Court File No.: 36636

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 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

FACTUM OF THE UNITED NURSES OF ALBERTA

(Pursuant to Rules 42 and 61(4) of the *Rules of the Supreme Court of Canada*)

Ritu Khullar, Q.C. **Vanessa Cosco** **Chivers Carpenter** Suite 101, 10426 – 81 Avenue Edmonton, AB T6E 1X5 Tel: (780) 439-3611 Fax: (780) 439-8543 E-mail: rkhullar@chiverslaw.com E-mail: vcosco@chiverslaw.com **Counsel for the Intervener** **United Nurses of Alberta**	**Colleen Bauman** **Goldblatt Partners** 30 Metcalfe Street, Suite 500 Ottawa, ON K1P 5L4 Tel: (613) 482-2455 Fax: (613) 235-3041 E-mail cbauman@goldblattpartners.com **Agent for the Intervener** **United Nurses of Alberta**

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON KIA 011

COPIES TO:

E. Wayne Benedict **McGown Cook** 120, 7260 – 12 Street SE Calgary, AB T2H 2S5 Tel: (403) 255-5114 Fax: (403) 258-3840 Email: wbenedict@mcgowncook.com **Counsel for the Appellant Brent Bish on behalf of Ian Stewart**	**Colleen Bauman** **Goldblatt Partners** 30 Metcalfe Street, Suite 500 Ottawa, ON K1P 5L4 Tel: (613) 482-2455 Fax: (613) 235-3041 E-mail cbauman@goldblattpartners.com **Agent for the Appellant Brent Bish on behalf of Ian Stewart**
Peter A. Gall, Q.C. **Gall Legge Grant & Munroe LLP** 1000 – 1199 West Hastings Street Vancouver, BC V6E 3T5 Tel: (604) 891-1152 Fax: (604) 669-5101 Email: pgall@glgmlaw.com **Counsel for the Respondent Elk Valley Coal Corporation, Cardinal River Operations**	**Mark Power** **Power Law** 1103 – 130 Albert Street Ottawa, ON K1P 5G4 Tel: (613) 702-5562 Fax: (613) 702-5562 Email: mpower@juristespower.ca **Agent for the Respondent Elk Valley Coal Corporation, Cardinal River Operations**

Janice R. Ashcroft, Q.C. **Office of the Chief of the Commission and Tribunals** J.J. Bowlen Bldg. Mess Level 620 – 7th Avenue Calgary, AB T2P 0Y8 Tel: (403) 476-4954 Fax: (403) 476-4945 Email: Janice.ashcroft@gov.ab.ca **Counsel for the Respondent the Alberta Human Rights Commission**	**Marie-France Major** **Supreme Advocacy LLP** 340 Gilmour Street, #100 Ottawa, ON K2P 0T3 Tel: (613) 695-8855 Fax: (613) 695-8580 Email: mfmajor@supremeadvocacy.ca **Agent for the Respondent the Alberta Human Rights Commission**
Karen R. Spector **Mariam Shanouda** **ARCH Disability Law Centre** 15th Floor, 55 University Avenue Toronto, ON M5J 2H7 Tel: (416) 482-8255 Fax: (416) 482-2981 Email: spectork@lao.ca **Counsel for the Intervener Council of Canadians with Disabilities**	**Michael Bossin** **Community Legal Services – Ottawa Carleton** 1 Nicholas Street, Suite 422 Ottawa, ON K1N 7B7 Tel: (613) 241-7008 ext. 224 Fax: (613) 241-8680 Email: bossinm@lao.ca **Agent for the Intervener Council of Canadians with Disabilities**
Karen R. Spector **Mariam Shanouda** **ARCH Disability Law Centre** 15th Floor, 55 University Avenue Toronto, ON M5J 2H7 Tel: (416) 482-8255 Fax: (416) 482-2981 Email: spectork@lao.ca **Counsel for the Intervener Empowerment Council**	**Michael Bossin** **Community Legal Services – Ottawa Carleton** 1 Nicholas Street, Suite 422 Ottawa, ON K1N 7B7 Tel: (613) 241-7008 ext. 224 Fax: (613) 241-8680 Email: bossinm@lao.ca **Agent for the Intervener Empowerment Council**

