

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

Brent Bish on behalf of Ian Stewart

Appellant

(Appellant on Appeal and Respondent on Cross-Appeal)

AND:

Elk Valley Coal Corporation, Cardinal River Operations

Respondent

(Respondent on Appeal and Appellant on Cross-Appeal)

AND:

The Alberta Human Rights Commission

Respondent

(Respondent by Order)

AND:

Council of Canadians with Disabilities, Empowerment Council, Construction Owners Association of Alberta, Construction Labour Relations – An Alberta Association, Enform Canada, Electrical Contractors Association of Alberta, Mining Association of Canada, Mining Association of Alberta, Mining Association of British Columbia, Ontario Mining Association, Northwest Territories and Nunavut Chamber of Mines and Saskatchewan Mining Association, United Nurses of Alberta, Ontario General Contractors Association, Ontario Formwork Association and Greater Toronto Sewer and Watermain Contractors Association

Interveners

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal arises from a decision of the Alberta Court of Appeal in the case of *Stewart v Elk Valley Coal Corporation*.¹ The Council of Canadians with Disabilities and the Empowerment Council (CCD/EC) jointly intervene in this appeal.
2. This case is about the rights of persons with addictions disabilities to the full protection of human rights law in the context of employment in a safety sensitive workplace. Persons with non-evident² disabilities including addictions and mental health disabilities face barriers in the workplace. Among those barriers are the challenges of disclosing their needs for accommodation. Such persons may not have identified that they have a disability, as an aspect of the disability itself, or face stigma when they disclose.³ An employer cannot rely on a workplace policy to circumvent their duty to accommodate that arises following an employee's post-incident disclosure of their disability in circumstances where the initial failure to disclose is disability related.
3. CCD/EC take no position with respect to the facts in this Appeal.

PART II - POINTS IN ISSUE

4. CCD/EC will focus on the proper application of the *prima facie* test for discrimination and the defence of *bona fide* occupational requirement (*BFOR*) in s. 7 of the *Alberta Human Rights Act (AHRA)* and its broader implications.⁴

PART III - STATEMENT OF ARGUMENT

5. CCD/EC respectfully submit that **(A)** a workplace policy on drugs and alcohol that permits termination for failing to disclose a disability pre-incident ("Drug Policy") is *prima*

¹ *Stewart v. Elk Valley Corporation*, 2015 ABCA 225, 19 Alta LR (6th) 21 [Stewart ABCA] (**Record Of the Appellant Volume I Tab 5**) [ROA]

² Non-evident disabilities are also sometimes called invisible disabilities

³ *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC) (**BOA Tab 1 paras 17, 56**); Ontario Human Rights Commission [OHRC], *Policy on Preventing Discrimination Based on Mental Health and Addictions [Addictions Policy]*, June 18, 2014 (**CCD/EC Book of Authorities [BOA] Tab 30 p. 3, 12**), OHRC, *By the Numbers (BOA Tab 27 p. 39)*; OHRC, *Minds That Matter: Report on the Consultation on Human Rights, Mental Health, and Addiction [Minds that Matter]* (**BOA Tab 28 p. 24, 41, 63**).

⁴ *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) (**CCD/EC Factum Part VII No. 15**).

facie discriminatory on the basis of an addiction disability; and **(B)** such a Drug Policy does not constitute a *BFOR*.

6. This Honourable Court has repeatedly stated that human rights legislation is “quasi-constitutional” and must be interpreted in a broad, liberal and purposive manner to advance the policy considerations underlying it.⁵ Section 7 of the *AHRA* should be given a liberal and purposive interpretation in its application to persons with addictions disabilities.

A. Drug Policy That Permits Termination For Failure To Disclose A Disability Pre-Incident is *Prima Facie* Discriminatory

7. In *Moore*⁶, this Honourable Court outlined the elements of a *prima facie* case of discrimination which requires the claimant to show:

- i) he or she is a member of a group protected by human rights legislation;
- ii) he or she experienced an adverse impact with respect to the treatment; and
- iii) the protected characteristic was a factor in the adverse impact.

