

d. Saskatchewan

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There is also much administrative tribunal jurisprudence from western Canada produced in 2009; however, there are too many decisions to list and address them all in this paper.

IX. Conclusion

The duty to accommodate cannot be understood without knowing where it is situated as an element within the broader human rights law of discrimination. Human rights statutes in all four western provinces set out prohibited grounds of discrimination, prohibited discriminatory practices, and defences to discrimination complaints, including BFOR/BFOQ defences. The onus is on the claimant to prove a *prima facie* case of discrimination, which may require application of the *Kemess Mines* test at common law, or the statutory test in the case of Manitoba. If the claimant successfully proves a *prima facie* case of discrimination, the onus shifts to the defendant to prove a BFOR/BFOQ defence. The *Meiorin* "unified approach" requires the defendant to show, consecutively: (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. The defendant (employer or trade union) always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost. Claimants owe duties to facilitate their own accommodations. The duty to accommodate may arise upon a request for same, but employers and others governed by human rights legislation are required in all cases to accommodate the characteristics of affected groups within their standards, so the duty to accommodate is always present when employers and trade unions draft and/or implement work rules and policies. The Supreme Court has provided guidance with respect to the factors addressed in determining whether a particular standard is reasonably necessary for the employer to accomplish its purpose. Reasonable or cogent evidence must be adduced to successfully establish that the point of undue hardship has been reached.

Emerging and changing areas of the law of accommodation include: the repercussions flowing from the (mis)framing of discrimination complaints narrowly as opposed to broadly; workplace safety displacing discrimination and accommodation; complainants' personal privacy rights balanced against the employer's right to sufficient personal (usually medical) information to verify the need for accommodation and to identify specific accommodation needs; and discrimination in the family status context.

There is interesting recent judicial jurisprudence on the duty to accommodate in western Canada. There is also much administrative tribunal jurisprudence from western Canada produced in 2009; however, there are too many decisions to list and address them all in this paper. As the above discussion makes clear, the law of discrimination and accommodation is far from settled in Canada, and interesting and exciting cases are presently wending their way through the courts and administrative tribunals of western Canada.

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