Barbara B. Johnston **Dentons Canada LLP** 15th Floor, 850-2nd Street SW Calgary, AB T2P OR8 Tel: (403) 268-3030 Fax: (403) 268-3100 Email: barbara.johnston@dentons.com **Counsel for the Intervener 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 British Columbia**	**K. Scott McLean** **Dentons Canada LLP** 1420 – 99 Bank Street Ottawa, ON K1P 1H4 Tel: (613) 783-9600 Fax: (613) 783-9690 Email: scott.mclean@dentons.com **Agent for the Intervener 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 British Columbia**
Barbara B. Johnston **Dentons Canada LLP** 15th Floor, 850-2nd Street SW Calgary, AB T2P OR8 Tel: (403) 268-3030 Fax: (403) 268-3100 Email: barbara.johnston@dentons.com **Counsel for the Intervener Ontario Mining Association, Northwest Territories and Nunavut Chamber of Mines and Saskatchewan Mining Association**	**K. Scott McLean** **Dentons Canada LLP** 1420 – 99 Bank Street Ottawa, ON K1P 1H4 Tel: (613) 783-9600 Fax: (613) 783-9690 Email: scott.mclean@dentons.com **Agent for the Intervener Ontario Mining Association, Northwest Territories and Nunavut Chamber of Mines and Saskatchewan Mining Association**
Norm Keith **Fasken Martineau DuMoulin LLP** 2400, 333 Bay Street Toronto, ON M5H 2T6 Tel: (416) 868-7824 Fax: (416) 364-7813 Email: nkeith@fasken.com **Counsel for the Intervener Ontario General Contractors Association, Ontario Formwork Association and Greater Toronto Sewer and Watermain Contractors Association**	**Yael Wexler** **Fasken Martineau DuMoulin LLP** Suite 1300, 55 Metcalfe Street Ottawa, ON K1P 6L5 Tel: (613) 696-6860 Fax: (613) 230-6423 Email: ywexler@fasken.com **Agent for the Intervener Ontario Mining Association, Northwest Territories and Nunavut Chamber of Mines and Saskatchewan Mining Association**

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I. Statement of Facts and Overview of Position

1. This case will determine whether human rights law applies to people with addictions. In the decision under appeal, *Bish v Elk Valley Coal Corp.*, 2015 ABCA 225, the Court found that Elk Valley Coal terminated Ian Stewart's employment because he failed to disclose his addiction and tested positive for drugs, and that the connection between Mr. Stewart's addiction and his termination was insufficient for his termination to constitute *prima facie* discrimination.

2. Below, the United Nurses of Alberta ("UNA") addresses the connection required between an addiction and an adverse impact before a human rights analysis is engaged. These submissions differ from the parties as UNA submits that if the prohibited ground is an addiction disability, a human rights analysis alone is engaged if the disability was a factor leading to the adverse impact; the complainant's "culpability" plays no role at this stage in the analysis.

II. Position with respect to the Grounds of Appeal

3. UNA takes no position on the Appellant's first ground of appeal concerning the standard of review. With respect to the Appellant's second and third grounds of appeal, UNA supports the Appellant's position that, with respect, the Alberta Court of Appeal misstated the tests for *prima facie* discrimination and for determining whether a standard that is *prima facie* discriminatory constitutes a bona fide occupational requirement. However, UNA's submissions are limited to the second ground of appeal concerning the test for *prima facie* discrimination.