8. The Appellant was held to have an addiction disability protected under the *AHRA*.⁷ The Appellant was adversely impacted by the Respondent’s workplace Drug Policy because of his disability, when he was terminated following the disclosure of his disability need for accommodation, *after* a workplace incident. Although the workplace Drug Policy appears neutral on its face in that it applies to all employees, a policy that permits termination for failing to disclose a disability *prior* to a workplace incident

⁵ *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 SCR 536 [O’Malley] (BOA Tab 21 p. 546-547); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321 (BOA Tab 23 p. 358-359); *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 (BOA Tab 13 p. 157-158).

⁶ *Moore v. British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 (Appellant’s Book of Authorities [ABA] Tab 39 para. 33).

⁷ *Bish v. Elk Valley Coal Corporation*, 2012 AHRC 7 [Stewart AHRC] (ROA Vol I Tab 2 para 118).

adversely impacts persons with addictions disabilities who fail to disclose their need for accommodation for reasons related to their disability.⁸

9. Disability related reasons for failing to disclose include stigma which is associated with certain disabilities, particularly addictions and mental health disabilities.⁹ In addition, employees with drug or alcohol dependencies may not readily admit their disability as denial may be part of the addiction itself.¹⁰ Terminating an employee for not disclosing their disability prior to a workplace incident in circumstances where their failure to disclose is due to their disability, links the person's disability to the adverse impact. As such, a workplace Drug Policy that permits termination for not disclosing a disability pre-incident is *prima facie* discriminatory on the basis of an addiction disability.

(i) Addiction Has Been Recognized as a Disability

10. Addiction has generally been recognized as a disability protected under human rights law.¹¹ However, there are still some misperceptions in the law regarding the nature of an addiction and whether it is recognized as a disability in a particular case. The Law Commission of Ontario states: "to some degree, the differences in approaches to addictions [in human rights law] may reflect perceptions that these conditions involve a degree of voluntariness that is not invoked in other types of disability – that is, there is no true impairment".¹²

⁸ *Alberta Human Rights Tribunal Hearing Transcript*, Dr. Els' evidence (ROA Vol II Tab 18.C 31); O'Malley, *supra* note 5 (ABA Tab 39 p. 551).

⁹ *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593, 102 OR (3d) 97 [Tranchemontagne] (BOA Tab 19 paras 121 and 126); OHRC Addictions Policy, *supra*, note 3 (BOA Tab 30 p. 3, 49).

¹⁰ OHRC Addictions Policy, *supra* note 3 (BOA Tab 30 p. 49).

¹¹ *Entrop v Imperial Oil*, 2000 CanLII 16800 (ON CA), 50 OR (3d) 18 [Entrop] (BOA Tab 10 para 89); Alberta Human Rights Commission, *Drug and Alcohol Dependencies in Alberta workplaces*, [AHRC Policy], March 2012 (BOA Tab 24 p. 1).

¹² Law Commission of Ontario, *The Law As It Affects Persons With Disabilities. Preliminary Consultation Paper: Approaches to Defining Disability* [LCO Persons with Disabilities Paper] [2009], online: Law Commission of Ontario www.lco-cdo.org (BOA Tab 25 p. 210).

(ii) Ableist Assumptions Regarding Persons with Addictions Disabilities

11. This Court has recognized that the history of persons with disabilities in Canada is one of exclusion and marginalization.¹³ Persons with addictions disabilities face negative stereotypes which create significant barriers in the workplace. Some common attitudinal barriers and assumptions regarding persons with addictions are that it is voluntary and a matter of personal choice.¹⁴ These ableist¹⁵ attitudes perpetuate the view that persons with addictions are morally blameworthy, responsible for their addiction and not really persons with disabilities who are entitled to accommodations.¹⁶

12. Other attitudinal barriers regarding persons with addictions disabilities relate to stereotypical beliefs about dangerousness, violence or risk.¹⁷ When persons with addictions face these kinds of attitudes, they can internalize them and see themselves in the same way that others see them. The resulting stigma attached to addiction makes it difficult for many persons with addictions to self-identify and seek accommodation because of the shame they are made to feel about their disability.¹⁸ The Ontario Court of Appeal recognized that “addiction is a disability that carries with it great social stigma”.¹⁹

13. These attitudinal barriers and negative stereotypes regarding persons with addictions disabilities are rooted in a medical model approach to disability which considers disability to be a deficiency located in the person that can be treated or cured.²⁰ This Honourable Court has adopted a *social model* of disability as distinguished from a *medical model*. In *Mercier*,²¹ Justice L’Heureux-Dubé emphasized that disability

¹³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, (BOA Tab 9 para 56).

¹⁴ OHRC Addictions Policy, *supra* note 3 (BOA Tab 30 p. 13, 15)

¹⁵ OHRC Policy on Ableism and Discrimination Based on Disability, June 27, 2016 [Ableism Policy] (BOA Tab 29 p. 10)

¹⁶ *Tranchemontagne*, *supra*, note 9 (BOA Tab 19 paras 132-133, 170-174, 179); OHRC Addictions Policy, *supra* note 3 (BOA Tab 30 p. 15)

¹⁷ OHRC Addictions Policy, *supra* note 3 (BOA Tab 30 p. 15)

¹⁸ OHRC Addictions Policy, *supra*, note 3 (BOA Tab 30 p. 15)

¹⁹ *Tranchemontagne* *supra*, note 9 (BOA Tab 19 para 126); OHRC Addictions Policy, *supra*, note 3 (BOA Tab 30 p. 3, 12-13, 15)

²⁰ LCO Persons with Disabilities Paper, *supra* note 12 (BOA Tab 25 p. 1)

²¹ *Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v. Montreal (City)*; *Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v. Broisbriand*, [Mercier] 2000 SCC 27, [2000] 1 SCR 665 (BOA Tab 22 paras 77- 84).

manifests not only as a physical limitation but also as a social construct that must be interpreted broadly:

[b]y placing the emphasis on human dignity, respect and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a 'handicap'. *In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes....* Thus, a 'handicap' may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors.²²
[emphasis added]

14. The focus of the social model is on the adverse effects of a workplace standard experienced by the person with a disability rather than on the limitation or impairment. In *Granovsky*, this Court expanded on the social model recognizing that a "proper analysis" of disability "necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed."²³ The social model of disability is also reflected in the Preamble to the United Nations *Convention on the Rights of Persons with Disabilities* ("CRPD"):

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.²⁴

15. Ableist assumptions and negative stereotypes regarding persons with addictions disabilities create barriers for persons with disabilities leading to their exclusion from the workplace. Stereotypical assumptions about the nature of addictions including around control, voluntariness, and choice result in punitive policies contrary to the spirit and intent of human rights legislation. Although addiction has been recognized as a disability under human rights legislation, workplace policies that result in termination rather than accommodation render such recognition illusory.

²² See also *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241 [*Eaton*] (**BOA Tab 8 at para 67**).

²³ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703 (**BOA Tab 12 paras 29-30**)

²⁴ UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006), online: United Nations Enable (**CCD/EC Factum Part VII No. 15-17**); See Malhotra, Ravi & Hansen, Robin F., "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (August 8, 2011). Windsor Yearbook of Access to Justice, Vol. 29, No. 1, 2011 (**BOA Tab 26 p. 73-79**).

B. Drug Policy That Permits Termination For Failure To Disclose A Disability Pre-Incident is not a BFOR

16. In order to satisfy the requirement of a *BFOR*, a Respondent must establish, among other things, that the Appellant's disability related needs could not be accommodated without undue hardship.²⁵ CCD/EC submit that terminating an employee for failing to disclose their disability and seeking accommodation prior to a workplace incident where the failure to disclose is disability related, does not constitute a *BFOR*. Punitive measures do not promote workplace safety by deterring drug use in respect of employees who have not identified as having an addiction disability. Rather, such measures merely serve to perpetuate ableist assumptions regarding persons with addictions disabilities as having a choice or control over their addiction and thereby denying an aspect of the disability itself. An employer cannot rely on ableist assumptions to establish undue hardship.