III. Argument

A. The Uncertainty in the Law

4. With respect to the test for *prima facie* discrimination, the connection required between a disability and an adverse impact has become unclear when the prohibited ground is an addiction disability. This uncertainty can be traced to cases involving individuals who engaged in addiction-related misconduct. In such cases, adjudicators have been applying one of three different legal analyses: a disciplinary approach, a hybrid approach, or a human rights approach. Below, UNA reviews these approaches as they relate to the test for *prima facie* discrimination and then submits that a purely human rights approach ought to apply.

i. The Three Different Legal Approaches

a. The Disciplinary Approach

5. The disciplinary approach is notably reflected in *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357 ("*Gooding*") (**TAB 1**) (leave to appeal refused: [2008] SCCA no 460). Indeed, the Alberta Court of Appeal relied on *Gooding* in the case before this Court and in *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 ("*Wright*") (**TAB 14**) (leave to appeal refused: [2012] SCCA no 486).

6. *Gooding* concerned the termination of a liquor store employee with alcoholism who stole alcohol from his employer. A majority of the British Columbia Court of Appeal held that there was no *prima facie* discrimination because the employer terminated Mr. Gooding because of his misconduct, not because of his disability, and the consequences of Mr. Gooding's misconduct were no greater than the consequences would be for an employee without a disability who committed the same misconduct (para 15 (**TAB 1**)). With respect to the connection between Mr. Gooding's alcoholism and his theft of alcohol, the Court commented:

> The fact that alcohol dependent persons may demonstrate "deterioration in ethical or moral behaviour", and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer's conduct in terminating the employee was based on or influenced by his alcohol dependency.
> para 11 (**TAB 1**)

7. The Court disregarded the connection between Mr. Gooding's alcoholism and his theft of alcohol, and on this basis held that Mr. Gooding's workplace conduct was culpable, there was an insufficient connection between Mr. Gooding's addiction and his conduct, and there was thus no need to engage a human rights analysis.

8. The Alberta Court of Appeal took a similar disciplinary approach in *Wright* (**TAB 14**). That case concerned two UNA members, Genevieve Wright and Mona Helmer, both of whom worked as registered nurses in hospitals, had addictions, and had taken narcotics from their workplaces for personal use. The College and Association of Registered Nurses of Alberta separately found both Ms. Wright and Ms. Helmer guilty of unprofessional conduct. Both nurses

appealed to the Court of Appeal. A majority of the Court rejected the nurses' argument that finding a nurse guilty of unprofessional conduct and punishing her, when there is a connection between her conduct and her addiction, is *prima facie* discriminatory. The majority accepted the factual findings that there was a connection between the nurses' disabilities and their misconduct, but held that the connection was not sufficient because the nurses made a *choice* to take the drugs. That is, the nurses had been subjected to disciplinary sanctions because of their workplace misconduct, not their addiction.

9. In the case under appeal to this Court, the Alberta Court of Appeal relied on the majority's reasons in *Wright* and applied the same reasoning. The majority found that Elk Valley Coal did not intend to discriminate and there was an insufficient connection between Mr. Stewart's addiction, his breaches of the employer's policies, and his termination. That is, the addiction was not the *sole* factor at play, Mr. Stewart's conduct was culpable, and it was appropriate for Elk Valley Coal to terminate Mr. Stewart's employment rather than to take a human rights approach. In this regard, the Court quoted its prior reasons in *Wright*, in which it similarly asked whether the addiction was the *sole* reason the two nurses in that case took narcotics from their workplaces:

> There are a great many addicts who do not commit criminal acts, and it is not discriminatory to hold those who do accountable for their actions. The decision to lay professional disciplinary charges, and the subsequent finding of misconduct, were not motivated by their conduct. There may be a connection between the appellants' actions and their disability, but there is no sufficient connection to make the College's actions discriminatory. The fact that the appellants' conduct was motivated or caused at some level by the addiction does not raise the College's proceedings to the level of discrimination in law.
> para 75, quoting *Wright*, para 67 (**TAB 14**)