(i) Post-Incident Disclosure Triggers the Duty to Accommodate

17. It is well established that an employer's duty to accommodate is triggered upon an employee's disclosure of their disability related needs.²⁶ The purported "ameliorative"²⁷ provisions in the Respondent's policy which encourage disclosure of an addiction without fear of discipline do not provide a benefit beyond what is required under human rights law. An employer has a duty to accommodate an employee's disability related needs for accommodation (to the point of undue hardship) regardless of whether an employee discloses their disability need before or after a workplace incident.

18. An employer cannot rely on a workplace Drug Policy to avoid their duty to accommodate which arises following an employee's disclosure of their disability,

²⁵ *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* [1999] 3 SCR 3 (*Meiorin*) (BOA Tab 3 paras 54-55, 62); *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561 (Respondent's Book of Authorities Tab 16 paras 14 and 16)

²⁶ *Lane*, *supra*, note 3 (BOA Tab 1 paras 65-66)

²⁷ *Stewart ABCA*, *supra* note 1 (ROA Vol I Tab 5 paras 126-127 and 152)

particularly, in circumstances where the initial failure to disclose is disability related. In some cases, an employer's duty to accommodate has also been held to arise upon an employee's disclosure of their disability needs following their termination from employment.²⁸

19. Furthermore, even the failure to disclose a disability and request accommodation does not relieve the employer from a duty to accommodate when the failure to disclose is disability related. Due to the nature of a person's disability, they may not identify that they have a disability, or that they have accommodation needs.²⁹ Denying the presence of a disability may be an aspect of having an addiction.³⁰

20. In addition, due to the stigma associated with addictions and mental health disabilities, an employee may not disclose their disability to their employer because of the risk of adverse consequences flowing from the disclosure.³¹ Courts have recognized the stigma of mental health disabilities³² and addictions.³³ In some cases, an employer has been found to have a duty to inquire into whether an employee requires accommodation, even where the employee has not expressly disclosed a disability related need, but the employer perceives the employee's conduct to be disability related.³⁴

(ii) The Individualized Nature of Accommodation

21. The essence of accommodating persons with disabilities is individualization.³⁵ Each person with a disability must be considered, assessed and accommodated on the basis of their particular unique needs and requirements. Addictions and mental health

²⁸ *City of Hamilton v. Canadian Union of Public Employees and its Local 5167* 2011 CanLII 73195 (ONLA) **(BOA Tab 6 para 37)**.

²⁹ OHRC *Addictions Policy*, *supra* note 3 **(BOA Tab 30 p. 49)**

³⁰ *Ibid.*

³¹ *Lane*, *supra* note 3 **(BOA Tab 1 para 27, 56, 126)**; See also OHRC *Addictions Policy* *supra*, note 3.

³² *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 SCR 566 **(BOA Tab 2 para 31)**

³³ *Tranchemontagne*, *supra* note 9 **(BOA Tab 19)**.

³⁴ *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361, 70 CHRR D/405 **(BOA Tab 15 paras 133 and 157)**.

³⁵ *Eaton*, *supra* note 22 **(BOA Tab 8 para 67)**, *Meiroin*, *supra* note 25 **(BOA Tab 3 paras 63-64)**; OHRC, *Ableism Policy*, *supra* note 15 **(BOA Tab 29 p. 30)**; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer Grievance)* [Grismer], [1999] 3 SCR 868 **(ABA Tab 7 para 22)**.

related disabilities exist along a wide spectrum. A pre-determined or blanket approach to accommodation does not fulfill an employer's duty to accommodate. As this Court stated, "no single accommodation or adaptation can serve the needs of all".³⁶

22. A workplace drug policy that provides for a blanket or pre-determined form of accommodation does not adequately address a person's individualized disability related needs. A policy that permits termination for failing to disclose a disability before an incident is not tailored to the particular needs of an employee who has not identified as having an addiction and therefore cannot disclose a need for accommodation pre-incident in accordance with the policy.³⁷

(iii) Post-Incident Disclosure Does Not Establish Undue Hardship

23. The threshold for establishing undue hardship is high. The amount of hardship to satisfy the duty to accommodate must be substantial.³⁸ With respect to employer concerns regarding safety, this Honourable Court has clearly indicated that standards of safety must include considerations of equality and non-discrimination. As stated in *Meiorin*, "employers designing workplace standards....must build conceptions of equality into workplace standards".³⁹ In *Grismer*, this Court stated that "standards must be as inclusive as possible".⁴⁰

24. Furthermore, when developing and applying safety standards, employers must accept that some moderate level of risk might be reasonably necessary in order to ensure the success of accommodation and promote inclusion. As such, employers cannot rely upon "anecdotal or impressionistic evidence" to establish safety risks and

³⁶ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 SCR 504 (BOA Tab 18 para 81); see also *Meiorin*, supra note 25 (BOA Tab 3 para 62). See also *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes l'Hopital general de Montreal*, 2007 SCC 4, [2007] 1 SCR 161 (BOA Tab 16 para 22).

³⁷ *Stewart ABCA*, supra note 1 [Vol I Tab 5 para 138]; *Kemess Mines Ltd v International Union of Operating Engineers, Local 115*, 2006 BCCA 58 (BOA Tab 14 para 41-45).

³⁸ *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 (ABA Tab 15 para 19).

³⁹ *Meiorin*, supra note 25 (BOA Tab 3 para 68).

⁴⁰ *Grismer*, supra note 35 (ABA Tab 7 para 22).

discharge their duty to accommodate short of undue hardship.⁴¹ Nor can they rely upon stereotypical assumptions about the level of risk posed by an employee with disabilities.

25. Following a post-incident disclosure of an addiction disability, an employer must consider whether the employee's disability needs can be accommodated, *before* taking steps to terminate them. A post-incident positive drug test is not sufficient to terminate an employee but instead triggers the duty to accommodate.⁴² A positive post-incident drug test does not, in itself, indicate the presence of an addiction disability. Nor does it demonstrate an employee's current impairment on the job or predict future impairment.⁴³ Furthermore, a positive post-incident drug test does not establish that an employee's drug use caused an accident. A positive drug test merely indicates past drug use.⁴⁴ However, not all forms of off duty drug use create a risk to the safety of the workplace.⁴⁵

26. Deterrence is not a valid consideration for establishing undue hardship as it promotes negative myths and stereotypes regarding the nature of addictions disabilities. Relying on punitive measures to deter drug use perpetuates stereotypical assumptions that persons with addictions disabilities require negative consequences to motivate them to overcome their addiction and as such are not really persons with disabilities. However, in *Tranchemontagne*, a similar rationale used to exclude persons with addictions from disability income supports in order to assist them to recover from their addiction was rejected by the court.⁴⁶

⁴¹ *Meiorin*, supra note 25 (BOA Tab 3 paras 62, 78-79); *Grismer*, supra note 35 (BOA Tab 4 paras 41-44); *Ontario Human Rights Commission v Etobicoke (Borough)*, [1982] 1 SCR 202 (BOA Tab 20 p. 212-213).

⁴² *Entrop*, supra note 11 (BOA Tab 10 para 112); 3 November 2005 Termination Letter, Exhibit 1.9 (ROA Vol III Tab 27 at 48); *Evrax Regina Steel v United Steel Workers, Local Union, 5890*, 2015 SLAA No. 12 (BOA Tab 11 para 57); *Canadian Pacific Railway Co. v Teamsters Canada Rail Conference*, 2014 CanLII 51686 (CA LA) (BOA Tab 5); *Mosaic Potash Esterhazy Ltd Partnership v Unifor Local 892*, 2016 SKCA 68; [2016] 6 WWR 820 (BOA Tab 17 para 29).

⁴³ *Entrop*, supra note 11 (BOA Tab 10 paras 99, 103); *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, (BOA Tab 7 para 86)

⁴⁴ *Entrop*, supra note 11 (BOA Tab 10 para 99).