b. The Hybrid Approach

10. The "hybrid" approach originated in the labour arbitration context. In such cases, rather than rejecting a human rights analysis outright as was done in the disciplinary cases reviewed above, adjudicators have parsed an addicted employee's addiction-related conduct into culpable and non-culpable components and applied a disciplinary analysis to the culpable component and a human rights analysis to the non-culpable component. The effect of this "hybrid" approach is to treat an addiction disability that has a connection with the impugned conduct as a mitigating

factor with respect to the appropriate penalty. This approach is reflected in *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 ("*Kemess Mines*") (**TAB 10**) (leave to appeal refused: [2006] SCCA no 140); *Health Employer's Association of B.C. (Kootenay Boundary Regional Hospital) v B.C. Nurses Union*, 2006 BCCA 57 (**TAB 9**) (leave to appeal refused: [2006] SCCA no 139); *Fraser Lake Sawmills Ltd. (Re)*, [2002] BCLRBD no 390 (**TAB 7**); and *Fearman's Pork Inc. v United Food and Commercial Workers International Union, Local 175*, [2011] OLAA no 388 (MacDowell) (**TAB 6**).

11. For instance, in *Kemess Mines* (**TAB 10**) the British Columbia Court of Appeal upheld an arbitrator's decision applying this hybrid approach in the case of a marijuana addicted employee terminated for smoking marijuana at a mine site. The arbitrator found that the grievor's use of marijuana at the work site was "partly the product of substantially diminished control due to his addiction" as his addiction disability influenced his misconduct, but it did not incapacitate him from refraining from possessing and using marijuana while at the mine site or from seeking assistance for his addiction (paras 8-10, 48 (**TAB 10**)). The Court upheld the arbitrator's decision substituting the termination for a ten-month suspension in recognition of the partial application of human rights legislation (paras 48-52 (**TAB 10**)).

c. The Human Rights Approach

12. Other decision-makers, like the dissenting Justices in *Gooding* (paras 51-59 (**TAB 1**)), *Wright* (paras 100-125 (**TAB 14**)), and this case (paras 96-110), apply a human rights analysis when the disability is an addiction and the addiction played a role in the individual's workplace misconduct. The dissenting Justices found there was *prima facie* discrimination in each case as each employee had a disability, suffered adverse treatment as a result of that disability, and on the evidence, there was a connection between the disability and the employee's conduct which had led to the adverse impact.

13. In reaching this conclusion, the dissenting Justices all applied the analysis first enunciated in *Ontario (Human Rights Commission) v Simpson Sears*, [1985] 2 SCR 536. That is, to prove *prima facie* discrimination, a complainant must prove: 1) there is a rule or standard that is neutral on its face; 2) the rule or standard has an adverse impact on the complainant; and 3) the

complainant has a characteristic protected from discrimination and this was *a factor* in the adverse impact. If these elements are proven, *prima facie* discrimination is established, and the burden shifts to the respondent to establish that the rule or standard is a bona fide occupational requirement. Examples of this approach are also found in: *Collingwood General & Marine Hospital and O.N.A. (Smart Grievance)*, [2010] OLAA no 196 (Jesin) ("*Collingwood General*") (**TAB 4**); and *Direct Energy v. Communications, Energy and Paperworkers Union, Local 975 (Tomas Grievance)*, [2009] OLAA no 216 (Burkett) ("*Direct Energy*") (**TAB 5**).

14. In *Collingwood General* (**TAB 4**), an employer discovered that a nurse had been stealing narcotics and using them at work. When the nurse was medically cleared to return to work with conditions, the employer terminated her employment. In finding *prima facie* discrimination, the arbitrator held that, as substance dependence is a disability, "an employer cannot discriminate against an employee because of behaviours resulting from dependence on drugs or alcohol" (paras 24, 37). In *Direct Energy* (**TAB 5**), the employer had referred the grievor to the employer's employee assistance program because of his drug problem. The grievor continued to work and, approximately nine months later, relapsed when he purchased cocaine during working hours while in uniform and in a company vehicle, and then had returned to a client's residence while in possession of the cocaine. The employer terminated his employment. In reinstating the grievor and directing the parties to work out an accommodation, the arbitrator found there was an "obvious connection between an addiction to cocaine and the need to purchase cocaine, that the grievor was acting on his addiction, and therefore, *prima facie* his judgment was impaired by his addiction to cocaine" (paras 28-30).