⁴⁵ *Stewart ABCA*, supra note 1 [Vol I Tab 5 para 124]

⁴⁶ *Tranchemontagne*, supra, note 9 (BOA Tab 19 paras 132-133, 170-174, 179).

(iv) Conclusion

27. Workplace safety must be balanced with an employee's right to dignity and inclusion and the right not to be discriminated on the basis of their disability. A workplace drug policy that permits termination for failing to disclose a disability prior to an incident, presupposes that an employee has identified that they have disability and is able to disclose their disability related needs. An employer cannot rely on a work place drug policy to circumvent well established human rights principles. The failure to disclose a disability and seek accommodation prior to a workplace incident does not obviate an employer's duty to accommodate where an employee's initial failure to disclose and seek accommodation is disability related.


PART IV - SUBMISSIONS REGARDING COSTS

28. CCD/EC does not seek any costs and asks that no costs be awarded against it.


PART V - ORDER SOUGHT

29. CCD/EC request leave to present oral submissions at the hearing of this Appeal.

ALL OF WHICH is respectfully submitted this 7th day of October, 2016.



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PART VI - TABLE OF AUTHORITIES

Case Law	Paras
<i>ADGA Group Consultants Inc. v. Lane</i> , [2008] O.J. 3076	2, 17, 20, 27, 33, 42
<i>Battlefords and District Co-operative Ltd. v. Gibbs</i> , [1996] 3 SCR 566	20
<i>Bish v. Elk Valley Coal Corporation</i> , 2012 AHRC 7	8
<i>British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)</i> , [1999] 3 SCR 3	16, 21, 23, 24
<i>British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer Grievance)</i> , [1999] 3 SCR 868	21, 23, 24
<i>Canadian Pacific Railway Company v. Teamsters Canada Rail Conference</i> , 2014 CanLII 51686 (CA LA)	25
<i>Central Okanagan School District No. 23 v Renaud</i> , [1992] 2 SCR 970	23
<i>City of Hamilton v. Canadian Union of Public Employees and its Local 5167</i> 2011 CanLII 73195 (ONLA)	18
<i>Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.</i> , 2013 SCC 34, [2013] 2 SCR 458	25
<i>Eaton v. Brant County Board of Education</i> , [1997] 1 SCR 241	13, 21
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 SCR 624	11
<i>Entrop v. Imperial Oil Ltd.</i> , [2000] O.J. No. 2689	10, 25
<i>Evrax Regina Steel v. United Steel Workers; Local Union 5890</i> , [2015] S.L.A.A. No. 12	25
<i>Granovsky v. Canada (Minister of Employment and Immigration)</i> , 2000 SCC 28, [2000] 1 SCR 703	14

<i>Hydro-Quebec v. Syndicat des employes de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)</i> , 2008 SCC 43, [2008] 2 SCR 561	16, 21
<i>Insurance Corp. of British Columbia v. Heerspink</i> , [1982] 2 SCR 145	6
<i>Kemess Mines Ltd. V. International Union of Operating Engineers, Local 115</i> , 2006 BCCA 58, [2006] BCJ No. 263, leave to appeal to SCC refused, [2006] SCCA No. 140	22
<i>Krieger v. Toronto Police Services Board</i> , 2010 HRTO 1361	20
<i>McGill University Health Centre (Montreal General Hospital) v Syndicat des employes l'Hopital general de Montreal</i> , 2000 SCC 4, [2007] 1 SCR 161	21
<i>Moore v. British Columbia (Education)</i> , 2012 SCC 61, [2012] 3 SCR 360	7
<i>Mosaic Potash Esterhazy Limited Partnership v. Unifor Local 892</i> , 2016 SKCA 68	25
<i>Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v Laseur</i> , 2003 SCC 54, [2003] 2 SCR 504	21
<i>Ontario (Director, Disability Support Program) v. Tranchemontagne</i> , 2010 ONCA 593	9, 10, 11, 12, 20, 26
<i>Ontario Human Rights Commission v Etobicoke (Borough)</i> , [1982] 1 SCR 202	24
<i>Ontario (Human Rights Commission) v. Simpson-Sears Ltd.</i> , [1985] 2 SCR 536	6, 8
<i>Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Broisbriand</i> , 2000 SCC 27, [2000] 1 SCR 665	13
<i>Stewart v. Elk Valley Coal Corporation</i> , 2015 ABCA 225	1, 17, 22, 25