B. A Human Right Analysis Ought to Apply When the Disability is an Addiction

15. UNA submits that the human rights analysis ought to be the same regardless of the protected ground and regardless of the disability, even if it is an addiction. The reasons for this approach are addressed below.

i) The Broad Definition of Disability

16. The legislation at issue in this case, the *Alberta Human Rights Act*, RSA 2000, c A-25.5, explicitly defines a mental disability as "*any* mental disorder ... *regardless of the cause or*

duration of the disorder" and a physical disability as "*any* degree of physical disability, infirmity ... that is caused by ... illness (s. 44(1)(h)(l), emphasis added). This is consistent with this Court's direction that a broad and purposive approach to the meaning of disability is necessary when interpreting and applying human rights legislation (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 SCR 665 at para 71 (**TAB 11**)). In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 (**TAB 8**), this Court took this same approach when it explained that, for the purposes of the Canadian *Charter of Rights and Freedoms*, "[a] disability may be, but is not necessarily, immutable, in the sense of not being subject to change" and disabilities "may be acquired in the course of life, and may grow more severe or less severe as time goes on" (para 27). Thus, the statutory definition of "disability" and this Court's direction regarding disabilities, affirm that those with addition disabilities are entitled to the full protection of human rights law, irrespective of the cause of their addiction or that it may change over time.

ii) Addictions are Treated Differently Precisely Because of Discriminatory Stereotypes

17. Both the disciplinary and hybrid models reviewed above are rooted in a perception that addiction is not a true disability worthy of human rights protection because,

- people suffering from an addiction are morally culpable for their condition,
- addiction results from poor choices, and
- addiction can be overcome once an addict chooses to get better.

Relying on such presumptions, adjudicators apply a disciplinary or hybrid model, even when the disability was a factor in the complainant's failure to meet the standard at issue. Consistent with the imposition of moral judgments into the analysis, adjudicators seem influenced by whether the addicting substance is legal or illegal, and by whether it was obtained legally or illegally.

18. This approach seems rooted in stereotypes and misconceptions about individuals with additions. Such stereotypes blame those with addictions for their condition and perpetuate the view that they are "dishonest, bad, immoral, weak, selfish, hopeless", and that addiction results from "some deliberate act or weakness of character rather than a disease" (M.K. Brewer & T.P. Nelms, *"Some Recovering Nurses' Experiences of Being Labeled "Impaired": A*

Phenomenological Inquiry" (1998) 10:4 J. Addictions Nursing p. 172 at 173 (**TAB 15**); *Saskatchewan (Department of Finance) v Saskatchewan*, 2004 SKCA 134 at para 21 (**TAB 13**)). It is precisely such stereotypical reasoning that human rights law addresses.

iii) The Misplaced Reliance on Choice

19. The disciplinary approach is imbued with the concept of choice: there are elements of choice in becoming an addict; an addict can choose to comply with laws or policies; and importantly, an addict can choose to get treatment and recover from their addiction (*Wright*, para 51 (**TAB 14**); *Bish*, para 83). In this way, "choice" is code for moral blameworthiness. This is problematic as it is inconsistent with human rights legislation to suggest that a person is less deserving of human rights protection if they are in some way responsible for their disability because of the choices they have made, for example, by choosing,

- to go skiing while impaired and becoming paraplegic, or
- not to take their insulin, or
- not to lose weight and remain obese, or
- not to prioritize their mental health and thus required medical leave from work, or
- to use alcohol or drugs and becoming addicted, but then failing to seek treatment.

20. Further, in *Canada (A.G.) v. PHS Comm. Serv. Soc.*, [2011] 3 SCR 134, this Court rejected the argument that negative health consequences for drug users result from their *choices* and not from government laws or policies (para 97-106 (**TAB 3**)). This Court noted that emphasizing choice ignores the nature of an addiction illness, the reliance on choice is a moral argument, and considerations regarding the validity of policies or laws belong in the justification stage of the analysis. The Court held, "The morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right" (para 102 (**TAB 3**)). A similar approach should apply here in that the complainant's choices are irrelevant at the *prima facie* discrimination stage of analysis.

iv) To Do Otherwise is to Dispense with Adverse Effects Discrimination

21. The effect of the disciplinary approach is to dispense with adverse effects discrimination for people with addictions. As is reflected in *Gooding* (paras 7, 11, 15 (**TAB 1**)), *Wright* (paras

58, 61, 62, 67 (**TAB 14**)), and this case (paras 73, 75, 76), decision-makers taking the disciplinary approach bring intentionality into the analysis. Particularly when looking for evidence of arbitrariness or stereotyping, these Courts focused on whether the respondent intended to discriminate. In the absence of arbitrariness, stereotyping, or an intention to discriminate, they concluded there was no discrimination. With respect, the point of adverse effects discrimination is that the respondent's intent is irrelevant.

22. Adjudicators applying the disciplinary approach also dispense with adverse effects discrimination by asking whether those without a disability would have been treated the same way by, for example, being terminated or charged with unprofessional conduct for the same misconduct (*Gooding*, para 11, 15 (**TAB 1**); *Wright*, paras 12, 23 (**TAB 14**), *Bish*, para 70). However, with respect to adverse effect discrimination, the focus is precisely on the effect of the otherwise neutral rule on the complainant, not on everyone else.

v) Setting a Reasonable Threshold

23. While the hybrid approach is preferable to a disciplinary approach, like the disciplinary approach it still entails approaching the human rights analysis differently when the disability is an addiction. Rather than asking whether the disability was *a factor* in the adverse impact, adjudicators applying the disciplinary and hybrid approaches ask whether the disability was the *sole factor*, or whether the addiction made it *impossible* to meet the standard. In essence, they focus on whether the complainant's culpability played a role in the adverse impact, rather than on whether there is a connection between the addiction and the adverse impact. If the addiction did not make it *impossible* for the complainant to meet the standard, they find the complainant's conduct culpable and a human rights analysis either inapplicable or only partially applicable (see Respondent's factum, paras 45, 50, 158, 185, 195, 199, & 202).

24. The Respondent argues to do otherwise would make it "too easy" to establish *prima facie* discrimination so the Respondent wants to raise the threshold to the point of impossibility and thus make it "too hard". This test undermines the purposive interpretation and application of human rights law this Court established. This Court has already established the appropriate threshold and there is no reason to change it in this context.

25. Outside of the addiction context, if the prohibited ground was *one of the factors* leading to the adverse impact, in that there is a connection between the prohibited ground and the adverse impact, then there is a sufficient connection to engage a human rights analysis (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, [2015] 2 SCR 789 at para 52 (**TAB 11**)).

26. This approach is consistent with seminal human rights cases such as *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 (**TAB 2**). In that case, the neutral standard of aerobic fitness was *prima facie* discriminatory because it had the effect of disproportionately excluding women from being forest firefighters. There was evidence that some women, with training, could meet the aerobic standard and thus it was not *impossible* for women to meet the standard. Still, this Court did not ask whether Ms. Meiorin could have trained or tried harder. Such questions would have explored whether Ms. Meiorin's gender was the *sole* factor in her failure to meet the standard or whether there was another contributing factor, such as a lack of commitment as reflected in the choices she made. The Court did not ask these questions because it was sufficient that Ms. Meiorin's gender made it more difficult for her to meet the standard. That is, a human rights analysis was engaged because it was more unlikely for women to meet the standard and thus the standard, although gender neutral, had an adverse effect on women.