Secondary Sources	
<p>Alberta Human Rights Commission, <i>Drug and Alcohol Dependencies in Alberta workplaces</i>, March 2012.</p> <p>Online: http://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/sheets/protected_grounds/drug_and_alcohol_dependencies.asp</p>	10
<p>Law Commission of Ontario, <i>IV. Conceptual Approaches to Disability and their Legal Application</i>, 2009.</p> <p>online: http://www.lco-cdo.org/en/disabilities-threshold-paper-sectioniv</p>	10, 13
<p>Malhotra Ravi & Hansen, Robin F., "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (August 8, 2011). Windsor Yearbook of Access to Justice, Vol. 29, No. 1, 2011.</p> <p>online: http://www.lco-cdo.org/en/disabilities-threshold-paper-sectioniv</p>	14
<p>Ontario Human Rights Commission <i>By the Numbers: A Statistical Profile of People with Mental Health and Addiction Disabilities in Ontario</i>.</p> <p>online: http://www.ohrc.on.ca/sites/default/files/By%20the%20numbers_Statistical%20profile%20of%20people%20with%20mental%20health%20and%20addiction%20disabilities%20in%20Ontario_accessible_5.pdf</p>	2
<p>Ontario Human Rights Commission <i>Minds That Matter: Report on the Consultation on Human Rights, Mental Health, and Addiction</i>, 2012.</p> <p>online: http://www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%20mental%20health%20and%20addictions_accessible.pdf</p>	2

<p>Ontario Human Rights Commission <i>Policy on Ableism and Discrimination Based on Disability</i>, June 27, 2016.</p> <p>online: http://www.ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability_accessible_2016.pdf</p>	11, 21
<p>Ontario Human Rights Commission <i>Policy on Preventing Discrimination based on Mental Health Disabilities and Addictions</i>, January 31, 2014.</p> <p>online: http://www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf</p>	2, 9, 11, 12, 19, 20
<p>Legislation</p>	
<p>Alberta Human Rights Act, RSA 2000, c A-25.5, s. 7</p>	4
<p>International Treaty</p>	
<p>Convention on the Rights of Persons with Disabilities, UN GAOR, 61st Sess., 76th Mtg., UN Doc. GA/10554 (2006),</p> <p>online: United Nations Enable http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf</p>	14

PART VII – STATUTES AND REGULATIONS

Alberta Human Rights Act, RSA 2000, c A-25.5

Discrimination re employment practices

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) 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.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

United Nations Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (in force 3 May 2008, ratified by Canada 11 March 2010), Preamble

Convention on the Rights of Persons with Disabilities

Preamble

The States Parties to the present Convention,

- a. Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,
- b. Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,
- c. Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,
- d. Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International

Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

- e. Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,
- f. Recognizing the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,
- g. Emphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,
- h. Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,
- i. Recognizing further the diversity of persons with disabilities,
- j. Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,
- k. Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,
- l. Recognizing the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,
- m. Recognizing the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,
- n. Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,
- o. Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,
- p. Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

- q. Recognizing that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,
- r. Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,
- s. Emphasizing the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,
- t. Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,
- u. Bearing in mind that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,
- v. Recognizing the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,
- w. Realizing that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,
- x. Convinced that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,
- y. Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Brent Bish on behalf of Ian Stewart

Appellant
(Appellant on Appeal and Respondent on Cross-Appeal)

v Elk Valley Coal Corporation, Cardinal River Operations

Respondent
(Respondent on Appeal and Appellant on Cross-Appeal)

The Alberta Human Rights Commission
Respondent
(Respondent by Order)

Court File No: 36636

IN THE SUPREME COURT OF CANADA

**FACTUM OF THE INTERVENER,
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