27. This threshold is not "too easy" as it requires proof on a balance of probabilities. In contrast, the impossibility test is inconsistent with the approach taken with respect to other protected grounds and would make adverse effects discrimination almost impossible to establish.

vi) Consistent with the Jurisprudence from this Court

28. A human rights approach is consistent with this Court's decades' long direction about *prima facie* adverse effects discrimination and its promise that human rights be interpreted purposively and liberally – from *O'Malley* to *Meiorin* to *Moore* and *Bombardier*.

C. Conclusion

29. The issue in every case ought to be whether the standard, although neutral on its face, has a disproportionally adverse impact on someone suffering from an addiction as that addiction makes it more difficult to meet the standard. This does not mean, as the Respondent argues, that a complainant will be entitled to human rights protection simply upon proving a disability and an adverse effect. Rather, the complainant must establish that the disability was *a factor* leading to that adverse effect. This properly places the focus on the effect of the workplace rule. If that test is met then there is a connection between the addiction and the neutral rule, a human rights analysis is engaged, and *prima facie* discrimination is established. Whether the complainant may also be "culpable" in some way and whether the neutral role was bona fide, play no role in the analysis as to whether there was *prima facie* discrimination. Those would be considerations under the bona fide occupational requirement test, which includes the duty to accommodate and an obligation on the complainant to cooperate in the accommodation.

30. In the workplace, human rights protection assists in removing barriers to participation. With respect to disabilities in particular, human rights protections also address the stigmas and stereotypes associated with the disability. If the majority analysis in this case is upheld, then the promise of human rights law will have been diminished for those with one particular disability.

IV: Costs:

31. UNA respectfully requests that no costs be ordered either in favour or against it.

V: Request for Permission to Present Oral Argument:

32. UNA respectfully requests an order allowing its counsel to make oral submissions to the Court on the hearing of this appeal.

ALL OF WHICH is respectfully submitted this 6th day of October, 2016.

CHIVERS CARPENTER

Ritu Khullar, QC, and Vanessa Cosco
Counsel for the United Nurses of Alberta

VI: Table of Authorities

TAB	CASES	Paragraphs
n/a	*Bish v Elk Valley Coal Corp.*, 2015 ABCA 225; 386 DLR (4th) 383	1, 5, 9, 12, 19, 21, 22
1	*British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357; 298 DLR (4th) 624; [2008] BCJ no 1760; leave to appeal refused 5 Feb. 2009	5, 6, 7, 12, 21, 22
2 excerpt	*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3	26, 28
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7	*Fraser Lake Sawmills Ltd. (Re)*, [2002] BCLRBD no 390	10
8 excerpt	*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703	16
9	*Health Employer's Association of B.C. (Kootenay Boundary Regional Hospital) v B.C. Nurses Union*, 2006 BCCA 57; leave to appeal refused: [2006] SCCA no 139	10
10	*Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58; 264 DLR (4th) 495; [2006] BCJ no 263; leave to appeal refused 24 Aug. 2006	10, 11
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11 excerpt	*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39; 2 SCR 789	25, 28
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13	*Saskatchewan (Department of Finance) v Saskatchewan*, 2004 SKCA 134; 245 DLR (4th) 636; [2004] SJ no 637	18
14	*Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267; 536 AR 349; [2012] AJ no 943; leave to appeal refused 28 March 2013	5, 8, 9, 12, 19, 21, 22
	ARTICLES	
15	Brewer, M.K. & T.P. Nelms, *"Some Recovering Nurses' Experiences of Being Labeled "Impaired": A Phenomenological Inquiry"* (1998) 10:4 J. Addictions Nursing p. 172 at 173	18

VII: Statutes Relied Upon

Alberta Human Rights Act, RSA 2000, c A-25.5, s. 44(h)(1):

> Interpretation
> 44(1) In this Act,
> ...
>
> (h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;
> ...
>
> (l) "physical disability" means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device;
> ...